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Submitted via email to [RegComments@pa.gov](mailto:RegComments@pa.gov)

PA Environmental Quality Board  
P.O. Box 8477  
Harrisburg, PA 17101-2301

**RE: 25 PA Code Chapter 105 Proposed Rulemaking**

Dear Board Members:

FirstEnergy Corp (“FirstEnergy”) submits these comments in response to the Pennsylvania Department of Environmental Protection’s (“PADEP”) proposed rulemaking to amend 25 PA Code Chapter 105 Dam Safety and Waterway Management.

### **FirstEnergy Overview**

FirstEnergy is a leading regional energy provider headquartered in Akron, Ohio. Its subsidiaries and affiliates are involved in the generation, transmission, and distribution of electricity. FirstEnergy has approximately 15,000 employees.

FirstEnergy’s four electric distribution companies in Pennsylvania include Pennsylvania Electric Company (Penelec), Metropolitan Edison Company (Met-Ed), Pennsylvania Power Company (Penn Power), and West Penn Power, collectively serving over 2 million customers in 56 counties within the Commonwealth. This electric service is provided with approximately 3,000 distribution circuits and 550 transmission circuits. These circuits are routed through more than 1,200 substations in the service territories of these four companies.

FirstEnergy is committed to providing its PA customers with safe, reliable, and cost-effective electricity while ensuring the protection of the state’s water resources. Therefore, we are pleased to offer the following comments on the proposed Chapter 105 Rulemaking.

### **FirstEnergy Comments**

**105.1 Definitions.** *The definition of Abandonment reads, “The discontinued construction, or operation and maintenance of a dam, water obstruction or encroachment by the owner or permittee.”*

**FirstEnergy Comment:** As written this definition identifies two discontinued actions as constituting “abandonment” – 1) discontinued construction, and 2) discontinued operation and maintenance. Since the definition as written, uses a comma only before the word “or” then uses “and” between operation and maintenance, it constitutes a single qualifying action with two components: operation and maintenance. This is problematic for us since we have idle sites that are not “operating” but that we are “maintaining.” An idle plant like our Mitchell station sits idle at producing electricity but represents a

potential interest for a company looking to expand its operations by purchasing an existing industrial facility with existing rail and water access along with an existing water intake structure. That potential market gives us reason to maintain the site for that possibility even though we are not operating the site or specifically the intake structure. The easy fix to the definition would be a simple change in punctuation and wording (red text is new and strike-through is deleted text) so that it reads: “The discontinued construction, ~~or~~ operation, ~~or~~ ~~and~~ maintenance of a dam, water obstruction or encroachment by the owner or permittee.” By making these simple changes the sentence now conveys three separate actions – discontinued construction, discontinued operation, or discontinued maintenance – that would qualify as “abandonment.” As long as “maintenance” of a structure is performed, it can be assumed it is not “abandoned.”

**105.1 Definitions.** *The definitions of (i) Direct impacts and (ii) Indirect impacts*

**FirstEnergy Comment:** The definitions of Direct and Indirect impacts do not clarify the specific activity of “conversion” of wetland from one vegetative cover type to another, for example conversion of forested wetland to scrub-shrub. The definitions given in the Environmental Assessment form clearly include this activity under Indirect Impacts. FirstEnergy suggests revising the definitions to be consistent with the EA form.

**105.1 Definitions.** *The definition of Stormwater management facilities includes “. . . The term does not include swales or ditches that have not been maintained and have developed into watercourses or other bodies of water, including wetlands.”*

**FirstEnergy comment:** The frequency or type of maintenance to avoid a stormwater facility becoming a regulated aquatic resource is not defined. The new definition of “maintenance” refers to dams, obstructions, and encroachments, not stormwater facilities. FirstEnergy suggests elimination of the phrase or clarifying language to define maintenance in this context.

**105.12 (3) Waiver of permit requirements,** *new language has been added, “An aerial crossing of a stream or wetland by electric, telephone or communications lines which are not located in a Federal wilderness area or watercourse or body of water designated as a wild or scenic river under the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271—1287) or the Pennsylvania Scenic Rivers Act (32 P.S. §§ 820.21—820.29) This waiver applies to one or more wires attached aboveground to single poles. This does not apply to the maintenance and construction of towers, single poles with concrete foundations or pilings, roads or other water obstructions or encroachments.”*

**FirstEnergy Comment:** FirstEnergy appreciates and fully supports the continued inclusion of this permitting Waiver and commends the PADEP for having the foresight to include it in the Chapter 105 proposed changes.

The revised Waiver 3 includes a more detailed specification that single poles on concrete foundations or pilings are not covered under the Waiver. FirstEnergy recognizes that the somewhat vague wording regarding structure type in the existing Waiver language has caused some confusion about use of the Waiver in the past. FirstEnergy is supportive of clearer language to make the permitting process more predictable.

However, it is our position that the Waiver language should make a distinction between the aerial crossing *over* a waivable resource, and the placement of a structure *within* a waivable resource. The existing

interpretation given by Central Office is that a Waiver 3 eligible activity includes the aerial crossing of, placement of the structure within, and temporary access to the waived pole.

Considering the existing interpretation with the proposed language, a wood pole line that traverses a wetland complex could both aerially span and place structures *within* the wetlands under the proposed Waiver 3. A steel monopole-on foundation line could completely *aerially* span the wetlands and have no physical footprint within the wetlands yet would trigger a Permit Application under the proposed language. This is an unnecessary burden on the applicant, unnecessary cost to ratepayers, and not in line with the PADEP's stated purpose of the rulemaking to streamline routine activities to "allow the Department to focus resources on activities and threats to public health, welfare, safety and the environment. . ." FirstEnergy recommends revising the Waiver 3 language to specify that placement of poles on concrete foundations or pilings *within* aquatic resources are not covered under the Waiver, however aerial crossings supported by poles on concrete foundations or pilings not within aquatic resources *are* covered by the Waiver. This would incentivize utility companies to go to the extra engineering effort and construction cost of designing longer spans supported by more robust poles to span *over* aquatic resources rather than be sited within them.

**105.12 (21) Waiver of permit requirements, Archeological, geotechnical or environmental activities where testing, monitoring or scientific investigations are of a temporary nature, not to exceed 1 year, including boring or placement of sensors to sample or test soil or rock material and other similar activities. This waiver does not apply to parking or other areas for ancillary activities.**

**FirstEnergy comment:** FirstEnergy appreciates and fully supports the creation of the new Waiver 21 for these low impact activities.

**105.12 (22) Waiver of permit requirements, The placement, maintenance and removal of temporary mats and pads used for minimizing erosion and sedimentation at a wetland crossing. The wetland must be fully restored to its pre-existing condition.**

**FirstEnergy comment:** First Energy appreciates and fully supports the creation of a standalone Waiver to clarify the use of temporary mats and pads as a BMP for site access. However, FirstEnergy previously performed this activity under Waiver 3, and the interpretation given by Central Office included temporary crossings of both wetlands and streams with temporary mats or pads. The new Waiver structure separates the two activities and does not specifically address the crossing of small streams with temporary mats or pads. FirstEnergy relies on waiverability of small stream crossings with mats or pads on a day-to-day basis for maintenance and emergency response on its Transmission and Distribution system. It would be an extreme burden for FirstEnergy and other utilities to have to apply for permits every time the crossing of a stream was required that is not already waived under 105.12(2). FirstEnergy recommends the addition of stream crossings accomplished with mats and pads, and that do not involve placement of in-stream structures such as culverts, be included under this Waiver.

**105.13(d) Regulated Activities-information and fees**

**FirstEnergy comment:** FirstEnergy appreciates and fully supports the added language recognizing that a project may straddle county lines and can still be covered by a single permit.

**105.13(e)(1) Regulated Activities-information and fees, An application for or a registration of a permit must be accompanied by the following information, maps, plans, specifications, design analyses, test reports and other data specifically required under this chapter and additional information as required by**

the Department to determine compliance with this chapter. (1) Permit applications for a dam, water obstruction or encroachment, except a permit application for a small project in subsection (f), must include the following information:

(ii) Location Map

(C) Locations of public water supplies.

**FirstEnergy comment:** We suggest adding “within one mile of the site” to be consistent with language elsewhere in the proposed rulemaking

(E) Names and locations of natural, cultural, archaeological and historical landmarks within 1 mile of the site.

**FirstEnergy comment:** We suggest duplicating the language given in 105.12(c)(3) for consistency and clarity in what resources are to be consulted to produce the requested information.

(v) Stormwater management, new language is given, “A demonstration that the project is consistent with the Storm Water Management Act (32 P.S. §§ 680.1—680.17) and that any associated Post Construction Stormwater Management (PCSM) plan meets the requirements under § 102.8 (relating to PCSM requirements).”

**FirstEnergy comment:** The magnitude of the demonstration that would be required of the applicant is unclear, or if anything is required beyond providing items outlined under (A) and (B) of this section. FirstEnergy suggests adding language that clarifies that if neither A or B is applicable to the application, then no further demonstration is required by the applicant.

(vi) Floodplain management consistency. New language is given, “If the proposed dam, water obstruction or encroachment is located within a floodway delineated on a FEMA map, include an analysis of the project’s impact on the floodway delineation and water surface profiles and when provided by the county or municipality, a letter commenting on the analysis as part of the application. When a dam, water obstruction or encroachment is being proposed by a Commonwealth agency, a political subdivision of the Commonwealth or a public utility, the floodplain management plan must be consistent with the Flood Plain Management Act (32 P.S. §§ 679.101—679.601) and Chapter 106 (relating to floodplain management).”

**FirstEnergy comment:** It is not clear if the “floodplain management plan” is something prepared by the applicant or if it is the plan already prepared by the municipality.

(viii) Alternatives Analysis

(E) new language reads, “A dam, water obstruction or encroachment must be designed, constructed, operated and maintained to assure adequacy and compliance with this chapter, taking into account reasonably foreseeable development within the watershed.”

**FirstEnergy comment:** It is unclear how the applicant should consider “reasonably foreseeable development in the watershed.” We suggest removing this phrase or adding clarifying language what is required of the applicant.

(x) Impacts Analysis (A) through (E) **FirstEnergy comment:** The new language and associated requirements will require significantly more effort in developing permit applications. Because projects vary greatly in size, complexity, and impacts, we recommend duplicating language found

under (viii) *Alternatives Analysis (A)* “*The level of detail required must be commensurate with the anticipated environmental impact*” to apply to these sections as well.

(xii) *Antidegradation* **FirstEnergy comment:** This is a new requirement that will add significantly to the effort of developing permit applications. Because projects vary greatly in size, complexity, and impacts, we recommend duplicating language found under (viii) *Alternatives Analysis (A)* “*The level of detail required must be commensurate with the anticipated environmental impact*” to apply to this section as well.

(xiii) *Cumulative Impacts Analysis*. **FirstEnergy comment:** This is a new requirement that will add significantly to the effort of developing permit applications. Because projects vary greatly in size, complexity, and impacts, we recommend duplicating language found under (viii) *Alternatives Analysis (A)* “*The level of detail required must be commensurate with the anticipated environmental impact*” to apply to this section as well.

**105.13(e)(4) *Regulated Activities-information and fees***, new language has been added, “*When the Department, conservation district or delegated local agency determines that an application or registration is incomplete or inadequate to demonstrate compliance with this chapter, it will notify the applicant in writing. The applicant shall have a specified period, as stated by the Department in writing, to provide the information necessary to complete the application or registration and provide the information necessary to demonstrate compliance with this chapter.*”

**FirstEnergy comment:** FirstEnergy understands the PADEP’s reasoning stated in the preamble for changing the 60 day timeframe for applicants to rectify application deficiencies, but to replace it with just a case-by-case agency determined timeframe with no minimum or maximum constraints may create a problem in practice because the plain language of the regulatory requirements are what dictate actions of both the agency and the applicant, not the intent of preamble language. As an alternative, FirstEnergy recommends that this section be changed to a PADEP determined timeframe with an included minimum and maximum period of not less than ten (10) days for very minor issues, and no greater than the old standard of 60 days; and anything reasonable in between. Including a minimum and maximum period in the language gives the applicant some known expectations in the regulation, yet still supports the PADEP’s desire to keep the process moving so permit issuance can occur in a timely manner.

**105.13(h) *Regulated Activities-information and fees***, new language has been added, “*An applicant may electronically sign and submit an application to the Department, consistent with the Electronic Transactions Act of 1999 (73 P.S. §§ 2260.101—2260.501).*”

**FirstEnergy comment:** FirstEnergy appreciates and fully supports the new language that specifically allows electronic signatures on permit applications. We request clarification if the e-signature provision also applies to Submerged Land License Agreements. This would greatly facilitate the processing of the agreements between applicant and agencies.

**105.17 (1)(iii) and (iv) *Exceptional Value Wetlands***, this section has been updated with the language, (iii) “*Wetlands located in or along the floodplain of the reach of a wild trout stream and the floodplain of streams tributary thereto*”, and “(iv) *Wetlands located in or along the floodplain of waters listed as exceptional value under Chapter 93(relating to water quality standards) and the floodplain of streams tributary thereto.*”

**FirstEnergy comment:** FirstEnergy supports the additional clarifying language to identify which waters are required to have their associated tributary wetlands included in the EV designation. However, most streams do not have any mapped floodplain boundary available, and so for those streams the onus is on the applicant to conduct their own floodplain study, in order to identify the wetlands that fall within it. In addition, for streams and rivers that have floodplain mapping, there are a range of floodplain zones; for example Special, Moderate, and Minimal flood zones. FirstEnergy suggests additional clarifying language as to what wetlands are included in the EV designation, and how they should be determined in relation to existing floodplain information.

*105.17 (1)(v) Exceptional Value Wetlands, existing language has been added under a new section, “Wetlands located within the corridor of a watercourse or body of water that has been designated as a National wild or scenic river in accordance with the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271—1287) or designated as wild or scenic under the Pennsylvania Scenic Rivers Act (32 P.S. §§ 820.21—820.29).”*

**FirstEnergy comment:** The term “corridor” is not defined and has no hydrologic reference. FirstEnergy suggests eliminating the term in favor of more precise terminology, such as regulatory floodway.

FirstEnergy appreciates PADEP’s thoughtful consideration of these comments relative to the 25 PA Code Chapter 105 proposed rulemaking. If you have any questions, please contact Kelly Grube of my staff by email at [kgrube@firstenergycorp.com](mailto:kgrube@firstenergycorp.com) or by phone at 484-926-0194.

Sincerely,



David A. Frederick