

administrative compliance order under the federal Clean Water Act requiring Dominion to construct the cooling towers (for which the challenged PSD Permit is required) in order to remedy serious harm to the Mount Hope Bay aquatic ecosystem. As explained below, because of the schedule and sequence of steps in the construction and startup of the cooling towers, even brief delays caused by this litigation could unnecessarily result in an additional year of delay in completing the cooling tower project and an attendant additional year of serious damage to the aquatic ecosystem of Mount Hope Bay.

BACKGROUND

1. The NPDES Permit

The PSD Permit at issue in this proceeding ultimately stems from another permitting matter that is by now familiar to the Board: the Clean Water Act permitting of the Brayton Point Station power plant in Somerset, Massachusetts. Briefly, in October 2003, the Region issued National Pollutant Discharge Elimination System (NPDES) Permit No. MA0003654 (“NPDES Permit”) for Brayton Point Station. The NPDES Permit required Brayton Point Station to achieve large-scale reductions in both its thermal discharge and its cooling water intake flow. These requirements reflected the conclusion of the Region (as well as of the states of Massachusetts and Rhode Island) that such reductions are needed to comply with the Clean Water Act and remedy serious environmental harm being done to the Mount Hope Bay estuary by operation of Brayton Point Station’s existing open-cycle cooling system. The parties agreed that these reductions could be achieved by installation of closed-cycle cooling technology.

The NPDES Permit was the subject of a lengthy appeal to the Board. *See generally In re Dominion Brayton Point, LLC*, 13 E.A.D. ___, NPDES Appeal No. 07-01

(EAB, Sept. 27, 2007) (Order Denying Review); *In re USGen New England, Inc., Brayton Point Station*, 11 E.A.D. 525 (EAB 2004). Ultimately, the Board upheld the permit. *See Dominion, supra*. Following resolution of the appeal before the Board, the NPDES Permit became effective on December 18, 2007.

2. The Region's Administrative Compliance Order

After Dominion agreed to construct cooling tower facilities to comply with the NPDES Permit, on December 17, 2007, the Region issued Dominion an administrative compliance order under section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a). *See In re Dominion Brayton Point, LLC*, Docket No. 08-007, Findings and Order for Compliance (Dec. 17, 2007) ("Order") (attached as Exhibit A).

The Order imposes a schedule for completing steps for the design, installation and operation of the cooling towers. *See Ex. A (Order)*, Part IV, at 4-8. Specifically, the schedule dictates, among other things, that "[w]ithin five days of obtaining all permits and approvals or April 6, 2009, whichever is later, [the permittee shall] issue the Notice to Proceed with Engineering and Procurement for cooling tower construction to Dominion's contractor." *Id.* § IV.1.i, at 5. The Order further requires that within 36 months of obtaining all permits and approvals, all condenser unit tie-ins be completed so that permit limits can be met. *See id.* § IV.1.r, at 6. The schedule contained in the Order was designed to ensure compliance as quickly as feasible and anticipates condenser unit tie-in and full compliance with the NPDES Permit by the spring of 2012.

3. The PSD Permit

a. Regulatory Framework

In Massachusetts, the federal Clean Air Act's Prevention of Significant Deterioration ("PSD") program is administered directly by EPA under 40 C.F.R. § 52.21. *See* Prevention of Significant Deterioration (PSD) Program; Massachusetts; Notice of Ending of Delegation Agreement Between EPA and Massachusetts Department of Environmental Protection, 68 Fed. Reg. at 35,881 (June 17, 2003). The Massachusetts Department of Environmental Protection ("MassDEP") administers a separate air permitting program under state law known generally as the Plan Approval requirements. *See generally* 310 Code of Massachusetts Regulations § 7.02. A Massachusetts Plan Approval is subject to a public comment period under state law, *see id.* § 7.02(3)(h), and may be administratively appealed within MassDEP, *see id.* § 1.01. Parties dissatisfied with MassDEP's final resolution may seek judicial review in Massachusetts Superior Court pursuant to Mass. Gen. Laws ch. 30A, § 14. A Massachusetts Plan Approval is not subject to the requirements of 40 C.F.R. part 124, because it is not a RCRA, UIC, PSD or NPDES permit, *see* 40 C.F.R. § 124.1(a), and therefore it is not subject to Board review under section 124.19.

Although EPA has approved the Plan Approval program into Massachusetts's State Implementation Plan for other purposes (e.g., the requirements of Nonattainment New Source Review and Minor New Source Review), many major sources in Massachusetts (including Brayton Point Station) require both a Plan Approval from MassDEP and an entirely separate PSD permit from the Region. In sum, a state Plan Approval and a federal PSD permit are separate permits, subject to separate substantive

and procedural requirements, and often (as in this case) with separate public comment periods and public hearings.

b. The PSD Permit Proceedings

As stated above, Brayton Point Station must install cooling towers in order to comply with the Order issued to it by the Region pursuant to the NPDES Permit.

Brayton Point Station cannot, however, construct and operate the cooling towers without first obtaining authorization to do so under a PSD permit issued by the Region and a separate Plan Approval issued by MassDEP. On August 28, 2008, pursuant to the schedule set forth in the Order,¹ Dominion applied to the Region for a PSD permit for construction of two natural draft cooling towers.² The application also sought permission for an additional, unrelated project: a dry scrubber and fabric filter on an existing boiler.

On January 28, 2009, the Region published in the *Fall River Herald News* (a newspaper of general circulation in Fall River, Massachusetts) a notice of the opportunity for public review and comment on a Draft PSD Permit for the proposed modifications at Brayton Point Station. See Exhibit B (Public Notice). Pursuant to the public notice, the public comment period for the Draft PSD Permit ran from January 28, 2009, to February 27, 2009. See *id.* at 2. The Region also held a public hearing at the Somerset (Massachusetts) Public Library on March 2, 2009. See *id.* at 3; see also Exhibit C (Response to Comments) at 1.

¹ The Order required Dominion to “submit application(s) for air permit(s)” by September 1, 2008. See Ex. A (Order) § IV.1.g, at 5.

² A PSD permit was required for the cooling towers because, during the mixing of the air and cooling water, a very small fraction of the water will exit the towers as drift droplets. Those drift droplets will contain dissolved solids (e.g., salts), which can become particulate matter emissions when the water evaporates.

The Region received written comments on the Draft PSD Permit from several parties, but not from Petitioner. The Region also received oral comments at the public hearing from several parties, but not from Petitioner. *See* Ex. C (Response to Comments) at 3-8 (enumerating all comments received and responding thereto).

On April 2, 2009, the Region issued a Final PSD Permit for construction and operation of the two natural draft cooling towers, along with a Response to Comments.³ *See* Ex. C (Response to Comments); Exhibit D (Final PSD Permit).⁴

On May 1, 2009, Petitioner (through counsel) filed a petition for review of the Final PSD Permit. To the best of the Region's knowledge, Petitioner is the only party that has appealed the Final PSD Permit.

REQUEST FOR EXPEDITED DECISION

1. Grounds for request

The Region requests that the Board issue its decision regarding this request to dismiss the Petition on an expedited basis due to the substantial environmental consequences of even a brief delay. As explained *infra*, the Petition in its entirety is appropriate for summary disposition, *see* Environmental Appeals Board Practice Manual at 36 n.43, and a delay of even a few days in the PSD Permit's effective date could have substantial negative consequences on the aquatic ecosystem of Mount Hope Bay.

³ Because of the urgency of issuing a Final PSD Permit to enable Dominion to construct the cooling towers, because the cooling tower project is separate from the dry scrubber and fabric filter projects, and because the latter project involves issues entirely unrelated to the cooling towers, the Region elected to bifurcate the PSD permit proceedings. Thus, the permit at issue in this proceeding authorizes construction only of the cooling towers. *See* Ex. C (Response to Comments) at 1-2 (General Issue No. 1) (explaining this decision). The Region intends to issue a final permit for construction of the dry scrubber and fabric filter shortly.

⁴ The permit application (and subsequent additional submissions by Dominion), the Draft PSD Permit and accompanying fact sheet, the public notice, the Final PSD Permit, and the Response to Comments are also available at the Region's web site at <http://epa.gov/nc/communities/nsemissions.html>.

Expedited review by the Board is crucial because a delay in the PSD permit taking effect will delay the construction of water pollution control equipment (the closed-cycle cooling towers) that Dominion needs in order to comply with the NPDES Permit and the Order. As explained above, EPA has concluded, and the Board has affirmed EPA's conclusion as consistent with the Clean Water Act, that the Brayton Point Station power plant needs these facilities to comply with the Clean Water Act and remedy serious ongoing environmental harm being done to the Mount Hope Bay estuary by operation of the plant's existing open-cycle cooling system.

Dominion has informed EPA of the following facts:⁵ Because of the strict compliance schedule, Dominion's contractor was poised to commence construction on Tuesday, May 5, 2009. Because of this appeal, commencement of construction has now been delayed and Dominion has informed EPA that twenty of the employees that were to work on the project have been laid off, additional layoffs are expected this week, and the company is currently paying the contractor at a rate of \$255,000.00 per week to sit idle.

Dominion has further informed the Region that any delay in commencing construction of more than two weeks following May 5, 2009, will ultimately result in a delay in compliance of a full calendar year beyond the spring of 2012 deadline. Several factors combine to cause this result. First, condenser unit tie-ins must occur in the fall and spring, and not during the peak electrical demand winter and summer seasons. Second, after the initial condenser unit tie-ins occur, discharge temperatures from Brayton Point Station will temporarily be elevated. Such elevated thermal discharge

⁵ These facts are not in the administrative record for the Final PSD Permit, and the Region does not suggest that the record could or should be supplemented to include them. Moreover, the Region relies on Dominion's representations regarding these facts. The Region does not ask the Board to consider these facts in deciding *whether* to deny review of the Petition. Rather, the Region provides this information for the limited purpose of supporting its request that the Board issue its decision on an expedited basis.

temperatures would be particularly harmful to marine organisms in the summer. Thus, the condenser unit tie-ins had to be sequenced to begin in the fall and finish in the spring. A construction delay of more than two weeks past May 5, 2009, however, would prevent Dominion from timely completing the steps to be ready to begin the tie-in sequence in the fall of 2011. Instead, to maintain the fall-spring sequence of tie-ins, Dominion would have to delay the initial tie-ins until the fall of 2012 and finish the final tie-ins in the spring of 2013, one year late.

In light of the impacts above, in accordance with the Order at ¶¶ IV.2 and VI.13 and 14, on May 6, 2009, Dominion notified EPA of a force majeure event. *See* Exhibit E (Notice of Force Majeure Event).⁶ In this notice, Dominion asserts that any further delay associated with the appeal of the PSD Permit may prevent it from complying with the cooling tower construction schedule.

Thus, unless resolution of this appeal is expedited, Dominion's construction of the cooling towers, and compliance with its NPDES Permit, will be further delayed by as much as one year. Such delay would unnecessarily extend the time during which Brayton Point Station's discharge of waste heat continues to adversely modify the thermal regime of the estuarine habitat of Mount Hope Bay, and its cooling water withdrawals continue to kill billions of marine organisms (i.e., fish eggs and larvae, juvenile and adult fish, and other types of organisms) by entraining or impinging them in the facility's cooling water intake structures. Therefore, it is critical that the current

⁶ This document was received after the Final PSD Permit issued and is therefore not part of the administrative record for the Final PSD Permit. The Region does not suggest that the record should be supplemented or that the Board should consider the Notice of Force Majeure Event in deciding *whether* to deny review. Rather, the Region provides this information for the limited purpose of supporting its request that the Board issue its decision on an expedited basis. *See supra* note 5.

appeal be resolved as quickly as possible so that the PSD Permit can take effect and Dominion will therefore be authorized to commence construction of the cooling towers.⁷

2. Nature of expedited relief requested

The Region requests that the Board decide the Region's request to deny review and dismiss the Petition on an expedited basis.⁸ The Region further requests that the Board decide this request without granting Petitioner an opportunity to reply. Neither 40 C.F.R. § 124.19 nor the Board's Practice Manual afford Petitioner an opportunity as of right to file a reply to a response to a Petition; indeed, the Practice Manual emphasizes that the Board "normally does not require further briefing before issuing a decision whether to grant review," that "the rules do not make provision for a reply," and that the Board only grants leave to file a reply "[o]n occasion." Environmental Appeals Board Practice Manual, at 36. At the same time, however, the Board's letter transmitting the Petition to the Region suggests that Petitioner may be allowed 10 days from the date of service of a response seeking summary disposition to file a reply with the Board. *See* Docket No. 3 (Letter to Carl Dierker, Director, Office of Regional Counsel, Requesting Response to the Petition for Review) at 2. The Region asks that the Board *not* grant Petitioner leave to file a reply in this instance.

The Region does not lightly request expedited review of this type from the Board, but in this instance such a request is appropriate. Because Petitioner clearly lacks standing to file an appeal, none of the issues raised in the Petition were preserved for

⁷ Dominion may not commence construction of the cooling towers until it has received an effective PSD permit. *See* 40 C.F.R. § 52.21(r).

⁸ The Board could issue a summary order dismissing the Petition and then issue a memorandum explaining the basis for the order at a later date. *See, e.g., Coalition to Protest Democratic Nat'l Convention v. City of Boston*, 327 F.Supp.2d 61, 64-65 (D. Mass. 2004) (noting that district court issued oral rulings "to expedite resolution of the injunctive requests and facilitate prompt assertion of appellate rights for any party that chose to do so," and that subsequent written memorandum of decision was "designed to provide an expanded written explanation for [the court's] rulings").

review, the Petition is plainly inadequate on its face, and the unusual circumstances of this proceeding mean that a delay of even a matter of days could result in extraordinary environmental harm and substantial delays in Brayton Point Station's achieving compliance with Clean Water Act requirements, the Board should summarily dismiss the Petition without further briefing from Petitioner.

RESPONSE TO PETITION FOR REVIEW

The Petition should be dismissed because it does not meet the threshold procedural requirements specified in 40 C.F.R. § 124.19(a). As explained below, Petitioner did not submit comments or participate in the public hearing on the PSD permit, and the Petition fails to state with specificity the reasons supporting review.

1. Failure to Comment During the Public Comment Period

Petitioner did not submit written or oral comments on the Draft PSD Permit and therefore lacks standing to seek review from the Board. EPA's Procedures for Decisionmaking at 40 C.F.R. part 124 require that "[a]ll persons . . . who believe any condition of a draft permit is inappropriate or that the Director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10." 40 C.F.R. § 124.13. Persons who fail to raise arguments during the comment period may not seek Board review of the final permit decision:

Within 30 days after a . . . PSD final permit decision . . . has been issued under §124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. . . . Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft

to the final permit decision. . . . The petition shall include . . . a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations

40 C.F.R. § 124.19(a) (emphases added); *see also In re Avon Custom Mixing Servs.*, 10 E.A.D. 700, 704-08 (EAB 2002) (finding petitioner's failure to comment on draft permit to be "fatal" to its appeal); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121,173 (EAB 1999); *In re Mass. Port Auth'y, Logan Int'l Airport*, NPDES Appeal No. 07-16, at 3 (EAB Sept. 19, 2007) (Order Denying Review).

Petitioner claims neither to have submitted written comments to EPA regarding the Draft PSD Permit, nor to have orally commented at EPA's March 2, 2009 public hearing regarding the Draft PSD Permit. Instead, Petitioner states that it submitted written comments *to MassDEP*. *See* Petition at 1, ¶ 1 ("On March 13, 2009, Bristol County filed with the Massachusetts Department of Environmental Protection formal comments with respect to the proposed permit (see Exhibit 'B' attached hereto)."); *id.* Ex. B (letter dated March 13, 2009, addressed to John Winkler of MassDEP, and sent to MassDEP's office in Lakeville, Massachusetts). In short, Petitioner submitted comments to MassDEP regarding MassDEP's Plan Approval. As explained above, MassDEP's Plan Approval permitting process is separate from EPA's PSD permit process as a matter of both law and actual practice. Submission of a comment to MassDEP regarding a MassDEP permit, without also forwarding a copy of that comment to EPA, does not qualify as submission of a comment to EPA, and Petitioner suggests no reason why it would. Furthermore, even if Petitioner *had* forwarded a copy of its March 13, 2009 letter to EPA, such a (hypothetical) submission would have been untimely because the public comment period on the Draft PSD Permit closed on February 27, 2009. *See* Ex. B

(Public Notice) at 2. Indeed, the Region did not see the comments upon which Petitioner grounds its Petition until well after the Final PSD Permit had already issued.

Similarly, Petitioner states that it provided similar comments at a March 16, 2009 public hearing held at Somerset Old Town Hall. *See* Petition at 1, ¶ 2. This was a MassDEP public hearing for the MassDEP Plan Approval; EPA's public hearing for the PSD permit was held on a different date (March 2, 2009), in a different location (the Somerset Public Library). *See* Ex. B (Public Notice) at 3. Petitioner may have participated in *MassDEP's* public hearing regarding MassDEP's proposed Plan Approval, but commenting to MassDEP about a state approval at a public hearing held two weeks after the close of EPA's comment period does not qualify as timely submission of a comment to EPA, and Petitioner suggests no reason why it would.

Moreover, Petitioner has not attempted to (and cannot) avail itself of the provision that a "person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review . . . to the extent of the changes from the draft to the final permit decision," 40 C.F.R. § 124.19(a). Although there were certain changes from the draft PSD permit to the final PSD permit, *see generally* Ex. C (Response to Comments), none of those changes involved the issue raised in the Petition or, indeed, in its comments sent to MassDEP. Put differently, the Draft PSD Permit proposed to authorize construction and operation of two natural draft cooling towers, and the Final PSD Permit authorizes construction and operation of the same two natural draft cooling towers. The Petition seeks review of EPA's decision to authorize construction and operation of the cooling towers *per se*, not of the changes between the Draft and

Final PSD Permits. Consequently, the issues raised in the Petition do not address “changes from the draft to the final permit decision” under 40 C.F.R. § 124.19(a).

In sum, Petitioner never submitted written or oral comments to EPA regarding the EPA-issued PSD permit. Rather, Petitioner provided comments to a different authority, regarding a different proposed permit, two weeks after the close of the comment period for the PSD permit. Consequently, the Petition should be denied and dismissed on a summary basis, because Petitioner lacks standing to file an appeal and none of the issues raised in the Petition were preserved for review.

2. Failure to State with Sufficient Specificity the Reasons Supporting Review

Even if the Petition could avoid dismissal based on failure to comment, the Petition itself is facially inadequate. A petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted. *In re LCP Chems. - N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993). Indeed, even when petitioners have timely raised their issues during public comment periods (unlike here), petitions “must include specific information supporting their allegations. Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority’s response to those objections warrants review.” *In re Knaf Fiber Glass, GMBH*, 9 E.A.D. 1, 5 (EAB 2000); accord *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 495-96 (EAB 2002) (rejecting challenge to endangered species analysis for lack of sufficient specificity); *In re Envotech, L.P.*, 6 E.A.D. 260, 267-69 (EAB 1996) (a petition for review must contain clear identification of the permit conditions at issue and argument that the conditions warrant review); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 18-19 (EAB 1994) (same). Moreover, “the Board generally will not grant review unless the petitioner establishes that a permit condition is based on a clearly erroneous

finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review.” *Dominion*, NPDES Appeal No. 07-01 (EAB, Sept. 27, 2007) (Order Denying Review), slip op. at 8-9.

The Petition, however, simply states that “construction of the cooling towers in proximity to Bristol County’s broadcast tower would have a significant adverse affect [sic] on its AM radio transmissions,” and refers to the comments that Petitioner submitted to MassDEP. Petition at 1, ¶ 3. The Petition then states that “[t]he permit as issued does not address this important policy consideration nor does it require mitigation by Dominion to insure the continued transmission of broadcasts to the public.” *Id.* at 1, ¶ 5.

These brief, conclusory statements do not meet the minimum requirements for specificity regarding the necessity of Board review. Even setting aside the obvious point that one reason the Final PSD Permit does not “address” Petitioner’s concern is that neither Petitioner (nor anyone else) ever brought the issue to the Region’s attention, the Petition makes no attempt to explain why the Region would be required, or even authorized, to deny a PSD permit, or impose “mitigation” conditions on such a permit, on the grounds of potential interference with radio transmissions.⁹ The Petition’s conclusory statement that such potential interference is an “important policy consideration” does not explain why this issue, raised for the first time on appeal by a party that did not comment

⁹ Furthermore, while the Board need not reach the merits of the issue belatedly raised in the Petition, the arguments advanced in the Petition and its attachments appear meritless. The Petition relies on an unofficial reprint of what may be a public notice from the Federal Communications Commission (FCC). See Petition at 13. This document states that FCC “Part 22 licensees” planning to construct “Cellular Radio towers” must take precautions to avoid or minimize interference. Petitioner does not suggest, and the Region has received no information stating, that the cooling towers at Brayton Point Station are “Cellular Radio towers” or are otherwise subject to an FCC license such that the obligations that the FCC imposes on its licensees would apply to the cooling towers at Brayton Point Station. Moreover, even if Brayton Point Station were bound by FCC regulations to undertake certain actions, Petitioner advances no reasons why such actions should be required as conditions in, or constitute a basis for denying, a PSD permit. Instead, the proper forum for alleging a violation of FCC regulations presumably lies with the FCC.


on the draft permit, is an important policy consideration *for a PSD permit*, for which the scope of EPA's authority to deny or condition permits is defined by section 165 of the Clean Air Act, 42 U.S.C. § 7475, and 40 C.F.R. § 52.21.

In short, even if the comments that Petitioner submitted to MassDEP after the close of the EPA comment period could somehow be construed as satisfying Petitioner's obligation to raise issues during the comment period, the Petition would still warrant dismissal on the grounds of lack of specificity.

REQUESTED RELIEF

The Board should dismiss the Petition because it fails to meet threshold procedural requirements for review. Because of the urgency of this matter, the Region respectfully requests that the Board issue its decision as soon as possible. Moreover, in light of the plain inadequacy of the Petition and the extraordinary circumstances presented above, the Region respectfully requests that the Board deny review summarily, without affording Petitioner an opportunity to file a reply brief.

Respectfully submitted,



Date: May 7, 2009

Elliott B. Zenick, Assistant General Counsel
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, DC 20460
Tel: (202) 564-7606
Fax: (202) 564-5603

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
Tel: (617) 918-1040
Fax: (617) 918-0040

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to Petition for Review and Request for Expedited Decision was served on the 7th day of May 2009 to the following persons in the manner described below:

Original by hand
Copy posted to CDX electronic system

Eurika Durr, Clerk of the Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005
Fax: 202-233-0121


Copy by overnight mail
Copy by email
Copy by fax

Arthur D. Frank, Jr., Esq.
209 Bedford St. Suite 402
Fall River, MA 02720
Fax: 508-674-3610
Email: afrank@adflaw.com

Courtesy copy by email

Mary Jo Sheeley, Assistant General Counsel
Law Department
Dominion Resources Services, Inc.
120 Tredegar Street
Richmond, VA 23219
Fax: 804-819-2183
Email: mary.jo.sheeley@dom.com

Signed: May 7, 2009



Elliott B. Zenick