

August 19, 2021

Mr. Eric Epstein
4100 Hillsdale Road
Harrisburg, PA 17112

Dear Mr. Epstein:

This correspondence is in response to your records request sent via e-mail on July 19, 2021. Your request contained three enumerated requests related to the assertion in the *RadWaste Monitor* that the Susquehanna River Basin Commission (Commission) does not issue certifications under Section 401 of the Clean Water Act. We will provide our response to each in turn.

1) *Please identify the lead agency on this issue.*

This is not a request for records. With our understanding of this question, the Pennsylvania Department of Environmental Protection (DEP) is the entity in Pennsylvania that would issue, deny, or waive a Section 401 Certification under the Clean Water Act.

2) *Please provide the legal opinion substantiating the above noted claim.*

To the degree this request seeks legal opinions that represent attorney-client privileged communications or attorney work product, it is beyond the scope of 18 CFR § 801.14. The Commission is not aware of any formal written legal opinion that it has issued regarding whether the Commission is an agency that can issue a Section 401 water quality certification. However, the above-noted claim is based on a fair reading of the Clean Water Act and the Susquehanna River Basin Compact, as well as the fact that, in its 50-year history, the Commission has never issued a 401 Certification under the Clean Water Act for any project.

3) *Please provide all records, requests, e-mails and communications, including notes of communications, between the DEP and the SRBC and their respective [sic] regarding this matter.*

The Commission has conducted a search for records regarding this matter as requested. All responsive documents from this search are enclosed.

This represents the Commission's complete response to your July 19, 2021, request. Thank you for your interest in the Susquehanna River Basin Commission.

Sincerely,



Paula Ballaron, P.G.

Manager, Policy Implementation and Outreach

Enclosures

cc: Curt Sebastian, Esq.
Andrew Gavin

569910.1

Oyler, Jason

From: Dehoff, Andrew
Sent: Tuesday, March 9, 2021 7:48 AM
To: Kunkel, Summer
Subject: Re: [External] SRBC meeting - Eric Epstein demand

Very good! Thank you.

Drew

On Mar 9, 2021, at 7:41 AM, Kunkel, Summer <sukunkel@pa.gov> wrote:

Morning –

Sounds like a plan and Epstein should be familiar with the process at this point. Based on his mandate for a fact-based response before the meeting – I’m wondering what his approach/tone will be during his allotted time.

Thanks for the additional info – see below:

From: Dehoff, Andrew <ADehoff@srbc.net>
Sent: Monday, March 8, 2021 4:45 PM
To: Kunkel, Summer <sukunkel@pa.gov>
Subject: RE: [External] SRBC meeting - Eric Epstein demand

Yes, typically. Three minutes is our standard but I might feel a little heavy-handed imposing that when there is only one person requesting to speak. I might suggest 5 minutes, with the caveat that Epstein please not simply read his letter to us. I’ll inform the other commissioners of this when we brief on Thursday. And I will forward them the letter as well prior to Thursday.

I’ve tasked SRBC staff with contacting NRC staff to get their take on the situation. Because SRBC doesn’t have a direct role in licensing or the 401, I think our best response is that we’re coordinating with our partner agencies that do. Jason is going to get in touch with Alicia Duke.

How is your prep for the meeting otherwise? You’re probably focused on DRBC first! I might point out a few other items for your awareness: we did reach out to Rich Reisinger and Josh Fair on Kehm dam – sounds like they are still waiting for some revised plans as the 5ft was something they couldn’t confirm. We don’t have any issues with the scope or project and it sounds like you guys had a fairly recent discussion about it. Just bringing that up because it says that revised plans were submitted to DEP.

- we’re going to recommend tabling the docket for Beech Resources, simply out of caution and consideration of a substantial public comment received late in the game. Thanks. Todd gave Rhonda a heads up on this one. I talked to Brian Bailey about it yesterday too and he was planning to give a DEP review update to Todd.
- he’s not confirmed, but MD Secretary of the Environment Ben Grumbles may join us Friday morning to present Gov. Hogan’s proclamation recognizing SRBC’s 50th anniversary. I don’t expect the same from PA, and we certainly don’t have anything similar from NY or the US, but I didn’t want to catch you off guard. I think it’s appropriate that, as current chair, Maryland wrap

up the brief observation with that proclamation, following remarks from the other commissioners. It's really just material for Twitter as the audience will be small. We're hopeful we'll be able to have an in-person observance later this year. At that time we can talk about Sec. McDonnell or Aneca presenting Gov. Wolf's proclamation if they have interest in doing so. Appreciate the heads up!

- You may have seen the DEP/SRBC LOU on the briefing agenda. My intent there is to simply offer an update to the other commissioners and verify that they're comfortable with us releasing it for public comment when our two agencies get to a draft that's ready for release. Perfect.
- I won't be looking for anything formal on the Conowingo WIP, but at some point will need some guidance and direction from PA on what role, if any, SRBC should play. There appears to be a gap we could fill regarding administration of the financing, but there are a lot of unknowns and substantial risks to accompany the opportunity. We can definitely set-up a separate call to discuss. Maybe lay the groundwork for that during the caucus and we can plan a follow-up discussion.

Thanks,
Drew

From: Kunkel, Summer <sukunkel@pa.gov>
Sent: Monday, March 8, 2021 4:19 PM
To: Dehoff, Andrew <ADehoff@srbc.net>
Subject: RE: [External] SRBC meeting - Eric Epstein demand

Understood – thanks, Drew.
I assume there is a time limit?

From: Dehoff, Andrew <ADehoff@srbc.net>
Sent: Monday, March 8, 2021 4:15 PM
To: Kunkel, Summer <sukunkel@pa.gov>; Atkinson, Aneca <aneatkinso@pa.gov>
Cc: Freyermuth, Shelby <shfreyermu@pa.gov>; Abels, James <jaabels@pa.gov>; Moses, Michelle <mmoses@pa.gov>
Subject: RE: [External] SRBC meeting - Eric Epstein demand

Thank you, Summer.

We sporadically receive requests to address the commissioners. The requests are usually relevant to business that is or will eventually be before the Commission for an action (typically because they are in opposition to an application). Mr. Epstein resurfaces every couple years.

From: Kunkel, Summer <sukunkel@pa.gov>
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To: Dehoff, Andrew <ADehoff@srbc.net>; Atkinson, Aneca <aneatkinso@pa.gov>
Cc: Freyermuth, Shelby <shfreyermu@pa.gov>; Abels, James <jaabels@pa.gov>; Moses, Michelle <mmoses@pa.gov>
Subject: RE: [External] SRBC meeting - Eric Epstein demand

Hi Drew –
Alicia Duke is the regional attorney for rad protection and Dave Allard/Rich Janati are in Rad Protection's central office.

For my own understanding, is this something that has happened previously with other stakeholders requesting time in front of the commission?

From: Dehoff, Andrew <ADehoff@srbc.net>
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Subject: [External] SRBC meeting - Eric Epstein demand
Importance: High

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Hello Aneca,

Need to alert you to the attached letter received this afternoon and a request from TMI-Alert to be “added to the agenda” for Friday’s meeting. Secretary McDonnell is listed as an email cc on the pdf, as are some email addresses at pa.gov that I don’t recognize: alduke, janati, and djallard.

As for Mr. Epstein’s request to address the Commission, I will recommend that the commissioners offer him a few minutes after the meeting adjourns to make his statement. The topic is an alleged Clean Water Act violation at TMI; his letter concludes the “current NRC license transfer at Three Mile Island violates the Clean Water Act” because our two agencies didn’t receive the necessary documentation nor did we provide certification. The letter also makes assertions about the discharge of radioactive water to the Susquehanna River.

In the request, Mr. Epstein also states that he is “looking forward to a fact-based response prior to [his] presentation” at the meeting. I’m still sorting through the 13 pages of assertions to try to make sense of it all, but I will be prepared Friday to offer a brief response if he demands one. I will not ask you to offer a response (unless you wish me to) but I wouldn’t be surprised if he directs a question to you – I suspect he views the SRBC meeting as a venue to get himself an audience with you. In my response, I will state that our two agencies will coordinate as necessary and appropriate.

Hope all is well otherwise – please let me know if you have different preferences for how we respond to this request.

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Attachments: 20210308132508097.pdf

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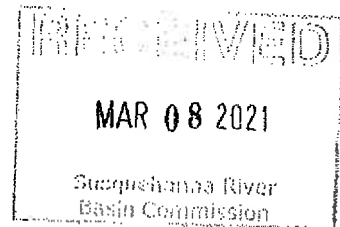
Thank you,
Drew

THREE MILE ISLAND A L E R T

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

February 16, 2021

Paula Ballaron
Susquehanna River Basin Commission
4423 North Front Street,
Harrisburg, PA 17110



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.

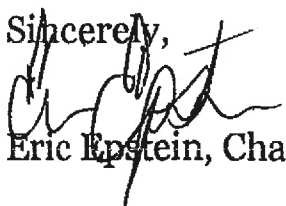
The Clean Water Act, Section 401 was designed in large part to protect citizens who live and work near nuclear power plants from radioactive discharges. The Environmental Protection Agency sought to insulate local residents from the previous negligence and silence of regulatory bodies charged to protect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

Department of Environmental Protection:

alduke@pa.go, janati@pa.gov, djallard@pa.gov, and pmcdonnell@pa.gov

Nuclear Regulatory Commission:

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Susquehanna River Basin Commission:

PBallaron@srbc.net, AGavin@srbc.net, gveno@srbc.net, and
joyler@srbc.net

Oyler, Jason

From: Ballaron, Paula
Sent: Tuesday, February 16, 2021 2:31 PM
To: Manning, Rhonda
Cc: Gavin, Andrew;M_O_U_ Coordination Member States _ E_mail
Subject: FW: Nuclear Watchdog Alleges Three Mile Island is in Violation of the Clean Water Act, (February 16, 2021)
Attachments: Release, (21621).pdf; Agency Notification, (21621).pdf; Release, (21621).pdf

Hi Rhonda,

I received these documents yesterday- 2 press releases and the notification (letter) from Three Mile Island Alert. The letter was copied to several individuals at DEP, including P. McDonnell. I don't recognize the others from their email addresses (you probably will).

I'll check with folks here about how SRBC will proceed; based on the final page of the correspondence they are looking for a reply in time to prepare testimony at the next SRBC meeting. Because we had previously discussed the question of TMI, I wanted you to be aware of this correspondence, and if appropriate, forward to Bryan Werner (the manager from Central Office Rad Protection).

thanks,
Paula

Paula Ballaron, P.G.
Manager, Policy Implementation & Outreach
Susquehanna River Basin Commission
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Your River ~ Our Mission

PRIVILEGED AND CONFIDENTIAL COMMUNICATION

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From: Eric Epstein <epstein@efmr.org>
Sent: Monday, February 15, 2021 10:15 AM
To: Ballaron, Paula <PBallaron@srbc.net>
Cc: Gavin, Andrew <AGavin@srbc.net>; Veno, Gene <gveno@srbc.net>; Oyler, Jason <joyler@srbc.net>; Data Requests _ E_mail <{F135020}.SRBC@dms.srbc.net>
Subject: Nuclear Watchdog Alleges Three Mile Island is in Violation of the Clean Water Act, (February 16, 2021)



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

February 16, 2021

Paula Ballaron
Susquehanna River Basin Commission
4423 North Front Street,
Harrisburg, PA 17110

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.

Department of Environmental Protection:

alduke@pa.go, janati@pa.gov, djallard@pa.gov, and pmcdonnell@pa.gov

Nuclear Regulatory Commission:

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joyler@srbc.net



Nuclear Watchdog Alleges Three Mile Island is in Violation of the Clean Water Act

February 16, 2021

(Harrisburg, Pa.) - Three Mile Island Alert, Inc. notified the Department of Environmental Protection “DEP”), the Nuclear Regulatory Commission (“NRC”), and the Susquehanna River Basin Commission (“SRBC”) that the Three Mile Island Unit-2 (“TMI-2”) license transfer from FirstEnergy to TMI-2 Solutions violated the Environmental Protection Agency’s, Clean Water Act Section, 401 Certification Rule.

On June 1, 2020, the Environmental Protection Agency (“EPA”) finalized this rule to ensure the water quality certification process is consistent with the Clean Water Act. (“CWA”). The final rule became effective on September 11, 2020, three months prior to the transfer of the license. TMI-2 never completed the paperwork required by the EPA.

TMI-Alert is attempting to prevent the radioactive contamination of the Susquehanna River and the Chesapeake Bay. TMI-Alert Chairman, Eric Epstein, said: “The CWA was the tool designed by the EPA to defeat pollution by corporate greed and regulatory inertia. The TMI-2 license transfer cannot occur without the new owners satisfying compliance with the Clean Water Act. Certification should explicitly state that TMI can not dump highly radioactive water into the Susquehanna River.”

The 13 page letter points out that the license transfer failed to satisfy EPA requirements. TMI-Alert referred the DEP and the SRBC to a ruling last month at the Point Beach Nuclear Plant. The NRC told NextEra that they were required to obtain a certification from the updated Clean Water Act to implement license modifications.

Mr. Epstein stated, “The agencies can correct their error or remain silent. The DEP and the SRBC should not be aiding and abetting the discharge of highly contaminated radioactive water into the Susquehanna River.”

Background

The Department of Environmental Resources and Metropolitan Edison, the original licensee, negotiated a limited, “interim” Settlement on November 9, 1977 relating to the Clean Water Act. The “documentation” did not provide in perpetuity environmental relief for CWA Certifications, SEction 401. It does not appear that this document was submitted as part of the TMI-2 License Transfer Application.

This Settlement did not endorse the discharge of highly radioactive water into the Susquehanna River. 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.



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Oyler, Jason

From: Eric Epstein <epstein@efmr.org>
Sent: Monday, April 19, 2021 3:44 PM
To: Ballaron, Paula
Subject: Re: Response to Questions submitted March 12, 2021

Follow Up Flag: Flag for follow up
Flag Status: Flagged

TY!

On Apr 19, 2021, at 9:32 AM, Ballaron, Paula wrote:

DEP, although they typically ask for our comments. For the Hydro facilities on the lower river, we've provided flow modelling

From: Eric Epstein
Sent: Monday, April 19, 2021
To: Ballaron, Paula
Cc: Gavin, Andre
<joyler@srbc.net>
Subject: Re: Response to Questions submitted March 12, 2021

Thank you!

What entity is responsible for the SRBC's oversight of TMI-2?

On Apr 19, 2021, at 9:32 AM, Ballaron, Paula wrote:

Eric,

With regard to the SRBC's (SRBC) oversight of TMI-2, SRBC regulates the withdrawal of water for use at the facility. Currently, TMI-2 does not have a docket approval (permit) from SRBC to withdraw groundwater or surface water. The new owner should make application for the quantity of water needed to maintain facility activities during decommissioning. As a first step in that process, SRBC recommends scheduling a pre-application conference with Commission staff. The application process is described and forms are available on the website.

The SRBC does not have any regulatory role in oversight of wastewater discharges at the Three Mile Island facility. That role resides with the commonwealth of Pennsylvania and the federal government, and more specifically with the PA Department of Environmental Protection and the Nuclear Regulatory Commission. Please contact those agencies regarding any protocols for approval.

Paula

Please note this printed out in this manner. Attached is the text of this e-mail in a word document for easier reading.

<joyler@srbc.net>; Oyler, Jason
{128}.SRBC@dms.srbc.net>

401?

ballaron@srbc.net>

Paula Ballaron, P.G.
Manager, Policy Implementation & Outreach
Susquehanna River Basin Commission
4423 North Front Street
Harrisburg, Pennsylvania 17110-1788
Office: 717-238-0423 Ext - 1222
Mobile: 717-215-0455
www.srbc.net
<image001.jpg>

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From: Eric Epstein <epstein@efmr.org>
Sent: Thursday, April 15, 2021 8:02 PM
To: Ballaron, Paula <PBallaron@srbc.net>
Cc: Gavin, Andrew <AGavin@srbc.net>; Veno, Gene <gveno@srbc.net>; Oylar, Jason <joyler@srbc.net>; _Public Information and Outreach E_mail <{F128}.SRBC@dms.srbc.net>; Eric Epstein <epstein@efmr.org>; Alicia Duke <alduke@pa.gov>
Subject: Re: Response to Questions submitted March 12, 2021

Paula:

Can you please provide the protocol in place for TMI-2 to withdraw ground water and surface water as well as the discharge protocols.

NRC Response will be file don Monday.

Eric Epstein

On Apr 2, 2021, at 10:40 AM, Ballaron, Paula wrote:

Good morning, Eric.

This is in response to several of your questions regarding Exelon Generation Company, LLC's (Exelon's) Three Mile Island Generating Station, Units 1 and 2 (TMI-1 and 2) submitted on March 12, 2021.

Question 1: Provide the amount of water TMI can withdraw daily, and how much they pay for consumptive and surface water at TMI-1 and TMI-2.

As I stated previously, the consumptive use, surface withdrawal, and groundwater withdrawal approvals from SRBC have not changed yet as a result of the non-operating status. The docket approval for TMI-1 dates from 2011, and is attached for your review. SRBC does not have a docket approval for TMI-2.

The approved quantities at TMI-1 are:

- Surface water withdrawal – up to 122.800 million gallons per day;
- Groundwater withdrawal – 0.225 million gallons per day (as a 30-day average) from Wells A, B, and C;
- Consumptive use – 19.200 million gallons per day (peak day).

The SRBC has no charges related to surface water withdrawals for any approved project. The project does not pay a consumptive use fee to the SRBC. The consumptive use is mitigated predominantly by releases of water stored in Cowanesque Reservoir during low flow periods, under an approved agreement (see Docket Section 7, no. 5).

*Question 2: Ask the NRC for the precise amount of water each reactor will need for decommissioning purposes, and inventorize the amount of water **not** used since TMI-1 no longer conveys heat from the reactor core to the steam turbine and there is no longer steam cycle heat transfers.*

The SRBC has no information from the NRC at this time concerning the amount of water required for decommissioning.

The attached a spreadsheet shows SRBC's data concerning the amount of recent water use at TMI-1. As you are aware, TMI-1 was taken offline and ceased operating for the purpose of generating electric power on September 20, 2019. The data brackets the time when operations ceased, containing reported daily water withdrawals from all sources and consumptive use from September 1, 2019 through December 31, 2020.

SRBC staff have not specific information at this time to answer your other questions regarding disposal of any radioactive wastewater. The SRBC will continue to coordinate with agencies of its member jurisdictions about all of the issues related to this project.

Exelon staff indicated water withdrawal and consumptive use quantities are expected to continue to exceed Commission regulatory thresholds, but at a much lower magnitude due to cessation of power generation. As such, and recognizing the change in operations, Commission staff will review the water withdrawal and consumptive use demands, from all sources, based on the Facility's reasonable and foreseeable need to adequately address ongoing decommissioning activities. Commission staff anticipate that this review will be done as part of the groundwater well renewal applications, required by May 26, 2021.

Thank you again for your patience as we work to obtain clarity on the key water issues related to decommissioning.

Best regards,
Paula

Paula Ballaron, P.G.
Manager, Policy Implementation & Outreach
Susquehanna River Basin Commission
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<image003.jpg>

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From: Eric Epstein <epstein@efmr.org>
Sent: Friday, March 12, 2021 3:19 PM
To: Ballaron, Paula <PBallaron@srbc.net>
Cc: Gavin, Andrew <AGavin@srbc.net>; Veno, Gene <gveno@srbc.net>; Oyler, Jason

<joyler@srbc.net>; _Public Information and
Outreach E_mail <{F128}.SRBC@dms.srbc.net>;
Eric Epstein <epstein@efmr.org>
Subject: Re: Before the SRBC, (Testimony of Eric
J. Epstein, December 11, 2020)

Folks:

These questions were
resubmitted at today's public
hearing.

In our opinion, the initial
responses were
general and vague.
I wrote the questions in
the hope of providing
clarity, and to
make sure you got the
questions free from
technical interference.

In addition, to
requesting more specific
responses to the
January 27, 2021 requests,
I also asked the SRBC to:

- 1) Provide the amount of water TMI
can withdraw daily,
and how much they pay
for **consumptive and
surface water**
at TMI-1 and TMI-2;
- 2) Ask the NRC for the precise
amount of water each reactor
will need
for **decommissioning
purposes, and inventorize**

the amount of
water **not** used since TMI-
1 no longer conveys
heat from the reactor core
to the steam turbine and
there
is no longer steam cycle
heat transfers;

3) Requests from the DEP and the
NRC for TMI-1's and
TMI-2's plan(s) to dispose of
radioactive water created
by the decommissioning
processes; and,

4) Identify CWA obligations as it
pertains to what entity actually
owns the water rights at TMI.

Gene and Paula did
contact me during the
meeting, and Gene
reached out after the
meeting. Unfortunatley,
I've been in zoom
meetings all afternoon. I
will return to the office on
Monday.

Have a great weekend!

Eric Epstein

On Mar 8, 2021, at 10:08 AM, Ballaron,
Paula wrote:

Good morning, Eric

As Andy advised in December, we can't "add you to the [business] meeting agenda." We don't accept formal public comment at the business meetings, only at our public hearings that occur about a month prior to the business meetings. Written comments pertaining to items on the agenda submitted by the date noted in the meeting notice are provided to the commissioners prior to the business meeting for their consideration.

However, there may be an opportunity to provide general public comment on Friday. After adjournment of the meeting and at the discretion of the chair, the commissioners can accept public comment – generally time-limited to 3 minutes for oral comments.

Thanks,
Paula

Paula Ballaron, P.G.
Manager, Policy Implementation
& Outreach
Susquehanna River Basin
Commission
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Harrisburg, Pennsylvania
17110-1788
Office: 717-238-0423 Ext - 1222
Mobile: 717-215-0455
www.srbc.net
<image001.jpg>

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the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify the sender and then delete the communication from your electronic mail system.

From: Eric Epstein
<epstein@efmr.org>
Sent: Monday, March 8, 2021 8:16 AM
To: Ballaron, Paula
<PBallaron@srbc.net>
Cc: Gavin, Andrew
<AGavin@srbc.net>;
Veno, Gene
<gveno@srbc.net>;
Oyler, Jason
<joyler@srbc.net>; Eric
Epstein
<epstein@efmr.org>
Subject: Re: Before the
SRBC, (Testimony of
Eric J. Epstein,
December 11, 2020)

Folks:

Please place
me on the agenda for
Friday's meeting.

Thanks,

Eric Epstein
On Jan 27, 2021, at
11:24 AM, Ballaron,
Paula wrote:

Good
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reflect:

1) Used and useful life of plant, 2) Operational or deactivated status of power plants; and, 3) Termination contract with firm dates.

Commission staff is working with TMI operators to determine operating parameters considering the change in status of the plant, and will recommend modifications to

docket
approvals as
appropriate.

2. [T]he SRBC
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river?
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Susquehanna River Basin Commission needs to address and answer the following questions we raised in our Testimony on August 18, 2008: “What systems and components contain radioactively contaminated water? What methods are being used to monitor leakage of radioactive contaminated water from the systems and

components?
What methods are being used to monitor the grounds around the facility for potential leakage of radioactively contaminated water? What assurance is there against a leak of radioactively contaminated water remaining undetected long enough to permit migration offsite? Will Three Mile Island dump

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Best
regards

,
Paula

*Paula
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mail - <111350201@srbcc@dmssrbcc.net>
Subject: RE: Before

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Data.XLSX><20110610.PDF>

TY!

On Apr 19, 2021, at 9:32 AM, Ballaron, Paula wrote:

DEP, although they typically ask for our comments. For the Hydro facilities on the lower river, we've provided flow modelling

From: Eric Epstein <epstein@efmr.org>

Sent: Monday, April 19, 2021 9:30 AM

To: Ballaron, Paula <PBallaron@srbc.net>

Cc: Gavin, Andrew <AGavin@srbc.net>; Veno, Gene <gveno@srbc.net>; Oyler, Jason <joyler@srbc.net>;
_Public Information and Outreach E_mail <{F128}.SRBC@dms.srbc.net>

Subject: Re: Response to Questions submitted March 12, 2021

Thank you!

What entity is responsible for enforcing the CWA, Section 401?

On Apr 19, 2021, at 9:23 AM, Ballaron, Paula <PBallaron@srbc.net> wrote:

Eric,

With regard to the Susquehanna River Basin Commission's (SRBC) oversight of TMI-2, SRBC regulates the withdrawal of water for use at the facility. Currently, TMI-2 does not have a docket approval (permit) from SRBC to withdraw groundwater or surface water. The new owner should make application for the quantity of water needed to maintain facility activities during decommissioning. As a first step in that process, SRBC recommends scheduling a pre-application conference with Commission staff. The application process is described and forms are available on the website.

The SRBC does not have any regulatory role in oversight of wastewater discharges at the Three Mile Island facility. That role resides with the commonwealth of Pennsylvania and the federal government, and more specifically with the PA Department of Environmental Protection and the Nuclear Regulatory Commission. Please contact those agencies regarding any protocols for approval.

Paula

Paula Ballaron, P.G.

Manager, Policy Implementation & Outreach

Susquehanna River Basin Commission

4423 North Front Street

Harrisburg, Pennsylvania 17110-1788

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strictly prohibited. If you have received this communication in error, please immediately notify the sender and then delete the communication from your electronic mail system.

From: Eric Epstein <epstein@efmr.org>
Sent: Thursday, April 15, 2021 8:02 PM
To: Ballaron, Paula <PBallaron@srbc.net>
Cc: Gavin, Andrew <AGavin@srbc.net>; Veno, Gene <gveno@srbc.net>; Oyler, Jason <joyler@srbc.net>;
_Public Information and Outreach E_mail <{F128}.SRBC@dms.srbc.net>; Eric Epstein
<epstein@efmr.org>; Alicia Duke <alduke@pa.gov>
Subject: Re: Response to Questions submitted March 12, 2021

Paula:

Can you please provide the protocol in place for TMI-2 to withdraw ground water and surface water as well as the discharge protocols.

NRC Response will be file don Monday.

Eric Epstein

On Apr 2, 2021, at 10:40 AM, Ballaron, Paula wrote:

Good morning, Eric.

This is in response to several of your questions regarding Exelon Generation Company, LLC's (Exelon's) Three Mile Island Generating Station, Units 1 and 2 (TMI-1 and 2) submitted on March 12, 2021.

Question 1: Provide the amount of water TMI can withdraw daily, and how much they pay for consumptive and surface water at TMI-1 and TMI-2.

As I stated previously, the consumptive use, surface withdrawal, and groundwater withdrawal approvals from SRBC have not changed yet as a result of the non-operating status. The docket approval for TMI-1 dates from 2011, and is attached for your review. SRBC does not have a docket approval for TMI-2.

The approved quantities at TMI-1 are:

Surface water withdrawal – up to 122.800 million gallons per day;

Groundwater withdrawal – 0.225 million gallons per day (as a 30-day average) from Wells A, B, and C;

Consumptive use – 19.200 million gallons per day (peak day).

The SRBC has no charges related to surface water withdrawals for any approved project. The project does not pay a consumptive use fee to the SRBC. The consumptive use is mitigated predominantly by releases of water stored in Cowanesque Reservoir during low flow periods, under an approved agreement (see Docket Section 7, no. 5).

*Question 2: Ask the NRC for the precise amount of water each reactor will need for decommissioning purposes, and inventorize the amount of water **not** used since TMI-1 no longer conveys heat from the reactor core to the steam turbine and there is no longer steam cycle heat transfers.*

The SRBC has no information from the NRC at this time concerning the amount of water required for decommissioning.

The attached spreadsheet shows SRBC's data concerning the amount of recent water use at TMI-1. As you are aware, TMI-1 was taken offline and ceased operating for the purpose of generating electric power on September 20, 2019. The data brackets the time when operations ceased, containing reported daily water withdrawals from all sources and consumptive use from September 1, 2019 through December 31, 2020.

SRBC staff have not specific information at this time to answer your other questions regarding disposal of any radioactive wastewater. The SRBC will continue to coordinate with agencies of its member jurisdictions about all of the issues related to this project.

Exelon staff indicated water withdrawal and consumptive use quantities are expected to continue to exceed Commission regulatory thresholds, but at a much lower magnitude due to cessation of power generation. As such, and recognizing the change in operations, Commission staff will review the water withdrawal and consumptive use demands, from all sources, based on the Facility's reasonable and foreseeable need to adequately address ongoing decommissioning activities. Commission staff anticipate that this review will be done as part of the groundwater well renewal applications, required by May 26, 2021.

Thank you again for your patience as we work to obtain clarity on the key water issues related to decommissioning.

Best regards,
Paula

Paula Ballaron, P.G.
Manager, Policy Implementation & Outreach
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From: Eric Epstein <epstein@efmr.org>

Sent: Friday, March 12, 2021 3:19 PM

To: Ballaron, Paula <PBallaron@srbc.net>

Cc: Gavin, Andrew <AGavin@srbc.net>; Veno, Gene <gveno@srbc.net>; Oyler, Jason <joyler@srbc.net>;
_Public Information and Outreach E_mail <{F128}.SRBC@dms.srbc.net>; Eric Epstein
<epstein@efmr.org>

Subject: Re: Before the SRBC, (Testimony of Eric J. Epstein, December 11, 2020)

Folks:

These questions were resubmitted at today's public hearing.
In our opinion, the initial responses were general and vague.
I wrote the questions in the hope of providing clarity, and
to
make sure you got the questions free from technical
interference.

In addition, to requesting more specific responses to
the
January 27, 2021 requests, I also asked the SRBC to:

- 1) Provide the amount of water TMI can withdraw daily,
and how much they pay for consumptive and surface water
at TMI-1 and TMI-2;
- 2) Ask the NRC for the precise amount of water each reactor
will need for decommissioning purposes, and inventorize
the amount of water **not** used since TMI-1 no longer
conveys
heat from the reactor core to the steam turbine and there
is no longer steam cycle heat transfers;

3) Requests from the DEP and the NRC for TMI-1's and TMI-2's plan(s) to dispose of radioactive water created by the decommissioning processes; and,

4) Identify CWA obligations as it pertains to what entity actually owns the water rights at TMI.

Gene and Paula did contact me during the meeting, and Gene reached out after the meeting. Unfortunatley, I've been in zoom meetings all afternoon. I will return to the office on Monday.

Have a great weekend!

Eric Epstein

On Mar 8, 2021, at 10:08 AM, Ballaron, Paula wrote:

Good morning, Eric

As Andy advised in December, we can't "add you to the [business] meeting agenda." We don't accept formal public comment at the business meetings, only at our public hearings that occur about a month prior to the business meetings. Written comments pertaining to items on the agenda submitted by the date noted in the meeting notice are provided to the commissioners prior to the business meeting for their consideration.

However, there may be an opportunity to provide general public comment on Friday. After adjournment of the meeting and at the discretion of the chair, the commissioners can accept public comment – generally time-limited to 3 minutes for oral comments.

Thanks,
Paula

Paula Ballaron, P.G.

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From: Eric Epstein <epstein@efmr.org>
Sent: Monday, March 8, 2021 8:16 AM
To: Ballaron, Paula <PBallaron@srbc.net>
Cc: Gavin, Andrew <AGavin@srbc.net>; Veno, Gene <gveno@srbc.net>; Oyler, Jason <joyler@srbc.net>; Eric Epstein <epstein@efmr.org>
Subject: Re: Before the SRBC, (Testimony of Eric J. Epstein, December 11, 2020)

Folks:

Please place me on the agenda for Friday's meeting.

Thanks,

Eric Epstein

On Jan 27, 2021, at 11:24 AM, Ballaron, Paula wrote:

Good morning, Eric.

Thank you for your comments to the Commission regarding the status of TMI. As stated in my last message, I reached out to staff at PADEP with some of your questions; I was hoping to complete our responses by last Friday, so please accept my apologies for the delay.

Based on my review, I've listed your questions below along with the Commission's response (blue).

1. TMI-Alert is requesting the Commission compel Exelon and FirstEnergy to reduce their excess water capacity. Three Mile Island's water use contracts are antiquated, and require modification and the adoption of revised "triggers" that reflect: 1) Used and useful life of plant, 2) Operational or deactivated status of power plants; and, 3) Termination contract with firm dates.

Commission staff is working with TMI operators to determine operating parameters considering the change in status of the plant, and will recommend modifications to docket approvals as appropriate.

2. [T]he SRBC should determine the amount of water needed on a daily basis - and returned to the river - for decontaminating and decommissioning TMI's reactors.

The consumptive use, surface withdrawal, and groundwater withdrawal approvals from SRBC have not changed yet as a result of the non-operating status, and TMI continues to submit the monitoring data required under these approvals. Commission staff recognize an ongoing need for water withdrawals and consumptive use related to decommissioning. The Commission will modify the approvals, as appropriate, based on all relevant data, including the reasonable foreseeable need for the decontamination and decommissioning processes at the project.

3. How is the new batch of contaminated radioactive water from Three Mile Island going to be treated? Will it be dumped directly into the river? The Susquehanna River Basin Commission needs to address and answer the following questions we raised in our Testimony on August 18, 2008: "What systems and components contain radioactively contaminated water? What methods are being used to monitor leakage of radioactive contaminated water from the systems and components? What methods are being used to monitor the grounds around the facility for potential leakage of radioactively contaminated water? What assurance is there against a leak of radioactively contaminated water remaining undetected long enough to permit migration offsite? Will Three mile Island dump radioactive water directly into the Susquehanna River?"

The SRBC does not regulate water treatment, water quality or quantity of discharges, or containment measures at a project site. Questions related to the treatment, storage, and disposal of radioactively contaminated water should be directed to agencies responsible for review and oversight of those activities, including the Pennsylvania Department of Environmental Protection Bureau of Radiation Protection. It is our understanding that the regulatory licensing for the radiological parts of the site remain at the federal level with the Nuclear Regulatory Commission.

4. Who or what actually owns the ground water and surface water rights for TMI-1? GPU? FirstEnergy? AmerGen? Exelon? Or, TMI-2 Solutions? Based on the Commission's protocols, doesn't ending the recognition of "pre-compact" or "grandfathered" consumptive uses or withdrawals upon a change of ownership, negate the transfer of project approvals?

The SRBC has docket approvals and contracts covering water withdrawals and use at TMI Unit 1; therefore, grandfathering is not a factor for any transfer of approvals.

Thank you for your patience and understanding as Commission staff continue to work to obtain clarity on the key water issues related to decommissioning.

Best regards,
Paula

Paula Ballaron, P.G.

Manager, Policy Implementation & Outreach
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From: Ballaron, Paula

Sent: Friday, January 15, 2021 9:28 AM

To: 'Eric Epstein' <epstein@efmr.org>; Gavin, Andrew <AGavin@srbc.net>

Cc: Veno, Gene <gveno@srbc.net>; Oyler, Jason <joyler@srbc.net>; 'Data Requests _ E_mail' <{F135020}.SRBC@dms.srbc.net>

Subject: RE: Before the Susquehanna River Basin Commission, (Testimony of Eric J. Epstein, December 11, 2020)

Hi Eric,

Yes, we received the correspondence.

Because SRBC doesn't regulate water treatment/processing, I've reached out to PADEP regarding some of your questions and am awaiting a response.

We'll have your formal reply soon.

thanks,

Paula

From: Eric Epstein <epstein@efmr.org>

Sent: Friday, January 15, 2021 8:38 AM

To: Gavin, Andrew <AGavin@srbc.net>

Cc: Veno, Gene <gveno@srbc.net>; Ballaron, Paula <PBallaron@srbc.net>; Oyler, Jason

<joyler@srbc.net>

Subject: Re: Before the Susquehanna River Basin Commission, (Testimony of Eric J. Epstein, December 11, 2020)

Folks:

Did you receive this correspondence on January 7, 2021?

Re: Testimony of Eric J. Epstein on December 11, 2020.

Thank you,

Eric Epstein

On Jan 7, 2021, at 1:20 PM, Eric Epstein wrote:

Folks:

When can we expect a formal response?

Best,

Eric Epstein
O

<TMIA Testimony, (12:11:20).pdf>

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<TMI Reporting Data.XLSX><20110610.PDF>

