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JOHN S. KENNEDY
ADMINISTRATIVE LAW JUDGE

October 28, 2019

LETTER ORDER

Sent Via E-Mail

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Re: **PSE&G NUCLEAR, LLC- SALEM GENERATING STATION v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION**
OAL DKT NO: ELU 15256-16
AGENCY DKT. NO.: NJ0005622

Dear Counsel:

By way of background, Delaware Riverkeeper Network (DRN) filed the above captioned matter in July 2016, challenging the Thermal Variance Pollution Discharge Elimination System Permit issued to PSE&G's Salem Nuclear Generating Station (Salem) by the New Jersey Department of Environmental Protection (NJDEP). DRN asserts that the NJDEP did not consider the best technology available (BTA) to minimize the adverse environmental impact caused by the facility's cooling water intake structures (CWIS). The main adverse environmental impact is thermal discharge which DRN asserts is killing billions of fish annually.

DRN filed the within Motion to Compel Discovery and the deposition of three individuals at the NJDEP with knowledge of the permit, namely Susan Rosenwinkle, Racheal Pepe, and Heather Genievich.

In support of this application, petitioner sites to N.J.A.C. 1:1-10.1 which provides that the purpose of discovery is to facilitate the disposition of cases and to enhance the likelihood of settlement. N.J.A.C. 1:1-10.1(c) provides in part that discovery shall be ordered on terms least burdensome to the party from whom discovery is sought.

Respondent argues that petitioner's application to compel the depositions fails to demonstrate "good cause" as required under N.J.A.C. 1:1-10.2(c).

Depositions in matters pending before the Office of Administrative Law (OAL) are extraordinary and seldom ordered absent "good cause." N.J.A.C. 1:1-10.2(c) states in pertinent part:

“Depositions upon oral examination or written questions and physical and mental examinations are available only on motion for good cause. In deciding any such motion, *the judge shall consider the policy governing discovery as stated in N.J.A.C. 1:1-10.1 and shall weigh the specific need for the deposition or examination; the extent to which the information sought cannot be obtained in other ways; the requested location and time for the deposition or examination; undue hardship; and matters of expense, privilege, trade secret or oppressiveness...*” [emphasis added]

In the instant matter, petitioner asserts that all three individuals remain employees and petitioner has offered flexibility with regard to the location and schedule of the deposition. To prevail in this matter, petitioner must prove that the NJDEP acted illegally or in a manner that was arbitrary and capricious. Hemsey v. Board of Trustees, Police & Firemen’s Retirement System, 198 N.J. 215 (2009). I **CONCLUDE** that petitioner has demonstrated “good cause” – specifically there has been a showing that information requested is highly technical in nature and cannot be obtained in other ways.

Therefore, petitioner’s motion to compel the deposition of respondent’s witnesses is **GRANTED**.

Moving to the motion to compel certain documents, DRN has requested the production of emails from 2006 through 2012 which mainly contained drafts of the permit and fact sheet as well as responses to comments. Respondents objected to the production of these documents asserting that the documents are protected by the deliberative process privilege. The deliberative process privilege is a doctrine that allows government agencies to withhold evidentiary documents that “reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” In re Liquidations of Integrity Inc. Co., 165 N.J. 75 (2000) DRN asserts that the issuance of an individual New Jersey Pollution Discharge Elimination System (NJPDES) permit is largely a ministerial or administrative act of applying established law to the facts of the case. However, this

argument is non-conforming with the argument raised that the decisions made regarding the NJPDES permit are so highly technical that depositions are required to determine the thoroughness and credibility of the permit writers. Therefore, I **CONCLUDE** that petitioners have failed to demonstrate a compelling need for unredacted copies of pre-decisional drafts of the 2015 draft permit and the 2016 NJPDES as they are outside the scope of the published administrative record.

Regarding the request for emails between 2006 and 2012, it is highly improbable that there is not one relevant email fitting the search terms requested by the petitioners. This is particularly true given the thousands of documents already produced. Therefore, I **CONCLUDE** that with the exception of those documents previously not produced based on the deliberative process privilege any email documents from 2006 through 2016 in the possession of respondents in accordance with petitioner's request for production of documents using the agreed upon search terms shall be produced within sixty days.

ORDER

Based on the forgoing it is hereby **ORDERED** as follows:

1. The depositions of Susan Rosenwinkle, Racheal Pepe, and Heather Genievich shall take place within sixty days unless a date and time thereafter is mutually agreed upon by the parties.
2. Petitioner's Motion to Compel Discovery that has been redacted based on the deliberative process privilege is **DENIED**.
3. With the exception of those documents previously not produced based on the deliberative process privilege any email documents from 2006 through 2016 in the possession of respondents in accordance with petitioner's request for production of documents using the agreed upon search terms shall be produced within sixty days.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

October 28, 2019

DATE



JOHN S. KENNEDY, ALJ

JSK/dm

cc: Deputy Clerk – OAL Trenton