

ECOLAW
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October 5, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Commissioner Kenneth L. Kimmel
Massachusetts Department of Environmental Protection
One Winter Street, Second Floor
Boston, MA 02108

Martha Coakley
Attorney General
One Ashburton Place, 20th Floor
Boston, MA 02108

John T. Herron, President
Entergy Nuclear Generation Company
and Entergy Nuclear Operations, Inc.
1340 Echelon Parkway
Jackson, MS 39213

C.T. Corporation System
155 Federal St., Suite 700
Boston, MA 02110

David Noyes, Operations Manager
Robert Smith, Site Vice President
Pilgrim Nuclear Power Station
600 Rocky Hill Road
Plymouth, MA 02360

Re: Written Notification of Damage to the Environment, G.L. c. 214, § 7A
Pilgrim Nuclear Power Station, Plymouth, MA: NPDES Permit No. MA 0000355

Dear Commissioner Kimmell, Attorney General Coakley, and Entergy representatives;

As the authorized representatives of a group of more than ten “persons domiciled within the Commonwealth,”¹ we are providing you with notice of the intent of the

¹ Under G.L. c. 214, § 7A, “‘person’ shall mean any individual, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or any political subdivision thereof, any administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representatives, agents or assigns.” Under G.L. c. 214, § 7A, any group of not less than ten persons

undersigned group of more than ten persons to commence an action pursuant to G.L. c. 214, § 7A, against the Department of Environmental Protection (the Department) and Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively referred to as Entergy) for damage to the environment that is occurring or is about to occur as a result of actions and/or failures to act by Entergy and the Department in connection with operations at the Pilgrim Nuclear Power Station (PNPS) in Plymouth.

Under G.L. c. 214, § 7A, any group of not less than ten persons domiciled within the Commonwealth may bring a lawsuit in Superior Court to prevent damage to the environment. “Damage to the environment” is defined to include “any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth” and explicitly includes water pollution and impairment of water resources.

G.L. c. 214, § 7A provides an action may be brought when the damage to the environment “constitutes a violation of a statute...or regulation the major purpose of which is to prevent or minimize damage to the environment.” The Department and/or Entergy have violated and continue to violate the following statutes and regulations the major purposes of which are to prevent or minimize damage to the environment: Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53, and its implementing regulations at 314 C.M.R. 2.0 (Permit Procedures), 314 CMR 3.00 (Surface Water Permits), and 314 C.M.R. 4.00 (Water Quality Standards); the Department’s enabling statute at G.L.c. 21A, § 8; and, the federal Clean Water Act, 33 U.S.C. § 1341. These violations interfere with the rights of the group of ten or more persons to a clean environment under Article 97 of the Massachusetts Constitution.

Article 97 of the Massachusetts Constitution states,

“The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment.”

The violations are described more fully below.

I. Clean Water Act permit violations

The Department and the U.S. Environmental Protection Agency (EPA) have issued a joint permit for PNPS under the federal Clean Water Act NPDES program. This permit authorizes Entergy to discharge pollutants to Cape Cod Bay, subject to pollution limits and conditions. The NPDES is also a permit issued by the Department under the Massachusetts Clean Waters Act, as amended, M.G. L. c. 21, §§ 26-53.² The NPDES permit expired in 1994, 16 years ago, but has been unlawfully extended by EPA.

domiciled within the Commonwealth is authorized to bring an action in Superior Court to prevent damage to the environment.

² EPA and DEP have a joint permit agreement governing the NPDES permit program. See, Agreement between EPA and Massachusetts Department of Water Pollution Control” (March 18, 1973).

The NPDES permit for Pilgrim was renewed and reissued in 1988 and in 1991. On August 30, 1994, EPA modified the 1991 permit through a formal notice and comment process. The 1994 Permit was due to

Entergy has violated and continues to violate the terms of the NPDES permit, as described more fully in the attached letter to the U.S. EPA and others (Clean Water Act, § 505 Notice of Intent to Initiate Citizen Suit for Violations at Pilgrim Nuclear Power Station, Plymouth, Massachusetts (§ 505 NOI Letter)). The § 505 NOI Letter is incorporated by reference herein.

The violations described in the § 505 NOI Letter constitute violations of the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53, and its implementing regulations. Entergy is strictly liable for the violations described in the § 505 NOI Letter and these violations constitute *per se* damage to the environment.

The Massachusetts Clean Waters Act provides that “[a]ny person who, directly or indirectly throws, drains, runs, discharges or allows the discharge of any pollutant into waters of the commonwealth except in conformity with a permit issued under section forty-three, or who violates any provision of this chapter, any valid regulation, order or permit prescribed or issued by the director thereunder . . .” shall be liable for a civil penalty not to exceed \$50,000 per day of such violation. G.L. c. 21, § 42. Entergy has violated and continues to violate §§ 42 and 43.

The Department has the duty to enforce the terms and conditions of the PNPS NPDES permit and to enforce the Massachusetts Clean Waters Act. The Act says it “shall be the duty and responsibility of the division [of water pollution control, within the Department] to enhance the quality and value of water resources and to establish a program for the prevention, control, and abatement of water pollution.” G.L. c. 21, § 27.

The Department also has a duty under its enabling statute, G.L. c. 21A, § 8, to “minimize and prevent damage or threat of damage to the environment.”

By ignoring Entergy’s violations of the Massachusetts Clean Waters Act, and by failing to prevent water pollution and the impairment of Cape Cod Bay, the Department is violating and continues to violate its duties under the Act, G.L. c. 21, § 27 and its enabling statute, G.L. c. 21A, § 8, causing damage to the environment.

II. Water Quality Standards

The Massachusetts Clean Waters Act regulations set minimum water quality standards, and no person may violate the standards. The water quality standard for Cape Cod Bay is “Class SA” which means,

“These waters are designated as an excellent habitat for fish, other aquatic life and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary contact recreation. In certain waters,

expire in 1996, at the end of the five-year term that started in 1991, but has been administratively extended by EPA for over sixteen years. EPA contends that the NPDES permit remains in effect pursuant to administrative extension provisions of 40 C.F.R. § 122.6. The Department has taken no action on the permit.

excellent habitat for fish, other aquatic life and wildlife may include, but is not limited to, seagrass. Where designated in the tables to 314 CMR 4.00 for shellfishing, these waters shall be suitable for shellfish harvesting without depuration (Approved and Conditionally Approved Shellfish Areas). These waters shall have excellent aesthetic value.”

G.L. c. 21, § 27; 314 CMR 4.05(4)(a).

Entergy discharges up to 510 million gallons per day of heated water to Cape Cod Bay. During normal operations, this water is up to 32 degrees Fahrenheit hotter than the water in Cape Cod Bay. During periodic operations to clean the pipes, Entergy discharges water that is up to 120 degrees into Cape Cod Bay. The Department has granted Entergy a variance from water quality standards and allows Entergy to discharge this thermal pollution to Cape Cod Bay. See, 33 U.S.C. § 1326 and 314 CMR 3.00. However, both the federal CWA and the Massachusetts Clean Waters Act require the Department to ensure that Entergy’s thermal pollution “continue[s] to comply with the variance standard for thermal discharges.” The Department has failed to require Entergy to support the continuation of the thermal pollution variance with studies based on the actual operating experience at PNPS, as required by 314 CMR 3.00, and has failed to require Entergy to otherwise meet the criteria under 314 CMR 3.00 for a variance. See also, 314 CMR 4.05(a)(2)(c).

As to Entergy’s cooling water intake structure (CWIS), the Department has failed to exercise its authority under G.L. c. 21, §§ 26-53 and 314 CMR 3.00 and 4.00 to condition Entergy’s CWIS operations to assure compliance of the withdrawal activity with 314 CMR 4.00, including, but not limited to, the water quality standard for Cape Cod Bay.

The Department has allowed and continues to allow Entergy to operate PNPS with an expired NPDES permit and has failed to show that the continued operation of PNPS complies with the water quality standard for Cape Cod Bay, as demonstrated in the § 505 NOI Letter and as stated above. Entergy’s failure to demonstrate compliance with the water quality standards and the Department’s failure to enforce the water quality standards is causing and/or will cause damage to the environment by causing or contributing to water pollution in Cape Cod Bay.

III. § 401 Certification

Under 33 U.S.C. § 1341 (§ 401), Massachusetts must certify to EPA that Entergy’s pollutant discharges to Cape Cod Bay under the NPDES permit will comply with state effluent limits and standards under the federal CWA, § 1311. By letter dated July 8, 1994, Massachusetts certified to EPA that Entergy’s operation of PNPS in a manner consistent with its NPDES permit will constitute compliance with the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26-53 (§ 401 Certificate).

As shown in the § 505 NOI Letter, Entergy is violating and continues to violate the effluent limits and standards under the federal CWA, § 1311. Therefore, the Department's § 401 Certificate is invalid because Entergy is not operating PNPS in a manner consistent with its NPDES permit and is violating effluent limits. By failing to revoke the § 401 Certificate, the Department is violating the Massachusetts Clean Waters Act, which imposes a duty and responsibility on the Department "to enhance the quality and value of water resources...." G.L. c. 21, § 27. The Department is also violating its duty under G.L. c. 21A, § 8 to "minimize and prevent damage or threat of damage to the environment" by failing to revoke the § 401 Certificate.

Conclusion

As shown above in Parts I – III, Entergy and the Department are violating statutes and regulations the major purposes of which are to prevent or minimize damage to the environment. The violations by Entergy and the Department constitute damage to the environment and interfere with the rights of the ten or more undersigned persons to a clean environment under Article 97 of the Massachusetts Constitution. The undersigned ten or more persons providing this notice pursuant to G.L. c. 214, § 7A intend to bring a civil action in Superior Court pursuant to that statute at least twenty-one days after this notice to seek equitable or declaratory relief concerning the violations and imminent violations described herein. Other parties or causes of action other than G.L. c. 214, § 7A, may be included in the Superior Court civil action.

This notice letter shall not in any limit the rights of any of the ten or more persons who are signatories hereto, or of any other person, to initiate a cause of action under G.L. c. 214, § 7A or another other law, with regard to PNPS or Entergy's operations thereof. Rights to bring such an action are explicitly reserved.

Should you have any questions about this letter, please contact either Attorney Sheehan or Attorney Bingham.

Submitted by,

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On behalf of the following persons domiciled in the Commonwealth:

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William Maurer	140 Gifford Street, Falmouth, MA 02540

Attachment: October 5, 2012 Letter re: Notice of Intent to Commence an Action under CWA § 505

cc:

Senator John Kerry
Senator Scott Brown
Representative Edward Markey
Representative Bill Keating
Governor Deval Patrick
Secretary of EOEEA, Richard Sullivan
Senator Therese Murray
Senator Marc Pacheco
Senator Dan Wolf
Senator James Eldridge
Senator Robert Hedlund
Senator Benjamin Downing
Senator William Brownsberger
Representative Tom Calter
Representative Vinny DeMacedo
Representative Sarah Peake
Representative Lori Ehrlich
Representative James Cantwell
Representative Anne Gobi
Representative Frank Smizik
Representative Kate Hogan
Representative Randy Hunt
Representative Dan Winslow
Town of Plymouth, Board of Selectmen
Town of Plymouth, Nuclear Matters Committee
Town of Duxbury, Nuclear Matters Committee