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July 10, 2008

Mark Stein, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency
One Congress Street, Mail Code RAA
Boston, MA 02114-2023

**Re: Public Service Company of New Hampshire
Merrimack Station
National Pollutant Discharge Elimination System ("NPDES") Permit No.
NH0001465**

Dear Mark:

On behalf of Public Service Company of New Hampshire ("PSNH"), I respectfully request that the United States Environmental Protection Agency ("EPA") await the United States Supreme Court's direction in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2nd Cir. 2007), *cert. granted sub nom. Entergy v. Riverkeeper*, 128 S. Ct. 1867 (2008) ("*Riverkeeper II*") before issuing a draft NPDES permit for Merrimack Station. As you know, the Court granted certiorari in that case on the question of whether, pursuant to Clean Water Act ("CWA") §316(b), EPA may weigh costs and benefits in regulating the cooling water intake structures ("CWISs") used by existing power plants, including Merrimack Station. The Court may reject the Second Circuit Court of Appeals' decision and reasoning in *Riverkeeper II*, reinstating the site-specific cost-benefit demonstration option provided in the Phase II Existing Facilities Regulations issued in 2004. PSNH expects and would be entitled to rely on a cost-benefit analysis in any such circumstance.

In the alternative, the Court may provide EPA with specific direction informing the appropriate role of "best professional judgment" ("BPJ") in determining the best technology available for minimizing adverse environmental impact ("BTA") under §316(b). EPA has stated that it may establish CWIS requirements for existing facilities in NPDES permits issued on a BPJ-based, case-by-case basis. *See, e.g.*, Brayton Point Determination Document, at 7-5 ("In the absence of regulations specifying national technology guidelines for CWISs, EPA has been applying, and continues to, apply CWA § 316(b) on a case-by-case, Best Professional Judgment (BPJ) basis."). However, consistent with EPA's position in the Brayton Point case, PSNH has concerns with EPA's continued use of BPJ after issuance of the Rule, particularly with respect to the

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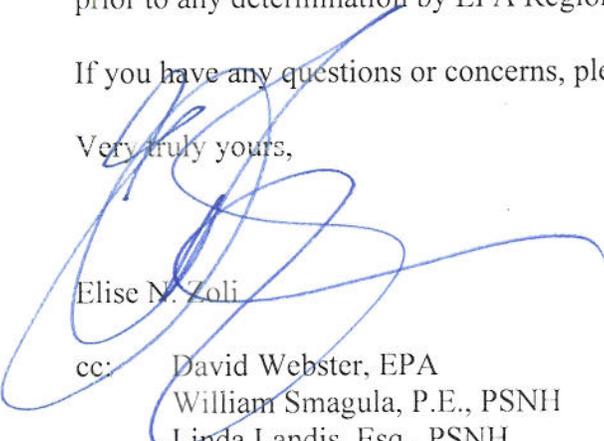
continues to, apply CWA § 316(b) on a case-by-case, Best Professional Judgment (BPJ) basis.”). However, consistent with EPA’s position in the Brayton Point case, PSNH has concerns with EPA’s continued use of BPJ after issuance of the Rule, particularly with respect to the application of §316(b) in a more stringent fashion than the Rule contemplates. *See, e.g., NRDC v. EPA*, 437 F.Supp.2d 1137, 1160 (C.D.Cal. 2006) (BPJ-based permit “was to be only an *interim* measure pending the promulgation of guidelines, limitations, and standards mandated elsewhere in the Act.”) (quoting H.R.Rep. No. 92-911, at 126 (1972)); *id.* at 1160-1161 (“We know of no legal authority stating that the practice of issuing permits based on ‘best professional judgment’ was to be ongoing”) (citation omitted). Thus, PSNH’s request is not only appropriate, but reflects the reasoned legal view.

Given this state of flux in applicable law, we respectfully request that EPA await the Supreme Court’s decision, and consequently the guidance the Court will provide regarding the appropriate scope and application of §316(b), before issuing a draft determination regarding what may constitute the BTA at Merrimack Station under §316(b). In particular, awaiting the Court’s decision may reduce the risk of an EPA decision subject to litigation as inconsistent with intervening or applicable law, a situation exacerbated in New Hampshire, where the “wholly disproportionate” test that the First Circuit Court of Appeals approved in *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1978), remains binding.

PSNH nonetheless would like to meet with EPA to discuss PSNH’s submission in response to EPA’s July 3, 2007 information request under CWA §308. PSNH already has requested such a meeting more than once, and we are increasingly concerned that we have not received a response. PSNH therefore reiterates and underscores its request for a meeting with EPA staff, on the grounds that starting a dialogue on technical issues now may enable the parties to resolve them while waiting for the Supreme Court’s direction. We believe such a dialogue is critical prior to any determination by EPA Region 1 regarding Merrimack Station’s draft NPDES permit.

If you have any questions or concerns, please do not hesitate to call me at 617/570-1612.

Very truly yours,



Elise N. Zoli

cc: David Webster, EPA
William Smagula, P.E., PSNH
Linda Landis, Esq., PSNH
Elizabeth Tillotson, PSNH
Allan Palmer, PSNH