



February 19, 2013

**VIA E-MAIL AND U.S. MAIL**

Docket No. CWA-05-2013-0005  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard, Mail Code E-19J  
Chicago, IL 60604

**RECEIVED**  
FEB 20 2013  
REGIONAL HEARING CLERK  
USEPA  
REGION 5

**RE: Proposed Consent Agreement and Final Order Regarding Clean Water Act  
Violations at the FirstEnergy Bayshore Power Plant in Oregon, Ohio**

Dear Regional Hearing Clerk:

Please accept these comments submitted pursuant to 40 C.F.R. § 22.45(c) on behalf of Lake Erie Waterkeeper, Sierra Club, Natural Resources Defense Council, Ohio Environmental Council, and the Alliance for the Great Lakes, who wish to participate in this proceeding regarding the U.S. Environmental Protection Agency's proposed Consent Agreement and Final Order ("CAFO") to address alleged violations of the Clean Water Act ("CWA") at FirstEnergy Generation Corp.'s ("FirstEnergy") Bayshore Power Plant in Oregon, Ohio (Docket No. CWA-05-2013-0005).

We write to express our concern that EPA is proposing to accept a Supplemental Environmental Project ("SEP") that does not directly benefit the Maumee Bay and Western Lake Basin ecosystem that was allegedly harmed by FirstEnergy's CWA violations at Bayshore that are the subject of the proposed CAFO. Rather, EPA is proposing to accept as a SEP FirstEnergy's donation of land in North Kingsville, Ohio to a land conservancy to mitigate its liability for penalties for the alleged Bayshore violations, despite the fact that this land is over 150 miles away from the Bayshore plant, in the ecologically distinct Central Lake Erie Basin.<sup>1</sup> Accepting the proposed SEP to mitigate liability for FirstEnergy's alleged CWA violations here would be arbitrary, capricious, and contrary to law, because the proposed SEP lacks a sufficient "nexus" with the alleged violations under EPA's 1998 SEP Policy.

FirstEnergy's Bayshore plant is located near where the Maumee River meets Maumee Bay, one of the most biologically productive, commercially valuable, and ecologically sensitive fish spawning grounds in the United States. Maumee Bay and the Western Lake Erie Basin are the warmest and shallowest portions of the Great Lakes system, and they face a unique combination of stresses and challenges. Blooms of toxic-blue green algae carpet Western Lake Erie each year due to phosphorous pollution from agricultural runoff, wastewater treatment

<sup>1</sup> According to the proposed CAFO, the land consists of 59.99 acres of property valued at \$132,938. (Proposed CAFO ¶ 72.) FirstEnergy has agreed to donate the land to the Western Reserve Land Conservancy along with \$40,000 to be used to maintain, conserve, and preserve the property. (*Id.* ¶ 70.) The proposed CAFO also requires FirstEnergy to pay a civil penalty of \$41,667 to the U.S. Treasury. (*Id.* ¶¶ 64-65.)

plants, and other sources. Invasive species such as the zebra and quagga mussel have transformed the native ecology, making the ecosystem less resilient. Climate change is causing warmer temperatures, lower lake levels, and more runoff and sewage overflow pollution from extreme rain events. And on top of all of that, facilities such as FirstEnergy's Bayshore plant continue to exacerbate these problems with their own thermal pollution, wastewater, and fish impingement and entrainment. Although FirstEnergy recently retired three of the Bayshore plant's four generating units, the remaining unit continues to discharge pollution into Maumee Bay and withdraw hundreds of millions of gallons of water every day from this uniquely valuable and uniquely stressed ecosystem.

EPA's discretion to accept the proposed SEP here is governed by the Agency's 1998 SEP Policy, which states that to be considered as a SEP to mitigate liability for alleged environmental harm, a project not only "must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action," it also "must have adequate nexus," *i.e.*, "relationship between the violation and the proposed project." (EPA, *EPA Supplemental Environmental Projects Policy*, at 5 (May 1, 1998), available at <http://www.epa.gov/enforcement/documents/policies/sep/fnlsup-hermn-mem.pdf>). The Policy further states that "[t]his relationship only exists if:

- a. the project is designed to reduce the likelihood that similar violations will occur in the future; or
- b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
- c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue."

(*Id.*) According to the Policy, "[n]exus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic area," which the Policy defines as "generally . . . within 50 miles of the site on which the violations occurred." (*Id.*)

The proposed SEP here does not satisfy this definition of "nexus." The only possible argument for a sufficient nexus here between the proposed SEP and the alleged violations is under paragraph (c),<sup>2</sup> in that the donation of the North Kingsville land for preservation would arguably benefit the environment of the Lake Erie Basin as a whole. But as noted above, the North Kingsville Land is located in the Central Lake Erie Basin, over 150 miles away from the Bayshore plant, in an ecologically distinct portion of Lake Erie. Moreover, because Lake Erie waters flow from west to east, the proposed SEP is downstream of Maumee Bay and Western Lake Erie. Although the proposed CAFO asserts that the North Kingsville land contains high-quality wetlands and bird habitat, and preservation of this land would undeniably provide environmental benefits consistent with the goals of the CWA, those benefits would not directly

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<sup>2</sup> Paragraphs (a) and (b) clearly do not apply: FirstEnergy's proposed donation of land in North Kingsville, Ohio for preservation will not reduce the likelihood that the alleged violations at issue here – unlawful discharges of oil into Maumee Bay and unlawful onshore management of oil at Bayshore – will occur in the future, nor will the preservation of this land reduce any adverse impact to public health and environment in the Western Lake Erie Basin from FirstEnergy's alleged violations.

address the harms to Maumee Bay and Western Lake Erie caused by FirstEnergy's alleged CWA violations at Bayshore.

In the absence of a sufficient nexus between the proposed SEP and the alleged violations, EPA's approval of the proposed CAFO here would be arbitrary, capricious, and contrary to law. (See Memorandum of Walker B. Smith, EPA Office of Regulatory Enforcement, *The Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy*, at 2 (Oct. 31, 2002) ("If there is a relationship between the alleged violation and the SEP, then it is within the Agency's discretion to take the SEP into account as a mitigating factor when determining the amount of a penalty that the Agency will agree to as part of an overall settlement. If there is no nexus, then the Agency does not have that discretion.") (citing 31 U.S.C. § 3102), available at <http://www.epa.gov/enforcement/documents/policies/sep/sep-nexus-mem.pdf>; see also Memorandum of Walker B. Smith, EPA Office of Regulatory Enforcement, *Reminder that Waiver is Required for Supplemental Environmental Projects Not Meeting All Conditions of SEP Policy*, at 1-2 (Mar. 21, 2005) ("In no event can the nexus requirement of the SEP Policy be waived."), available at <http://www.epa.gov/enforcement/documents/policies/sep/sep-waiver32105.pdf>.)

Instead of accepting the proposed SEP as mitigation for FirstEnergy's alleged violations at Bayshore, EPA should require the company to invest in a project that would address the unique stresses and challenges faced by Maumee Bay and Western Lake Erie, including the ongoing harm that the operation of the Bayshore plant causes to that ecosystem. Such a project could include preservation of land within the Western Lake Erie Basin that contributes to water quality improvement, pollution reduction, and habitat restoration in that ecologically distinct region. In addition, consistent with EPA's SEP Policy, local municipalities, community groups, and members of the public in the Western Lake Erie Basin should be consulted in the design of a new SEP. EPA is already supporting a number of successful similar projects in the Western Lake Erie Basin through the Great Lakes Restoration Initiative, and requiring FirstEnergy to propose a SEP located in the Western Lake Erie Basin would further support these critical ongoing efforts to restore and protect Western Lake Erie.

For the reasons set forth above, Lake Erie Waterkeeper, Sierra Club, Natural Resources Defense Council, Ohio Environmental Council, and the Alliance for the Great Lakes respectfully urge EPA to withdraw the proposed CAFO and require FirstEnergy to propose a new SEP to mitigate its alleged CWA violations at Bayshore that has a sufficient nexus to the Maumee Bay and Western Lake Erie ecosystem.

Thank you for the opportunity to comment.

Sincerely,



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Submitted on behalf of:

Lake Erie Waterkeeper  
Sierra Club  
Natural Resources Defense Council  
Ohio Environmental Council  
Alliance for the Great Lakes

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