EHSCP
Environmental, Health & Safety Communications Panel
EHS Support and Advocacy for the Communications Industry

January 21, 2016

HAND DELIVERED AND TO RHARRISON@ADEM.STATE.AL.US

Russell A. Kelly, Chief
Permits and Services Division
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36110

Attention: NPDES Permit No. ALR100000

Re: Comments of the Environmental, Health & Safety Communications Panel on the Alabama Department of Environmental Management General NPDES Notice Request for Comments on General NPDES Permit ALR100000

Dear Mr. Kelly:

The Environmental, Health & Safety Communications Panel (EHSCP) [1] is pleased to provide comments in response to the Alabama Draft National Pollutant Discharge Elimination System ("NPDES") Construction Stormwater General Permit, published by the Alabama Department of Environmental Management ("ADEM") (the "Draft Permit") on December 23, 2015. ADEM provided a thirty-day public comment period on the permit, and we understand that these written comments are timely if submitted on or before January 22, 2016.

The EHSCP is a consortium of communications environmental, health, and safety professionals dedicated to promoting employee safety and health, and environmental responsibility throughout the communications industry. The EHSCP strives to provide constructive input in the development and implementation of environmental, health and safety standards and guidelines that affect the varied businesses within the communications industry. As such, the panel maintains an active advocacy role, providing comments and recommendations to federal and state agencies when issues concern the communications industry. It is in this capacity that the EHSCP is submitting these comments. More information regarding the EHSCP may be found at www.ehscp.org.

I. SCOPE OF THESE COMMENTS

According to the public notice, interested persons are invited to submit written comments on any aspect of the Draft Permit. ADEM solicited comments on the following specific changes to the current permit:

1. Requirement that a twenty-five (25) foot natural buffer be maintained around all streams at the construction site;

[1] The EHSCP member companies include Alcatel-Lucent, AT&T, Bell, CenturyLink, Comcast, Crown Castle, Cincinnati Bell, Ericsson, Ledcor Technical Services, Level 3 Communications, Sprint, T-Mobile, Verizon, and Windstream Communications.

2. Requirement that polymers, flocculants, or other treatment chemicals only be applied where treated stormwater is directed to a sediment control prior to discharge;
3. Requirement that a Qualified Credentialed Professional ("QCP") conduct a pre-construction inspection prior to the placement of any Best Management Practices ("BMPs") or land disturbing activities;
4. Addition of several defined terms, such as Agricultural Land, Borrow Area "Pit", Bypass, Chronic and Catastrophic Precipitation, Construction Best Management Practices Plan, Ephemeral Stream, Intermittent Stream, National Pollutant Discharge Elimination System, Natural Buffer (Riparian Buffer), New Construction, Non-stormwater Discharges, Notice of Intent ("NOI"), Outfall, Perennial Stream, Qualified Credential Inspector, Qualified Credential Inspector Program, Receiving Stream, Silvicultural Operations, Treatment facility and treatment system, Total Suspended Solids ("TSS"), 24-hour precipitation event, Upset, and Waters;
5. Requirement that a list be provided of all flocculants or chemical stabilization products to be used at the site, including the Material Safety Data Sheets ("MSDS"), dosages, and locations where the materials are to be used; and
6. Removal of the following from the previous permit:
    a. turbidity monitoring requirements; and
    b. the requirement that non-linear projects provide a topographic map showing pre-construction contours at the project site.

Most of the content of the current ADEM Construction General Permit and of the new Draft Permit focuses on conventional commercial and industrial builders and homebuilders. Such projects are characterized by (1) controlled perimeters, (2) a relatively small number of controlled discharge locations that serve the site as a whole or a substantial portion of the site, and (3) one entity that qualifies as the Operator, as that term is generally used in administration of NPDES permits. Only a small percentage of EHSCP member company construction activity is similar to such projects. As to the Draft Permit's regulation of those projects, we have no comments.

The majority of EHSCP member company construction activities, however, and the activities that we wish to address specifically in these comments, involve two types of projects very different from the conventional construction projects describe above: (1) the installation and maintenance of linear underground infrastructure independent of any conventional construction project, referred to as "Linear Communications Projects," or "LCPs"; and (2) the installation of cable and the making of service connections entirely within the footprint of an already-permitted development project.

The comments that follow focus first on two provisions of the Draft Permit that will adversely affect LCPs. The comments first describe the activities that constitute LCPs and the factors that differentiate such projects from more traditional construction projects, and then discuss the unsuitability of the 25-foot natural buffer requirement as applied to ephemeral streams located within or adjacent to an LCP and the suitability of Qualified Certified Inspectors to perform the pre-construction inspections for LCPs.

The comments then turn to a question that arises under both the current and the Draft Permit: the need to clarify a utility's role and responsibilities in situations where it lays cable and makes service connections entirely within the footprint of an already-permitted development project.

II. COMMENTS RELATED TO LINEAR COMMUNICATION PROJECTS

A. Characteristics of Linear Communications Projects

As used in these comments, the term Linear Communications Projects, or "LCPs," refers to projects within the communications industry that are characterized by narrow widths of construction over a long distance that are *not* undertaken within the footprint of another, permitted construction project. These LCP construction sites are significantly different from conventional perimeter-bounded projects.

Stand-alone LCPs typically are legally and geographically confined to easements and other rights-of-way. These easements often are fifteen feet in width or less. The actual width of earth disturbance is significantly less than that of the entire easement - no more than six to twelve feet, and sometimes as small as a foot or two, depending on the construction technique used - making these projects minimally intrusive.

Also, unlike traditional perimeter-bound construction, a cable-laying project can run for miles. This means that a single LCP can cross multiple political and regulatory boundaries, pass through multiple watersheds, and encounter a wide variety of soil, slope and vegetation types. Accordingly, the project may cross multiple water features, and have numerous discharge points. However, the use of minimally invasive construction methods[2] typically employed for LCP construction, generally prevent the type of sedimentation and grade changes associated with traditional construction projects.

Furthermore, LCPs are distinguishable from traditional construction projects because construction activity on an LCP occurs in a very small and moving area over the life of the project. Unlike traditional projects, where the construction activity typically creates large areas of disturbance over the entire project footprint for the life of the project, LCPs typically open a small trench, lay or remove cable, and close the trench as the project proceeds, usually within a day. As a result, the area of active construction moves daily, with un-trenched territory ahead and temporarily or permanently stabilized project lands behind. This means that only a very small fraction of the total area of the LCP is actually disturbed at any given time, and that the duration of disturbance at any point is extremely limited in comparison with traditional construction projects and in comparison with non-communications linear projects.

B. Specific Comments Related to Linear Communications Projects

1. A Twenty-Five Foot Natural Buffer is Ill-Suited to Ephemeral Streams Located Within the Footprint of a Linear Communications Project

[2] The most common cable installation equipment is either (1) a plow that directly inserts the cable or cable conduit underground and immediately backfills the trench to the original grade or (2) a trenching machine that cuts a narrow trench for subsequent placement of the conduit or cable. In rare instances, a backhoe might be used to dig a short section of a trench for an LCP, such as if the soil is too rocky to allow use of a plow or trencher. In addition, a "handhole" sometimes is placed to facilitate future access to the buried cable at a certain point, such as at a splice point. Typically a small backhoe is used to excavate a small hole to allow placement of prefabricated box-like structure.

In the Draft Permit, ADEM revises Part III.A.2 and Part III.B of the Construction General Stormwater Permit to require a minimum of a 25-foot natural riparian buffer zone adjacent to all streams at the construction site. This provision would apply to perennial, intermittent, and ephemeral streams.

EHSCP supports the new buffer provision as it relates to all three classes of streams when applied in the context of traditional, non-LCP projects. EHSCP also supports the new buffer provision as it relates to perennial and intermittent streams in the context of LCPs. These streams are readily identifiable and have continuous flow that could be affected by construction runoff during at least part of every year.

However, with respect to the application of the buffer requirement to ephemeral streams for LCPs, we believe a change in the Draft Permit is warranted. EHSCP proposes this change for several reasons.

First, it is difficult to identify ephemeral streams and the consequences of that difficulty are multiplied where a project is a Linear Communications Project. The Draft Permit defines "ephemeral stream" to include "a stream or portion of a stream which flows briefly in direct response to precipitation in the immediate vicinity, and whose channel is at all times above the ground-water reservoir." Flow-ways that respond only "briefly," and in direct response only to local precipitation, are inherently difficult to identify. Put another way, without a detailed knowledge of historic flow patterns in a given area and in the absence of reliable, readily available information on how local geographic features respond to storms of various intensities, nearly every swale or other depression could be viewed as meriting a 25-foot buffer. Where such streams are only generically defined, *potential* ephemeral streams lurk everywhere. A Linear Communications Project will encounter dozens or hundreds of such *potential* streams, imposing significant burden and delay on the project simply to confirm or deny the existence of each ephemeral stream.

Second, making the 25-foot buffer requirement applicable to LCPs in proximity to ephemeral streams could inadvertently result in greater and more disruptive earth disturbance or, in the alternative, require LCP projects to develop extensive justifications for utility routings that has been preferred by planners for decades. LCPs often are designed to parallel roadways for the sake of efficiency and to avoid unnecessary disruption to other, more sensitive land uses. However, because the definition of "ephemeral stream" might someday be ready to include roadside ditches that convey flow only in response to local storm events, the LCP permittee would be required either to (1) re-locate its project off the roadway, likely onto virgin ground or onto the property of adjacent homeowners, farmers or commercial establishments, or (2) develop a detailed justification that such relocation is, in whole and in part, infeasible.[3]

Finally, and perhaps most important, the environmental benefit of requiring Linear Communications Projects to establish 25-foot buffers for ephemeral streams is extremely slight. Unlike a traditional project where earth disturbance can continue for months at a time, an LCP's earth disturbance moves with the project and is itself brief at each point along the right-of-way. As noted above, LCPs typically open a small trench, lay or remove cable, and close the trench as the project proceeds. As a result, the area of active construction moves daily, with un-trenched territory ahead and temporarily or permanently stabilized project lands behind. Only a very small fraction of the total area of the LCP is actually disturbed at any given time. Coupled with the appearance of brief and unpredictable flows in an ephemeral stream, this abbreviated and traveling area of ground disturbance poses little threat to the ephemeral waters.

[3] See Draft Permit, Part III (B)(6) at page 10.

This slight and speculative environmental benefit must be balanced against the substantial burdens and uncertainties that would be fostered by the Draft Permit as currently drafted, and against the potential of that language to push utility cable routes out of roadway rights-of-way and onto more sensitive private property. In many cases the net environmental impact of the Draft Permit may in fact be negative. For these reasons, EHSCP respectfully requests that the 25-foot buffer requirement not be applied to ephemeral streams in proximity to Linear Communications Projects.

In the alternative, EHSCP's concerns about the extension of the 25-foot buffer requirement to ephemeral streams in proximity to Linear Communications Projects would be adequately addressed if the Department confirms that Section III.B.6 of the Draft Permit is intended to provide an exception from requirements contained in Section III.B.1 of the Draft Permit where infeasibility is demonstrated. This confirmation could appear in the final permit, in a final Fact Sheet, or in a formal Response to Comments that becomes a part of the public record.

2. It is Unnecessary and Unduly Burdensome to Require That a Qualified Credentialed Professional Inspect an LCP Prior to Implementation of BMPs or Initiation of Land Disturbing Activities

The Draft Permit would amend the existing permit language by adding the new Part III.H.1. That new section includes a pre-construction observation and inspection requirement. Pursuant to this requirement, each construction site would be subject to a pre-construction inspection, which would consist of a ***complete and comprehensive*** inspection of the ***entire project*** including all proposed areas of land disturbance by a Qualified Credentialed Professional ("QCP"). In the Draft Permit, a QCP is defined as follows.

> A professional engineer (PE), or a Certified Professional in Erosion and Sediment Control (CPESC) as determined by CPESC, Inc. Other registered or certified professionals such as a registered landscape architect, registered land surveyor, registered geologist, registered forester, Registered Environmental Manager as determined by the National Registry of Environmental Professionals (NREP), or Certified Professional and Soil Scientist (CPSS) as determined by ARCPACS.

EHSCP understands and supports the new requirement for a QCP to evaluate a traditional, non-LCP site for proper BMP selection. In contrast, however, Linear Communications Projects involve little grading or stormwater channel flow modification. As a result, the primary purpose of a pre-construction visit on LCPs is simply to verify slope conditions and drainage consolidations points for later consideration by the QCP. Given these reduced demands on a Linear Communications Project, coupled with the burdens of dispatching a QCP to inspect the whole of what could be a miles-long project site, a Qualified Credentialed Inspector ("QCI"), trained and certified as required by the Draft Permit, is fully capable of performing the newly established pre-construction inspection.

QCIs are frequently used to assess such conditions. According to Part III.G of both the current permit and the Draft Permit, for example, the Permittee has the option of employing/contracting with a QCP to perform permit onsite duties, ***or*** ensuring that one onsite employee is certified as a QCI. To become a QCI, the certified employee must have completed an initial training, along with annual courses through an ADEM-approved Qualified Credentialed Inspector Program ("QCIP"). After completing the course, ADEM anticipates that the QCI would be knowledgeable about: 1) the applicable requirements of the Alabama NPDES rules; 2) the requirements of the stormwater construction general permit; 3) the evaluation of construction sites to ensure that QCP designed and certified erosion and sediment controls detailed in a Construction Best Management Practices Plan ("CBMPP") are effectively implemented and maintained; and 4) the evaluation of conveyance structures, receiving waters and adjacent impacted

offsite areas to ensure adequate protection of water quality. Based on the extensive training a QCI receives, he or she would be adequately prepared to review the footprint of a Linear Communications Project right-of-way for later consideration by the QCP. The current permit seems to acknowledge the proficiency of the QCI for reviewing the site, already permitting such a review.

The current permit also authorizes site inspections by a QCI, the results of which are to be submitted to ADEM in a detailed technical report. This currently-required inspection consists of a complete observation of the construction site. In conducting the inspection the inspector must ensure that: 1) erosion and sedimentation control measures are being effectively and fully implemented; 2) pollutant discharges are being prevented and/or minimized; and 3) discharges are not resulting in the contravention of water quality standards. According to the permit, this inspection, which is substantively similar to the new pre-construction site inspection, may be performed by a QCI, QCP or a qualified person under the direct supervision of the QCP. The option to have either a QCI or QCP conduct a site-assessment should be carried over to the proposed pre-disturbance review.

Under both the current and the Draft Permit, the QCP exercises oversight of the QCI to ensure that water quality is not degraded. Permit Part III.E details the requirements of the CBMPP, which must be prepared and certified by a QCP. We simply propose that the Draft Permit be modified to authorize a QCI to conduct the pre-construction review proposed in Part III.H.1 for Linear Communications Projects and, based upon that inspection, to prepare a report of its findings which it would submit to a QCP for certification, approval, and use in developing the CBMPP.

III. SPECIFIC COMMENT RELATED TO THE ROLE AND RESPONSIBILITIES WHERE A UTILITY LAYS CABLE AND MAKES SERVICE CONNECTIONS ENTIRELY WITHIN THE FOOTPRINT OF AN ACTIVE AND ALREADY-PERMITTED DEVELOPMENT PROJECT

ADEM should modify the Draft Permit to clarify the permitting and compliance responsibilities of a utility operating exclusively within the footprint of a construction site that is already covered by the Construction General Stormwater Permit. Under Part II.A, the permit states that, "[a]ny person wishing to obtain coverage under this general permit shall submit an NOI…" The permit then goes on to describe the schedule applicable to persons seeking permit coverage, yet does not further refine nor explain which entities are meant by "any person." This language is confusing, seeming to compel multiple entities to obtain permit coverage.

The only guidance on the issue of multiple permittees currently offered by the permit is contained in section Part III.E. According to that section, "multiple operators conducting regulated land disturbances in a common plan of development may jointly submit an NOI. An NOI covering multiple operators must include a site plan clearly describing each operator's areas of operational control." In pertinent part, the permit provides that

> ***Operator*** means any person or other entity, that owns, operates, directs, conducts, controls, authorizes, approves, determines, or otherwise has responsibility for, or exerts financial control over the commencement, continuation, or daily operation of activity regulated by this permit. An operator includes any person who treats and discharges stormwater or in the absence of treatment, the person who generates and/or discharges stormwater, or pollutants. An operator may include but may not be limited to, property owners, agents, general partners, LLP partners, LLC members, leaseholders, developers, builders, contractors, or other responsible or controlling entities.

This definition of an "operator" is extremely broad. Indeed, it might be read to apply to utility companies who conduct land disturbing activities within the boundaries of an existing permitted construction project simply because, in a narrow sense, they are persons who generate and/or discharge stormwater pollutants.

It is our understanding that this is not the policy of ADEM under such circumstances. Moreover, requiring separate permitting of a utility that is working exclusively within the footprint of an active and already-permitted construction site could cause confusion by requiring the utility and the original permit holder (and any other permit holders) to assign areas of operational control to each permit holder. That model works well in a homebuilder setting or in a commercial development where discrete parcels are under the control of different general contractors. However, it is ill-suited to the utility model, because the scant utility right-of-way is entirely contained within the permitted project site. Indeed, such rights-of-way generally are not of sufficient size to support meaningful BMPs. Rather, BMPs designed for the site as a whole by the original permittee are required to be sufficient to provide erosion and sediment control for the entire site – including the portion on which the utility contractor is working.

Rather than leaving open what we believe is an unintended implication that utility companies submit an NOI and become independent permittees on such sites, the permit should make clear that utilities operating entirely within a construction site that already is permitted by another party (a) must comply with the Construction Best Management Practices Plan developed by the existing permit holder(s) and (b) that such a utility and its contractor are not considered "operators" subject to a requirement to independently submit an NOI or obtain permit coverage in their own names.

There are a number of states that address utility work on existing permitted projects in just this way. We offer the following two models for ADEM's consideration for inclusion in its new Construction General Permit. We strongly urge ADEM to add a provision such as used in South Carolina, to clarify the responsibilities of a utility operating exclusively within the footprint of a construction site that is already covered by the Construction General Stormwater Permit. South Carolina's process is a further refinement of a similar process previously adopted by the state of Georgia. While Georgia's process presents certain additional administrative hurdles, it also is described below.

A. The South Carolina Construction General Stormwater Permit Model

South Carolina offers "Utility Providers" the option of submitting an ABNOI and also provides additional permitting options, which would reduce the potential for implementation of overlapping and inconsistent stormwater pollution control technologies.

The South Carolina permit defines Utility Providers as:

> entities responsible, either directly or indirectly, for the construction, installation, and maintenance of conduits, pipes, pipelines, cables, wires, trenches, vaults, manholes, and similar structures or devices for the conveyance of natural gas (or other types of gas), liquid petroleum products, electricity, telecommunications (telephone, data, television, etc.), water or sewage.[4]

[4] South Carolina Department of Health and Environmental Control, NPDES Permit for Stormwater Discharges From Construction Activities, Permit No. SCR100000, § 2.2.3(A) (Oct. 15, 2012).

Entities meeting the above definition would be required to obtain coverage by either completing a Contractor Certification Form or, as an alternative, submitting an ABNOI.[5] The Contractor Certification Form must include:

- The entity seeking coverage's name, address, telephone number, and Employer Identification Number (EIN) as established by the U.S. Internal Revenue Service;
- Project/Site name, subdivision name and lot number(s) (if applicable), NPDES coverage number for Primary Permittee[6];
- A certification statement, signed and dated by an authorized representative; and
- Any other information, pertinent to this permit, the Department requires on the NOI form.[7]

B. The Georgia Construction General Stormwater Permit Model

The state of Georgia has published three Construction General Stormwater Permits, one of which applies to the presence of multiple "Operators" conducting land disturbing activities at a construction site.[8] The Georgia permit provides separate definitions for Primary and Secondary Permittees, as well as for Utility Companies, as follows:

- "Primary Permittee" means the Owner or the Operator or both of a tract of land for a construction project subject to this permit.[9]
- "Secondary Permittee" means an owner, individual builder, utility company, or utility contractor that conducts a construction activity within a common development with an existing primary permittee.[10]
- "Utility Company or Utility Contractor" means, for purposes of this Permit, an entity or sub-contractor that is responsible, either directly or indirectly, for the construction, installation, and maintenance of conduits, pipes, pipelines, cables, wires, trenches, vaults, manholes, and similar structures or devices for the conveyance of natural gas (or other types of gas), liquid petroleum products, electricity, telecommunications (telephone, data, television, etc.), water, storm water or sewage.[11]

Where these entities are present, the Georgia permit requires that only one single NOI for the Primary Permittee be signed and submitted.[12] Utility Companies, as a type of Secondary Permittees, are offered two paths of compliance: 1) submission of a truncated NOI;[13] or 2) submission of an Annual Blanket NOI ("ABNOI"), which would cover all construction activities within common developments on a statewide basis for the calendar year in which the ABNOI is submitted.[14] As part of the ABNOI, the Utility

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[5] *Id.*
[6] *Id.*; *see also* 2.3.2
[7] *Id.*
[8] State of Georgia Department of Natural Resources Environmental Protection Division, Authorization to Discharge Under The National Pollutant Discharge Elimination System Storm Water Discharges Associated With Construction Activity For Common Developments, General Permit No. GAR100003 (Sept. 23, 2013) [*hereinafter* General Permit No. GAR100003].
[9] *Id.*, at p. 6.
[10] *Id.*
[11] *Id.* at p. 7.
[12] *Id.*, at part II.B.1.
[13] *Id.*, at part II.B.2.
[14] *Id.*

Company would be required to certify that it would adhere to the applicable provisions of the Primary Permittee's Erosion, Sedimentation and Pollution Control Plan (for all intents and purposes, this is analogous to a CBMPP).[15]

IV. CONCLUSION

EHSCP appreciates the opportunity to provide these comments in response to the Draft Permit and to bring the unique characteristics of, and issues faced by the telecommunications to the Department's attention. We look forward to the opportunity to work with the Department to develop the technical detail necessary to appropriately address the issues raised in these comments and produce a final Construction Stormwater General Permit that is practicable in light of the unique circumstances presented by the telecommunications and utility work discussed above.

Should you have any questions about the information included in these comments please contact me at the number below.

Sincerely,

Gary Schongar
Verizon
Chair, Environmental, Health & Safety Communications Panel
Tel: (908) 559-3688

[15] *Id.*