

IPRenewal NPEmails

From: Zoli, Elise N [EZoli@goodwinprocter.com]
Sent: Tuesday, September 20, 2011 10:09 PM
To: Stuyvenberg, Andrew; Julie Crocker
Cc: Gray, Dara F; Julie.Williams@Noaa.Gov; Sutton, Kathryn M.; Dacimo, Fred R.; Mark Mattson; Imboden, Andy; BUCKLEY, RICKY N; Dowell, Kelli; pbessette@morganlewis.com; Turk, Sherwin; Balsam, Briana; Logan, Dennis; Glew Jr, William; Fitzgerald, Robert H
Subject: RE: Schedule for final BO

Julie, thanks very much for your email; we appreciate your indicating that NMFS may need additional time to issue its final Biological Opinion (BO). The relevant portion of our extension agreement is quoted below. Based on its language, the extension agreement contemplates that the final biological opinion will be issued no later than September 20th. We, therefore do not read the extension agreement as being effective after that date, consistent with 50 CFR 402.14(e), which both requires a finite deadline and sets a limit on the timeframe within which a final BO must be issued. As importantly, we believe the extension agreement did not guarantee NRC or Entergy comments, but allowed NRC or Entergy to choose what, if anything, they wanted to submit in the timeframe authorized, i.e., by September 6th. As such and as indicated in NRC's email earlier today on this subject, we understand NRC's submission of technical comments on the draft BO on September 6th constituted its position on the issues, as did our submission by that date on behalf of Entergy.

That said, we understand that NMFS is interested in the benefit of NRC's process-related thoughts, which we understand were received by NMFS today. To that end, we are willing to extend issuance of the deadline for the final BO to Monday, September 26th, to allow NMFS a reasonable opportunity to consider NRC's September 20, 2011 correspondence. Because Entergy's express agreement is required to effect such an extension, we wanted you to have it in writing.

Further, we understand NMFS has two process-related questions, and we believe we can provide relevant assurances to NMFS on those issues, facilitating issuance of the final BO in a timely fashion:

(1) Entergy is willing to include the key elements of the proposed draft biological opinion, as finalized, in its proposed technical specifications to the licenses for IPEC. If we make such a commitment, we believe this provides NMFS with the requisite assurances regarding enforceability of the final BO (conforming to the draft BO while accounting for NMFS' response to comments received to date from Entergy and NRC). While we understand from NRC and our review of applicable regulation that this is not required by law, we believe such an approach is consistent with Entergy's commitment to environmental stewardship.

(2) In my conversation with Julie Williams, I also clarified that we can see no reasonable basis for amendment of the current NRC license renewal application with respect to cooling water intake technology that could trigger reinitiation of consultation under 50 CFR 402.16. To the contrary, consistent with NRC's September 20, 2011 correspondence, the ASLB determined that SPDES issues - specifically, Section 316(a and b) issues -- will be resolved in the pending NYSDEC proceeding, not before the ASLB on license renewal. If a final Section 316(a, b) decision in the SPDES proceeding requires NRC approval to implement, Entergy would submit such a new application to NRC, as a result of which we understand from NRC 's September 20, 2011 correspondence may precipitate a new consultation with NMFS on that amendment at that time. Likewise, CWIS modifications requiring US Army Corps approval would also trigger consultation with NMFS. For these reasons, we can foresee no situation in which NMFS consultation would not be sought, where required.

Finally, lest there be any confusion, we believe that NMFS' draft biological opinion addressed, within its authority, the proper species, i.e., short-nose sturgeon, and that the absence of discussion of Atlantic sturgeon is appropriate as a matter of law. To that end, while we appreciate that NRC may have an interest in NMFS' views on Atlantic sturgeon, we have identified no legal basis for the proposed further exchange of information, potential initiation of a new or different consultation, or the delay that would almost certainly result from either of those actions.

As noted above, the extension language is as follows:

"Ten calendar days after NMFS provides a draft BO to NRC (likely September 6 - first working day after Labor Day) - NRC provides comments from NRC and from Entergy, if any, on the draft BO to NMFS at the end of this 10-calendar day period. If there are no substantive comments, then NMFS prepares the final BO within several days of September 6. If NRC or Entergy submit substantive comments, then NMFS will either prepare a final BO within ten working days (September 20) or NMFS will notify NRC and Entergy of a need for additional time."

As always, I am happy to discuss the above, and my regards, Elise

From: Stuyvenberg, Andrew [mailto:Andrew.Stuyvenberg@nrc.gov]

Sent: Tuesday, September 20, 2011 8:37 AM

To: Julie Crocker

Cc: Gray, Dara F; Julie.Williams@Noaa.Gov; Zoli, Elise N; Sutton, Kathryn M.; Dacimo, Fred R.; Mark Mattson; Imboden, Andy; BUCKLEY, RICKY N; Dowell, Kelli; pbessette@morganlewis.com; Turk, Sherwin; Balsam, Briana; Logan, Dennis

Subject: RE: Schedule for BO (revised proposal)

Julie –

The NRC staff transmitted all of its draft BO comments to NMFS on September 6, per our agreement. We have completed our letter in which we respond to Ms. Kurkul's cover letter and will issue it today.

Best regards,
Drew

From: Julie Crocker [mailto:Julie.Crocker@Noaa.Gov]

Sent: Monday, September 19, 2011 4:41 PM

To: Stuyvenberg, Andrew

Cc: Gray, Dara F; Julie.Williams@Noaa.Gov; Zoli, Elise N; Sutton, Kathryn M.; Dacimo, Fred R.; Mark Mattson; Imboden, Andy; BUCKLEY, RICKY N; Dowell, Kelli; pbessette@morganlewis.com; Turk, Sherwin; Balsam, Briana; Logan, Dennis

Subject: Re: Schedule for BO (revised proposal)

All,

Given that NMFS has not yet received all of NRC's comments related to the draft Biological Opinion distributed to NRC on August 25, apparent disagreement regarding the schedule, and in light of the possibility of NMFS needing to address substantive comments, in an abundance of caution, NMFS is writing to indicate that additional time is needed for the consultation to be completed.

Julie

On 6/29/2011 5:31 PM, Stuyvenberg, Andrew wrote:

Dara, others –

The following summarizes my understanding of the schedule for the ongoing ESA Section 7 consultation as agreed-to by NRC, NMFS, and Entergy on this afternoon's teleconference.

T (likely July 5; not before July 5) – Entergy submits information on benthic resources in the action area as discussed on the June 22 teleconference (i.e., information on the biofouling community at the IP intakes, information on the entrainment of amphipods and published studies related to the distribution of the benthic community in the Hudson River). Entergy is also to provide to NRC any relevant thermal information for NRC's revised BA

T+20 calendar days (likely July 25, depending on T) – NRC staff submits BA supplement to NMFS focusing on the assessment of the thermal discharge on shortnose sturgeon.

One month after NRC submits BA supplement to NMFS (likely August 25) - NMFS provides a draft Biological Opinion (BO) to NRC. In completing its BO, NMFS will: (a) review the information provided in the supplemental BA, (b) incorporate the new information on the thermal plume (Swanson et al. 2011, and other sources of information as appropriate) into the draft Opinion, (c) incorporate additional

technical information provided by Entergy on the June 22 conference call, (d) make a draft determination as to whether the proposed action is likely to jeopardize the continued existence of shortnose sturgeon and provide justification for this determination, (e) prepare a draft Incidental Take Statement with draft Terms and Conditions and Reasonable and Prudent Measures, as appropriate. Following receipt of the BO, it is NMFS understanding that NRC will distribute the draft BO to Entergy and request that Entergy's comments be submitted to NRC for transmittal to NMFS pursuant to 50 CFR 402.14(g)(5).

Ten calendar days after NMFS provides a draft BO to NRC (likely September 6 – first working day after Labor Day) - NRC provides comments from NRC and from Entergy, if any, on the draft BO to NMFS at the end of this 10-calendar day period.

If there are no substantive comments, then NMFS prepares the final BO within several days of September 6. If NRC or Entergy submit substantive comments, then NMFS will either prepare a final BO within ten working days (September 20) or NMFS will notify NRC and Entergy of a need for additional time.

I believe that captures our agreed-upon timeline, but please reply if I've missed or misconstrued anything.

Best regards,
Drew

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From: Zoli, Elise N

Created By: EZoli@goodwinprocter.com

Recipients:

"Gray, Dara F" <DGray@entergy.com>
Tracking Status: None
"Julie.Williams@Noaa.Gov" <Julie.Williams@noaa.gov>
Tracking Status: None
"Sutton, Kathryn M." <ksutton@morganlewis.com>
Tracking Status: None
"Dacimo, Fred R." <FDacimo@entergy.com>
Tracking Status: None
"Mark Mattson" <mmattson@normandeu.com>
Tracking Status: None
"Imboden, Andy" <Andy.Imboden@nrc.gov>
Tracking Status: None
"BUCKLEY, RICKY N" <RBUCKLE@entergy.com>
Tracking Status: None
"Dowell, Kelli" <kdowell@entergy.com>
Tracking Status: None
"pbessette@morganlewis.com" <pbessette@morganlewis.com>
Tracking Status: None
"Turk, Sherwin" <Sherwin.Turk@nrc.gov>
Tracking Status: None
"Balsam, Briana" <Briana.Balsam@nrc.gov>
Tracking Status: None
"Logan, Dennis" <Dennis.Logan@nrc.gov>
Tracking Status: None
"Glew Jr, William" <wglew@entergy.com>
Tracking Status: None
"Fitzgerald, Robert H" <rfitzgerald@goodwinprocter.com>
Tracking Status: None
"Stuyvenberg, Andrew" <Andrew.Stuyvenberg@nrc.gov>
Tracking Status: None
"Julie Crocker" <Julie.Crocker@Noaa.Gov>
Tracking Status: None

Post Office: BOSMSGMBX04.goodwinprocter.com

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