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

In re: Dominion Energy Brayton)
Point, LLC (formerly USGen)
New England, Inc.))
Brayton Point Station)
)) NPDES Appeal No. 07-01
))
NPDES Permit No. MA 0003654)

SAVE THE BAY'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO FILE AN AMICUS BRIEF
IN SUPPORT OF THE REMAND DETERMINATION ISSUED BY REGION 1 IN
RELATION TO EPA NPDES PERMIT, NO. MA 0003654

Introduction

Save The Bay – Narragansett Bay (“Save The Bay”) is one of Rhode Island’s largest non-profit organizations with approximately 20,000 members and supporters. The purpose of the organization is to ensure that the environmental quality of Narragansett Bay, and its watershed, is restored and protected from the harmful effects of human activities now and in the future.

Save the Bay supports the Final National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA 0003654 and Determination on Remand (“Determination”) issued by Region I of the United States Environmental Protection Agency (“EPA Region I”) for Brayton Point Power Station (“Brayton Point”) or (“the plant”) in Somerset, Massachusetts. Substantial deference must be given to EPA Region I’s thoroughly explained, site-specific determination made in compliance with controlling law.

Wherefore, Save The Bay files the within Amicus Memorandum and requests the Environmental Appeals Board ("EAB") or ("Board") uphold the Determination.

Background

Save The Bay has been the leading non-government environmental organization involved in the environmental permitting and review of Brayton Point's operation for over ten years. Through scientific and technical analysis, legal and regulatory advocacy, and grass-roots networking, we have been actively engaged in the public process. Over this time, we have become intimately familiar with the facility, its operations, and impacts. Our institutional memory predates Dominion Energy Brayton Point, LLC's ("Dominion") and USGen New England, Inc.'s ("USGen") ownership of the plant.

After over a decade of work on the issues surrounding Brayton Point, it is clear that the plant had, and continues to have, a direct, severe and adverse impact on the ecosystem of Mount Hope Bay, and that it is the single largest point-source of marine pollution in Mount Hope Bay, and by extension, Narragansett Bay. Through the combination of entrainment and impingement of billions of fish eggs and larvae¹, and with thermal pollution, the Brayton Point plant has definitively contributed to a decline in the Mount Hope Bay ecosystem not observed anywhere else. The aquatic impacts from the plant have been studied in extraordinary and unprecedented detail, while Brayton Point continues to degrade the fisheries and habitat of Mount Hope Bay.

Argument

I. Mount Hope Bay is a valued Public Trust resource.

Historically, the Mount Hope Bay/Taunton River watershed has been a biologically significant nursery area for many species of fish found throughout

¹ USEPA Final NPDES Permit, Fact Sheet, October 2003.

Narragansett Bay and Rhode Island Sound and one of the main breeding grounds for commercially harvested fish in Narragansett Bay. Mount Hope Bay is a shallow estuary with high freshwater input and is suitable for designation as essential fish habitat under the federal Sustainable Fisheries Act. It is classified under both Rhode Island and Massachusetts law as "Class SA and SB waters" which are by definition suitable for swimming, recreational activities, shellfish harvesting, fishing, aquacultural uses, and fish and wildlife habitat.

Save The Bay is a member of the committee formed to study the Taunton River, which continues to pursue Wild and Scenic designation by the National Park Service. The Taunton River joins Mount Hope Bay at Brayton Point, and is considered part of the same ecological complex. The Taunton is perhaps the most diverse and intact coastal riverine ecosystem in all of southern New England, and is the only major coastal river in the region that is without a dam or obstruction over its entire length. The width of undisturbed river corridor along the upper Taunton and its primary tributaries ranges from approximately 2,000 feet to over one mile for approximately twenty-two meandering miles - an extraordinarily wild river in eastern Massachusetts. The river corridor's mix of large woodland areas (largely devoid of non-native species), vast tidal and non-tidal wetlands, and edge habitats related to nearly 2,000 acres of prime agricultural land provides extraordinarily rich habitat diversity for a wide range of species. Some of the outstanding attributes of the Taunton River corridor include:

- * over 154 species of birds and 29 species of fish, including the bald eagle and the very rare Atlantic sturgeon;

- * more than 360 identified plant species, including 3 globally rare species

* The river and Mount Hope Bay also support a broad range of recreational uses, and is enjoyed by thousands of people from throughout the region.²

In addition to its ecological value and diversity, Mount Hope Bay continues to support a valuable recreational fishing industry, as well as direct-contact recreational activities such as sailing, power boating, water-skiing, shellfishing, and other activities. Its surrounding lands are becoming an increasingly attractive place to live. Property values on the waterfront in Rhode Island have continued to grow at an unprecedented rate, and waterfront surrounding much of Mount Hope Bay remains undeveloped. As a cultural and recreational resource, the Bay is one of the most important in the region.

Mount Hope Bay is anomalous, in many respects, to surrounding Narragansett Bay and other hydrologically similar embayments in the region. It is an integral part of the Narragansett Bay ecosystem, providing unique habitat conditions to a wide range of fish, birds, and wildlife species. Our members and supporters appreciate the aesthetic beauty, high quality of life, and numerous recreational opportunities in Mount Hope Bay. In addition to swimming and boating, many of our members also fish recreationally. Recent estimates, according to the National Marine Fisheries Service Marine Recreational Fisheries Statistics, include over 380,000 people who fish in Rhode Island waters and over 1 million in Massachusetts waters.³ While exact numbers are difficult to measure, thousands of these anglers still fish in Mount Hope Bay.

Though it once supported a thriving commercial fishery, primarily for winter flounder, Mount Hope Bay continues to experience almost no commercial fishing

² Taunton River Wild and Scenic River Study, published as the Taunton River Stewardship Plan, July, 2005.

³ NOAA Fisheries: Office of Science and Technology, Fisheries Statistics. Marine Recreational Fisheries Statistics Survey Query Results, available at <<http://www.st.nmfs.gov>> (last visited February 16, 2007).

pressure except for the deep portion adjacent to the Mount Hope Bridge. It is difficult to estimate exactly how valuable the Bay's fishery was, though anecdotal evidence suggests that it may have been used by dozens of vessels on a regular basis for generations. Low winter flounder populations have resulted in more stringent fishing regulations, but ultimately commercial vessels ceased to fish Mount Hope Bay through the 1980's as it became economically infeasible.

Mount Hope Bay is a resource, held in trust for the benefit of the public and governed by both state and federal law. Save The Bay submits the continued decimation of this resource must be prohibited. The various companies who have owned and operated Brayton Point over the years have enjoyed great financial benefits at the direct expense of the public trust resources of Massachusetts and Rhode Island.

II. Mount Hope Bay is an integral part of the Narragansett Bay ecosystem and other substantial expenditures have been made on real improvements to the overall system.

Brayton Point has been operating using technology below the industry standards for years. As a result of the continuing harm to the Bay and surrounding ecosystem, it is long past time for Brayton to comply with the conditions of the 2003 NPDES Permit by implementing the statutorily required best technology available for minimizing adverse environmental impacts. The weight of the evidence introduced over the last thirteen years clearly demonstrates the operations at the Brayton facility have had significant adverse impacts on the water quality in Mount Hope Bay. Without immediate implementation of the mandated closed-cycle cooling technology, this valuable ecosystem will not recover.

In furtherance of the larger effort to improve, protect and preserve the Narragansett Bay ecosystem, several substantial improvements have been made by other users of the Bay system. Several pollution sources that have contributed to the cumulative impacts compromising the natural conditions of the lower Taunton River, Mount Hope Bay, and Narragansett Bay have taken responsibility for their part and have either made commitments to upgrade water quality or are actually implementing those plans.

The Fall River Wastewater Treatment facility and the more than ten communities in the Taunton River watershed are among those users who have either made commitments to upgrade river water quality or are under legal and regulatory requirements to do so. The Conservation Law Foundation filed suit against the City of Fall River for water quality violations resulting from combined sewer overflow discharges, while Save The Bay exerted efforts at the Massachusetts Legislature to obtain funding to correct the deficiencies at the Fall River plant. Fall River has also already implemented the first phase of its combined sewer overflow abatement project and is investing significant capital in riverfront improvements.

Furthermore, various improvements in wastewater treatment over many years have resulted in significant water quality improvements, particularly in the Upper Narragansett Bay and urban rivers. Based on monitoring reports, conventional wastewater loadings to the Bay have decreased significantly over the past three decades, and metals in the waste stream have been reduced. As aesthetic water quality has improved, many people are rediscovering area rivers as recreational boating and fishing resources. The comprehensive combined sewer overflow abatement project ("CSO")

taken on by the Narragansett Bay Commission ("NBC") is the largest single public works project in Rhode Island since the construction of interstate 95. The CSO is designed to reduce bacteria from chronic wet-weather overflows of the antiquated Providence sewer system into Narragansett Bay. The first phase is scheduled to be completed this year.

In response to ground-breaking legislation passed in 2004, mandating a fifty percent reduction in nutrient loadings to the Bay by 2008, the Rhode Island Department of Environmental Management ("RIDEM") issued new permits with total nitrogen limits to five wastewater treatment plants discharging to Narragansett Bay or one of its tributaries. The NBC has since begun development of technology and facilities necessary to comply with these permit limits. Once the new technology is installed and operating, the environment and the public will benefit from dramatic improvements in water quality.

River herring populations in this region are so depressed that the states of Massachusetts, Rhode Island, and Connecticut have all banned the possession of herring and stopped all fishing. Projects that have significant potential to further degrade or impact anadromous fish are being denied.

The Wild and Scenic designation currently being sought for the Taunton River is particularly important in light of the broad efforts and investment being made to restore the Taunton River and surrounding area. Congressmen Barney Frank and Jim McGovern have filed H. 415 to add the Taunton River to the United States Wild and Scenic Rivers list. This designation would bring recognition of the Taunton River's outstanding values in six areas: Agriculture; Ecology and Biodiversity; the Estuary; Fisheries; History and Archaeology; and Recreation and Scenery. The Wild and Scenic Rivers process was the

culmination of many years of hard work by the state, local communities, and other interested groups. It aims to improve, protect and restore the health of the river.

Additional accomplishments to enhance the recreational use of the Taunton River for fishing, kayaking and general passive recreational use include a new improved landing site at the Berkley Bridge. The Berkley Historical Commission successfully planned and organized the clean up of a small parcel on the lower Taunton River next to the Bridge. Other projects include dam removal to restore the natural flow of tributary rivers, fish ladders to restore fish passage to historic spawning grounds and habitat restoration in the larger effort to bring back native species to the tributary watersheds.

Other users are investing time, knowledge and funds to make real improvements and stop avoidable damage to our valuable ecosystem. Still, the Lower Taunton and Mount Hope Bay are in relatively poor ecological health, as evidenced, in part, by depressed native fish populations. It is Brayton's turn to take responsibility.

III. The operations of Brayton Point must be limited as determined by both states and EPA in the NPDES permit and further clarified in the Determination on Remand.

Save The Bay and its members have been frustrated with this lengthy permit and appeal process which has allowed the plant owners to profit while the Bay continues to be harmed. Dominion is operating under a 1993 permit that should have been revoked or modified in 1997. The agencies responsible for issuing the permit recognized over ten years ago that that "immediate action to reduce impacts" from the plant were necessary.⁴ Despite state and federal knowledge that the withdrawal and discharge of water from the Brayton Point facility was degrading Mount Hope Bay, the grave, ongoing impacts to the

⁴ Memorandum of Agreement II, page 2, Paragraphs 3 and 4.

ecosystem have been permitted to continue for more than twelve years without consequence to the previous owner, USGen, or now to Dominion. Mount Hope Bay is an integral part of Narragansett Bay and a resource held in trust by Rhode Island and Massachusetts for the benefit of their citizens. The harm to the ecosystem is evident from the plant's own monitoring and entrainment and impingement data alone. The decimation of public trust resources should not be allowed to continue. Any further review of this carefully considered permit will further prejudice the interests of Save The Bay and further reward Dominion with additional time to avoid the purchase and installation of technology necessary to operate in a manner that is protective of Mount Hope Bay and its resources.

Moreover, a second review and/or reopening of the already exhaustive record would continue to drain the very limited resources of Save The Bay and similarly situated organizations with minimal resources. Upholding EPA Region 1's final permit and Determination on Remand benefits non-profit organizations because it ends the otherwise limitless opportunity of for-profit companies to drag out the proceedings and continue to hire and present experts. Dominion purchased Brayton Point with full knowledge of the issues surrounding the plant. Save The Bay has been actively participating in the NPDES permit review for over a decade and financial restraints limit its ability to continue to review reports, testimony and argument on the NPDES issues that have been vigorously debated for almost fifteen years.

This is not a case where a permit was reissued in an expedited, or even a remotely timely, manner. As explained in *Save The Bay's Memorandum of Law in Support of its Motion for Leave to File an Amicus Brief in Support of NPDES Permit No. MA0003654*

(December 19, 2003), "[t]he legal and scientific basis for the draft permit was exhaustively explained and supported by Region 1, and the "aquatic impacts have been studied in extraordinary and unprecedented detail..." *Id.* at 4.

Brayton Point has been permitted to operate during more than a decade of study while devastation to the fisheries of Mount Hope Bay continued. The current permit governing the operations of the plant should have been reviewed and revised in 1997. Despite constant pressure from the RIDEM, Save the Bay, and the Rhode Island Attorney General's Office to modify or revoke the permit, EPA and Massachusetts Department of Environmental Protection continued to accept and incorporate new information, attend technical meetings, and review models, studies and other claims of Brayton Point while the decimation of the fisheries of Mount Hope Bay continues. Precious time and resources have already been wasted responding to claims the plant was not the cause of the drastic decline of the fisheries. For years, the various owners of the plant have hired innumerable consultants to refute the evidence that the operations at Brayton Point are a contributing factor to the elimination of certain species from the local fish population. However, the entire mass of ecological and economic research used to justify the NPDES permit shows significant direct and indirect negative economic impact caused by Brayton Point and imposed on the users of Mount Hope Bay and the rivers that feed into it. It is impossible to capture the costs born by the public from over forty years of pollution from the plant.

Dominion, continuing to profit under an outdated permit issued in error, is faced with compelling evidence from over nine years of comprehensive studies demonstrating that its operations have significant adverse impacts on Mount Hope Bay. Continuing

study will not change the Brayton Point's obligation to operate in compliance with the Clean Water Act and state water quality standards.

Conclusion

Dominion has no right to continue to degrade the remaining living resources in Mount Hope Bay and prevent its recovery. The plant continues to profit at the expense of our public trust resources. Because compliance with the permit and the Clean Water Act will require a capital investment, it is in the best financial interest of Dominion to continue to delay the issuance of the permit and to profit at the expense of Mount Hope Bay. This tactic of delay through attempts to expand and challenge the record claiming new or inadequately reviewed evidence must be recognized and rejected. Additional delay can not be permitted while the decimation to the unique ecosystem of the Mount Hope Bay estuary continues.

Save The Bay supports the limits outlined in the NPDES Permit for Brayton Point. It is evident that EPA has provided a rational basis for the NPDES permit issued in accordance with controlling law. Accordingly, substantial deference must be given to EPA Region I's decision. "[A]gencies, after all, are normally entitled to substantial deference so long as their decisions do not collide directly with substantive statutory commands and so long as procedural corners are squarely turned. This deference is especially marked in technical areas." *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3rd 73, 77 (1st Cir. 1993). Extensive study and analysis support the NPDES permit for Brayton Point Station. EPA Region I has exhaustively explained the rational basis for the permit and the EAB should defer to EPA Region I's determination, particularly given the technical nature of the decision.

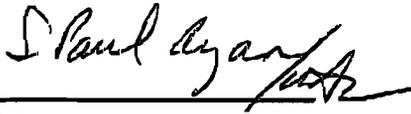
The public interest demands timely implementation of the technology necessary to begin to protect the resource from further harm be installed as soon as possible. Save the Bay requests this Board deny Dominion's Petition for Review and uphold the final permit and Determination on Remand issued by EPA Region 1.

Respectfully submitted,

Save The Bay - Narragansett Bay,
Amicus Curiae,
By its attorneys,


/s/ Wendy A. Waller

Wendy A. Waller, Esq.
(MA BBO #657208, RI BAR #6808)
Save the Bay - Narragansett Bay
100 Save The Bay Drive
Providence, Rhode Island 02905
(401) 272-3540 Ext. 122
(401) 273-7153 (fax)


/s/ S. Paul Ryan

S. Paul Ryan, Esq.
(MA BBO #436220, RI BAR #2264)
670 Willett Avenue
East Providence, Rhode Island 02915
(401) 437-0660
(401) 437-0128 (fax)

Dated: March 6, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2007, I served a true copy of Save The Bay's Memorandum of Law in Support of the Remand Determination Issued by Region 1 in Relation to NPDES Permit No. MA-0003654 for Brayton Point Station on the following parties by regular mail:

Wendy B. Jacobs, Esq.
John M. Stevens, Esq.
Elisabeth M. DeLisle, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210-2600

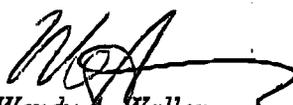
Mark A. Stein, Esq.
U.S.E.P.A, Region 1
1 Congress Street
Suite 1100 (RAA)
Boston, MA 02114-2023

Robert G. Brown, Esq.
Massachusetts Department of Environmental Protection
One Winter Street - 3rd Floor
Boston, MA 02108

Tricia K. Jedele, Esq.
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903

Brian Wagner, Esq.
Deputy Legal Counsel
235 Promenade Street
Providence, RI 02908

Ann Morrill
Kickemuit River Council
90 Dexterdaled Road
Providence, RI 02906


/s/ Wendy A. Waller