

Sarah Bernrdi

v.

West Penn Power/FirstEnergy

C-2014-2453852

July 21,2015

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Before I begin, I'd like to make the point that I shouldn't have had to defend the Waters of the Commonwealth from FirstEnergy's illegal point source release of pesticides. Stopping FirstEnergy's irresponsible use of herbicides was not my responsibility. I had to make it my responsibility. I had to circumvent the Department of Agriculture and the DEPs' attempts to prevent me from exposing the truth about FirstEnergy's illegal herbicide spraying program as they both enabled FirstEnergy to break the law. This is wrong

When I called the Department of Environmental Protection and the Department of Agriculture for help after my neighbors' stream was sprayed July 3, 2014 I was sent on a wild goose chase. The Department of Agriculture Bureau of Plant Industry is the agency responsible for the licensing of pesticide applicators. They're also responsible for the enforcement of pesticide application violations. Yet, everyone I spoke to in the Bureau of Plant Industry told me that First Energy had the right to maintain their ROW, and that they were using EPA approved pesticides. I was told there was nothing I could do to change this situation, because FirstEnergy had the RIGHT to maintain their ROWs. I couldn't understand how FirstEnergy had the RIGHT to contaminate my ground water. What happened to my neighbors and my RIGHT to clean water?

Exhibit 6 Breitsman Response Letter Written April 17, 2015, to Sarah Bernardi by John Breitsman, Department of Agriculture Director of Plant Industry, in response to emails I sent to Governor Wolf's office. Mr. Breitsman proclaims that it's an "accepted industry practice" for certified applicators to use herbicides on the property they have the right to maintain.

I sent the Department of Agriculture the photos of the destroyed creek and buffer zone;

Exhibit 11 Ruoff Property The Department of Agriculture found the devastation acceptable. I find it unacceptable that a Government Agency which is supposed to uphold the Pennsylvania State Codes pertaining to pesticide use and certification would be unaware of the following Pennsylvania Codes pertaining to pesticide release to the Waters of the Commonwealth:

Exhibit 20

25 PA Code § 91.34. Activities utilizing pollutants.

(a) Persons engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, **application** or disposal of pollutants **shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth**, through accident, carelessness, maliciousness, hazards of weather or from another cause.

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If FirstEnergy is exempt from the Pennsylvania State laws regulating pesticide use the PA Codes regulating pesticide use would feature an exemption clause stating: These regulations pertain to all pesticide applicators, EXCEPT: FirstEnergy; because, FirstEnergy is grandfathered by "accepted industry practices" granted by the Department of Agriculture.

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Exhibit 23

7 PA Code § 130d.45. Prohibited applications.

(a) *General.* **The following applications of soil or groundwater contaminated with agricultural chemicals are prohibited, unless specifically authorized by the Department in writing:**

(b) *Setback areas where land application is prohibited.* The operation plan shall address how the applicant intends to comply with this subsection. Soil and groundwater contaminated with agricultural chemicals may not be applied in the following areas:

- **Within 100 feet of an intermittent or perennial stream** as defined in 25 Pa. Code § 271.1 (relating to definitions).

(2) **Within 300 feet of a water source**, as defined in 25 Pa. Code § 271.1, unless the current owner of the water source has provided a written waiver consenting to the activities closer than 300 feet.

(3) Within 100 feet of a sinkhole or diversion ditch.

(4) **Within 100 feet of an exceptional value wetland**, as defined in 25 Pa. Code § 105.17 (relating to wetlands).

(5) Within 100 feet measured horizontally from an occupied dwelling, unless the current owner thereof has provided a written waiver consenting to the activities closer than 100 feet. The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the owner.

Exhibit 11 Ruoff Property Do these photos depict an herbicide application 100 feet from the stream? Were the herbicides sprayed on these wetlands 100 feet away?

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Exhibit 22

25 PA CODE § 91.33. Incidents causing or threatening pollution.

(a) If, because of an accident or other activity or incident, a toxic substance or another substance **which would endanger downstream users** of the waters of this Commonwealth, would otherwise result in pollution or **create a danger of pollution** of the waters, or would damage property, is discharged into these waters—including sewers, drains, ditches or other

channels of conveyance into the waters—or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, **to notify known downstream users of the waters.**

(b) In addition to the notices in subsection (a), a person **shall immediately take or cause to be taken steps necessary to prevent injury to property and downstream users of the waters from pollution or a danger of pollution** and, in addition thereto, within 15 days from the incident, **shall remove from the ground and from the affected waters** of this Commonwealth to the extent required by this title **the residual substances contained thereon or therein.**

The application of herbicides by FirstEnergy to the stream, wetlands and buffer zones was not an accident. It was FirstEnergy's intention to spray these areas. Intentional release of pesticides to the Waters of the Commonwealth is illegal.

FirstEnergy should be required to remove the poisoned soil which continues to contaminate the stream due to storm runoff and erosion, caused by FirstEnergy's negligent spraying of the creek and its buffer zone. Sufficient well water testing for contaminants have not been conducted; due to: the expense and uncertainty as to which herbicides and surfactants were actually broadcasted.

At this point none of the government agencies have felt inclined or ordered FirstEnergy to do water studies to insure the safety of our drinking water which is supplied by the ground water previously purified by the buffer zone which was totally destroyed by herbicides. Most in jeopardy is the Casper well **Exhibit 10** which is located at the base of the steep up stream watershed where the stream was contaminated by herbicides.

I also informed the Department of Agriculture that FirstEnergy does not have a #9 Aquatic license to spray aquatic areas with aquatic pesticides that require aquatic pesticide licenses. Their response was FirstEnergy doesn't need an aquatic license. The Department of Agriculture also informed the PUC: **Exhibit 8 PUC Letter** That the "#10 license permits applications on the ROWs using products labeled appropriately for the conditions." Am I to believe that for some reason "industry practice" has exempted FirstEnergy from the Pennsylvania State Code regulating pesticide use and licensing? If FirstEnergy isn't exempt from the Pennsylvania Codes regulating pesticide use (and they are not) then FirstEnergy is violating every Pennsylvania Code pertaining to pesticide use. How is this possible? Why is FirstEnergy's illegal herbicide spraying condoned by the Department of Agriculture, and why won't the DEP prosecute FirstEnergy for non-compliance of the Pennsylvania Codes regulating pesticide use?

PA Code 7 § 128.32. Categories of business licenses.

§ 128.32. Categories of business licenses.

A commercial or public business shall identify in its application those business categories in which it desires to operate. A business shall employ for each business category in which it makes a pesticide application at least one applicator who is certified in a specific applicator category recognized under the general business category and shall limit its applications to those applicator categories in which it employs at least one certified applicator. The business categories are listed

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in paragraphs (1)—(10). The applicator categories recognized under a particular business category are listed under that business category.

(4) *Category (D)*—Aquatic Pest Control.

09 Aquatic Pest Control

24 Swimming Pools

26 Sewer Root Control

(5) *Category (E)*—Right-of-Way Pest Control.

10 Right-of-Way and Weeds

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FirstEnergy admitted under oath: June 3 2015 during the PUC telephonic hearing that they do not have an aquatic applicator license.

Is FirstEnergy also permitted by the Department of Agriculture to use a pesticide inconsistent with the manufacturers labeling?

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Exhibit 12 Polaris Label:

General Use Precautions and Restrictions:

Applications of this product can only be made by federal or state agencies, such as Water Management District personal, municipal officials and the US Army Corp of Engineers, **or those applicators who are licensed or certified as aquatic pest control applicators** and are authorized by the state or local government.

FirstEnergy's pesticide applicators are certified under a #10 ROW pesticide application license. Their applicators do not have the #9 license required to spray pesticides in aquatic areas. FirstEnergy violated the General Use Restrictions of the Polaris Label.

Environmental Hazards:

Do not apply to water except as specified on the label. Treatment of aquatic weeds may result in oxygen depletion or loss due to decomposition of dead plants. This oxygen loss may cause the suffocation of some aquatic organisms. This herbicide is phytotoxic at extremely low concentrations. Non target plants may be adversely affected from drift. For terrestrial uses, do not apply directly to water or to areas where surface water is present or to intertidal areas below the mean high water mark.

FirstEnergy violated the Environmental Hazards precaution on the Polaris Label by suffocating the creek with the decaying dead debris which was left to rot in the creeks water after the vegetation was killed with the herbicide FirstEnergy sprayed in and along the creek. The Polaris label states: **do not apply directly to water or to areas where surface water is present.** FirstEnergy claims they did not spray herbicides into the water, yet the photos in **Exhibit 11 Ruoff Property** Clearly show otherwise.

FirstEnergy violated the Polaris label instructions by DIRECTLY spraying the herbicide Polaris in the water on the Ruoff property. If you examine the **Exhibit 11** photographs it's obvious that the banks were thoroughly sprayed. The herbicide had nowhere to go but into the water. FirstEnergy Forestry Specialist Richard Scott claimed under oath: that the sprayers walked up to the creek, turned their backs and then sprayed away from the water. The photos do not depict this happened, the vegetation is too thick and undisturbed by footsteps. Not that that matters, it's illegal to spray the stream closer than 100 feet, according to

Exhibit 23:

7 PA Code § 130d.45. Prohibited applications.

- Within 100 feet of an intermittent or perennial stream as defined in 25 Pa. Code § 271.1 (relating to definitions).

Apparently, Industry Practice which is supported by the Department of Agriculture is permitting FirstEnergy to not only violate Pennsylvania State Codes but also Federal Codes.

FirstEnergy also admitted under oath at the PUC telephonic hearing June 3, 2015 to also using Rodeo which contains Glyphosate..... And Milestone, which is even more toxic than Glyphosate and Imazapyr.

Exhibit 14

7 USC 136-Sec.136j. Unlawful acts

§136j. Unlawful Acts

- It shall be unlawful for any person—(G) to use any registered pesticide in a manner inconsistent with its labeling.

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The Department of Agriculture also condones FirstEnergy's right to spray their herbicides in areas where wells and wetlands are located as long as the herbicides being used are EPA approved.

Exhibit 17

25 PA Code § 105.17. Wetlands.

Wetlands are a valuable public natural resource. This chapter will be construed broadly to protect this valuable resource.

(1) *Exceptional value wetlands.* This category of wetlands deserves special protection. Exceptional value wetlands are wetlands that exhibit one or more of the following characteristics:

(iv) **Wetlands located along an existing public or private drinking water supply, including both surface water and groundwater sources,** that maintain the quality or quantity of the drinking water supply.

(2) *Other wetlands.* This category includes wetlands not categorized as exceptional value wetlands.

- *Permits.* The Department will maintain a list of permit decisions involving wetlands. This list will be a matter of public record and will be available for inspection at the Department's offices.

Also discussed at the hearing was **PA Code 25§ 109.1. Definitions.**

Wellhead protection area—The surface and subsurface area surrounding a water well, well field, spring or infiltration gallery supplying a public water system, through which contaminants are reasonably likely to move toward and reach the water source. A wellhead protection area shall consist of the following zones:

(i) *Zone I.* The protective zone immediately surrounding a well, spring or infiltration gallery which shall be a 100-to-400-foot radius depending on site-specific source and aquifer characteristics.

(ii) *Zone II.* The zone encompassing the portion of the aquifer through which water is diverted to a well or flows to a spring or infiltration gallery. Zone II shall be a 1/2 mile radius around the source unless a more detailed delineation is approved.

(iii) *Zone III.* The zone beyond Zone II that contributes surface water and groundwater to Zones I and II.

Exhibit 1 Westmoreland County Map:

Obviously none of the above well head protection areas were considered by FirstEnergy before they illegally sprayed herbicides in and around the stream which contributes to the ground water which supplies our wells. Why would FirstEnergy consider the rights of the property owners

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along their ROW? They're certainly not being required to. I've apparently thrown the Department of Agriculture under the bus, but the DEP deserves to be run over also.

It was the Department of Environmental Protection that referred me to the Department of Agriculture in August of 2014. If the DEP had done the job we pay them to do then they would have immediately determined that FirstEnergy was illegally spraying the Waters of the Commonwealth without a permit; because, they're the agency that issues the permits that regulates the release of pesticides into the Waters of the Commonwealth.

After 10 months of being ignored I decided to write to Governor Wolf. The Governors' office forwarded my letter to Mr Brietsman at the Department of Agriculture **Exhibit 6b**. After receiving Mr. Breitsmans reply to my letter **Exhibit 6**, I wrote to the Governors' office again. I informed the Governor's office that they'd sent the letter to the wrong agency, that they should have contacted the SW PA DEP; so, that's what they did.

Exhibit 9 Susan Malone Regional Director of DEP reply to the Governors letter

I've had to learn how the system works, or in this case how it doesn't work. I've had to scrutinize everything I've been told by using the Pennsylvania Code as the schematic for truth. Everywhere I look I see negligence and discrepancies in the procedures followed by the DEP and the Department of Agriculture. Far too many laws have been broken for all this to be a coincidence. How can this much negligence be the standard?

Paragraph 2, of Susan Malones letter states The application of herbicides to surface water, wetlands and adjacent areas known as "waters edge" must be authorized under and in accordance with joint approval given by the DEP and the Fish and Boat Commission in accordance with 25 PA Code 91.38(2). The DEP recommends that pesticide applications specifically for weed, algae, and animal pest control use patterns that occur within 100 feet of surface water be considered at waters edge unless there is a 35 foot buffer zone. In other words, it's not legal to spray herbicides closer than 35 feet to any body of water IF the water is protected by a vegetated area that extends 35 feet from the waters edge. If there is no vegetated buffer zone than pesticide applications cannot be made any closer than 100 feet from the edge of the water.

Attorney Wauhops claims that FirstEnergy has a permit. They do not. Permits do not permit illegal activity. The NPDES permit regulates pesticide releases into the Waters of the Commonwealth to control aquatic weeds, algae, insects and pathogens. This permit does not apply to FirstEnergy. FirstEnergy is required to comply with Best Management Practices which is a schedule of activities prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce pollution to surface waters of this Commonwealth.(25 PA Code 93.1 Definitions

In Attorney Wauhops' **Exhibit 2, Integrated Vegetation Management, Page 19, 3. IVM Application, Buffers:**

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Stream crossings of ROW corridors, surface water supply, reservoirs and drinking water wells and springs need to be protected by buffers. Buffers should retain as much compatible vegetation as possible.

25 Pennsylvania Code 92.a.2 Definitions Vegetated buffer- Defines a Vegetated buffer; A permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for purposes that include slowing runoff, enhancing water infiltration and minimizing the risk of any potential pollutants from leaving the field and reaching surface waters.

First Energy not only violates the Pennsylvania Code pertaining to Buffer Zones but they also violate their own standards which are clearly outlined in their operating manuals.

ALSO: Submitted by Attorney Wauhop:

Exhibit 1, ANSI 300 Standards; Page 5, Part 7 Integrated Vegetation

Management: a. Utility Rights of Way 70.4.3 Operators shall comply with applicable Federal and State Occupational Safety and Health Standards ANSI Z133, as well as **Federal, State, and Local Laws and regulations.**

ALSO: Submitted by Attorney Wauhop:

Exhibit 1, ANSI 300 Standards: Page 7, 73 IVM a. Utility Rights of Way practices: 73.3 Evaluate Site: 73.3.1, The site shall be inspected to evaluate existing conditions to determine what type of control methods if any is appropriate to meet defined objectives. **AND:**

73.3.2 Pre control evaluations should consider ROW use, type of utility facility, **general conditions,** ownership, intended uses of site, adjacent land use, **existing vegetation, topography,** soils, fire risk, **sensitive or protected areas, water resources,** or protected species, and **regulations.**

FirstEnergy neglected to properly evaluate the Burnick, and Ruoff properties before they negligently sprayed herbicides in and along the stream. I'd like to know why this sensitive area of water resources was negligently sprayed by FirstEnergy and I'd like to know why FirstEnergy is being permitted to conduct their illegal spraying programs by the Department of Agriculture and the DEP? The Pennsylvania Code regulates pesticide use, yet, every State and Federal law pertaining to pesticide use is being violated by FirstEnergy.

Exhibit 9 Malone Letter:

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Susan Malone stated in her letter: "After FirstEnergy submits a NOI to the DEP they'll be offered a joint permit" That permit will require FirstEnergy to follow all the permit stipulations; including, yearly reports, inspections of areas to be sprayed, (before the area is sprayed)

Watersheds, streams and geographic conditions will be analyzed to prevent adverse environmental impacts. AND, monitoring by the DEP will insure compliance of the PA Codes regulating the activity of point source release pesticides into the Waters of the Commonwealth.

FirstEnergy will no longer be able to haphazardly spray every weed, tree and shrub growing along their ROWs without using proper Best Management Practices; which, are clearly defined in the above quoted PA Codes. What I am asking for is not unreasonable. I'm asking that FirstEnergy be required to comply with the same rules and regulations that apply to everyone else under penalty of law.

As of today there has been no change in FirstEnergy's spraying program. FirstEnergy has not submitted a NOI to the DEP and the illegal spraying continues to poison the Waters of the Commonwealth. *Nothing has changed. I notified Kevin Halloran of the SW department of the DEP on June 23, 2015 to complain about FirstEnergy's continued illegal spraying in the Delmont area. His response was: "Well, we have to give them a chance to get a permit" My question is: Can a bank robber get a permit to rob a bank?*

It's my hope that you, Judge Colwell can stop FirstEnergy's illegal herbicide spraying in Pennsylvania and force the Department of Agriculture and the DEP to enforce the Pennsylvania Codes which regulate the point source release of pesticides into the Waters of the Commonwealth. FirstEnergy's disrespect for the law is incomprehensible. The fact that the State is also breaking the law by enabling FirstEnergy to break the law is even more incomprehensible.

Thank you for hearing my complaint.

Sarah Bernardi



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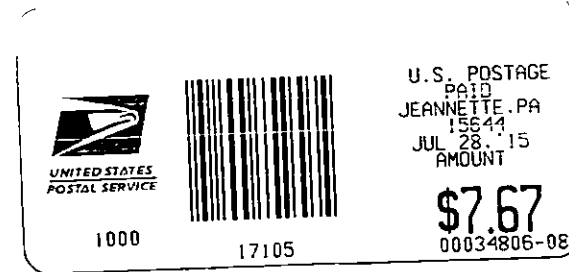
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