



State of Rhode Island and Providence Plantations

RECEIVED  
U.S. E.P.A.

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400

TDD (401) 453-0410

2007 MAR -6 AM 10:01

ENVIR. APPEALS BOARD

*Patrick C. Lynch, Attorney General*

March 5, 2007

*Sent via overnight mail*

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
1341 G Street, N.W. Suite 600  
Washington, D.C. 20005

**In re: Dominion Energy Brayton Point, LLC (formerly USGen New England, Inc.), Brayton Point Station  
Permit Number: MA0003654  
Appeal Number: NPDES 07-01**

Dear Sir or Madam:

Please accept for docketing and review by the Environmental Appeals Board, the original and five copies of the following:

- Motion for Leave to File *Amicus* Brief;
- State of Rhode Island's *Amicus* Brief in Opposition to Petition for Review of November 30, 2006 Determination on Remand Issued by Region 1 in Relation to NPDES Permit for Brayton Point Station;
- State of Rhode Island's Motion to Expedite Review of Dominion Energy's Appeal of Region I's Determination On Remand; and
- Objection to Dominion's Motion to Supplement the Administrative Record.

If you have any questions, please do not hesitate to call.

Very truly yours,

Tricia K. Jedele

Special Assistant Attorney General  
Extension 2400

TKJ/cc

cc: service list

RECEIVED  
U.S. E.P.A.

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

2007 MAR -6 AM 10: 01  
ENVIR. APPEALS BOARD

In re: Dominion Energy Brayton )  
Point, LLC (formerly )  
USGen. New England, Inc. )  
Brayton Point Station )

**NPDES Permit No.: MA0003654**  
**Appeal No.: NPDES 07-01**

STATE OF RHODE ISLAND'S *AMICUS* BRIEF IN OPPOSITION TO  
PETITION FOR REVIEW OF NOVEMBER 30, 2006 DETERMINATION  
ON REMAND ISSUED BY REGION 1 IN RELATION TO NPDES  
PERMIT FOR BRAYTON POINT STATION

Submitted By:

STATE OF RHODE ISLAND  
PATRICK C. LYNCH  
ATTORNEY GENERAL

RHODE ISLAND DEPARTMENT  
OF ENVIRONMENTAL  
MANAGEMENT,

Tricia K. Jedele  
Special Assistant Attorney General  
150 South Main Street  
Providence, RI 02903  
Phone: (401) 274-4400, ext. 2400  
Fax: (401) 222-3016  
[tjedele@riag.ri.gov](mailto:tjedele@riag.ri.gov)

Brian Wagner  
Deputy Legal Counsel  
235 Promenade Street  
Providence, RI 02908  
Phone: (401) 222-6607  
Fax: (401) 222-3378  
[brian.wagner@dem.ri.gov](mailto:brian.wagner@dem.ri.gov)

## **I. Introduction**

The State of Rhode Island ("Rhode Island") opposes the *Petition for Review of November 30, 2006 Determination On Remand Issued By Region 1 in Relation to NPDES Permit for Brayton Point Station ("Petition")*, filed by Dominion Energy Brayton Point, LLC ("Dominion") with this Board on January 3, 2007.

Rhode Island opposes the Petition for Review for substantive reasons that are discussed below, and renews its concern that the continued delay of the implementation of the terms of the 2003 permit ("Permit") are having an immediate and exponentially deleterious impact on Mount Hope Bay – a resource of the State of Rhode Island. As this Board has been made well aware, the Permit at issue in this appeal was issued for Brayton Point Station on October 6, 2003 and was designed to replace an expired and ineffective 1993 permit. Since the expiration of the 1993 permit, thirteen years have passed and Brayton Point Station continues to operate with outdated technology well under par for the industry standard. The impact to the Bay and to Rhode Islanders has been and continues to be severe, and unfortunately in the face of unwavering motion practice and endless appeal opportunities, the impact promises to continue well into the future. The Permit, as written, is a necessary requirement for future operations at Brayton Point Station. The Permit is necessary to satisfy Rhode Island's water quality standards, necessary for any possible recovery of Mount Hope Bay, and necessary for the protection and preservation of the Mount Hope Bay ecosystem. In addition to filing this *amicus* brief to address the merits of Dominion's Petition, therefore, Rhode Island has also filed a Motion Seeking Expedited Review should the Petition be granted.

Rhode Island files this *amicus* to support the 2003 permit and to support Region 1 in its opposition to this second Petition for Review. Additionally, Rhode Island submits this *amicus* to address Dominion's misuse of information and data produced by Rhode Island employees.

**II. Dominion Mischaracterizes Available Data As To The Status Of The Winter Flounder Population In Mount Hope Bay.**

Dominion argues that Region 1 erroneously characterized the data as to the status of the winter flounder population in Mount Hope Bay, and that this mischaracterization "calls into question the fundamental premise on which the Permit is based and cautions against mandating burdensome and irreversible alternations [sic] in the operations of Brayton Point Station." *Petition* at 16. In fact, it is Dominion that continues to mischaracterize the data – old and new.

**A. Dominion Mischaracterizes the Data in the 41° North Publication**

Dominion alleges that "new evidence" has come to light in the form of a new report written by Mark Gibson of the Rhode Island Department of Environmental Management that indicates that Mount Hope Bay's winter flounder population is recovering. Dominion suggests that the record should be opened and supplemented with this report, and that Region 1 should be directed to consider the article in what would amount to a second remand. There are five clear reasons to deny this request.

First, the document that Dominion references was **not** written by Mark Gibson as represented. The document in question, a 2006 article entitled, "*What is the Net Result?*" was written by Mr. Chip Young, a staff member of the Rhode Island Sea Grant Program, for its publication, *41° North*. Although Mr. Young's article includes several interview-

style quotes from Mark Gibson, the statement that Dominion attributes to Mr. Gibson in its Motion to Supplement the Record is the author's, not Mr. Gibson's.

Second, the article referenced by Dominion is not "evidence" at all. Mr. Young's article is not a "published" study and was not peer reviewed, nor will it ever be. Mr. Young's article is a Sea Grant public relations piece intended to promote some of the work being performed as part of the state's "Bay Window" program by explaining how the models developed with the Bay Window funding have allowed RIDEM to track and analyze fish species of importance in Narragansett Bay. While interesting and informative, an article of this nature would not be the type of resource that a governmental agency would rely upon in making critical and technology/scientific-based permitting decisions impacting important ecosystems. The article and the publication, *41° North*, are aimed at a lay audience, not the scientific community. Dominion's designation of this magazine article as "Gibson (2006)" in its Motion to Supplement the Record, therefore, not only misrepresents the document as having been written by Mr. Gibson, but mischaracterizes a magazine article as a peer reviewed, scientific paper; something that it clearly is not.

Third, Dominion presents the misquoted language in a manner that ignores historic fishery population data. While the article references a single-year improvement in the survival of the young-of-the-year winter flounder, neither the author nor Mark Gibson reach any conclusions, nor could they with such a limited data set, about whether the 2005 catch of Age 1 winter flounder is indicative of a recovery of the species as a whole, or more importantly whether the 2005 catch data indicates a "recovery" of winter flounder in Mount Hope Bay to levels of former abundance prior to 1986. While

Dominion highlights the article's statement that the data from 2005 "might" indicate the beginning of a recovery, Dominion ignores the second half of the very same sentence, which explains that it could take five to ten years to determine if the 2005 data is representative of the beginning of a stable recovery. For example, in 1995, the data documented a similar, one-year "blip" in the abundance of Age-1 winter flounder in Narragansett Bay—a short-lived improvement promptly followed by a collapse the following year and never materializing into a recovery. The more recent 2006 trawl data also shows that winter flounder abundance levels had again retreated from the "blip" observed in 2005.

The data referenced in *41° North* would not be useful in reaching a conclusion about whether the winter flounder population in Narragansett Bay were beginning to recover unless the young-of-the-year age structure filled its way out and grew into adult species. Even though the 2005 catch of Age 1 winter flounder could be adequately protected by all of the sources of mortality from which the State could protect them, the State cannot singly control the operations of Brayton Point Station. Accordingly, if Mr. Gibson's data as reported in *41° North* can be viewed as evidence at all in this permitting context, it is evidence only of a fleeting, un-sustained improvement in the young-of-the-year age structure for winter flounder in Narragansett Bay.

Fourth, even if Mr. Gibson's statements could be taken to mean that there is hope for the recovery of the winter flounder species in Narragansett Bay—an unfounded stretch to say the least—evidence of such a rebound in Narragansett Bay would not necessarily correlate with a rebound of winter flounder in the upper reaches of Mount Hope Bay. The Rhode Island Department of Environmental Management's Division of

Fish and Wildlife (“RIDFW”) perform bottom trawl surveys in Narragansett Bay, Block Island Sound, and on occasion in the lower reaches of Mount Hope Bay. Such survey data would not be sufficient to draw a conclusion about whether the winter flounder fish stocks in the upper reaches of Mount Hope Bay have shown any improvement. In fact, Dominion’s own standard trawl catch rates, derived from the trawl surveys conducted in the upper reaches of Mount Hope Bay, indicate that winter flounder in the upper reaches of Mount Hope Bay have not shown any sign of recovery. Instead, Dominion’s data as reported in the *Brayton Point Station 2005 Annual Report*, Table 5-9, document the actual impact the plant’s operations are having on the shallow waters in the vicinity of the plant’s thermal plumes – a fact upon which Mark Gibson’s original 1996 analysis was built. Ironically, RIDFW, the University of Rhode Island, and the Dominion data all began by recording a significant abundance of winter flounder. Then each data set began to show a decline in the abundance of winter flounder, but, while all surveys showed a decline in winter flounder, it was Dominion’s trawl survey data that recorded the crash of winter flounder to essentially zero, and it is Dominion’s trawl survey data that shows no recovery of that species in the upper reaches of Mount Hope Bay.

Fifth, even if Mr. Young’s article was a peer-reviewed, scientific paper, or even if Dominion’s representations of the data were accurate, the fact is that the administrative record in this matter has been closed for at least 3 ½ years since the date the Permit issued. Allowing the perpetual consideration of “new evidence” for a 2003 permit (that should have been issued in 1998) involving a water body that is constantly being surveyed and studied would likely mean that no permit would ever become effective.

In sum, Dominion misrepresents Mr. Gibson's authorship of the *41° North* article, mischaracterizes the nature of the article, ignores historic fishery population data, attempts to apply data that may be representative of winter flounder population status in Narragansett Bay to winter flounder population status in Mount Hope Bay, and attempts to continually supplement the record more than 3 ½ years after the record has closed. For all of these reasons, the *41° North* article should not be considered by the EAB.

**B. Dominion Wrongly Identifies A RIDFW Employee as a Co-Author of an Article that Concludes that the Decline of the Winter Flounder Population in Mount Hope Bay is No Different than the Decline of that Species in Narragansett Bay.**

In Table 1 of Dominion's Petition for Review, entitled, *Summary of Biological Errors in: U.S.EPA Region 1 Determination on Remand from the EPA Environmental Appeals Board Brayton Point Station, NPDES Permit No. MA0003654*, Dominion lists as the topic for "Error No. 2" – Mount Hope Bay Finfish Declines. Dominion argues that although EPA relied upon Dominion's own trawl data to conclude that Brayton Point Station's operations were a significant contributor to the declining quantity of fish in Mount Hope Bay, "Region 1's account does not acknowledge recent studies (Study #1. Roundtree and Lynch, 2003, and Study #2. DeAlteris et al., In Press, described below) that have determined that the declines in abundance of winter flounder, . . . in Mount Hope Bay are consistent with those in Narragansett Bay . . ." See *Dominion's 1/3/07 Petition for Review*, Table 1 at 2. The reference to the "Roundtree and Lynch" study is misleading. Study #1 in Table 1 references a presentation made by Mr. Rodney Roundtree in 2003 at the New England Estuarine Research Society (NEERS) – Spring 2003 Conference. This study should not be considered by the EAB for three reasons.

First, the reference erroneously lists Mr. Timothy Lynch, an employee of RIDFW, as a co-author of the study. He is not. While Mr. Lynch provided the data from the long-term Seasonal Trawl Survey conducted by RIDFW to Mr. Roundtree, he did not agree with the conclusions reached by Mr. Roundtree. Specifically, Mr. Lynch does not agree with the conclusion that Brayton Point Station is not having a measurable impact on Mount Hope Bay. In fact, Mr. Lynch has stated numerous times that Brayton Point Station is a contributing factor to the decline of the winter flounder populations in Mount Bay. In May of 2003, Mr. Lynch asked that his name be removed from the abstract because he did not agree with the conclusions reached by Mr. Roundtree with the data he provided to him. See Exhibit A, 2/21/07 3:39 PM email series from Rodney Roundtree to Timothy Lynch.

Second, Dominion erroneously identifies the study as being “In Press,” but it is not. The “study” was an unpublished abstract and there is no publication of the same that is pending. See Exhibit A.

Third, the Roundtree study was not available to Region 1 at the time the Permit was issued and is therefore beyond the scope of the administrative record.

Dominion’s reference to the “Roundtree and Lynch” study is misleading and is a misguided attempt to associate a Rhode Island employee with an incorrect scientific conclusion – a conclusion Dominion insists is relevant to the Permit. The study was not authored by a Rhode Island employee, does not represent any Rhode Island position on this matter, reaches an incorrect conclusion, and is beyond the scope of the administrative record. For these reasons, the Roundtree study should not be considered by the EAB.

C. **Dominion Mischaracterizes the Lesa Meng Study**

In addition to other requests to supplement the administrative record, Dominion also requests that the EAB include a copy of a recently published study by Lesa Meng et al. entitled "*Relationships between Juvenile Winter Flounder and Multiple-Scale Habitat Variation in Narragansett Bay, Rhode Island*" ("Meng (2005)"). See Motion to Supplement the Administrative Record, p.4, ¶4. This request also should be rejected for various reasons. First, as has been noted previously, the administrative record in this matter has been closed at least since the date of the issuance of the Permit in October 2003. The study in question was not even published until 2005 and clearly could not have been considered by EPA in the Permit determination process, nor should it be considered now.

Second, the description of Meng (2005) contained in Dominion's Motion to Supplement the Administrative Record misrepresents the conclusions presented in the study. Dominion represents that Meng (2005) stands for the proposition that the growth of winter flounder is enhanced by temperatures as high as 26°C. This is neither what Meng (2005) studied nor concluded. Meng (2005) is a study that was designed to look at the effect of habitat alteration on juvenile winter flounder. The study particularly focused on the upper reaches of estuaries and coves that are both preferred habitat and the most susceptible to alteration and development. Thus, the focus of the study was on habitat alteration, not water temperature. The study concluded that winter flounder seek out upper estuarine cove areas without regard to the amount of alteration due to other characteristics of these areas including: proximity to spawning grounds, calm waters, bottom substrate, vegetation, reduced salinity, increased nutrients, reduced flushing rates,

shallow depth; plentiful food; refuge from predation and warmer temperatures. The authors, however, did not weight the relative importance of these characteristics. They merely identified each of these conditions as characteristic of the upper estuarine coves where abundance was found to be the highest. The authors place no special significance on temperature. Significantly, the authors *do not*, as Dominion infers, indicate that temperatures of 26°C “help rather than hinder winter flounder growth.” *Motion to Supplement the Administrative Record, p.4, ¶4.* The temperatures that Dominion refers to are found in Table 1 of the report. *Meng (2005) at 1512.* While Table 1 does indicate that the maximum temperatures encountered during the study were 26.1°C in 2002 and 26.4°C in 2003, the average temperatures encountered were substantially lower at 21.4°C and 20.6°C, respectively. Furthermore, since the study does not indicate how frequently the highest temperatures were encountered, nor does it correlate those temperatures to the numbers of fish caught, it is misleading for Dominion to suggest that Meng (2005) concluded that the maximum observed temperatures were found to be beneficial for winter flounder growth. In reading Meng (2005) it must be remembered that temperature is a relative concept and that even the average temperatures observed in the study areas preferred by juvenile winter flounder are considered “warm” when compared to the temperatures preferred by adult winter flounder.

For these reasons, the Meng (2005) article should not be considered by the EAB.

### **III. Conclusion**

The 2003 Permit should be implemented as it was issued on October 6, 2003. The appeal of the 2003 Permit simply delays the inevitable – closed-cycle cooling at Brayton Point Station. Closed-cycle cooling is not only cost-effective, possible, and necessary at Brayton Point Station, it is the best technology available for minimizing adverse environmental impacts – a statutory requirement.

Dominion is attempting to draw attention away from the well-founded, thoroughly substantiated Permit limits by directing the Board's attention to new, oftentimes, unpublished articles, and calling it evidence.

The only evidence we have is the evidence that was available to Region 1 prior to the date the Permit issued. The weight of that evidence shows that the unregulated operations of Brayton Point Station have significantly impacted the quality of the waters in Mount Hope Bay and that if left unchecked, the operations will prevent the ecosystem from recovering.

For the reasons set forth herein, Rhode Island respectfully requests that the EAB deny Dominion's Petition for Review.

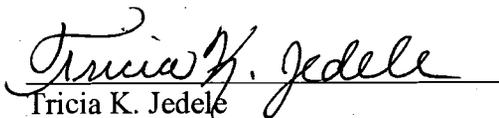
Respectfully submitted,

STATE OF RHODE ISLAND  
PATRICK C. LYNCH  
ATTORNEY GENERAL

RHODE ISLAND DEPARTMENT  
OF ENVIRONMENTAL  
MANAGEMENT,

By his attorney,

By its attorney,



Tricia K. Jedele  
Special Assistant Attorney General  
150 South Main Street  
Providence, RI 02903  
Phone: (401) 274-4400, ext. 2400  
Fax: (401) 222-3016



Brian Wagner  
Deputy Legal Counsel  
235 Promenade Street  
Providence, RI 02908  
Phone: (401) 222-6607  
Fax: (401) 222-3378

Dated: March 5, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of *STATE OF RHODE ISLAND'S AMICUS BRIEF IN OPPOSITION TO DOMINION'S PETITION FOR REVIEW* was sent to each of the following persons by first-class mail on this 5<sup>th</sup> day of March, 2007.

Mark A Stein, Esq.  
Senior Assistant Regional Counsel  
U.S. EPA, Region 1  
1 Congress Street, Suite 1100 (RAA)  
Boston, MA 02114-2023

Richard Lehan, Esq.  
Deputy General Counsel  
Counsel for MA Dept. of Environmental  
Protection  
One Winter Street  
Boston, MA 02108

Kristy A.N. Bulleit, Esq.  
Hunton & Williams LLP  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074

Jerry Elmer, Esq.  
Conservation Law Foundation (RI)  
Rhode Island Advocacy Center  
55 Dorrance Street  
Providence, RI 02903

Carol Lee Rawn, Esq.  
Staff Attorney  
Conservation Law Foundation Mass.  
62 Summer Street  
Boston, MA 02110-1016

Wendy B. Jacobs, Esq.  
Counsel for USGen New England, Inc.  
Foley Hoag LLP  
155 Seaport Boulevard  
Boston, MA 02210-2600

Jerry Elmer, Esq.  
Conservation Law Foundation (RI)  
Rhode Island Advocacy Center  
55 Dorrance Street  
Providence, RI 02903

Wendy Waller, Esq.  
Save The Bay, Inc.  
100 Save The Bay Drive  
Providence, RI 02905

Ann Morrill, Vice President  
Kickemuit River Council  
90 Dexterdale Road  
Providence, RI 02906-1926

Joseph L. Callahan  
Board of Directors  
Taunton River Watershed Alliance, Inc.  
P.O. Box 146  
Bridgewater, MA 02324

Carol Lee Rawn, Esq.  
Counsel for Conservation Law Foundation  
82 Summer Street  
Boston, MA 02110-1016

Brian Wagner, Esq.  
Deputy Legal Counsel  
RI Department of Environmental  
Management  
235 Promenade Street  
Providence, RI 02903



# **EXHIBIT A**



Rhode Island  
Department of Environmental Management

**DIVISION OF FISH AND WILDLIFE**

3 Fort Wetherill Rd  
Jamestown, RI 02835

401 423-1920  
FAX 401 423-1925

**MEMORANDUM**

DATE: February 21, 2007  
TO: Rodney A. Roundtree  
FROM: Timothy R. Lynch  
RE: Co-Authorship

Rodney,

As referenced in my e-mail to you today (February 21, 2007 @ 11:06AM), this letter is being sent to formally request that my name be removed from all past usage or future publication of: **SPATIAL AND TEMPORAL PATTERNS OF THE FISH ASSEMBLAGES IN THE GREATER NARRAGANSETT BAY ESTUARINE SYSTEM: IS MT. HOPE BAY DIFFERENT?**

In May of 2003, you made a presentation of this paper at a New England Estuarine Research Society/Southern New England Chapter-American Fisheries Society meeting. At that time, I had asked that my name be removed because, while the modeling exercise you chose to analyze my trawl data was/is interesting in concept, I did not then, nor do I now, agree with the inference you maintain relative to the (then) status of Mt. Hope Bay, in relation to the greater Narragansett Bay system.

Thank you for tending to this request. I truly hope you are not offended by it. Certainly none intended.

Tim

Timothy R. Lynch  
Pr. Marine Fisheries Biologist  
RIFW - Marine Fisheries  
3 Ft. Wetherill Rd.  
Jamestown, RI 02835

**Timothy Lynch**

---

From: rountree@fishecology.org  
Sent: Wednesday, February 21, 2007 3:39 PM  
To: Timothy Lynch  
Subject: Re: Co-authorship

Dear Tim:

I'm on travel and don't have full access to my email or files. I'm not sure what you are seeing. Your name is not on any publication pending. If you recall though, your name was on the original abstract submitted to the SNECAFS several years ago and though you subsequently asked to have it removed there is nothing I can do about the original submission (which occurred many months before the meeting). Your name was removed from the actual presentation. Where are you seeing this abstract with your name on it? But rest assured your name will not appear on anything in the future.

If you give me your phone number I'll call you when I get back in town next week.

Rodney

Timothy Lynch writes:

> Hello Rodney. Hope all is well.  
> The reason for this e-mail, is to request (formally) that my name be  
> removed from any reference to the talk (Spatial And Temporal Patterns  
> of the Fish Assemblages in the Greater Narragansett Bay Estuarine  
> System: Is Mt. Hope Bay Different). I was recently looking through  
> material for the up-coming symposium and came across the abstract for  
> the presentation you made in May of 2003, with my name on it as  
> co-author. Prior to you giving the presentation, I had asked that my  
> name be taken off as co-author. It wasn't then, and apparently still  
> hasn't been removed. I am under the impression that the publication  
> of this work is pending (or may be pending) or may indeed be in  
> publication. If any scenario be the case, I must insist that my name  
> be stricken from it. While I was (and still am) honored to have worked  
> with you on it, and the modeling exercise used was/is interesting in  
> concept, I did not then, nor do I now, agree with the inference you  
> maintain relative to the (then) status of Mt. Hope Bay in relation to  
> the greater Narragansett Bay system.  
> A formal request for removal of my name will be sent via ground mail  
> on official letter head. That way it will be officially done with.  
> Thank you for attending to this and I truly hope that you are not  
> offended by this request. Certainly none intended.  
> Tim  
>  
> Timothy R. Lynch  
> Pr. Marine Fisheries Biologist  
> RIFW - Marine Fisheries  
> 3 Ft. Wetherill Rd.  
> Jamestown, RI 02835  
>