



RIVERKEEPER.
NY's clean water advocate

FOIA/PA REQUEST

Case No.:

2013-0029

Date Rec'd:

11/2/12

Specialist:

Phelps

Related Case: _____

November 1, 2012

VIA U.S. MAIL AND ELECTRONIC MAIL

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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 impact of the Indian Point nuclear power plant on endangered Atlantic sturgeon in the Hudson River. Today, Riverkeeper was made aware that a draft BiOp related to this matter had been issued, due to correspondence from staff of the U.S. Nuclear Regulatory Commission ("NRC"), explaining that "[o]n October 26, 2012, NMFS transmitted a draft biological opinion to the [NRC] Staff" to solicit comments from the agency.²

¹ 5 U.S.C. § 552.

² In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR/50-286-LR, NRC Staff's Ninth Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012 (Nov. 1, 2012), at ¶4 (hereinafter cited as "NRC Staff Nov. 1, 2012 Status Report Letter").

As you may recall, Riverkeeper previously requested NMFS' draft BiOp relating to the impact of Indian Point on endangered shortnose sturgeon.³ NMFS subsequently provided a copy of that draft BiOp, and Riverkeeper greatly appreciated the opportunity to review it and provide NMFS with relevant and important comments.⁴ Riverkeeper now similarly respectfully requests a copy of NMFS' new draft BiOp (together with any accompanying documents, such as any cover letter, memorandum, etc.), concerning the newly listed Atlantis sturgeon, in order to review it and potentially provide comments before a final BiOp is issued "on or before November 28, 2012, unless the consultation period is extended."⁵

As previously explained, 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 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.⁶

Additionally, as with NMFS' earlier draft BiOp related to shortnose sturgeon, to the extent a draft has been or will be provided to Entergy for review and comment, the draft BiOp would not be subject to any exemption from public disclosure,⁷ since, as NMFS' own applicable guidance explains "once released to an applicant, the document [i.e., the draft opinion] may no longer be considered an interagency memorandum exempt from the disclosure requirements of the Freedom of Information Act (5 USC §552(b)(5))."⁸

Moreover, even if Entergy does not receive the draft BiOp, it remains appropriate for NMFS and/or NRC to provide Riverkeeper with a copy of it, as courts have held that releasing the draft does not compromise internal dialogue:

³ See Letter from D. Brancato (Riverkeeper) to J. Williams (NMFS) and S. Turk (NRC), re: Indian Point Nuclear Power Plant Endangered Species Act § 7 Consultation (July 14, 2011).

⁴ See Letter from D. Brancato (Riverkeeper) to P. Kukul (NMFS), J. Williams (NMFS), and J. Crocker (NMFS) re: Draft Biological Opinion for License Renewal of the Indian Point Nuclear Generating Unit Nos. 2 and 3 (Sept. 15, 2011). Indeed, Riverkeeper's comments raised issues that NMFS clearly considered prior to finalizing its BiOp concerning shortnose sturgeon, including whether accidental radiological leaks from Indian Point had impacted the endangered species in the Hudson River as well as the impact of the Indian Point Unit 1 cooling water intake on shortnose sturgeon – issues for which NMFS' draft BiOp was completely silent. See *id.* at 7-9; see generally Endangered Species Act Section 7 Consultation DRAFT Biological Opinion - Relicensing - Indian Point Nuclear Generating Station, F/NER/2009/00619; endangered Species Act Section 7 Consultation Biological Opinion - Relicensing - Indian Point Nuclear Generating Station, F/NER/2009t00619, at 49-51, 62.

⁵ NRC Staff Nov. 1, 2012 Status Report Letter, *supra* Note 2, at ¶4.

⁶ 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").

⁷ 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.

⁸ 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).

[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 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.⁹

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.¹⁰ Riverkeeper is a non-profit environmental advocacy organization that is committed to the protection of the aquatic ecology of the Hudson River, including endangered 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 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 appeal 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. Indeed, such an open process in relation to NMFS' draft BiOp concerning shortnose sturgeon at Indian Point has already proved fruitful and demonstrates the efficacy of providing Riverkeeper with a meaningful opportunity to review the new draft BiOp concerning Atlantic sturgeon.¹¹

Based on the foregoing, there is no legal or logical reason why the draft BiOp cannot be provided to Riverkeeper for review and comment, as it was with NMFS' earlier draft BiOp related to

⁹ *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, No. 01-765(CKK/JMF), 2002 WL 732363 (D.D.C. Apr. 25, 2002).

¹⁰ 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).

¹¹ *See supra* Note 4.

shortnose sturgeon at Indian Point. Therefore, pursuant to FOIA, Riverkeeper respectfully requests a copy of the draft BiOp.¹²

As you are persons at your respective agencies with direct knowledge 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, and NRC Staff's representation that the consultation process is set to end in a few short weeks, on November 28, 2012.¹³ 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)

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¹² 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 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). However, because of the short time limits applicable to the ESA § 7 consultation period (which is currently slated to end on or about November 28, 2012, (*see* NRC Staff Nov. 1, 2012 Status Report Letter *supra* Note 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. In addition, today NRC was granted an extension of time to issue its next hearing file to November 6, posing additional potential delay. 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.

¹³ *See* NRC Staff Nov. 1, 2012 Status Report Letter *supra* Note 2 (indicating that “NMFS will issue its final Biological Opinion on or before November 28, 2012, unless the consultation period is extended.”)