



Three Mile Island is In Violation of the “Clean Water Act Section 401 Certification Rule”

February 16, 2021

Paula Ballaron
Susquehanna River Basin Commission
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Dear Paula:

I. Background.

Enclosed please find TMI-Alert’s Reply to your Response of January 27, 2021. (Enclosure). The Susquehanna River Basin Commission’s (“Commission” or “SRBC”) comments are remarkable in your decision to do nothing about nuclear contamination in light of the final adoption of the Environmental Protection Agency’s (“EPA”) Clean Water Act, Section 401, Certification Rule becoming effective on September 11, 2020. This action took place three months prior to the license transfer at Three Mile Island Unit-2 (“TMI-2”). The Certification charged statewide, water quality agencies to implement the water quality certification process consistent with the text and structure of the Clean Water Act (“CWA”).

Your “Response” - and the absence of any documentation during the course of the NRC proceeding - appears to ignore the Clean Water Act (“CWA”), Section 401, Water Quality Certification (“WQC”). The final rule establishes procedures that promote consistent implementation of CWA Section 401, and regulatory certainty in the federal licensing and permitting process.

II. Argument.

The final rule became effective on September 11, 2020. A license modification and transfer at Three Mile Island Unit-2 cannot occur without a documented waiver or other documentation from the Certifying Authority - either the Department of Environmental Protection (“DEP”) or the Susquehanna River Basin Commission - that Section 401 Certification does not apply to the changes in license conditions at Three Mile Island. The rule was modified to address deficiencies in the nuclear oversight and regulatory omissions:

1. Legislative history indicates that Congress created the water quality certification requirement to “recognize the responsibility of Federal agencies to protect water quality whenever their activities affect public waterways.” S. Rep. No. 91-351, at 3 (1969). “In the past, these [Federal] licenses and permits have been granted without any assurance that the [water quality] standards will be met or even considered.” *Id.* As an example, the legislative history discusses the Atomic Energy Commission’s failure to consider the impact of thermal pollution on receiving waters when evaluating “site selection, construction, and design or operation of nuclear power plants.” (1)

1 Environmental Protection Agency, P 40, CFR, Part 121, [EPA-HQ-OW-2019-0405; FRL-10009-80-OW] RIN 2040-AF86, Clean Water Act, Section 401 Certification Rule: Environmental Protection Agency: Final rule, p. 36.

The DEP and SRBC (2) are well aware that,

The Clean Water Act (CWA) Section 401 governs certification of water quality. Under section 401, any project seeking federal permits or licenses for activities that “may result in any discharge into the navigable waters” must also obtain a water quality certification from a state or interstate authority. Projects that trigger section 401 certification include projects requiring permits for disturbing wetlands, permits under the Rivers and Harbors Act, licenses for hydroelectric power plants, and licenses from the Nuclear Regulatory Commission. The certification process takes a holistic look at the water quality and the uses of the water where the discharge(s) may occur to ensure that water quality is maintained and that the water can support human, plant, and animal life... if a state denies certification, federal agencies cannot permit such activity. (3)

2 The Congress of the United States and the legislatures of New York, Pennsylvania, and Maryland, provide the mechanism to guide water resource management of the Susquehanna River Basin.

The Compact, which went into effect on January 24, 1971, also established the Susquehanna River Basin Commission as the agency to coordinate these water resources. Part of the SRBC’s mission is, “To support the existing and designated uses of all water bodies by achieving water quality that meets or exceeds standards.”

The SRBC Project Review program works with project sponsors to ensure the Commission's regulations are met in order to protect public health and safety. When sponsors fail to seek approval for a change in their “processes”, the Commission can and has taken action.

In December, 2006 Exelon was fined \$640,000 by the Susquehanna River Basin Commission for water violations at Peach Bottom related to water use and power uprates. (SRBC, Docket #, 20061209). Exelon failed to seek the Commission's approval for any change in their processes that required them to increase water usage by 100,000 gallons a day.

3 Harvard Law School, Environmental and Energy Law Program, (October 30, 2019).

Furthermore, states' roles and obligations were reaffirmed by the United States Supreme Court in 2006.

The Court concluded by observing that “[s]tate certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution.” *Id.* This sentence, when read in isolation, has been interpreted as broadening the scope of section 401 to allow certifying authorities to consider potential environmental impacts from a proposed federally licensed or permitted project that have nothing to do with water quality. (4)

The Court then stated,

These are the *very reasons* that Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ 33 U.S.C. 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.” *Id.* (emphasis added). (5)

The SRBC’s Response, which was copied to legal counsel, is an admission the Commission is violating its own standards as well as the Clean Water Act, Section 401. The planned discharge of highly contaminated radioactive water into the Susquehanna River is not a fait accompli the Congress envisioned, and the SRBC’s silence does not achieve “water quality that meets or exceeds standards.”

4 Environmental Protection Agency, P 40, CFR, Part 121 [EPA-HQ-OW-2019-0405; FRL-10009-80-OW] RIN 2040-AF86 Clean Water Act Section 401 Certification Rule: Environmental Protection Agency: Final rule, p. 36

5 Environmental Protection Agency, P 40, CFR Part 121, [EPA-HQ-OW-2019-0405; FRL-10009-80-OW] RIN 2040-AF86 Clean Water Act Section 401 Certification Rule: Environmental Protection Agency: Final Rule, pp. 47-50.

The revised CWA rule specifically provides for state oversight as a safety valve to prevent pollution. The DEP and the SRBC have failed to discourage, monitor and regulate radioactive discharges from nuclear power plants. The rule was designed in large part to protect citizens who live and work around nuclear power plants from radioactive discharges. The Environmental Protection Agency sought to insulate local residents from the previous negligence of regulatory bodies charged to protect their health and safety.

Finally, the EPA is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401. Legislative history indicates that Congress created the water quality certification requirement to “recognize the responsibility of Federal agencies to protect water quality whenever their activities affect public waterways.” S. Rep. No. 91-351, at 3 (1969). “In the past, these [Federal] licenses and permits have been granted without any assurance that the [water quality] standards will be met or even considered.” *Id.* As an example, the legislative history discusses the Atomic Energy Commission's failure to consider the impact of thermal pollution on receiving waters when evaluating “site selection, construction, and design or operation of nuclear power plants. *Id.* (6)

The Supreme Court in 2006 in *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) (*S.D. Warren.*) explicitly referenced Senator Edmund Muskie’s speech on the floor of the Senate in their decision.

⁶ Federal Register, Vol. 85, No. 134, July 13, 2020/Rules and Regulations, p. 42219.

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of *water quality standard[s]*. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with *water quality standards*. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of *water quality requirements*. (7)

This rule was advertised, discussed, and publicized in full public view. Moreover, the EPA actively engaged the SRBC's partners regarding the rule modification prior to the rule becoming effective on September 11, 2020.

The EPA engaged with federal agencies that issue licenses or permits subject to section 401, including the United States Department of Agriculture, the Federal Energy Regulatory Commission (FERC), the U.S. Army Corps of Engineers (Corps), the Alcohol and Tobacco Tax and Trade Bureau, the Nuclear Regulatory Commission, and the Bureau of Reclamation through several meetings and phone calls to gain additional feedback from federal partners. (8)

The Federal Energy Regulatory Commission ("FERC"), the Nuclear Regulatory Commission, and the U.S. Army Corps of Engineers ("Corps") ARE partners with the Susquehanna River Basin Commission. The Corps, which is a member of the SRBC, plays a pivotal role regarding water resource allocation at nuclear plants. The Three Mile Island nuclear plant is located within the FERC- designated "exclusion zone."

7 Federal Register, Vol. 85, No. 134, July 13, 2020/Rules and Regulations, p. 42222.

8 Document Citation: Federal Register: 40 CFR 121, 85 FR 42210, pp. 42210-42287 (78 pages), Agency/Docket Numbers: EPA-HQ-OW-2019-0405. FRL-10009-80-OW. RIN: 2040-AF86. Document Number: 2020-12081.

We were hoping that the DEP and SRBC would learn from their previous mistakes. The EPA established a Certification protocol to ensure pollution does not become a routine feature of water use. Regrettably, both agencies seem determined to make the same error and omission relating to the ill gotten license transfer of TMI-2.

In June 1980, the Susquehanna Valley Alliance filed a Complaint and Injunction with the Middle District Court in Harrisburg, Pennsylvania against the Nuclear Regulatory Commission and Metropolitan Edison. The Injunction sought to prevent the owner and operator of Three Mile Island from dumping 700,000 gallons of radioactive water into the Susquehanna River. The Injunction was granted, and the NRC was found to be in violation of the National Environmental Policy Act. (9)

The complaint alleges the jurisdictional amount required by 28 U.S.C. § 1331. Plaintiffs' complaint charges that the actions and inactions of the NRC and the actions of the Operators have given rise to four substantive claims. Count I charges violations of section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361, 4332 (1976), and of a provision of the Operators' operating license requiring that the licensee, before engaging in additional construction or operational activity, prepare and record an environmental evaluation of such activity. Count II charges violations of various provisions of the Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 Supp. I), regulations of the NRC issued pursuant to that Act, and the Operators' license. Count III charges violations of section 301(f) of the Federal Water Pollution Control Act, 33 U.S.C. § 1311(f). Count IV alleges that the action of the NRC permitting the Operators to discharge radioactive waste violates plaintiffs' rights under various provisions of the United States Constitution. (9)

9 Susquehanna Valley Alliance v. Three Mile Island: United States Court of Appeals, Third Circuit. Date published: March 17, 1980 Citations 619 F.2d 231 (3d Cir. 1980) No. 79-2446. Argued November 13, 1979. Decided March 17, 1980.

TMI-2's license's transfer application was silent on the Clean Water Act, Section 401.

The TMI-1 license renewal in 2008, referenced, "Three Mile Island Nuclear Station, Section 401 , State Water Quality Certification, Docket No. 77-076, dated November 9, 1977, issued by the Pennsylvania Department of Environmental Resources. TMI-1, which is owned by a separate corporation, failed to disclose or discuss the "interim" and limited content of the DER Settlement with Metropolitan Edison. Despite this oversight, the Unit-1 license was renewed on October 22, 2009. The document referenced in Three Mile Island Unit-1 License Renewal. Appendix B, **did not** cover the Clean Water Act, Section 401, despite the misleading title. **The NRC ignored the Third Circuit ruling in the TMI-1 relicensing proceeding and stated:**

The Commonwealth of Pennsylvania issued a Section 401 State Water Quality Certification for the TMI nuclear station on November 9, 1977 (included in Appendix B). Now, AmerGen is applying for NRC approval to extend TMI-1 operations under a renewed license. The NRC has indicated in its Generic Environmental Impact Statement for License Renewal that issuance of an NPDES permit by a state implies continued Section 401 certification by the state (NRC 1996, Section 4.2.1.1). The Commonwealth of Pennsylvania has EPA authorization to implement the NPDES permitting program. In addition, guidance published by the Pennsylvania Department of Environmental Protection (PADEP) states that water quality certifications have been integrated with other required permits and that individual water quality certifications will be issued only for activities that are not regulated by other water quality approvals or permits. Accordingly, as evidence of continued Section 401 certification by Pennsylvania, AmerGen is providing the existing TMI-1 NPDES permit.

The evidence in the TMI-1 relicensed proceeding was lacking, and predated the Clean Water Act, Section 401 Certification rule change. **TMI-1 is not TMI-2**, which is highly contaminated, and the NPDES issued in 1977 was explicitly referred TO as an “interim agreement. (10) Based on publicly available submissions, **TMI-2 did not submit Clean Water Act, Section 401 Certification documents.** (11) Silence on the part of the sponsor and regulator is a driving force behind the enactment of the Clean Water Act, Section 401. This was the very tool designed to defeat “fait accompli pollution.”

The forty-four year CWA Settlement is limited to the effluent, discharges, effluent quantity and temperature limitations, and restrictive conditions: 1) Effluent discharge from sewage treatment facilities; 2) Limitations regarding the Combined Mechanical Draft Cooling tower; 3) The amount and temperatures of the discharge; and clearly stated, 4) “We do not not certify that the applicant for an NPDES permit is now in compliance with our effluent limitations or permit requirements established pursuant to the Clean Streams Law, Act of June 22, 1937, P.L.,

10 Appendix B, Environmental, Report, Clean Water Act Documentation. Three Mile Island Nuclear Station Section 401 State Water Quality Certification Docket No. 77-076-B, dated November 9, 1977, issued by the Pennsylvania Department of Environmental Resources. <https://www.nrc.gov/docs/ML0802/ML080220261>.

11 This document was **not** submitted as part of the Application from EnergySolutions and GPU Nuclear, Order Approving and Conforming License Amendments, Three Mile Island Unit, NRC Docket, 50-320, November 12, 2019. Those documents were also addressed and shared with the DEP. The TMI-2 license transfer application purportedly covered environmental compliance under “Environmental Laws” and “Environmental Matters under 4.9.” **Under Schedule 4.19.1, there was no discussion of the Clean Water Act, Section 401.**

1987, as amended, 35 P.S. 691.1 or that such source is discharging in compliance with the terms or conditions of a state permit. Nor do we certify that by attaining the interim standards contained in the NPDES permit that such source will be in compliance with the aforementioned Clean Stream Law, and the Rules and Regulations Thereunder.” (12)

This was a limited, “interim” Settlement that does not provide in perpetuity environmental relief for 401 Certifications, and can not be grandfathered as a means of satisfying the Clean Water Act, Section 401. **This document was not submitted as part of the TMI-2 Application, not did it authorize the discharge of highly radioactive water into the Susquehanna River.**

The original license holder, Metropolitan Edison, attempted to dump 700,000 gallons of radioactive wastewater into the Susquehanna River. FirstEnergy and TMI-2 Solutions are attempting to repeat Metropolitan Edison and the NRC’s illegal attempt to dump radioactive water directly into the Susquehanna River. The SRBC can correct the error or remain silent and defend radioactive contamination.

The enclosed excerpt from a January 15, 2021, Nuclear Regulatory Commission letter to NextEra regarding the Point Beach Nuclear Plant, identifies the need for state related agencies - including the DEP or SRBC - to review the criteria from the updated Clean Water Act, Section 401, Water Quality Certification at nuclear plants amending and/or extending their licenses. The NRC staff made the following determinations while performing its review of the Point Beach application:

12 Environmental Hearing Board, Frederick A Marraco, Chief Planning Section, DER, Harrisburg Regional; Office, November 9, 1977.

NextEra has not provided a Clean Water Act ("CWA") Section 401 Water Quality Certification ("WQC") from the Wisconsin Department of Natural Resources (the CWA 401 Certifying Authority), or a documented waiver or other documentation from the Certifying Authority that Section 401 Certification does not apply to the subsequent renewal of the licenses for Point Beach. The staff cannot issue the subsequent renewed licenses without this certification or documented waiver from the Certifying Authority. As such, the lack of Section 401 certification has the potential to adversely impact the issuance of the subsequent renewed licenses. (13)

The Department of Environmental Protection and/or the Susquehanna River Basin Commission - likewise - must require this documentation from Exelon and FirstEnergy (public utilities) to ensure a valid license of Three Mile Island Unit-2 to TMI-2 Solutions (a limited liability corporation).

If this documentation has not been received, both plants, Three Mile Island Unit-1 and Three Mile Island Unit-2, are non-compliant with the Clean Water Act, Section 401, Water Quality Certification.

13 Point Beach Subsequent License Renewal Acceptance Letter
Document Type: Letter Schedule and Calendars: Date: 01/15/2021.
ML21006A417<https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21006A417>.

III. Timeline.

On June 1, 2020, the Environmental Protection Agency (“EPA”) finalized the “Clean Water Act, Section 401, Certification Rule” to implement the water quality certification process consistent with the text and structure of the Clean Water Act. The final rule establishes procedures that promote consistent implementation of CWA Section 401, and regulatory certainty in the federal licensing and permitting process. The final rule became effective on September 11, 2020.

On November 23, 2021, the Nuclear Regulatory Commission announced an impending order approving the transfer of a license, and a draft conforming administrative license amendment will be issued on or about December 2, 2020, to Metropolitan Edison Company, Jersey Central Power and Light Company, Pennsylvania Electric Company, GPU Nuclear, Inc. (collectively, the FirstEnergy Companies), and TMI-2 Solutions, LLC (together with the FirstEnergy Companies, the applicants).

The Office of the Secretary of the Nuclear Regulatory Commission issued a “Memorandum and Order, (CLI-21-02)” entitled “Re: NRC Proceeding, Three Mile Island 50-320 LT,” allowing the license transfer of Three Mile Island, Unit 2 from FirstEnergy to TMI-2 Solutions on January 15, 2021.

This action took place 120 days after the EPA rule became effective. Both the DEP and the SRBC failed to provide a documented waiver or other documentation from the Certifying Authority that Section 401 Certification does not apply to the nuclear license transfer from a public utility to a limited liability corporation.

IV. Conclusion.

The Clean Water Act, Section 401 was designed in large part to protect citizens who live and work near nuclear power plants from radioactive discharges. The Environmental Protection Agency sought to insulate local residents from the previous negligence and silence of regulatory bodies charged to protect their health and safety.

It does not appear that Exelon, FirstEnergy or TMI-2 Solutions provided a Clean Water Act, Section 401, Water Quality Certification exemption to either the Department of Environmental Protection or the Susquehanna River Basin Commission that has certified that the Three Mile Island Nuclear Generating Station is in compliance with the Final Rule: Clean Water Act, Section 401, Certification Rule.

If Exelon, FirstEnergy or TMI-2 Solutions have provided this documentation to the Department of Environmental Protection and/or the Susquehanna River Basin Commission, please provide copies of the documents and related correspondence. If neither the DEP or SRBC have received the necessary documentation, and both agencies failed to provide Certification, the current NRC license transfer at Three Mile Island violates the “Clean Water Act, Section 401, Certification Rule.”

I am looking forward to a fact based response prior to my presentation at the next the SRBC meeting on March 12, 2021.

Sincerely,

Eric Epstein, Chairman

cc: Service lists.

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