



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

September 2, 2008

Elise N. Zoli, Esq.
Goodwin Procter
Exchange Place
Boston, MA 02109

Re: NPDES Permitting for Merrimack Station (Permit No. NH0001465)

Dear Ms. Zoli:

Thank you for your letter of July 10, 2008, sent on behalf of your client, Public Service Company of New Hampshire (PSNH). You request that the United States Environmental Protection Agency (EPA) refrain from issuing a new draft National Pollutant Discharge Elimination System (NPDES) permit to PSNH's Merrimack Station power plant until after the United States Supreme Court decides *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007), *cert. granted sub nom. Entergy v. Riverkeeper, Inc.*, 128 S.Ct. 1867 (2008) (*Riverkeeper II*). Our response is provided below.

EPA does not at this time agree to your request that the Agency delay issuing a new draft permit for Merrimack Station until after the Supreme Court's decision in *Riverkeeper II*. We will, however, take your request under advisement as we continue working to develop the new draft permit. In addition, it should be understood that it is not presently clear whether EPA will even be in a position to issue Merrimack Station a new draft permit prior to the Court's decision.

The *Riverkeeper II* case is currently being briefed to the Supreme Court, with oral argument scheduled for the fall and a decision expected sometime next year. The issue before the Court is whether EPA is authorized to consider a comparison of a technology's costs and benefits as a factor in determining the Best Technology Available for cooling water intake structures under Section 316(b) of the Clean Water Act (CWA), 33 U.S.C. § 1326(b). The United States Court of Appeals for the Second Circuit earlier answered this question in the negative but the Supreme Court will now review that decision.¹ Yet, just as it is uncertain precisely when the Court will decide the case, it is also uncertain what that decision will be and whether it will fully resolve the outstanding issues, or whether it might, instead, involve a remand that requires further proceedings before matters are clarified.

¹ We also note for the record our disagreement with the contention in your letter that "the 'wholly disproportionate' test . . . remains binding [in the First Circuit]."

The Second Circuit's decision in *Riverkeeper II* remanded many key aspects of EPA's Phase II regulations under Section 316(b) of the CWA to the Agency. In response, EPA suspended the Phase II regulations except for 40 C.F.R. § 125.90(b). 72 Fed. Reg. 37107, 37108 (July 9, 2007). This regulation provides that in the absence of applicable national, categorical standards, permit requirements under section 316(b) of the CWA will be determined for individual permits on a case-by-case, best professional judgment (BPJ) basis. 40 C.F.R. § 125.90(b). This is consistent with the general principle that the CWA's technology standards should be applied on a BPJ basis to individual permits when national categorical standards have yet to be developed. See 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(c)(2). Moreover, prior to issuing the Federal Register notice formally suspending the Phase II regulations, EPA issued a memorandum stating that the regulations should be considered to be suspended and that "in the meantime, all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment Basis." May 20, 2007, Memorandum from Benjamin Grumbles, EPA Assistant Administrator, Office of Water, to EPA Regional Administrators, "Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation." EPA also stated in the memorandum that, "if the [appeals] court's decision is overturned after publication of the notice [of suspension], the Agency will take appropriate action in response." *Id.* at n. 1.

Thus, EPA has indicated that NPDES permits with requirements under section 316(b) of the CWA should continue to be developed on a BPJ basis while awaiting resolution of pending legal issues. This reflects the important policy in favor of reevaluating and reissuing expired NPDES permits as expeditiously as possible. The Merrimack Station permit expired in 1997, more than ten years ago. (It has also, of course, been administratively continued as a result of the company's application for permit reissuance.) The permit also involves a number of important issues beyond the cooling water intake requirements under section 316(b) of the CWA, including thermal discharge issues. Moving forward with permit development and issuance may have the benefit of addressing these issues more quickly.

In light of the above, EPA does not agree to commit to delaying the Merrimack Station permit until after the Supreme Court's decision. Instead, the Agency will continue to work on the new permit with care and reasonable speed. As we get closer to being in a position to issue the permit, we can take account of the status of the *Riverkeeper II* proceedings at that time and act accordingly. Furthermore, if EPA does issue the new draft permit before the Supreme Court decision, we can still take appropriate account of that decision before a new Final Permit is issued.

Finally, in response to your request for a meeting with EPA staff to continue the dialogue on technical issues related to the permit, EPA would be pleased to host such a meeting. I suggest that you have Allan Palmer of PSNH contact John King, EPA's engineer for the Merrimack Station permit, to specify a date and agenda for the meeting. Mr. King's telephone number is (617) 918-1295. (I expect that Mr. Palmer already has the number because I believe that he and Mr. King converse fairly often.)

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Stein', written in a cursive style.

Mark Stein
Senior Assistant Regional Counsel

cc: David Webster, EPA OEP (By email)
John King, EPA OEP (By email)
Eric Nelson, EPA OEP (By email)
Harry Stewart, NH DES (By email)