



RIVERKEEPER.
NY's clean water advocate

FOI/PA REQUEST

Case No.: 2011-0292
Date Rec'd: 7-14-11
Specialist: Christian
Related Case: _____

July 14, 2011

VIA U.S. MAIL AND ELECTRONIC MAIL

Julie Williams
Attorney-Advisor
National Oceanic and Atmospheric Administration
55 Great Republic Drive
Gloucester, MA 01930
julie.williams@noaa.gov

Sherwin Turk
Counsel for NRC Staff
Office of General Counsel
Mail Stop: 0-15D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Sherwin.Turk@nrc.gov

Re: Indian Point Nuclear Power Plant Endangered Species Act § 7 Consultation

Ms. Williams and Mr. Turk:

I am writing on behalf of Riverkeeper, Inc. pursuant to the Freedom of Information Act,¹ to formally request a copy of National Marine Fisheries Service's ("NMFS") draft Biological Opinion ("BiOp") concerning the Indian Point nuclear power plant's impact on endangered species in the Hudson River. The U.S. Nuclear Regulatory Commission ("NRC") as well as Entergy Nuclear Operations Inc. ("Entergy"), the owner of the plant, have requested the opportunity to review a draft of NMFS' BiOp and provide comments prior to NMFS finalizing the BiOp.² To the extent this draft has been transmitted already, Riverkeeper requests that

¹ 5 U.S.C. § 552.

² Letter from F. Dacimo (Entergy) to A. Stuyvenberg (NRC) Re: Endangered Species Act Consultation, Indian Point Nuclear Generating Unit Nos. 2 & 3, Docket Nos. 50-247 and 50-286, License Nos. DPR-26 and DPR-64 (March 1, 2011), ADAMS Accession No. ML110670270 (Entergy requesting pursuant to 50 C.F.R. § 402.14(g)(5) that NMFS "make the draft biological opinion available to the NRC, and that NRC provide Entergy with a copy of the draft biological opinion upon issuance, as well as the opportunity to review and comment on the draft opinion."). Today, Mr. Turk indicated via letter to the Atomic Safety and Licensing Board that the consultation process has been extended and that presently, "it is expected that NMFS will issue the [final] BO on or before September 20, 2011." See Letter from S. Turk (NRC) to L. McDade, K. Lathrop, R. Wardwell (NRC Administrative Judges), In the Matter

NMFS and/or NRC provide a copy of the draft BiOp, together with any accompanying documents (cover letter, memorandum, or any other document included in the transmission to Entergy) for Riverkeeper to review and comment upon; in the alternative, if the draft BiOp and any accompanying documents have not been transmitted yet, Riverkeeper requests that NMFS and/or NRC provide Riverkeeper with copies when such transmittal occurs.³

It is appropriate for NMFS and/or NRC to provide Riverkeeper with a copy of the draft BiOp for review and comment, for a variety of reasons, as follows.

As Ms. Williams has explained to me during a previous conversation, while NMFS does not as a matter of course provide draft BiOps to members of the public upon request, doing so is not prohibited by the Endangered Species Act or applicable regulations. Indeed, there are instances where NMFS has provided draft BiOps for the purpose of allowing public comments.⁴

Additionally, because the draft has been or will be provided to Entergy for review and comment, the draft BiOp is not subject to any sort of exemption from public disclosure.⁵ NMFS' own applicable guidance makes this explicit:

Applicants can request draft opinion/conference documents through the action agency. When an action agency then requests this document for the applicant, the Services must inform the action agency that, *once released to an applicant, the document may no longer be considered an interagency memorandum exempt from the disclosure requirements of the Freedom of Information Act (5 USC §552(b)(5)).*⁶

Moreover, even if Entergy does not receive the draft BiOp, Riverkeeper should still be provided with a copy. Indeed, courts have still held that releasing the draft does not compromise internal dialogue:

[D]isclosure of the draft BiOp would not jeopardize the agency's private deliberations, for NMFS staff could still communicate behind closed doors prior to the release of the draft BiOp. We see

of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Unit Nos. 2 and 3) Docket Nos. 50-247-LR/286-LR (July 14, 2011) (hereinafter "S. Turk July 14, 2011 Letter").

³ As of June 24, 2011, it was Riverkeeper's understanding that the draft BiOp had not yet been transmitted to NRC or Entergy.

⁴ See, e.g., *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 637 F.3d 259, 263 (4th Cir. 2011) ("[s]hortly after issuing the draft BiOp [on July 31, 2008], the Fisheries Service opened an online docket to enable persons to comment on the draft until September 15, 2008").

⁵ This includes the "inter-agency memorandums" exemption from disclosure pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), as well as the deliberative process privilege.

⁶ U.S. Fish & Wildlife Service & National Marine Fisheries Service, Consultation Handbook: Procedures for Conducting Consultation & Conference Activities Under Section 7 of the Endangered Species Act *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf, at 1-14 (emphasis added).

a perfect example of this in the NEPA process, for instance, where an agency must publicly release the DEIS. All of the agency's work product up until that point is private and need not be disclosed. Thus, as long as the agency knows that its draft BiOp will be available to applicants, there is no resulting disclosure of private communications.⁷

Disclosure of NMFS' draft BiOp is further warranted pursuant to basic tenets of fairness, due process, and the Federal government's commitment to openness, transparency, and public participation.⁸ Riverkeeper is a non-profit environmental advocacy organization that is committed to the protection of the aquatic ecology of the Hudson River, including endangered shortnose sturgeon and threatened candidate species Atlantic sturgeon that reside in the river. To this end, Riverkeeper has historically been engaged in advocacy activities and legal actions involving Indian Point, and, as you are likely aware, is currently a party to the Indian Point license renewal proceeding, the Indian Point State Pollution Discharge Elimination System permit renewal proceeding, and the Indian Point Clean Water Act § 401 Water Quality Certification proceeding, all of which implicate and involve endangered species issues. The opportunity to review and comment on the draft BiOp would clearly facilitate Riverkeeper's ability to meaningfully participate in these proceedings and to act as public advocate, as well as foster an open process that Federal agencies are obligated to strive for. Moreover, given that Riverkeeper's position in the aforementioned proceedings is clearly adverse to that of Entergy, it is patently unfair to allow a one-sided external review of the draft BiOp.

Based on the foregoing, there is no legal or logical reason why the draft BiOp can not be provided to Riverkeeper for review and comment. Therefore, pursuant to FOIA, Riverkeeper respectfully requests a copy of the draft BiOp if it has already been provided to NRC and Entergy, or, to the extent the draft has not yet been released, that a copy be provided to Riverkeeper at the time it is transmitted to Entergy.⁹

⁷ *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, No. 01-765(CKK/JMF), 2002 WL 732363 (D.D.C. Apr. 25, 2002).

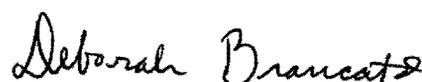
⁸ For example, the NRC regularly touts its commitment to openness and to fostering public participation. *See, e.g.*, U.S. NRC, Transparency, <http://www.nrc.gov/public-involve/open/transparency.html> (last visited July 12, 2011) ("The U.S. Nuclear Regulatory Commission (NRC) has a long-standing practice of conducting its regulatory responsibilities in an open and transparent manner, consistent with The NRC Approach to Open Government"); U.S. NRC, Public Participation, <http://www.nrc.gov/public-involve/open/public-participation.html> (last visited July 12, 2011) ("The U.S. Nuclear Regulatory Commission (NRC) considers public involvement in, and information about, our activities to be a cornerstone of strong, fair regulation of the nuclear industry. We recognize the public's interest in the proper regulation of nuclear activities and provide opportunities for citizens to be heard. For that reason, consistent with The NRC Approach to Open Government, the agency is committed to providing opportunities for the public to participate meaningfully in the NRC's decisionmaking process"); *see also* Prepared Remarks for the Honorable Gregory B. Jaczko, Commissioner, U.S. NRC at the Organization for Economic Co-operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities, "Openness and Transparency: The Road to Public Confidence," (Tokyo Japan, May 22, 2007).

⁹ Riverkeeper also understands and appreciates that any draft BiOp that is transmitted to NRC and Entergy must be disclosed in the Indian Point license renewal proceeding. *See* 10 C.F.R. § 2.336(b) (requiring NRC Staff to disclose "[a]ll documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding."); *see also In the Matter of Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Docket

As you are persons at your respective agencies with direct knowledge of the status of the relevant draft BiOp, you are, therefore, in the position to expeditiously transmit the requested information or to direct this letter to the appropriate persons who are in the position to do so. Such haste is necessary and appreciated in light of applicable limited timeframes involved in the ESA § 7 consultation process.¹⁰ Furthermore, Riverkeeper has copied this letter to NRC and NMFS' FOIA offices to the extent necessary to effectuate the request made herein.

Thank you for your consideration and please do not hesitate to contact me to discuss anything further.

Sincerely,



Deborah Brancato
Staff Attorney

cc: (via e-mail)

NOAA FOIA Office
FOIA@noaa.gov

NRC FOIA Office
FOIA.resource@nrc.gov

Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions (July 6, 2011), at 60-71 (admitting contention proffered by Riverkeeper related to the Indian Point ESA § 7 consultation process, which any draft BiOp is indisputably relevant to). Based on the explanation above, it is patent that no "claim of privilege or protected status" will apply to any draft BiOp that is transmitted to Entergy, that would preclude its disclosure in the Indian Point license renewal proceeding. However, because of the short time limits applicable to the ESA § 7 consultation period (which is currently slated to end on or about September 20, 2011, *see* S. Turk July 14, 2011 Letter, *supra* footnote 2), Riverkeeper requests a copy of any draft BiOp pursuant to FOIA in order to avoid any potential delays in the ultimate disclosure of and accessibility to that document in the license renewal proceeding. (Notably, there is always at least a week delay between NRC staff's issuance of its monthly Indian Point Hearing File Index and when the documents listed on the index are made available on NRC's electronic hearing docket or in NRC's document database, ADAMS; and sometimes even longer delays have occurred, for example: as of today, July 14, 2011, documents disclosed by NRC staff in its last Indian Point Hearing File update dated June 30, 2011, have still not been posted to the NRC's hearing docket, nor are they accessible via the provided ADAMS accession numbers). Riverkeeper trusts that to the extent the disclosure of any draft BiOp would be more expedient via the license renewal proceeding, that NRC would transmit it to Riverkeeper accordingly.

¹⁰ *See* S. Turk July 14, 2011 Letter, *supra* footnote 2 (indicating that the consultation process concerning Indian Point is currently set to end on or about September 20, 2011 with issuance of NMFS' final BiOp).

FOIA Resource

From: Deborah Brancato [DBrancato@riverkeeper.org]
Sent: Thursday, July 14, 2011 2:55 PM
To: julie.williams@noaa.gov; Turk, Sherwin
Cc: FOIA@noaa.gov; FOIA Resource
Subject: Indian Point Endangered Species Act § 7 Consultation
Attachments: 2011.07.14.Riverkeeper Letter to NRC, NMFS (Request for Draft Indian Point BiOp).pdf

Importance: High

Ms. Williams and Mr. Turk:

Attached please find a letter on behalf of Riverkeeper, Inc. requesting a copy, pursuant to FOIA, of NMFS' draft Biological Opinion relating to the Indian Point license renewal proceeding.

Please don't hesitate to contact me with any questions concerning this transmittal, or to discuss this matter further.

Sincerely,

Deborah Brancato, Esq.
Staff Attorney

Riverkeeper, Inc.
20 Secor Road
Ossining, New York 10562
P: (914) 478-4501 x230
F: (914) 478-4527
www.riverkeeper.org



This message contains information that may be confidential or privileged and is intended only for the individual or entity named above. No one else may disclose, copy, distribute or use the contents of this message. Unauthorized use, dissemination and duplication is strictly prohibited, and may be unlawful. All personal messages express views solely of the sender, which are not to be attributed to Riverkeeper, Inc. and may not be copied or distributed without this disclaimer. If you received this message in error, please notify us immediately at info@riverkeeper.org or call 914-478-4501.