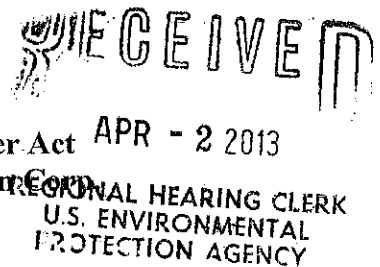


**EPA Response to Comments regarding Proposed Clean Water Act  
Consent Agreement and Final Order to FirstEnergy Generation Corp.**

APR - 2 2013



Background

On February 19, 2013, the public comment period closed for three proposed Clean Water Act (CWA) Consent Agreement and Final Orders (CAFOs) to resolve FirstEnergy Generation Corp.'s (FirstEnergy's) alleged violations of the CWA in connection with oil spills at three facilities in Ohio.<sup>1</sup> To settle the alleged violations, FirstEnergy agreed to pay a penalty of \$125,000 and perform a Supplemental Environmental Project (SEP) valued at \$471,000, to be divided among the three facilities. The SEP requires FirstEnergy to donate and transfer fee title to 194.52 acres of land located near Lake Erie in North Kingsville, Ohio to the Western Reserve Land Conservancy (WRLC).<sup>2</sup> The CAFO for the Bay Shore facility, of particular relevance here, requires FirstEnergy to donate and transfer 59.99 acres of the total 194.52 acres of land, and donate \$40,000 to WRLC to fund the future maintenance and preservation of the property.

Comments Received

EPA received two public comments, both relating to the proposed CAFO for FirstEnergy's Bay Shore facility, located at 4701 Bay Shore Road in Oregon, Ohio. The public comments, which were submitted by environmental groups and the Lake Erie Waterkeeper, argue that the proposed SEP for the Bay Shore facility does not meet the definition of "nexus" under EPA's 1998 SEP Policy.<sup>3</sup> The commenters do, however, agree that the proposed SEP would "undeniably provide environmental benefits consistent with the goals of the CWA." Nevertheless, the commenters contend that because the land to be transferred by FirstEnergy is located in the Central Lake Erie Basin, which is "ecologically distinct" from the Western Lake Erie Basin where the Bay Shore facility is located, and is over 150 miles away from the Bay Shore facility, the benefits from the proposed SEP "would not directly address the harms to Maumee Bay and Western Lake Erie caused by FirstEnergy's alleged CWA violations at Bayshore."

The commenters further state that "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."

While not required by the CWA or the applicable regulations to provide a response to these public comments, EPA is providing a response.

<sup>1</sup> FirstEnergy owns and operates several power plants in Ohio and other states.

<sup>2</sup> WRLC is a non-profit organization with the mission to preserve and protect northeast Ohio's natural resources by ensuring the permanent protection, restoration and preservation of properties with high conservation value through fee ownership.

<sup>3</sup> Earthjustice submitted a comment on behalf of the Lake Erie Waterkeeper, Sierra Club, National Resources Defense Council, Ohio Environmental Council, and Alliance for the Great Lakes. Additionally, the Lake Erie Waterkeeper, who is also a member of the Oregon City Council and lives near the Bay Shore facility, submitted a comment.

## EPA's Response

EPA has considered the comments received, and has determined that the proposed SEP to be performed by FirstEnergy meets the requirements of EPA's 1998 SEP Policy for the reasons described below. EPA's Office of Civil Enforcement has concurred in this determination.

Under EPA's 1998 SEP Policy, EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of any settlement.<sup>4</sup> All SEPs must satisfy the "nexus" requirement, which the SEP Policy defines as follows:

All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if . . . the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

In order to satisfy this requirement, nexus can be demonstrated if a SEP: (1) addresses the same pollutant that was the subject of the violation; (2) addresses the same health effects as caused by or potentially caused by the violation; or (3) addresses the same ecosystem where the violation occurred, such as the same watershed or airshed. The SEP Policy states that "nexus 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." As a footnote, the SEP Policy further provides:

The immediate geographic area will generally be the area within a 50 mile radius of the site on which the violations occurred. Ecosystem or geographic proximity is not by itself a sufficient basis for nexus . . . In some cases, a project may be performed at a facility or site not owned by the defendant/respondent.

SEP Policy at 5-6. EPA has made clear that geography alone does not create nexus. See Memorandum of Walker B. Smith, EPA Office of Regulatory Enforcement, Importance of the Nexus Requirement in the SEP Policy at 2.<sup>5</sup> That Memo further provides that 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." EPA guidance indicates that a SEP could still satisfy the nexus requirement if it is performed at a location more than 50 miles away from the facility where the violation occurred, *e.g.*, if it is performed at a different site in the same ecosystem. When establishing nexus, the focus is on the relationship between the alleged

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<sup>4</sup> <http://www.epa.gov/enforcement/documents/policies/sep/sepnexus-mem.pdf>.

<sup>5</sup> <http://www.epa.gov/enforcement/documents/policies/sep/sepnexus-mem.pdf>.

violation and the proposed SEP, and not the exact distance between the facility where the violation occurred and the location where the SEP is to be performed.<sup>6</sup>

FirstEnergy's proposed SEP has an adequate nexus to the alleged violations at the Bay Shore facility because the land to be donated and transferred to WRLC is located along Lake Erie, within the Lake Erie watershed, which is where the alleged violations occurred. All three of FirstEnergy's oil spills impacted Lake Erie and potentially harmed the surrounding watershed.<sup>7</sup> The spill that occurred from an outdoor tank at the Bay Shore facility traveled over 5 miles before reaching Lake Erie, which potentially harmed plant and animal life. Therefore, there is a clear relationship between the oil spills and the donation of land located in the Lake Erie watershed.

The SEP reduces the overall risk to the environment potentially affected by FirstEnergy's alleged violations of the CWA because the preservation of this ecologically important land helps offset the potential harm done to Lake Erie ecosystem and the surrounding watershed caused by FirstEnergy's oil spills. The property to be donated consists of high quality forested wetlands and class II and class III primary headwater habitat bedrock streams which support unique, permanent aquatic communities; process nutrients and sediment; dissipate energy; maintain stream energy dynamics and maintain and protect downstream beneficial uses.<sup>8</sup> Thus, the preservation of this property provides direct benefits by reducing adverse impacts of pollution to the Lake Erie watershed.

Additionally, wetlands, particularly the high quality wetlands located on the property, are known to improve water quality through removal of suspended solids and absorption of excess nutrients. Wetland functions include water quality improvement, floodwater storage, fish and wildlife habitat, and biological productivity.<sup>9</sup> Preservation of these wetlands, near a highly developed industrialized area, will provide reduction of pollutants within the Lake Erie watershed and habitat for a diverse species of plants and animals including rare, threatened and endangered species, such as the Indiana bat, Small Fringed Maple, Appalachian Sedge, and Gray Birch. The WRLC has identified the property as a critical migratory bird habitat stopover area along the shores of Lake Erie.

It is also important to consider the proposed CAFO for the Bay Shore facility in connection with the other two proposed settlements with FirstEnergy, which would result in the preservation of 194.52 contiguous acres of land and \$40,000 donated to WRLC to preserve that land. These three adjacent properties, and associated funding to maintain and preserve them, cumulatively

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<sup>6</sup> The distance from the property to be donated to each of the three facilities is approximately 65 miles (Lake Shore facility), 97 miles (former Edgewater facility), and 181 miles (Bay Shore facility). EPA only received comments on the proposed CAFO for the Bay Shore facility.

<sup>7</sup> EPA has defined "watershed" as the area draining into the traditional navigable water. See [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf) at 8.

<sup>8</sup> [http://www.epa.state.oh.us/portals/35/wqs/headwaters/HWH\\_keyfindings\\_jan2003.pdf](http://www.epa.state.oh.us/portals/35/wqs/headwaters/HWH_keyfindings_jan2003.pdf).

<sup>9</sup> <http://water.epa.gov/type/wetlands/outreach/upload/functions-values.pdf>.

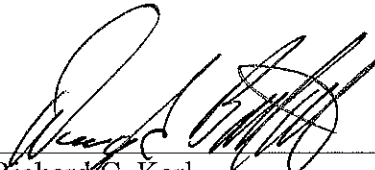
provide a greater eco-habitat than they would as three discrete SEPs of smaller size closer to the individual FirstEnergy facilities.<sup>10</sup> The preservation of this large ecologically important area will improve the habitat and, ultimately, the water quality of the Lake Erie watershed as a whole, which includes the area near the Bay Shore facility. In fact, the Lakewide Management Plan for Lake Erie, which was developed as part of the Great Lakes Water Quality Agreement between the United States and Canada, found the availability of natural lands to be the key driver of ecosystem sustainability in the Lake Erie watershed. The Plan also found that changes in land use that represent a return towards more natural landforms or that mitigate the impacts of urban, industrial, and agricultural land use are the most significant actions that can be taken to restore the Lake Erie ecosystem.

The commenters indicated that because the waters in Lake Erie flow from west to east, the proposed SEP would be located downstream of Maumee Bay and western Lake Erie, where the Bay Shore facility is located, and therefore a SEP located closer to the Maumee Bay would be more appropriate. However, given the direction of the water flow, pollutants from the Maumee Bay area would be carried eastward, towards the location of the SEP. Thus, the SEP would help to improve the overall health of Lake Erie and reduce the impacts of pollutants in the Lake being carried in the west to east currents from the Maumee Bay area.

The commenters also requested that EPA require FirstEnergy to invest in a project that specifically addresses Maumee Bay and Western Lake Erie. While EPA cannot require that a respondent reach out to a community for SEP suggestions, the Agency encourages violators to consult with communities and environmental groups when considering and developing SEP proposals. However, due to the confidential nature of negotiations, EPA is limited in the information that it can provide to communities, and the type of outreach that can be conducted. EPA reviews and approves any SEP proposed; however, EPA cannot require a respondent to perform a SEP, or dictate any particular SEP. EPA is aware of and appreciates the importance of communities and environmental groups in developing SEPs. EPA has consulted with WRLC to confirm that the property to be donated has high ecological value to the Lake Erie watershed.

Thus, the proposed SEP meets the nexus requirements under EPA's 1998 SEP Policy because the SEP will reduce adverse impacts of pollution to the Lake Erie watershed, which is the same ecosystem potentially harmed by the alleged violations from FirstEnergy facilities located along Lake Erie.

3/27/13  
Date

  
Richard C. Karl  
53 Director  
Superfund Division  
U.S. Environmental Protection Agency, Region 5



APR - 2 2013

<sup>10</sup> Additionally, the Bay Shore facility spill resulted in significantly less oil reaching Lake Erie than the other two spills. FirstEnergy reported that approximately 5 gallons of oil reached Lake Erie as a result of the spill.

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY



**EARTHJUSTICE**

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

February 19, 2013

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USEPA  
REGION 5

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

**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/falsup-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,



Thomas Cmar  
Earthjustice  
5042 N. Leavitt St., Ste. 1

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FEB 20 2013

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USEPA  
REGION 5

Chicago, IL 60625  
(312) 257-9338  
tcmar@earthjustice.org

Submitted on behalf of:

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

CC: Susan Hedman, Regional Administrator  
United States Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard, Mail Code R-19J  
Chicago, IL 60604  
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REGION 5



Whitehead, LaDawn

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FEB 19 2013

REGIONAL HEARING CLERK  
USEPA  
REGION 5

From: idaemon.rtpnc.epa.gov [idaemon@hazelnut3.epa.gov]  
Sent: Tuesday, February 19, 2013 4:27 PM  
To: Whitehead, LaDawn  
Subject: (049172645) R5 Public Notice Comments

1.DocketNumber:CWA-05-2013-0005  
2.DocketTitle:Bayshore First Energy Power Plant Oregon, Ohio 3.Description:These comments are offered as: a member of Oregon City Council where the Bayshore power plant is located; as homeowner that lives on Maumee Bay on Bayshore Rd. about 2.5 miles east of the plant; and as Lake Erie Waterkeeper.

It would seem that USEPA would reach out to the city, county or watershed where the plant is located to determine if there are any feasible SEP projects/land in this area. There is no evidence that this happened. Why?

The Maumee River/Bay/Western Lake Erie are on the USEPA targeted watershed list for help because of ongoing nutrient/algae problems that threaten water quality, habitat, jobs, businesses, property values in this area. The SEP requirements need to be met in this basin. Why is the proposed project over 100 miles away - far from where the environmental damage was done.

It is really disappointing that a 'spill' happens in Maumee Bay, Oregon, Ohio and the proposed settlement for the 'spill' is over 100 miles east of here.

I ask that USEPA abandon the current SEP proposal and place the SEP in the Maumee River/Bay/Western Lake Erie area. There are many conservation groups and local governments that would welcome the chance to conserve land in the western Lake Erie watershed.

4.Name:Sandy Bihn  
5.Organization:  
6.Mailing Address:6565 Bayshore Rd  
Oregon,Ohio 43616  
7.E-mail:sandylakeerie@aol.com  
8.Phone:419-691-3788  
Submit:Submit your comment

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Referred: <http://www.epa.gov/region5/publicnotices/r5pnccomment-form.htm>