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Public Comment to Proposed Rulemaking 25 PA. Code CH. 102

ENVIRONMENTAL QUALITY BOARD

Summary: The Department (of Environmental Protection) has been remiss in its' obligations to comply with Pa. Title 37 (The History Code) and the preservation of cultural resources in the permitting process for Oil and Gas activities. The proposed changes to Chapter 102 do not address these shortcomings and if anything, the permit-by-rule provision will facilitate the further destruction of historical sites.

- 1) The Department established a set of uniform policies and procedures "consistent with the Pennsylvania History Code" effective March 16, 2002 (Document ID # 012-0700-001). These are NOT being applied in the permitting process for Oil and Gas.
- 2) Although the Department has taken a position that Oil and Gas activities have been exempted from compliance with the History Code (see attached), I can find NO STATUTORY exemption.
- 3) Further, in 0120-PM-PY003a Revised 6/2006, (DEP/PHMC Policies and Procedures Implementation of the History Code-List of Exemptions May 2006 Bureau of Oil and Gas Management), the only applicable exception is "Individual Well Permits (normally only ½ to 1 ½ acre is size)". There is no mention of earth moving activities for pipeline, compression station or similar construction and many of the well sites for Marcellus Shale are several times over the "normal" acreage.
- 4) Finally, as even stated in the disclaimer for 012-0700-001, the policies and procedures as established by the Department "... are not an adjudication or a regulation". They are the Department's interpretation of its' working framework. The Department has overstepped its' "administrative discretion" in attempting to circumvent Title 37 for Oil and Gas activities. In Title 37, Chapter 5, Section 507, (a 1 and 2)"Commonwealth agencies... shall cooperate fully with the commission (PHMC) in the preservation of archeological resources...". Agencies, such as DEP are required to "Notify the commission before undertaking any ... projects that may affect the archeological sites." and "Notify the commission when they become aware of any undertaking... which affects or may affect an archeological site...". By not requiring any form of historical survey prior to earthmoving activities by Oil and Gas in the permitting process, the Department is blatantly ignoring the mandates of the statute.

The Commonwealth of Pennsylvania has a long and unfortunate history of trading off environmental damage in exchange for "economic development" and jobs. As stated in Chapter One of Act 37, " The rapid social and economic development of our contemporary society threatens to destroy the remaining vestiges of our historic heritage." With industries like coal mining and the production of metals, legislation has been introduced to curtail the damage and remedial actions taken to attempt restoration. There are no remedial actions that can be taken to restore archeological sites once disturbed. The only course is one of prevention.

CASE EXAMPLE :

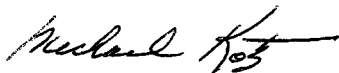
In the summer of 2009, at my request, Dr. Mark McConaughy of the PHMC Bureau of Historic Preservation, examined just the last two miles of a gas line construction project done in Washington County by Mark West Energy. (Mark West had previously been fined \$250,000 for infractions/violations of Chapters 102 and 105 on this project.). His data showed that it was likely that Mark West had compromised, damaged or destroyed 9 identified and recorded Native American sites (36WH 251, 423, 723, 1087, 4, 581, 491, 1030 and 1029). In a subsequent informal meeting held in August with representatives of Mark West, the DEP (2), PHMC and myself, this information was shared with all present. In a thrice repeated position by Mark West, it was stated that they would comply with all state regulations of the permitting process however, it was their position that **THERE ARE NO REGULATIONS IN AFFECT REGARDING CULTURAL RESOURCES IN THE PERMITTING PROCESS FOR OIL AND GAS ACTIVITIES.**

The Mark West representative further stated that the site information maps as provided by PHMC were/are "unusable" for their planning purposes, that they had "inadequate staff" to handle this information and are not planning on adding additional staff for this purpose. From this position, one can only assume that legislation requiring Oil and Gas activities to comply with the History Code (in the permitting process) is required as a voluntary, discretionary expenditure by this industry is unlikely.

RECOMMENDATIONS:

- 1) The Pennsylvania Department of Environmental Protection should be made to comply with Title 37 in its' permitting of Oil and Gas activities.
- 2) If staffing is an issue with PHMC to review the permit applications submitted by DEP in a timely manner, PHMC should grant access to their site maps and delegate this responsibility to the County Conservation Districts.
- 3) Because of the major significance of even some "small sites" (i.e. The Meadow Croft Rockshelter), there should be no minimal acreage limits established for "exemption" of the historical survey requirement in areas of known, high density archeological sites and certainly no 25 acre exemption as proposed in the current rulemaking changes to 25 PA. Code Ch. 102.
- 4) An inventory taken of all Gas and Oil earth moving activities in the last three years matched against PHMC site maps to assess damage.

Respectfully Submitted:



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Pennsylvania Department of Environmental Protection

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August 19, 2009

Bureau of Watershed Management

717-787-6827

Mr. Mike Kotz
1199 North 231 Road
Claysville, PA 15323

Dear Mr. Kotz:

Thank you for your recent letter to Department of Environmental Protection (DEP) Secretary John Hanger regarding the Marcellus Shale gas exploration permit-by-rule activities, and your concern over the destruction of significant archeological sites located atop of these gas fields.

First let me clarify that at the present time DEP does not have a permit-by-rule process in place for earth disturbance activities including the activities associated with Marcellus Shale exploration. A draft permit-by-rule process has been developed by DEP for low impact projects with riparian forest buffers. This process has been included in the proposed Chapter 102 rulemaking which will be published on August 29, 2009, in the *Pennsylvania Bulletin* for a 90-day public comment period. As proposed, the permit-by-rule may be used once the rule becomes final by persons undertaking Marcellus Shale activities, if they are eligible for coverage based on the permit-by-rule requirements contained in the rule, and if they can meet all the permit conditions.

In regards to your concern over the destruction of significant archeological sites, oil and gas exploration activities have been specifically exempted from DEP and the Pennsylvania Historic and Museum Commission (PHMC) policy and procedures for implementing the requirements of the History Code. DEP would recommend that you contact representatives of the PHMC, Bureau of Historic Preservation for appropriate action.

If you have any additional questions, please contact Ms. Barbara Beshore, in DEP's Bureau of Watershed Management, by e-mail at bbeshore@state.pa.us or by telephone at 717-787-6827.

Sincerely,

Kenneth Murin, Chief
Division of Waterways, Wetlands
and Stormwater Management

cc: Jean Cutler, PHMC
Senator Barry Stout (c/o Linda Stettner)



