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

FILED
FEB 19 2004
CLERK, ENVIRONMENTAL APPEALS BOARD
INITIALS

In re:	)	
USGen New England, Inc. Brayton Point Station	)	NPDES Appeal No. 03-12
NPDES Permit No. MA-0003654	)	

ORDER GRANTING REVIEW[1]

On October 6, 2003, Region I ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") issued a final permit decision to USGen New England, Inc. ("USGen" or "Petitioner") for a renewal of its National Pollutant Discharge Elimination System ("NPDES") permit, NPDES Permit No. MA 0003654. The NPDES permit in question is for USGen's Brayton Point Station, a power plant that withdraws water from the Taunton and Lee Rivers for cooling purposes and later discharges that water into Mount Hope Bay in Somerset, Massachusetts.[2] On November 5, 2003, the Environmental Appeals Board (the "Board") received a petition for review of this NPDES permit from USGen pursuant to 40 C.F.R.

[1] This order is not intended to be an adjudication on the merits of any of the issues raised in the Petition.

[2] Mount Hope Bay occupies the northernmost portion of Naragansett Bay, which is a 146-square mile bay bordering Rhode Island Sound. *See* Petition at 3. Mount Hope Bay is bordered by the States of Massachusetts and Rhode Island.

§ 124.19(a). In addition to the petition, USGen also submitted several other motions, including a Motion to Supplement the Administrative Record[3] and a Motion for Evidentiary Hearing.

Since the filing of USGen's petition, five entities have filed motions to intervene and/or to file amicus curiae ("amicus") briefs in this matter. These are: the Conservation Law Foundation ("CLF"), the Massachusetts Department of Environmental Protection ("MADEP"),[4] Save the Bay, the Department of Attorney General of the State of Rhode Island, and the Utility Water Act Group ("UWAG"). Region I has also filed several documents in this matter, including a Response to the Petition for Review.

In this case, we are presented with, among other things, a legal issue of first impression for the Board. USGen filed a Motion for Evidentiary Hearing with its petition, requesting an evidentiary hearing in connection with the issuance of its NPDES permit. EPA's procedural regulations governing NPDES permit decisions previously authorized evidentiary hearings in certain circumstances. *See In re City of Moscow*, NPDES Appeal No. 00-10, slip op. at 9 n.20 (EAB, July 27, 2001), 10 E.A.D. __.[5] In 2000, however, the Agency amended its procedural

---

[3] On November 28, 2003, USGen filed a Second Motion to Supplement the Administrative Record.

[4] Although the Region administers the NPDES program in the State of Massachusetts, *see In re Avon Custom Mixing Services, Inc.*, slip op. at 3 & n.4 (EAB, Aug. 27, 2002), 11 E.A.D. __, the State generally issues a concurrent state permit. Region's Response to Petition at 7; Amicus Brief of MADEP at 1.

[5] *See also In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997); *In re Florida Pulp & Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995); *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994). EPA's former procedural regulations were upheld by the Supreme Court in *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980).

regulations and, in streamlining the procedures governing various permits that EPA issues, eliminated the provisions allowing evidentiary hearings. *See* Amendments to Streamline the NPDES Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,896-901 (May 15, 2000); *see also* Amendments to Streamline the NPDES Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,275-80 (proposed Dec. 11, 1996).

In its Motion for Evidentiary Hearing, Petitioner argues that, despite the fact that the part 124 regulations governing permit appeals were amended in 2000 to remove the procedures authorizing evidentiary hearings, it is entitled to an evidentiary hearing as a "matter of statutory right" prior to final issuance of the permit. Motion for Evid. Hear. at 1. Petitioner contends that this legal entitlement is based upon the decision of the Federal Court of Appeals for the First Circuit in *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978). *Id.* Petitioner also claims that *Seacoast* has recently been affirmed by the First Circuit in *Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 48 (1st Cir. 2001), a case decided *after* the part 124 regulations were amended. *Id.* at 1-2. Thus, Petitioner argues, "EPA must still provide an evidentiary hearing when requested by a [p]ermittee in the First Circuit." *Id.* at 2. At bottom, Petitioner's argument could be read to call into question the legality of the amended regulations.

The Board generally does not entertain challenges to regulations in the context of a permit appeal. *E.g., In re City of Irving*, NPDES Appeal No. 00-18, slip op. at 18-20 (EAB, July 16, 2001), 10 E.A.D. __; *In re Tondu Energy Co.*, 9 E.A.D. 710, 715 (EAB 2001); *In re City of Port St. Joe*, 7 E.A.D. 275, 286 (EAB 1997). Nonetheless, where there are "compelling

circumstances," the Board may entertain such challenges. *In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997); *accord In re Echevarria*, 5 E.A.D. 626, 634-37 & n.13 (EAB 1994) (review warranted only in "exceptional cases"). Because of Petitioner's argument that First Circuit precedent requires an evidentiary hearing, the Board is interested in having the parties further address this issue in the context of the current permit appeal.[6] Accordingly, the briefing schedule established below specifically provides for briefing on this particular issue. In their briefs on this issue, the Board requests that the parties address, among other things, (1) whether Petitioner is, in effect, challenging the amended regulations; (2) if so, whether or not the circumstances of this case meet the standard of reviewability articulated in *B.J. Carney* and *Echevarria* and why or why not; and (3) the applicability, if any, of section 509(b)[7] of the CWA, 33 U.S.C. § 1369(b), or other applicable legal authority, on whether Petitioner may challenge this regulation at this time. Because a decision as to whether an evidentiary hearing must be held necessarily impacts the posture of the case thereafter, this is the first issue scheduled to be briefed.

In addition to this issue of first impression, there are also several other considerations that have influenced our decision to grant review here. This permit appears to be of significant regional interest, with potential interstate implications. The permitting process itself has

---

[6] In taking further briefing on this issue, the Board expresses no opinion of the merits of the issue at this time.

[7] Section 509(b) authorizes judicial review of a number of Agency actions by the United States' Circuit Courts of Appeal, but, for the most part, limits applications for review to 120 days from the date of the Agency's "determination, approval, promulgation, issuance or denial" of such action. 33 U.S.C. § 509(b).

involved not only the Region and Petitioner, but two States, Massachusetts and Rhode Island, apparently due to the fact that the power plant discharges into an interstate body of water. Also, several of the entities filing briefs have alleged that the discharges from the power plant have had a substantial impact on the fisheries in the region, thus explaining the considerable interest in this permit. In fact, up to this point, five entities (including the two States) have requested to intervene and/or file amicus briefs in the matter. Under part 124, if the Board grants review of a permit, public notice is provided which allows for the filing of amicus briefs by "any interested person." 40 C.F.R. § 124.19(c). Thus, with the granting of review, other interested persons, in addition to the five entities that have already requested involvement, may also have an opportunity to participate. Finally, some of the issues also appear to be relatively complicated and/or unique in nature.[8]

Although it would be within the range of options available to the Board to grant review solely on the evidentiary hearing issue at this time and defer the decision on whether to grant review on other issues until a later date, we instead grant review on the permit as a whole in view of case management considerations,[9] the fact that some of the other issues may be interrelated,

---

[8] As we have noted, the Region and many of the amici have alleged that the plant has significant impacts on the fisheries in that region. Furthermore, although we do not opine on this issue at this time, we note that Petitioner has argued that the Region has "singled out" Brayton Point Station for disparate treatment which, it asserts, is a clear error of law in the First Circuit. Petitioner at 25 (citing cases); *but see* Region's Response to Petition at 83-89. USGen also explains that EPA is scheduled, by court order, to issue a final rule governing power plants in February of this year, which it asserts will codify prior Agency practice that the Region did not follow in issuing the Brayton Point Station permit. *Id.* at 6, 24. This rule will thus likely be issued during the pendency of this appeal.

[9] We believe that, in this case and with this number of parties, taking review of the entire permit will expedite consideration of USGen's petition, whereas piecemeal consideration may delay the resolution of the permit appeal.

the presence of a legal issue of first impression, the complexity of some of the issues in this particular petition, and the significant interest by outside parties in this permit.

Briefing Schedule

Because we are granting review, we have established a briefing schedule below which will allow additional briefing by the Petitioner[10] and the Region, as well as allowing all other interested persons, including all those that have filed requests to intervene and/or file amicus briefs, to file amicus briefs in this matter in accordance with the briefing schedule. The briefing schedule has been divided into two phases because, as noted earlier, we believe the evidentiary hearing issue necessarily needs to be addressed prior to addressing the bulk of the issues.

By virtue of our decision to grant review of the permit, the following motions to file amicus briefs are **GRANTED**: MADEP's Motion for Leave to File Amicus Brief and Amicus Brief (filed Dec. 29, 2003); Save the Bay's Motion to File an Amicus Brief in Support of the NPDES Permit (filed Dec. 29, 2003); State of Rhode Island's Motion for Leave to File an Amicus Brief in Support of NPDES Permit (filed Dec. 30, 2003); and UWAG's Motion for Leave to File a Brief Amicus Curiae in Support of Appellant (filed Jan. 23, 2004). Likewise, USGen's Motion for Leave to Submit Brief in Connection with Petition for Review (filed

[10] We note that USGen has made several requests for additional briefing.

Nov. 5, 2003) is also **GRANTED**. Such additional amicus or supplemental briefs[11] may be filed pursuant to the schedule set forth below, as we believe they will fit within the scope of the briefing schedule we have set. We also find that the Region's Motion for Third Scheduling Order (filed Jan. 27, 2004) and all oppositions filed thereto are rendered **MOOT** by our grant of review and concurrent briefing schedule.

At this time, we are **DENYING** the motions for intervention filed by two entities – CLF[12] and the State of Rhode Island – **WITHOUT PREJUDICE.**[13] These two parties may file amicus

---

[11] Those parties that have already requested amicus status and that have already submitted a brief on the substantive issues in this matter need not re-file or reargue those same issues as we have granted their request for amicus status in this Order and thus will consider their previously-filed briefs in making our decision. In particular, we note that MADEP attached an amicus brief to its motion and that three of the other entities – the State of Rhode Island, CLF, and Save the Bay – included significant, substantive arguments in their memoranda supporting their motions to intervene and/or file amicus briefs.

[12] CLF, unlike Rhode Island, moved solely for intervenor status. *Compare* CLF's Motion for Leave to Intervene and File a Brief/Supporting Memorandum (filed Nov. 25, 2003) *with* State of Rhode Island's Motion for Leave to Intervene and File a Brief or in the Alternative Motion for Leave to File an Amicus Brief (filed Dec. 30, 2003). However, because it is clear that CLF is interested in filing a brief on the issues in this permit appeal and because our grant of review of this permit appeal allows for any interested persons to file an amicus brief, we assume that CLF will want to proceed in this case as an amicus. Accordingly, we will consider all of its previously-filed briefs in that light, including its Memorandum of Law in Support of its Motion for Leave to Intervene and File a Brief (filed Nov. 25, 2003), which includes arguments on the substantive permit appeal issues, *see supra* note 11, its Objection to Petitioner's Motion for Evidentiary Hearing and Supporting Memorandum (filed Dec. 29, 2003), and its Objection to Petitioner's Motions to Supplement the Administrative Record and Supporting Memorandum (filed Dec. 29, 2003). Thus, it need not re-file those documents nor reargue those issues.

[13] The current regulations governing NPDES permit appeals do not explicitly provide for intervention. *See* 40 C.F.R. part 124. The former part 124 regulations did, however, expressly allow for intervention in the evidentiary hearing phase of the proceedings. *See* 40 C.F.R. § 124.79 (1999); *see also* Proposed Amendments to Streamline the NPDES Program Regulations, Round Two, 61 Fed. Reg. 65268, 65282 (Dec. 11, 1996). In its brief requesting intervention, CLF cites several Board cases decided after part 124 was amended in which we granted intervention. The parties requesting intervention in all of those cases, however, were either the permittees themselves or the tribes whose authority to regulate water quality were at issue. *In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons*, NPDES Appeal No. 01-16, at 6 (EAB, Sept. 3, 2002) (tribe's motion to intervene and file a

briefs according to the briefing schedule and, if at some point in the future we grant USGen's request for an evidentiary hearing, these two parties may renew their request for intervenor status at that time. We are also **DENYING** Petitioner's Motion for a Conference to Organize and Prioritize the Issues on Appeal (filed Jan. 16, 2004) as we have organized the issues and set forth a schedule below.

At this time, the Board is not ruling on Petitioner's Motion for Evidentiary Hearing, Motions to Supplement the Administrative Record, Motion for Oral Argument, or the Region's Motion to Strike, nor any responses to such motions. If a decision with respect to the issue addressed in the first phase necessitates a change in the schedule, we will so inform all parties, including those from which we receive amicus briefs in response to the public notice.

---

response or to participate as amicus granted); *In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, slip op. at 15 (EAB, May 21, 2002), 10 E.A.D. __ (permittee's motion to intervene and file a response to the petition granted); *In re NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan*, NPDES Appeal Nos. 00-26 & 00-28, at 3, 7 (EAB, Jan. 23, 2001) (tribe's motion to intervene and file a brief granted); *see also In re Aurora Energy, L.L.C.*, NPDES Appeal No. 03-11, at 1 (EAB, Oct. 21, 2003) (permittee's motion for leave to intervene granted); *In re Haw. Elec. Light Co. ("HELCO")*, PSD Appeal Nos. 01-24 through 01-29, at 1 (EAB, Oct. 18, 2001) (permittee's motion to intervene and file a response to petitions for review granted); *In re Four Corners Power Plant*, NPDES Appeal No. 01-06, at 1-2 (EAB, Feb. 20, 2001) (tribe's unopposed motion to intervene and file a brief granted). Nonetheless, on several occasions, the Board has allowed persons who are neither the permittees nor the permitting authorities to participate in the proceedings as amici curiae and to file briefs. *See In re Tenn. Valley Auth.*, CAA Docket No. 00-6 (EAB, June 16, 2000) (denying environmental groups' motion to intervene, but granting leave to file non-party briefs); *In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695, 696 (EAB 2001) (noting that EPA's Office of General Counsel and EPA Region V's Office of Regional Counsel had been allowed to intervene *as amicus curiae* and file a brief). Because the regulations do not specifically address the question of intervention, we have discretion, where appropriate, to allow intervention and/or non-party briefing and typically allow permittees to participate as intervenors when supported by an appropriate motion. *E.g.*, *HELCO*, at 1. In this case, we believe that, as the matter is styled at the current time, the parties who have requested intervention will be provided with sufficient participation in the case as amicus consistent with the current regulations. As we noted, however, we are denying the motions to intervene *without prejudice* to their renewal at a later date if we grant Petitioner's request for an evidentiary hearing.

The briefing schedule is established as follows:

Phase 1: *Issue with respect to USGen's request for an Evidentiary Hearing*

- Briefs from Petitioner and any amicus in support of Petitioner (e.g., UWAG) on the evidentiary hearing issue (if they wish to submit additional briefing on the matter) are **due on or before April 12, 2004**. In light of the briefing already before the Board, these briefs are limited to 25 pages. The parties need not repeat any arguments they have already argued in previous briefs.
- Responses from the Region and any amicus in support of the Region (e.g., CLF, the States, Save the Bay) on the evidentiary hearing issue (including parties that may have already submitted briefs on this issue) are **due on or before May 3, 2004.** These briefs are likewise limited to 25 pages. The parties need not repeat any arguments they have previously argued.

Phase 2: *All other Issues regarding NPDES Permit No. MA0003654 raised by Petition*

- Briefs from Petitioner[14] and any amicus in support of Petitioner (e.g., UWAG) on all other issues are **due on or before June 7, 2004**. In light of

[14] USGen and UWAG are limited to the issues USGen has already raised in the Petition, as those are the issues with respect to which Petitioner requested additional briefing in its Motion for Leave to Submit Brief in Connection with Petition for Review which was filed on the same day the petition was filed (i.e., November 5, 2003).

the fact that Petitioner has already submitted a 53-page petition accompanied by over 100 pages of tables, these briefs are limited to 50 pages. Again, the parties need not repeat any arguments they have already submitted.

- Responses from the Region and any amicus in support of the Region (e.g., CLF, the States, Save the Bay)[15] **are due on or before June 28, 2004.** In light of the fact that the Region has already submitted a 159-page response to the petition with lengthy accompanying tables, these briefs are limited to 50 pages. The parties likewise need not repeat any arguments they have previously made before the Board.
- Reply by Petitioner is due **on or before July 12, 2004.** This brief is limited to 25 pages.

No further briefing shall be permitted except by order of the Board. If the Petitioner, the Region, or any of the other entities specifically named in this Order file additional briefs, memoranda, or motions in this matter, they are hereby **DIRECTED** to serve such documents on all other persons who have already filed motions, briefs, and/or memoranda in this matter.

Finally, as required by 40 C.F.R. §§ 124.10(a)(iv) and 124.19(c), the Regional Administrator (or an authorized representative) is **DIRECTED** to promptly give public notice of

---

[15] These parties are likewise limited to addressing issues raised by the Petition.

this grant of review pursuant to the procedures described in 40 C.F.R. § 124.10, in particular 40 C.F.R. § (c), (d)(1), and (e). Such notice shall be consistent with the directives in this Order.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein
Environmental Appeals Judge

Date: February 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Scheduling Order in the matter of USGen New England, Inc., Brayton Point Station, NPDES Appeal No. 03-12, were sent to the following persons in the manner indicated:

By Pouch Mail:

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

By First Class Mail:

Wendy B. Jacobs, Esq.
Randall Kromm, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210-2600

Christopher A. D'Ovidio, Esq.
Christopher M. Kilian, Esq.
Conservation Law Foundation
55 Dorrance Street
Providence, RI 02903

Richard Lehan, Esq.
Deputy General Counsel
One Winter Street
Boston, MA 02108

Kendra L. Beaver, Esq.
Save the Bay
434 Smith Street
Providence, RI 02908

By First Class Mail:

Tricia K. Jedele, Esq.
Special Assistant Attorney General
Department of Attorney General, State of R.I.
150 South Main Street
Providence, RI 02903

Brian Wagner, Esq.
Deputy Legal Counsel
R.I. Department of Environmental Management
235 Promenade Street
Providence, RI 02908

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

Dated: FEB 2 0 2004

Annette Duncan
Secretary