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INDEPENDENT REGULATORY
REVIEW COMMISSION

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November 25, 2009

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Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

NOV 30 2009

ENVIRONMENTAL QUALITY BOARD

Dear Board Members:

The following comments on the proposed regulations in Chapter 102 Erosion and Sediment Control and Stormwater Management (PA Bulletin, Vol. 39, No.35, 8/29/2009) are being submitted on behalf of Pennsylvania Power Company, Pennsylvania Electric Company, and Metropolitan Edison Company, the Pennsylvania electrical distribution companies of FirstEnergy Corp. (FirstEnergy). Together, these three companies are involved in the transmission and distribution of electricity, as well as energy management and other energy-related services. These three electric utility operating companies serve approximately 1.3 million customers in 49 Pennsylvania counties.

FirstEnergy supports the Department's efforts to update these regulations for the earth disturbing activities occurring in the Commonwealth. However, in reviewing the proposed rulemaking, FirstEnergy has identified sections that require clarification and reconsideration relative to the types of earth-disturbing activities unique to the utility industry. Because utility companies must maintain, repair, upgrade and install miles of overhead lines on property primarily owned by third parties, the mandates for forested riparian buffers and perpetual operation and maintenance of Post Construction Stormwater Management (PCSM) controls present compliance costs that will impact the rates of regulated utilities.

The following comments on the proposed regulations are respectfully offered for your consideration. Responses to the questions posed by the Water Resources Advisory Committee (WRAC) on the (1) permit-by-rule, (2) responsibility for long-term operation and maintenance of PCSM Best Management Practices (BMPs), and (3) mandatory riparian forest buffers are included in the comments.

1. Definitions - §102.1

Licensed Professional

FirstEnergy requests that the Department expand this category of professionals to include persons who are certified professionals in erosion and sediment control (CPESC), certified professionals in stormwater quality (CPSWQ), or certified arborists.

2. Obligation to Restore and Reclaim Water Quality and Existing and Designated Uses - §§102.1, 102.4(b)(4)(v), 102.8(b)(9), 102.11(a)(1)(2)

A number of the proposed additions and revisions to Chapter 102 require that earth disturbance activities and related PCSM activities be planned and conducted so as to "protect, maintain, reclaim and restore the quality of water and the existing and designated uses of water within the Commonwealth."

FirstEnergy agrees that a person involved in earth disturbance activities should be obligated both to protect and maintain the quality and existing and designated uses of waters of the Commonwealth during the activity and to implement BMPs to protect and maintain the water quality after the activities. However, FirstEnergy does not support the Department's position that the restoration and reclamation of the waters in the project area that have **not** been degraded by the current project should become the responsibility of the current permittee/developer.

FirstEnergy requests that the Department retain the words "to the extent practicable" in §§102.4(b) (4) (v) and 102.8(b) (9), and add it to the definition of BMP in §102.1, and to §102.11(a) (1) and (a) (2), to be consistent with the other sections using these terms. The words, "to the extent practicable" afford the permittee an opportunity to take a realistic position in restoring and reclaiming the water quality and existing and designated uses of the waters of the Commonwealth.

3. Stormwater Event - §102.4(b)(5)(x)

With respect to the operation and maintenance of BMPs and documented post-event inspection reports after a "stormwater" event, FirstEnergy requests that the Department consider the nature of multi-mile linear utility line projects and delete the words "stormwater event" and maintain the words, "measurable rainfall stormwater event". A clear definition of measurable rainfall stormwater event, such as 0.5 inches of rain in a 24-hour period, should be added to §102.1 of the proposed regulations to avoid uncertainty.

In utility projects, a "stormwater event" or "measurable rainfall stormwater event" may be occurring in one section of the project and not in another. The "stormwater event" or "measurable rainfall" can occur in an inactive (disturbed, but stabilized) section of the project and not in the active construction section of the project. It is impossible for a site inspector to be in every location simultaneously where Erosion and Sediment (E&S) BMPs are installed in such a project. FirstEnergy requests that the Department recognize the uniqueness of a linear project in the implementation of the post-rain event inspection requirements of the proposed rulemaking and identify an endpoint for those requirements, such as once the site is restored and permanently stabilized.

4. Inspection Reports - §102.4(b)(7)

FirstEnergy requests that the Department add the words "manned" to this section.

The E&S Plan, inspection reports and monitoring records shall be available for review and inspection by the Department or the conservation district at the **manned** project site during all stages of the earth disturbance activity.

Flexibility is needed in requiring inspection reports and monitoring records to be kept onsite during construction. Many small construction projects do not have an onsite construction trailer or other suitable place to keep these records. The inspections may be done by and kept electronically at a remote office, or be in possession of an inspector who is not present on site at all times (such as a consultant or licensed professional). As long as the records can be produced promptly on request, (within 24 hours) – that should be sufficient to meet the intent of this requirement.

5. Permit Coordination - §102.4(d) and (e)

Electric utility projects are frequently phased projects. Some phases require earth disturbance, while others do not. However, Chapter 105 permits are often required for the non-earth disturbing phases. For example, a Chapter 105 GP-5 permit may be required for upgrading an aerial utility line crossing of a creek or stream or a GP-11 may authorize reconductoring lines, neither of which involve earth disturbance. But these same lines may be leaving a substation, where earth disturbance is required for installing the substation equipment associated with the line upgrade.

FirstEnergy requests the Department's confirmation that a permittee may begin earth disturbance work in a substation or similar site before the permits for non-earth disturbing line work have been obtained. Frequently, below grade work must be completed before the line work is either designed or scheduled.

6. Responsibility for Long-term Operation and Maintenance of the PCSM Plan - §102.5 (f), 102.7(b)(5), §102.8(f)(10), §102.8 (f)(11), §102.8(m)

The proposed rulemaking adds language at §102.5(f) stating that "[a] person proposing earth disturbance activities requiring a permit or permit coverage under this chapter shall be responsible to ensure implementation and long-term operation and maintenance of the PCSM Plan." Additionally, in new §102.8(m) (PCSM requirements), the proposed regulations provide that:

[u]nless a different person is approved in writing by the Department, operation and maintenance of PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMP is located. The deed for any property containing a PCSM BMP shall identify the PCSM BMP and provide notice that the responsibility for operation and maintenance of the PCSM BMP is a covenant that runs with the land and that is enforceable by subsequent grantees. A grantor that fails to comply with this requirement shall remain jointly responsible with the landowner for operation and maintenance of the PCSM BMPs located on the property.

See §102.8(m).

While FirstEnergy agrees that identifying a responsible party to ensure long-term operation and maintenance of the PCSM plan is crucial, the regulatory language is too prescriptive, assumes the need for engineered PCSM BMPs on every project requiring an NPDES Permit for Discharge of Stormwater from Construction Activities (NPDES Permit) and does not indicate that operation and maintenance obligations may terminate when site is stabilized or when a Notice of Termination (NOT) is approved.

Many electric utility projects do not result in grade changes or increased impervious surface area and, once restoration is complete, do not require implementation and maintenance of PCSM BMPs. Further, the landowner is very often not the utility, and may have neither the obligation to take on this role under existing agreements or add such language to its deed.

Accordingly, FirstEnergy seeks language to provide flexibility both in determining whether implementation and maintenance of PCSM BMPs is warranted and in identifying a responsible party. Utility projects that are multi-mile and linear in scope necessarily run across or through consecutive properties owned by different landowners. The permittee likely does not own the property and may not be the party responsible for maintenance or have control over how the property within the easement or right-of-way is used by the landowner. Thus, flexibility and communication between the permittee and the Department on a case-by-case basis is necessary to determine both the need for PCSM BMPs on a particular project and the party responsible for long-term operation and maintenance of PCSM BMPs.

Adding the language "if necessary" to the end of proposed §102.5(f) should provide the requested flexibility, in part. Additionally, providing language in proposed Section 102.8(m) which acknowledges the unique position of the regulated utility industry, and provides for the naming of a responsible party in cooperation with the Department, without necessarily requiring the deed restriction, will provide flexibility and a practical solution to this issue.

If the Department retains the position that permittees (utility companies) will be responsible for maintaining PCSM BMPs, FirstEnergy requests that the Department reconsider the feasibility, practicality, cost, and future effect of this requirement on the property. See the sections of the proposed rulemaking cited above. Compliance will require hiring a qualified professional to complete the tasks in §102.8(f) (10). As an electric utility, these costs of distribution and/or transmission service may be passed on to the ratepayer. If the property owner becomes responsible, he then assumes the cost as a private citizen who is penalized because he provided right-of-way for utility services. This additional cost will begin to be reflected in the utilities' right-of-way costs, which in turn, may be passed on to the ratepayer.

Currently, the NPDES Permit is required to be terminated by the acceptance of the NOT after an inspection by the conservation district that deems a site satisfactorily stabilized. FirstEnergy requests that the Department define an end point for conducting inspections of a stabilized utility line construction site. There is no value in continuing inspections and maintaining inspection records of a site that has no PCSM BMPs. The Department should continue the practice of terminating the permit after the site has been uniformly covered with 70% perennial vegetation or stabilized with another acceptable BMP, in lieu of the perpetual long-term operation and maintenance of the site, as stated in §102.8(m).

7. Permit Fees - §102.6 (b)(2)

FirstEnergy acknowledges the Department's need to increase the fees for the permits issued for projects in the Chapter 102 program. FirstEnergy recommends that the Department adopt a tiered approach to the fee increases, similar to the fee schedule maintained by many conservation districts based on ranges of acreage.

The increased fee schedule is acceptable, provided, the fees are used to augment the agency resources to improve responsiveness and provide reasonable application processing timelines. As proposed, these rules only impose timelines on the permittee for response to application deficiencies. Timelines should be spelled out for both completeness and technical reviews by the agencies.

8. Forested Riparian Buffers - §102.4(b) (5) (xv), §102.14

FirstEnergy questions whether the inclusion of §102.14 is appropriate as a mandate in this rulemaking. This is only one of many BMPs in the PA Stormwater Manual. The discussion of forested riparian buffers in the PA Stormwater Manual presents this option as one that requires considerable planning. The first step in that planning is obtaining landowner permission and support. As presented in the proposed rulemaking, the landowner would not have a choice of BMPS, because this BMP is mandated in the situations identified in §102.14 (a) (1) and (2).

The PA Stormwater Manual also advises that the site conditions must be well understood, the buffer width could be flexible, and the appropriate plants should be selected for the site. The prescription for the mandated buffer in §102.14 is written to be implemented without deviation, which appears contrary to the language in the PA Stormwater Manual. If §102.14 remains in the proposed rulemaking, FirstEnergy requests that the Department replace the word, "shall" with "should" throughout this section. This requested change would be consistent with §102.11(3) that references the *Riparian Forest Buffer Guidance* with **various** design, construction, and maintenance standards.

Additionally, §102.14(e) (4) (i) lists construction or placement of utilities in a forested riparian buffer as an acceptable activity. Overhead electric utility lines could not be constructed in a forested riparian buffer. These overhead lines require a right-of-way varying in width from 30 to 100 feet, that must be cleared of trees and brush that could grow into the lines. In addition, this clearance requirement already limits the property owner in the development allowed in the right-of-way or easement granted to a utility. The requirement to maintain or plant a forested buffer is contrary to present practices and federal requirements and will result in additional utility costs for property acquisition and possible buffer maintenance. Ultimately, these additional costs will fall on the ratepayer as transmission and /or distribution charges. While FirstEnergy acknowledges the biological value of the buffer, the Department should consider buffers other than forested, if necessary, for linear utility line projects.

In siting new utility lines, a company can try to avoid development within 150' of an Exceptional Value (EV) stream with minimal earth disturbance in an effort to protect the water resources in the Commonwealth. However, §102.14(a) (2) appears to grant the Department discretionary authority to require a forested riparian buffer in any project site. FirstEnergy requests that §102.4(a) (2) be deleted from the proposed rulemaking. It creates too much uncertainty and possible cost for the regulated public by potentially requiring acquisition of additional property and re-designing a project to include a forested buffer after the permit application has been submitted. Construction budgets and schedules are developed based on best available field data, project need, and specific permitting criteria. Requiring such vague permit criteria creates unnecessary risk in the project.

WRAC has requested input on expanding the requirement for a forested riparian buffer along all water bodies of the Commonwealth, not limited to EV waters. First Energy maintains that the language as proposed is too prescriptive and unworkable when it is applied to linear utility projects that are often constructed on non-utility property subject to existing rights-of-way and easements.

Even if the requirement is limited to projects located within an EV watershed, FirstEnergy questions whether the riparian buffer must be forested, particularly because the North American Electric Reliability Corporation (NERC) regulations do not allow woody vegetation to be planted where it could interfere with overhead lines. Flexibility and cost consideration are necessary and warranted, particularly in the area of the typical utility project involving overhead transmission and distribution lines where costs are passed on to all ratepayers.

Moreover, FirstEnergy questions whether this requirement is appropriate in the context of preventing accelerated erosion and sedimentation, i.e., do the assumed environmental benefits decrease erosion and sedimentation due to earth disturbance activity. A better way in which to promote the establishment of riparian buffers (all types) along waterways and achieve the desired environmental benefits would be through the creation of incentives, such as post-construction stormwater credits, rather than mandates.

9. Permit-by-Rule - §102.15

FirstEnergy commends the Department in its effort to develop a permit-by-rule and welcomes a streamlined, shortened process. However, as proposed for Chapter 102, the permit-by-rule is unlikely to be of any significant advantage to the regulated utility industry. The restrictions on its applicability and the extensive prescriptive requirements of the permitting process and package are equivalent to or more stringent than the requirements for the General and/or Individual NPDES Permit.

The preparer of the E&S Plan and the PCSM Plan for this permit-by-rule must be a licensed professional, as defined in the proposed rulemaking. Holding a license in one of the designated disciplines does not necessarily qualify the licensee to prepare either of those plans. For example, a person who has prepared a portfolio of approved E&S Plans is a better choice to prepare the plans required by the permit-by-rule, than a professional mechanical engineer who designs pumps.

The Department offers a 30-day review time for the permit-by-rule, but in spite of the preliminary work required prior to the permit submittal, the application may still be denied and may exceed the 30-day review period. The permittee would then be required to apply for one of the other permits identified in Chapter 102.

Shortage of personnel in both PADEP and the conservation districts makes the 30-day response time for review of this permit application an unrealistic timeframe.

While FirstEnergy is supportive of a "permit-by-rule", it is not convinced that the process proposed in this rulemaking is streamlined, less prescriptive or less costly than adhering to the general permit process.

10. Typographical

§102.5 (a) An NPDES permit stormwater discharges associated with construction activities.
FirstEnergy requests that the Department insert the word "for" after "permit" to read,

§102.5 (a) An NPDES permit for stormwater discharges associated with construction activities.

§102.7 (c) Until the permittee has received written acknowledgement an NOT...
FirstEnergy requests that the Department insert the word "of" after acknowledgement to read,

Until the permittee has received written acknowledgement of an NOT...

FirstEnergy thanks you for the opportunity to express comments on these proposed regulations and trusts that the Department will consider these remarks during the formulation of the final regulation.

Respectfully submitted,



fsw

Fred J. Starheim
Manager, Environmental Energy Delivery
Services

FJS/KMK/pcp

Summary of Comments of First Energy Corp.

Proposed Rulemaking to Amend 25 PA Code Chapter 102 (relating to erosion and sediment control and stormwater management)

Earth disturbance activities undertaken by regulated utilities in Pennsylvania consist primarily of multi-mile linear projects over real estate owned by others, i.e., non-utility third party owners. Utilities are most often engaged in projects to which they have rights-of-way or easements. In many situations, the utility is not the landowner. FirstEnergy's concerns in this proposed rulemaking focus on the unique situation of the utility industry, which must maintain, repair, upgrade, and install miles of overhead lines on property owned by third parties.

1. Permit-by-Rule

The permit-by-rule proposed as a shortened and streamlined process is unlikely to be of any significant advantage to the regulated utility industry. The restrictions on its applicability and the extensive prescriptive requirements of the permitting process and package are equivalent to or more stringent than the requirements for the General and/or Individual NPDES Permit. FirstEnergy supports a permit-by-rule, where a regulated entity is "deemed" to have a permit under specific identified conditions without the need to submit an application.

2. Responsibility for Long-term Operation and Maintenance of the Post Construction Stormwater Management (PCSM) Plan

Identifying a responsible party to ensure long-term operation and maintenance of the PCSM Plan is crucial, but it is not feasible or practical to require utility companies to assume that responsibility on land they do not own. If the electric utility assumes these operational costs, they may be passed on to the ratepayer. If the property owner becomes responsible, he then assumes the cost as a private citizen who is penalized because he provided right-of-way for utility services. This additional cost will begin to be reflected in the utilities' right-of-way costs, which in turn, may be passed on to the ratepayer.

3. Forested Riparian Buffers

Because this is only one of many Best Management Practices (BMPs) in the PA Stormwater Manual, FirstEnergy questions whether its inclusion as a required BMP is appropriate in this rulemaking. Furthermore, the language as proposed for the forested riparian buffer is too prescriptive and unworkable when it is applied to linear utility projects that are often constructed on non-utility property subject to existing rights-of-way and easements.

FirstEnergy opposes mandating this BMP to be used for work along all Pennsylvania creeks and streams because it is not convinced that the assumed environmental benefits of forested riparian buffers will decrease erosion and sedimentation due to earth disturbance activity in every situation.

4. Obligation to Restore and Reclaim Water Quality and Existing and Designated Uses

A person involved in earth disturbance activities should be obligated both to protect and maintain the quality and existing and designated uses of waters of the Commonwealth during the activity and to implement BMPs to protect and maintain the water quality after the activities. However, FirstEnergy does not support the Department's position that the restoration and reclamation of the waters in the project area that have **not** been degraded by the current project should become the responsibility of the current permittee/developer.

FirstEnergy requests that the Department retain the words "to the extent practicable" in §§102.4(b)(4)(v) and 102.8(b)(9), and add it to the definition of BMP in §102.1, and to §102.11(a)(1) and (a)(2), to be consistent with the other sections using these terms. The words, "to the extent practicable" afford the permittee an opportunity to take a realistic position in restoring and reclaiming the water quality and existing and designated uses of the waters of the Commonwealth.