



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
ONE CONGRESS STREET SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

April 26, 2004

Ms. Eurika Durr, Clerk of the Board
Environmental Appeals Board 1103B
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Mr. Ernest Hauser, Senior Vice President
PG&E National Energy Group
Northeast Region
50 Congress Street, Suite 310
Boston, MA 02109

Re: Appeal No. NPDES 03-12; Notice of Uncontested and Severable Conditions of NPDES Permit MA0003654

Dear Ms. Durr and Mr. Hauser:

This letter provides notification of which conditions of the above-referenced permit are stayed as a result of the above-referenced permit appeal, and which conditions are not stayed and will go into effect 30 days from the date of this letter. This notification is issued in accordance with 40 C.F.R. §§ 124.16 and 124.60.

I. Procedural Background

On October 6, 2003, the United States Environmental Protection Agency's ("EPA" or the "Agency") Region 1 office ("Region 1" or the "Region") reissued the above-referenced National Pollutant Discharge Elimination System ("NPDES") permit for the Brayton Point Station power plant ("BPS"). Region 1 issued the NPDES permit to BPS under the requirements of the Federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"). BPS is owned and operated by USGen New England, Inc. (the "Petitioner" or "USGen New England"), a subsidiary of PG&E Corporation. On November 5, 2003, USGen New England filed a petition for review of the permit with EPA's Environmental Appeals Board (the "EAB") pursuant to 40 C.F.R. § 124.19(a). This permit appeal (Appeal No. NPDES 03-12) has yet to be decided.

While a permit appeal is pending, the contested permit conditions are stayed. *See* 40 C.F.R. § 124.16(a)(1). Furthermore, uncontested permit conditions that are “inseverable” from contested conditions are also considered to be contested and are stayed. *See* 40 C.F.R. §§ 124.60(b)(4), 124.16(a)(2)(i). Uncontested permit conditions that *are* severable from contested conditions, however, are *not* stayed and become enforceable conditions of the permit. *See* 40 C.F.R. §§ 124.16(a)(2)(i) and (ii). The term “uncontested conditions” is not defined in the regulations but is illuminated by examples of conditions considered to be “uncontested” that are set forth in 40 C.F.R. § 124.60(b). In addition, it should be understood that when the permit being appealed is a *reissued* permit, the provisions of the prior permit that correspond to the stayed conditions of the new permit generally remain in effect and must be complied with.¹ *See* 40 C.F.R. § 124.16(c)(2).

When a permit appeal is filed, the EPA Region that issued the new permit must issue a notification identifying which permit conditions are stayed as a result of the appeal, and which permit conditions will go into effect. *See* 40 C.F.R. §§ 124.16(a)(2)(i) and (ii). The notification must comply with the applicable requirements of 40 C.F.R. §§ 124.16 and 124.60(b). *See* 40 C.F.R. § 124.16(a)(2)(ii). New permit conditions that are not stayed go into effect *30 days after the date of the notification*. The EPA Region must notify the EAB, the permit applicant, and “all other interested parties.” To satisfy this requirement, Region 1 is (a) mailing a copy of this notification to the EAB, the permit applicant and all parties who have participated in the permit appeal thus far, and (b) posting a copy on Region 1's website (at www.epa.gov/region1/).

EPA regulations require that the above-described notification be issued “as soon as possible after receiving notification from the EAB of the filing of a petition for review . . .” Region 1 received notification of the Petitioner’s appeal of the new BPS permit on November 13, 2003. It has taken the Region longer than it would have liked to issue this notification for two main reasons. First, the Region initially needed to focus on responding to the Petitioner’s extensive petition for review, as well as to a significant number of motions filed in connection with the appeal.

¹ Prior to the 2003 issuance of the permit currently under appeal, the last NPDES permit issued to BPS was issued in 1993. In 1997, however, BPS, Region 1, Massachusetts and Rhode Island entered a voluntary agreement to govern thermal discharges and cooling water withdrawals under limits somewhat more stringent than those in the 1993 permit. This agreement is referred to as the “Memorandum of Agreement II” (or “MOA II”). The parties agreed that BPS would comply with the limits in the MOA II until they were supplanted by limits in a new permit. Therefore, limits from the MOA II will take the place of corresponding limits from the 1993 permit as the existing conditions that will remain in effect while related provisions in the new permit are stayed. A copy of the MOA II is attached as Appendix C to Region 1's “Clean Water Act NPDES Permitting Determinations for Thermal Discharge and Cooling Water Intake from Brayton Point Station in Somerset, MA” (July 22, 2002) (the “DPDD”). The MOA II is discussed at pages 3-3 to 3-5 of the DPDD. The DPDD was submitted as Exhibit 4 to Region 1's Response to the Petition for Review, which was filed with the EAB on December 29, 2003.

Second, the facts involved in this permit appeal raise certain difficult issues related to determining which permit conditions should be stayed. The Region has taken time to carefully consider these issues. This consideration included initiating discussions with the Petitioner on the subject, offering the Petitioner the chance to submit a letter on the subject, and considering the Petitioner's views.

Region 1 wishes to emphasize that it makes the determinations discussed herein based on the best information and analysis available to the Region at this time, but that, as discussed in more detail below, there is still some uncertainty regarding some of the key issues here. Nevertheless, given the regulatory requirement to issue this notification "as soon as possible" after commencement of the permit appeal, Region 1 concluded it was important to issue the notification at this time. As a result, however, Region 1 expressly notes that the Region could decide at a later date to alter some of the determinations presented herein if warranted by new facts or improved analysis. If the Region makes such a decision, it will first discuss the matter with the Petitioner and then issue another notification in accordance with the requirements of 40 C.F.R. § 124.16.

II. Which Permit Conditions Are Stayed and Which Will Become Effective?

As discussed above, new permit conditions contested in a permit appeal are stayed pending resolution of the appeal by the EAB. In addition, permit conditions that are uncontested, but cannot be severed from contested conditions, are also considered contested and must be stayed. Uncontested conditions that are severable from contested conditions become effective. Guidance regarding when a permit condition is considered uncontested (and severable from contested conditions) is provided in 40 C.F.R. § 124.60(b).

In the case of the Petitioner's appeal of the new permit for BPS, it is clear that the new permit's limits for thermal discharge and cooling water withdrawals are contested and must be stayed. A difficult question is posed, however, regarding whether the thermal discharge and cooling water withdrawal limits *proposed by the Petitioner* in its request for a permit and its comments on the Region's Draft Permit should be regarded to be uncontested conditions that should go into effect. If not, the corresponding limits from the MOA II/1993 permit will simply remain in effect until the EAB's resolution of the appeal. Because of the difficulty and importance of this question, it is addressed first in the section immediately below. Afterward, this notification addresses the balance of the permit's conditions.

(a) Whether or Not the Permit Conditions Related to Thermal Discharges and Cooling Water Withdrawals Proposed by the Petitioner Should be Considered to be Uncontested

The new permit issued by Region 1 to BPS sets a variety of limits on the facility's thermal discharges and cooling water withdrawals. These limits are set forth in the Parts I.A.4.a through

I.A.4.d of the Final Permit issued by the Region on October 6, 2003 (*see* pages 3 - 6).² Some of these limits are new and more stringent than the limits in the MOA II or the 1993 permit. These include new annual limits on thermal discharges (expressed as British Thermal Units (BTUs)), and cooling water withdrawal volume. The Petitioner's permit appeal clearly contests these new limits and, as a result, they are stayed.

The more difficult question, however, is what limits should apply pending resolution of the permit appeal. In seeking reissuance of its NPDES permit, the Petitioner plainly proposed new permit limitations for thermal discharges and cooling water withdrawals more stringent than the limits in the MOA II (and the 1993 permit), though less stringent than the limits that ultimately were included in Region 1's new permit. At a minimum, the Petitioner proposed these more stringent limits in (a) its "316(a) & (b) Demonstration in Support of NPDES Renewal, NPDES Permit No. MA0003654, USGen New England, Inc., BPS, Somerset MA" (December 6, 2001), Vol. I, pp. 1 - 3, 6 and 19 ("Table II.E - Proposed NPDES Permit Conditions"),³ and (b) its Comments on Region 1's Draft Permit (October 4, 2002), Vol. I, pp. 12 (n. 27), 47 - 48, 70 and Attachment 2 ("Table II.E - Proposed NPDES Permit Conditions").⁴ The Petitioner even reiterated that it had proposed these limits in its Petition for Review filed with the EAB (November 5, 2003), pp. 4 and 7.

Table 1 below presents some of the key, corresponding limits included in Region 1's new permit, the Petitioner's proposed limits, and the MOA II/1993 permit.

² The October 6, 2003, Final Permit was submitted as Exhibit 1 to Region 1's Response to the Petition for Review, filed with the EAB on December 29, 2003.

³ The Petitioner's December 6, 2001, 316(a) and (b) Demonstration document was filed as Exhibit 62 to Region 1's Response to the Petition for Review, filed with the EAB on December 29, 2003.

⁴ A copy of the Petitioner's October 4, 2002, comments on the Draft Permit were filed as Exhibit 33 to Region 1's Response to the Petition for Review, filed with the EAB on December 29, 2003.

Table 1 - Comparison of Corresponding Thermal Discharge and Cooling Water Intake Limits from New 2003 Permit, USGen New England Proposal, and MOA II/1993 Permit

Parameter	Limits In Region 1's New Permit (10/03)	Limits Proposed by USGen NE	Limits in MOAII/1993 Permit
Maximum Temp.	95° F (hourly ave.)	95° F (hourly ave.)	95° F (hourly ave.)
Delta- Temp.	22° F (hourly ave.)	22° F (hourly ave.)	22° F (hourly ave.) (30° F as seasonally modified during piggyback cooling in MOA II)
Annual Average (June - May) - Thermal Loading - Intake Flow	- 1.7 Trillion BTUs - 56.2 MGD (With an additional 6,847 million gallons per year from up to 122 hours of once-through cooling)	- 28 Trillion BTUs - 650 MGD (circ. flow) (including up to 11 MGD for Lee River Intake)	- 42 Trillion BTUs -No Annual Average Intake Flow Limit
Winter Monthly (Oct. - May) - Thermal Loading - Intake Flow	No Seasonal Limits Proposed (no once-through cooling during winter flounder spawning, Feb. - May)	- 3.5 Trillion BTUs - Not Proposed	4.1 Trillion BTUs -No Intake Flow Limit
Winter Season (Oct. - May) - Thermal Loading - Intake Flow	No Seasonal Limits Proposed (no once-through cooling during winter flounder spawning, Feb. - May)	- 19 Trillion BTUs - 600 MGD (circ. flow)	- 29 Trillion BTUs -No Intake Flow Limit
Summer Monthly (June - Sept.) - Thermal Loading - Intake Flow	No Seasonal Limits Proposed	- 2.5 Trillion BTUs - Not Proposed	- 3.4 Trillion BTUs - No Intake Flow Limit
Summer Season (June - Sept.) - Thermal Loading - Intake Flow	No Seasonal Limits Proposed	- 9 Trillion BTUs - 750 MGD (circ. flow)	- 13 Trillion BTUs - No Intake Flow Limit
Daily Maximum Intake Flow	56.2 MGD (with increase during once-through cooling)	1,298.5 MGD (circ. flow)	- No Intake Flow Limit
Effluent Flow Rate	40 MGD (mo. ave.) 42 MGD (max. day)* * (with increase during once-through cooling)	Not Proposed	Oct. - May: 925 MGD mon/ave (circ. flow) June - Sept: - 1130 MGD mon/ ave. - 1080 MGD, daily/ave

The question of whether the permit limitations proposed by the Petitioner should be considered uncontested conditions that are severable from other contested conditions arises because EPA regulations at 40 C.F.R. § 124.60(b)(6)(iii) state that:

(6) Uncontested conditions shall include:

* * *

(iii) When the discharger proposed a less stringent level of treatment than that contained in the final permit, any permit conditions appropriate to meet the levels proposed by the discharger, if the measures required to attain that less stringent level of treatment are consistent with the measures required to attain the limits proposed by any other party.

As described above, the Petitioner in this case plainly “proposed a less stringent level of treatment than that contained in the final permit . . .” *Id.* Furthermore, imposing the permit conditions proposed by the Petitioner would clearly be “permit conditions appropriate to meet the levels proposed by the discharger . . .” *Id.* The remaining question is whether “measures required to attain that less stringent level of treatment are [or would be] consistent with the measures [that would be] required to attain the limits proposed by . . .” Region 1 in the event the new permit’s limits are upheld. *Id.*

Region 1’s initial evaluation indicated at least three possible means of complying with the permit limits proposed by the Petitioner. These include (a) installation of cooling towers in the “enhanced multi-mode” configuration proposed by the Petitioner with a sufficient number of cooling tower cells to meet the limits proposed by the Petitioner, (b) installation of other types of cooling towers in other configurations but with a sufficient number of cells to meet the Petitioner’s proposed limits (e.g., “conventional” closed-cycle cooling with wet mechanical-draft cooling towers), or (c) implementation of generating unit outages sufficient to meet the Petitioner’s proposed permit limits.

Considering option (c) first, one could consider meeting the Petitioner’s proposed limits through generating unit outages to be considered “consistent with” any later steps needed to comply with more stringent limits. This is because generating unit outages would not create any technological impediment to adding more effective technology at a later date if it was needed to meet more stringent permit limits. Nevertheless, Region 1 concludes that it would be inappropriate to rely on generating unit outages as the basis for determining that the permit limits proposed by the Petitioner must be regarded to be uncontested conditions that should be complied with pending resolution of the permit appeal. Such outages would likely be very expensive for the Petitioner, depending on how long they continued, and the expense would not later go toward meeting the cost of complying with any more stringent limits that might be imposed after resolution of the appeal. The Region does not think the regulations contemplated

that a permit issuing Region would deem less stringent permit conditions proposed by a discharger to be “uncontested” during pendency of a permit appeal solely because those less stringent limits could be met by reduced production, regardless of whether such reduced production would be very expensive for the discharger. This conclusion is supported by the terms of 40 C.F.R. §§ 124.60(b)(3) and (6)(iii) and (iv), all of which suggest that measures to comply with less stringent limitations proposed by the discharger will be regarded as uncontested conditions only when these measures are relatively inexpensive or would later be compatible with meeting the more stringent limits being challenged in the appeal in the event that those limits are ultimately upheld. The common theme here is that measures to comply with uncontested conditions should not entail substantial expenditures that could be wasted depending on how the permit appeal turns out. *See also* 40 C.F.R. § 124.60(b)(6)(i).

With respect to the first two options identified above (i.e., the enhanced multi-mode cooling tower configuration or other cooling tower options, such as the use of conventional closed-cycle cooling), the Region preliminarily concluded that both approaches *might* be consistent with the Petitioner later meeting the limits in the Region’s final permit. This is because it appeared to the Region that meeting the final permit’s more stringent limits might only require that the Petitioner add additional cooling tower capacity by retrofitting additional generating units to closed-cycle cooling.⁵ Indeed, in its Petition for Review (at p. 7) filed with the EAB on November 5, 2003, the Petitioner stated that, “[f]rom an engineering perspective, the Permittee’s proposal allows for further reductions, if needed . . .” Thus, the Petitioner itself indicated that steps to meet its proposed permit limits would be compatible with taking steps at a later date to meet more stringent limits if Region I’s Permit was upheld. If this were true, then it would appear that the permit limits proposed by the Petitioner should be regarded to be uncontested conditions under the regulations.

⁵ EPA regulations are consistent with the Region’s initial thinking. The terms of 40 C.F.R. § 124.60(b)(3) indicate that “[w]hen a combination of technologies is contested, but a portion of the combination is not contested, that portion shall be identified as uncontested if compatible with the combination of technologies proposed by the requester.” Applying this regulation to the instant case, the full complement of cooling towers needed to comply with the Region’s permit would be considered contested, but the installing the portion of cooling towers needed to comply with the Petitioner’s proposed permit limits would be considered uncontested. *See also* 44 Fed. Reg. 32854, 32937 (June 7, 1979) (*see* “Comment - Example 1” included in earlier published version of identical regulations). In addition, 40 C.F.R. § 124.60(b)(6)(iv) states that uncontested permit conditions include “[c]onstruction activities, such as . . . installation of equipment, which would partially meet the final permit conditions and could also be used to achieve the discharger’s proposed alternative conditions.” Thus, if the Petitioner’s proposed permit limits could be met with a smaller number of cooling towers, and the more stringent final permit limits could be met by adding more cooling towers for additional generating units, then the regulations would support viewing the Petitioner’s proposed permit limits as uncontested conditions.

Having taken the analysis this far, Region 1 informed the Petitioner that the Region was considering whether the permit limits proposed by the Petitioner should be considered uncontested permit conditions. The Region directed the Petitioner to the pertinent regulations for its consideration and then discussed the issues with the Petitioner in a follow-up telephone call. The Region also offered the Petitioner an opportunity to present its views to the Region in writing. The Petitioner did so in a letter dated February 27, 2004.

In its letter, the Petitioner argues that it would be improper to regard the permit limits it proposed as uncontested conditions because the sole technological approach acceptable to the Petitioner is its proposed “enhanced multi-mode” cooling tower system, and this system would *not* be compatible with converting the entire station to closed-cycle cooling (i.e., by retrofitting additional generating units to closed-cycle cooling by adding more cooling tower capacity at a later date if the Region’s permit was upheld on appeal).⁶ As a result, the Petitioner argues that the permit limits it proposed cannot be regarded as uncontested permit conditions under 40 C.F.R. § 124.60(b)(6)(iii).⁷

⁶ The Petitioner also pointed out that while it proposed new permit limits, it did not concede that even these limits were *required* by applicable law. It indicated that it simply proposed the new permit limits in an effort to help address concerns about the health of the Mount Hope Bay ecosystem. Yet, the language of 40 C.F.R. § 124.60(b)(6)(iii) turns on whether or not “the discharger proposed a less stringent level of treatment than that contained in the final permit,” without regard to *why* those limits were proposed. As discussed above, it is incontrovertible that the Petitioner proposed such “a less stringent level of treatment” as reflected in its proposed permit limits.

⁷ In support of its position, the Petitioner cites *In the Matter of Simpson Paper Company, Louisiana Pacific Corp.*, 1991 EPA App. LEXIS 38, 3 E.A.D. 541 (March 26, 1991), but this case does not answer the question presented here. In *Simpson Paper*, the EAB rejected EPA Region 9’s argument that it could impose a monitoring requirement as a condition on the stay of a permit that had been appealed, when that monitoring requirement had been challenged in the appeal. As the EAB explained, “[i]n conclusion, the Region’s reading that it has the authority under section 124.60(c) to impose a conditional stay by means of an interim permit condition that is virtually the same as the contested permit condition is strained and ignores the balance the regulations attempt to strike.” *Id.* 1991 EPA App. LEXIS 38, [*24]. This decision would be pertinent if Region 1 was attempting to require compliance with the final permit limits that are under appeal by deeming them to be uncontested conditions. Region 1 is doing no such thing, however. Region 1 has only been considering whether the permit limits *proposed by the Petitioner* should be considered to be uncontested permit conditions that should become effective pending resolution of the permit appeal. While *Simpson Paper* does not answer the question presented by the facts of our case, it should be noted that the EAB stated in that case that enforceable permit limits based on uncontested conditions “must be compatible with proposals made by the permit applicant.” *Id.* 1991 EPA App. LEXIS 38, [*21]. This is consistent with Region 1’s understanding of the regulations. In the case of BPS, it is clear that

The Petitioner's current stance is somewhat perplexing because it appears to contradict its statements in the Petition for Review. As quoted above, the Petitioner states in the Petition for Review (at p. 7) that "[f]rom an engineering perspective, the Permittee's proposal allows for further reductions, if needed . . ."

Now, however, the Petitioner argues that the specific piping configurations associated with the enhanced multi-mode system are incompatible with later installing additional closed-cycle cooling capacity. Indeed, the Petitioner now asserts – without providing supporting engineering information – that if the enhanced multi-mode system was currently in place and the Petitioner was then required to retrofit the plant to provide cooling tower capacity for the entire facility it would “require much or all of the design to be demolished and rebuilt from scratch.” The Petitioner also argues that increased problems with vapor plumes would result from providing additional cooling towers for the entire plant so that “plume abated towers with a different tower configuration would need to be used instead of or in addition to operational measures.” Therefore, according to the Petitioner, since the cooling towers for the enhanced multi-mode system were not proposed to be “plume abated towers,” they might need to be replaced if cooling towers become necessary for the entire plant's operations.⁸

The Region recognizes that the Petitioner proposed to rely on the enhanced multimode cooling tower system to meet its proposed permit limits. Moreover, after reviewing the Petitioner's letter, Region 1 is left uncertain regarding whether or not the Petitioner's enhanced multimode system would be compatible with later adding additional cooling tower capacity if the limits in the Region's final permit are upheld. In addition, the Region is left uncertain regarding whether or not the Petitioner would be able to meet its proposed permit limits using some type of conventional cooling tower configuration – i.e., without all the complex piping that Petitioner argues is associated with its enhanced multimode approach – that would be compatible with later adding additional cooling tower cells if the Region's permit is upheld. If neither approach would work, then the Petitioner's proposed permit limits should not be regarded to be uncontested conditions under 40 C.F.R. § 124.60(b)(6)(iii) because complying with them would be incompatible with later steps to comply with the final permit's limits.

the Petitioner proposed alternative permit limits. The question to be resolved is whether measures to comply with those limits would be compatible with later steps to comply with the limits in Region 1's final permit if they were upheld.

⁸ The Region believes that it is presently far from clear that plume abated cooling towers will be required for all or some of the cooling tower cells at BPS, though the Region agrees that plume abatement cooling tower technology is available and that it may turn out to be advisable for some or all of the cooling towers at the plant. The Region also understands that it may be possible to retrofit cooling towers with plume abatement equipment if that became necessary at a later date.

Given the Region's uncertainty on this subject, the Region has determined that it would not be appropriate *at this time* to regard the Petitioner's proposed permit limits to be uncontested conditions under 40 C.F.R. § 124.16(b)(6)(iii). At present, the Region is simply unable to conclude that measures required to attain the less stringent level of treatment proposed by the Petitioner *will be* consistent with measures required to meet the limits in the Region's final permit. We can only conclude that there is uncertainty in this regard. Nevertheless, the regulations require that the Region issue this notification "as soon as possible" after commencement of a permit appeal. Therefore, the Region has determined that the appropriate action at this time is to issue this notification and take the position that the Petitioner is contesting any change from the thermal discharge and cooling water withdrawal requirements of the existing permit (as adjusted by MOA II). The Region reserves the right to revisit this issue at a later date based on further analysis, but will not take any action in this regard without first communicating with the Petitioner on the subject.

(b) Conditions of the New Permit That Are Stayed, and Conditions That Are Uncontested and Severable from Contested Conditions

Region 1's determinations regarding the conditions of the Region 1's Final NPDES Permit for BPS (October 6, 2003) (the "Final Permit") that are (a) contested and stayed, and (b) uncontested *and* severable from contested conditions and will go into effect 30 days after the date of this notification are set forth below. As explained above, where new conditions from the Final Permit are stayed, the corresponding limits from the 1993 Permit or MOA II, whichever applies, remain in effect.

1. Parts I.A.1 - A.3 of the Final Permit are uncontested and severable from contested conditions.
2. The status of the conditions in the table at Part I.A.4.a. of the Final Permit (at p. 3) is as follows:
 - a. **Influent and Effluent Flow Rate:** These limits are considered contested and stayed.
 1. The first sentence of Footnote 1 regarding monitoring of flow is uncontested and severable from contested conditions. The remaining sentences of footnote 1 are considered contested and stayed.
 2. The reporting of the influent flow rate, and the terms of Footnote 2, are uncontested and severable from contested conditions.
 - b. **Temperature Rise (i.e., "Delta-T"):** The Delta-T limit of 22° F is considered contested and stayed.
 1. Footnote 3 of the permit is uncontested and severable from contested conditions.

- c. **Daily Maximum Temperature:** The daily maximum discharge temperature of 95° F is uncontested and severable from contested conditions.
 - 1. Footnote 4 is also uncontested and severable from contested conditions.

- d. **Thermal Discharge (Heat Load):** The “Calculation and Monthly Reporting” requirements are uncontested and severable from contested conditions.
 - 1. Footnote 5 is also uncontested and severable from contested conditions. During this review, however, Region 1 noted a potential confusion in the equation stated for calculating heat load. Specifically, on page 5 of the Permit, the conversion of flow rate to mass of water is given by the following: flow rate in millions of gallons per day (MGD) x 8.344 pounds per gallon. This is *not* intended to mean that the number of *millions of gallons* per day be multiplied by the pounds per gallon to convert the volume to mass. Rather, the Region intends that the number of gallons per day be used in the equation (e.g., for a volume of 100 million gallons per day, the figure 100 x 10⁶ gallons per day would be used, *not* 100).
 - 2. However, the daily heat load limits from outfalls 003A, 003B, and 003C are considered contested and stayed.

- e. **Total Residual Oxidant (TRO):** The average monthly and maximum daily limits are uncontested and severable from contested conditions.
 - 1. Footnote 6 of the permit is uncontested and severable from contested conditions.
 - 2. A typographical error has been identified in footnote 6. It should read “See subparagraph “e” below ...” instead of “See subparagraph “d” below” The Region expects to correct this error as a minor modification to the permit.

- f. **pH:** The maximum daily limit is uncontested and severable from contested conditions.

- g. **Whole Effluent Toxicity (WET):** WET testing requirements are uncontested and severable from contested conditions.
 - 1. Footnote 8 is also uncontested and severable from contested conditions.

- h. **Spectrus CT1300:** The maximum daily limit is uncontested and severable from contested conditions.
 - 1. Footnote 9 is uncontested and severable from contested conditions.

- i. **Copper:** The average monthly and maximum daily limits are contested. Pursuant to 40 C.F.R. § 124.16(c)(2), the copper limits shall be as specified in the existing 1993 permit (1.0 mg/l average monthly and maximum daily, applied at outfall 004).
3. Part I.A.4.b is contested and is therefore stayed.
4. Part I.A.4.c is contested and is therefore stayed.
5. Part I.A.4.d is contested and is therefore stayed.
6. Part I.A.4.e - Part I.A.4.g are uncontested and severable from contested conditions.
7. Part I.A.5 - Part I.A.7 are contested and therefore stayed.
8. Part I.A.8 - Part I.A.9 are uncontested and severable from contested conditions. As stated above, the copper limit will now apply to outfalls 004A and 004B. Additionally, a typographical error is contained in Part I.A.9 (page 14). The iron limit units are mistakenly stated as pounds/day instead on mg/l. Region 1 intends to correct this error through a minor modification.
9. Part I.A.10 is uncontested and severable from contested conditions.
10. Part I.A.11 is contested and is therefore stayed.
11. Part I.A.12.a and Part I.A.12.b are uncontested and severable from contested conditions.
12. Part I.A.12.c is contested and is therefore stayed.
13. Part I.A.13 - Part I.A.26.1.ii are uncontested and severable from contested conditions.
14. Part I.A.26.iii is contested and is therefore stayed.
15. Part I.B is uncontested and severable from contested conditions.
16. Part I.C. is uncontested and severable from contested conditions.
17. Part I.D is uncontested and severable from contested conditions.
18. Part II is uncontested and severable from contested conditions.
19. The Petitioner requested clarification of certain conditions of the final permit (see page 2 of the Petition for Review). Although Region 1 discussed these issues in its Response to

the Petition for Review (see page 157), they are repeated below for the Petitioner's convenience.

a. **Total Iron Limit**

The Petitioner notes that the Region agreed to express the total iron limit as 1.0 mg/l, rather than in pounds per day. Petition at 2. The Region made this change for Outfall 004A, but failed to do so for Outfall 004B. The Region plans to fix this inadvertent typographical error in a minor permit modification. The Region also notes Outfall 004B is not authorized for use until the new air pollution control equipment is installed (which the Region believes is still more than two years away).

b. **Targeted Chlorination**

The Petitioner states that the Permit is silent about targeted chlorination, which is an approach authorized under the current permit, and which the Petitioner states will be necessary under closed-cycle cooling. Petition at 2. The Region did not include targeted chlorination provisions because Petitioner did not make any showing that it would be necessary with a closed-cycle system. Such a showing is required before targeted chlorination can be authorized. *See* 40 C.F.R. § 423.13(d)(2). Petitioner also did not comment on this issue in its comments on the Draft Permit.

That being said, the Region agrees that this Permit condition (i.e., the absence of the targeted chlorination provision) is stayed pending resolution of this appeal because the change is related to the other new permit limitations that are being challenged. Thus, Petitioner can continue to engage in targeted chlorination consistent with the 1993 permit conditions during the pendency of this appeal. The Region is also open to considering a request from Petitioner documenting the need for targeted chlorination and, if that request is persuasive, undertaking a permit modification on this point.

III. Conclusion

The permit conditions identified above that are uncontested and severable from contested conditions are not stayed and will become fully effective, enforceable obligations of the NPDES Permit for BPS thirty days from the date of this Notice, as provided by 40 C.F.R. § 124.16(a)(2)(i).

If you have any questions regarding this correspondence, please feel free to contact Damien Houlihan of the Region's Office of Ecosystem Protection (at 617-918-1586), or to have your attorneys contact Mark Stein of the Region's Office of Regional Counsel (at 617-918-1077).

Sincerely,

Robert W. Varney
Regional Administrator

cc: Glenn Haas, Director, Division of Watershed Management, MA DEP
Richard Lehan, Esq., Office of General Counsel, MA DEP
Angelo Liberti, RI DEM
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Carol Lee Rawn, Esq., Counsel for Conservation Law Foundation
Kendra L. Beaver, Counsel for Save the Bay