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From: John_Butler@fpl.com
Sent: Friday, April 13, 2007 4:27 PM
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Subject: Docket No. 070007-EI -- FPL's Notice of Suspension of CWA Section 316(b) Phase II Rules
Attachments: 316(b) Phase II rule suspension notice final.doc; Docket 070007-EI Exhibit 1.pdf; Docket 070007-EI _Exhibit 2.pdf



316(b) Phase II Docket Docket
rule suspensio..07-EI Exhibit 1.07-EI _Exhibit 2

Electronic Filing

a. Person responsible for this electronic filing:

John T. Butler
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b. Docket No. 070007-EI

c. Documents being filed on behalf of Florida Power & Light Company

d. There are 9 pages total.

e. The documents attached for electronic filing are (i) Florida Power & Light Company's Notice of Suspension of Phase II Rules Adopted Pursuant to Clean Water Act Section 316(b) (3 pages); (ii) Exhibit 1 to the Notice (2 pages); and Exhibit 2 to the Notice (4 pages).

(See attached file: 316(b) Phase II rule suspension notice final.doc) (See attached file: Docket 070007-EI Exhibit 1.pdf) (See attached file: Docket 070007-EI /Exhibit 2.pdf)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental Cost)
Recovery Clause. _____)

Docket No. 070007-EI
Filed: April 13, 2007

**NOTICE OF SUSPENSION OF PHASE II RULES
ADOPTED PURSUANT TO CLEAN WATER ACT SECTION 316 (b)**

Florida Power & Light Company (“FPL”) hereby notifies the Commission and all parties of record that on March 20, 2007, the United States Environmental Protection Agency (“EPA”) announced that the rule it adopted pursuant to Section 316(b) of the Clean Water Act to establish requirements for reducing the mortality of aquatic organisms by cooling water intake structures at certain existing large power plants (the “Phase II Rule”)¹ should be considered suspended. A copy of EPA’s March 20, 2007 letter is attached hereto as Exhibit 1. As explained in the letter, EPA intends to suspend the Phase II Rule based on the recent decision in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2nd Cir. 2007), which remanded several provisions of the Phase II Rule to EPA for further rulemaking. The letter states that EPA intends to issue a Federal Register notice formally suspending the Phase II Rule in the near future, but no such notice has been issued yet.

FPL recovers through the Environmental Cost Recovery Clause (“ECRC”) costs associated with conducting the Comprehensive Demonstration Study (“CDS”) that is required by the Phase II Rule. When the Commission approved FPL’s “CWA 316(b) Phase II Rule” project, it observed that there was a possibility the Phase II Rule would be stayed and directed FPL to notify the Commission promptly of the stay. Order No. PSC-04-0987-PAA-EI, Docket No. 040582-EI, dated October 11, 2004. The Phase II Rule was never stayed, but because the effect

¹ The Phase II Rules are codified in 40 CFR Parts 9, 122, 123, 124, and 125, and became effective on September 7, 2004.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

of EPA's announced intention to suspend the Phase II Rule will be similar to the effect of a stay, FPL has elected to notify the Commission of EPA's intent.

Attached hereto as Exhibit 2 is the affidavit of Randall R. LaBauve, FPL's Vice President of Environmental Services. The affidavit explains that FPL is presently collecting biological data needed for the CDS. While FPL does not yet know the specific terms of EPA's suspension, it likely will render the current deadline for submitting a CDS ineffective. Therefore, strictly from a deadline perspective, FPL may have the option of suspending its data collection, as well as the data analysis and technology evaluation work that FPL plans to conduct in support of filing the CDS. However, for the reasons explained in the affidavit, FPL does not intend to suspend that work because it would not be cost-effective or appropriate to do so. FPL believes that the costs of the work remain ECRC recoverable, because the work will continue to be useful for purposes related to the Phase II Rule, irrespective of the ultimate outcome of EPA's further rulemaking.

Respectfully submitted,

R. Wade Litchfield, Esq.
Associate General Counsel
John T. Butler, Esq.
Senior Attorney
Law Department
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-304-5639
Fax: 561-691-7135

By: /s/ John T. Butler
John T. Butler
Florida Bar No. 283479

CERTIFICATE OF SERVICE
Docket No. 070007-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Notice of Suspension of Phase II Rules Adopted Pursuant to Clean Water Act Section 316(b) has been furnished by electronic delivery this 13th day of April, 2007 to the following:

Martha Brown, Esq.
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By: /s/ John T. Butler
 John T. Butler

EXHIBIT 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 20 2007

MEMORANDUM

OFFICE OF
WATER

SUBJECT: Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation

FROM: Benjamin Grumbles, Assistant Administrator

TO: Regional Administrators

The purpose of this memorandum is to provide guidance on the status of the Cooling Water Intake Structures Phase II regulation under section 316(b) of the Clean Water Act ("Phase II rule" or "Rule"). The Phase II rule set national standards for cooling water withdrawals by large, existing power producing facilities ("Phase II facilities"). See 40 C.F.R. Part 125 Subpart J; 69 Fed. Reg. 41576 (July 6, 2004). The Second U.S. Circuit Court of Appeals recently issued its decision in the litigation over the Phase II regulation. See *Riverkeeper, Inc., v. EPA*, No. 04-6692, (2d Cir. Jan. 25, 2007).

The court's decision remanded several provisions of the Rule on various grounds. The provisions remanded include:

- EPA's determination of the Best Technology Available under section 316(b);
- The Rule's performance standard ranges;
- The cost-cost and cost-benefit compliance alternatives;
- The Technology Installation and Operation Plan provision;
- The restoration provisions; and
- The "independent supplier" provision.

With so many provisions of the Phase II rule affected by the decision, the rule should be considered suspended. I anticipate issuing a Federal Register notice formally suspending the Rule in the near future.¹ 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. See 40 C.F.R. § 401.14.

If you have questions regarding the application of section 316(b) at Phase II facilities, please contact either Janet Goodwin with the Office of Science and Technology at 202-566-1060 (goodwin.janet@epa.gov) or Deborah Nagle with the Office of Wastewater Management at 202-564-1185 (nagle.deborah@epa.gov).

¹ In the event that the court's decision is overturned prior to publication of the Federal Register notice, then I will not proceed to effect the suspension; if the court's decision is overturned after publication of the notice, the Agency will take appropriate action in response.

EXHIBIT 2

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority, personally appeared Randall R. LaBauve, who being first duly sworn deposes and says:

1. My name is Randall R. LaBauve, and I occupy the position of Vice President of Environmental Services, Florida Power & Light Company ("FPL"), 700 Universe Boulevard, Juno, Florida. In this position I have knowledge of and have familiarity with the matters addressed in this affidavit.
2. I received a Bachelor of Arts degree in Psychology from Louisiana State University in 1983 and a Juris Doctor degree from Louisiana State University in 1986. I joined FPL in 1995 as an Environmental Lawyer and in 1996 assumed the responsibility of Director of Environmental Services. In July of 2002, I assumed the responsibility of Vice President of Environmental Services. Prior to joining FPL, I was the Director of Environmental Affairs for Entergy Services, Incorporated located in Little Rock, Arkansas and prior to that practiced law with Milling, Benson, Woodward, Hilliard, Pierson and Miller in New Orleans, Louisiana.
3. I am responsible for directing the overall corporate environmental planning, programs, licensing, and permitting activities to ensure the basic objective of obtaining and maintaining the federal, state, regional and local government approvals necessary to site, construct and operate FPL's power plants, transmission lines, and fuel facilities and maintain compliance with environmental laws.
4. On June 21, 2004, FPL petitioned for cost recovery through the Environmental Cost Recovery Clause ("ECRC"), for the costs associated with performing a Comprehensive Demonstration Study ("CDS") to determine the effect of its cooling water intake structures on aquatic life. FPL's petition stated that the CDS was necessary to address rules adopted by the U.S. Environmental Protection Agency ("EPA") pursuant to Section 316(b) of the Clean Water Act (the Phase II Rule"). The Phase II Rule established requirements to reduce the mortality of aquatic organisms by cooling water intake structures at certain existing large power plants. The Phase II rule was codified in 40 CFR Parts 9, 122, 123, 124, and 125, effective date September 7, 2004, but it was subsequently challenged by several environmental groups and six northeastern states.
5. On October 11, 2004, the Florida Public Service Commission issued Order No. PSC-04-0987-PAA-EI in Docket No. 040582-EI authorizing FPL to recover prudently incurred CDS costs through the ECRC. The Order noted that it was possible the Phase II Rule would be stayed; that there was no stay at the time of the Order; but that, "If a stay is issued, FPL shall file a copy of it with the Commission within two weeks of its issuance. The manner in which the stay will be handled procedurally and substantively will be addressed at the time."
6. The Phase II Rule was never stayed, and FPL has continued to gather data and perform analyses necessary for the CDS, which was essential in view of the CDS deadline established by the rule.
7. On January 25, 2007, the Second Circuit Court of Appeals issued its decision on the rule challenges in *Riverkeeper, Inc. v. EPA*, which resulted in a remand of the Phase II Rule to EPA on several grounds.
8. On March 20, 2007, Benjamin Grumbles, the Assistant Administrator of the EPA, issued a memorandum entitled "Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation" (the "EPA Memorandum"). The EPA Memorandum states that, "With so many provisions of the Phase II rule affected by the decision, the rule should be considered suspended. I anticipate issuing a Federal Register notice formally suspending the rule in the near future. 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 (BPJ) basis. See 40 C.F.R. Section 401.14.” To date, no Federal Register notice has been issued on this subject. A copy of the EPA Memorandum is attached hereto as Exhibit 1.

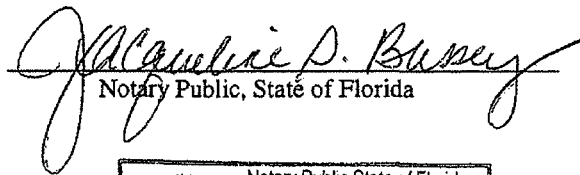
9. Because the effect of EPA’s intended suspension of the Phase II Rule will be similar to the effect of a stay, FPL has elected to notify the Commission of EPA’s intent.
10. While FPL does not yet know the specific terms of EPA’s suspension, it is likely to render the current deadline for submitting a CDS ineffective. Therefore, strictly from a deadline perspective, FPL may have the option of suspending the data collection and analysis activities that it has been performing in support of filing a CDS. However, FPL does not believe that it would be cost-effective or appropriate to suspend that work. FPL has completed biological sampling at one facility and is near completion (by mid-May) at three of the remaining six facilities. The Cape Canaveral Plant and the St. Lucie Plant have several months of sampling remaining. FPL believes that the following activities should continue and that FPL should continue to recover the costs for those activities via the ECRC:
 - Complete sampling events for all facilities and complete data summary reports.
 - Conduct “high level” evaluations of potential technologies (including cooling towers) that could be used to reduce impingement mortality and entrainment at FPL facilities.
11. These foregoing activities should continue to completion for the following reasons:
 - To be meaningful, biological sampling must occur in a minimum of one-year intervals so all seasons are represented. To discontinue sampling with only partial-year data would invalidate, or certainly make much less valuable, all of the data previously collected. Moreover, to restart a sampling program would result in a minimum of \$50,000 in incremental mobilization fees for each facility.
 - It would be much more efficient to have the data that is currently being collected analyzed and summarized now, rather than putting the data “on the shelf” and then analyzing it later. Important details about the data collection could be lost in the interim, and the analytical personnel would not be as familiar with the data if significant time passes between data collection and analysis.
 - For similar reasons, the high level technology evaluations based on the data should be performed contemporaneously.
12. FPL expects that the foregoing biological data collection and analysis, and the high level technology evaluations, will continue to be highly useful to FPL, no matter the eventual outcome of rulemaking on the Phase II Rule.
 - The EPA Memorandum indicates that EPA will require BPJ determinations pursuant to the NPDES permit process while the Phase II Rule is suspended. This means that FPL will have to address its plans to reduce the mortality of aquatic organisms in cooling water intake structures as part of its NPDES permit renewal applications via the BPJ process during the suspension period. FPL will be required to demonstrate to the Florida Department of Environmental Protection (FDEP”) permit writers that the operation of each permitted facility has no “adverse environmental impact.” The current data collection and analysis will assist the FDEP permit writers in determining the impact of the permitted facility’s cooling water intake structures, and the technology evaluation will assist them in determining the proper course of action for the facility to take.
 - Future rulemaking proceedings on the Phase II Rule – Rulemaking that was conducted for the existing Phase II Rule was based on biological data that were generally 30 years old. Technology evaluations that were made to determine the overall cost of the rule, as well as potential costs to an individual facility were based on minimal data submitted to EPA in a 1998 questionnaire. Having more detailed technology/cost data will assist FPL in presenting

its views on the true cost of the revised rule and enable FPL to better justify the inclusion of realistic, cost-effective compliance alternatives in the revised rule.

- Given the nature of the issues on which the Phase II Rule was remanded by the 2nd Circuit, it is highly likely that a CDS or something comparable will be required under the revised Phase II Rule. FPL's biological data and analysis, as well as its high level technology evaluation, would be useful to support FPL's compliance with such requirements in the revised rules.
 - Some or all of the grounds for remand in *Riverkeeper, Inc. v. EPA* could be reversed in subsequent appellate review by the Second Circuit *en banc*, or by the Supreme Court if certiorari is sought and granted.
13. Regardless of the status of the Phase II Rule, FPL continues to be subject to a "governmentally imposed environmental regulation enacted after the utility's last test year upon which rates are based" -- as contemplated by section 366.8255 of the Florida Statutes and Order No. PSC-94-0044-FOF-EI -- to address the entrainment and impingement of marine organisms at its power plants. That requirement arises either under the Phase II Rule or, in the absence of currently effective rules, as part of the NPDES permitting process pursuant to section 316(b) of the Clean Water Act. As noted above, FPL expects that if the Phase II Rule is not effective at the time of the next round of NPDES permitting, FPL will be required to make a similar showing about entrainment and impingement of marine organisms at its power plants to what the Phase II Rule would have required. That showing would become the basis for the FDEP's BPJ determination, which is an integral part of the NPDES permit renewal process.
14. FPL projects that completing the current biological data collection and analysis, and performing high level technology evaluations based on that analysis, will cost approximately \$2 million. FPL expects that these expenses all will be incurred in 2007 and 2008.
15. Affiant says nothing further.


Randall R. LaBaue

SWORN TO AND SUBSCRIBED before me this 13th day of April 2007, by Randall R. LaBaue, who is personally known to me or who has produced _____ (type of identification) as identification and who did take an oath.


Notary Public, State of Florida

My Commission Expires:

