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March 24, 2016

The Honorable John F. Mizner, Esq., Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

**Re:** Final Rulemaking: Environmental Protection Performance Standards at Oil and Gas Well Sites (25 Pa. Code Chapters 78 and 78a) – IRRC #3042

Dear Chairman Mizner:

The Marcellus Shale Coalition (MSC) was formed in 2008 and is comprised of approximately 220 natural gas producer, midstream and supply chain members who are fully committed to working with local, state and federal government officials, local communities, and other stakeholders to facilitate the development of the natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in natural gas production, gathering and transmission in the country, as well as the consultants, suppliers and contractors who work with the industry.

Recently, the Independent Regulatory Review Commission (IRRC) received from the Environmental Quality Board (EQB or Board) the final above-referenced rulemaking that makes substantial revisions to the Commonwealth's regulations governing oil and gas operations. The MSC has previously shared with IRRC our significant concerns with both the proposed rulemaking and the Advanced Notice of Final Rulemaking (ANFR). We appreciate our prior opportunities to meet and discuss in detail the concerns outlined in the MSC's public comment letters. As this rulemaking is now before IRRC for final consideration, we feel obligated again to register our serious concerns with both the substantive implications of many of the provisions in the final rulemaking, as well as the process utilized to arrive to this point. We also incorporate by reference the MSC's prior comments submitted on this rulemaking, including the May 19, 2015 comments on the ANFR. Our comments on a relatively limited number of items below should not be construed as insinuating that our concerns expressed in our official public comments have been sufficiently addressed.

Process

Before discussing specific substantive issues, the MSC objects to the regulatory process utilized by the Department of Environmental Protection (DEP) in the time since the proposed rulemaking. In particular, the MSC believes that the use of the ANFR process in the manner employed by DEP is not consistent with the Regulatory Review Act (RRA).

The MSC commented extensively in our May 19, 2015 comment letter regarding DEP's use of the ANFR process. While the public was originally given 30 days to provide public comment (later extended to 45 days and three public hearings, at the urging of members of the General Assembly), under the RRA, the ANFR is not part of the formal regulatory process. In April 2014, IRRC submitted 19 pages of detailed and substantive comments on the proposed rulemaking. However, DEP's use of the informal ANFR process circumvented IRRC's opportunity to comment formally on

the most recent substantive changes and new additions that have been incorporated into the final rulemaking before IRRC. In this manner, DEP eliminated the opportunity for IRRC to review significant changes made since the Commission's April 2014 comments and precluded IRRC from requesting either clarification, justification or consideration of amendatory language.

Moreover, through its use of the ANFR process, the department sidestepped its legal obligations to publish a Regulatory Analysis Form (RAF). In the *Pennsylvania Bulletin* notice regarding the ANFR (45 Pa.B. 1615, April 4, 2015), the Department identified 17 different provisions that it identified as "significant changes" and added 15 new definitions. In essence, the Department submitted a new set of proposed regulations without following the requirements of the RRA. Key components of the RAF include the statutory authority, statement of need, considerations for small business and estimates of compliance costs related to regulatory changes. The absence of that vital information, which is intended to inform the comments of the public, the Oil and Gas Technical Advisory Board (TAB), the regulated community, standing legislative committees, and IRRC, deprived these same commentators of critical information necessary to evaluate and provide input on the rulemaking. Both chairs of the Senate and House legislative oversight committees requested this information on multiple occasions from DEP, only to have the department withhold the information.

At a minimum, it seems appropriate that those provisions in the ANFR which were either substantially revised or are wholly new, and which are now in the final rulemaking before you, should be withdrawn and included in a proposed rulemaking that adheres to the RRA requirements. These provisions include, but are not necessarily limited to:[1]

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| • Sections 78a.15 – 78a.122 | Electronic notifications, forms and reporting requirements |
| • Section 78a.15 | Public resources |
| • Section 78a.17 | Permit expiration and renewal |
| • 78a.52a | Area of review |
| • 78a.56 | Temporary storage |
| • 78a.57 | Control, storage and disposal of production fluids |
| • 78a.59b | Well development impoundments |
| • 78a.59c | Centralized impoundments |
| • 78a.65 | Site restoration |
| • 78a.66 | Reporting and remediating spills and releases |
| • 78a.68b | Well development pipelines |
| • 78a.69 | Water management plans |
| • 78a.73(c) | General provisions applicable to wells within area of review |
| • 78a.121 | Waste reporting |

Lack of Clarity and Practicality

In addition to numerous substantive policy concerns in the rulemaking, as evidenced by the MSC's prior public comments shared with IRRC, there are significant technical deficiencies within the rulemaking. Such deficiencies would likely have been identified by IRRC if afforded the opportunity to provide formal comments to the department for both consideration and response.

[1] Sections referred to are in Chapter 78a (Unconventional rulemaking) and may have corresponding sections in Chapter 78 (Conventional rulemaking)

The MSC and other stakeholders made substantial efforts to persuade DEP to address those issues. Many of the issues were discussed at public meetings of TAB and the Conventional Oil and Gas Advisory Committee (COGAC). Still others were included in numerous public comments submitted to DEP, including within the MSC's own comments. Several of these issues were highlighted and discussed as amendments offered by members of the EQB at the Board's February 3, 2016 meeting. At the urging of DEP, all amendments were defeated despite several instances where DEP stated that they actually intended to implement the rule consistent with the proposed amendment. For example:

- The definition of 'mine-influenced water' is extremely broad, making it difficult for operators to understand what exactly constitutes such water. An amendment sought to clarify that a mine-influenced water is one which is listed on DEP's official list of impaired waterways (the '303(d)' list under the U.S. Clean Water Act) due to pollutional mine drainage. DEP opposed the amendment, and it was defeated. We note that in its comments on the proposed rulemaking, IRRC recommended that the sentence, "*The term may also include surface waters that have been impaired by pollution mine drainage as determined by the Department*" be either amended or deleted because it failed to establish a regulatory, binding norm. The department ignored IRRC's comment on this section. (Sections 78.1 and 78a.1)
- Under the final rulemaking, pre-drilling or pre-alteration surveys required to be submitted to the department for an operator to preserve their rights under the rebuttable presumption provision of the Act must be submitted 10 business days prior to the commencement of drilling. An amendment was offered at the EQB to change this time frame to "at least 10 business days" prior to the commencement of drilling, so as to avoid an absurd result whereby an operator who submits a survey 9 days, or 11 days, or some other time-frame prior to commencement of drilling, forfeits their statutorily-afforded protection. DEP argued against the amendment, and it was defeated. (Sections 78.52(d) and 78a.52(d))
- Moreover, this same provision states that surveys not received "within 10 business days" may not be used to preserve the operator's rebuttable presumption defense. This limitation seeks to, by regulation, impose unreasonable standards regarding the forfeiture of a legal defense that is afforded, without such qualification, by the Act. DEP has no legal authority to limit this defense. Nonetheless, DEP argued against the amendment, and it was defeated.
- An 'Area of Review' report must be submitted to the department at least 30 days prior to the commencement of drilling. However, the critical time for consideration of this information is during the hydraulic fracturing process, whereby the well is stimulated prior to being put into production. For a variety of reasons, and particularly in this current economic climate of sustained and historically low natural gas prices, it is not unusual for a significant period of time (1-2 years) to pass from the commencement of drilling operations until a well is hydraulically fractured. The EQB considered an amendment that would require the submission of the area of review report at least 30 days prior to commencement of hydraulic fracturing operations. However, DEP argued against this amendment, and it was defeated. (Sections 78.52a(e) and 78a.52a(d))
- The standard for water quality replacement states that it must meet either Pennsylvania Safe Drinking Water Act standards, or is comparable to the quality of the water supply if it was better than Pennsylvania Safe Drinking Water Act standards. In determining whether an operator has fulfilled their obligation, DEP fails to limit the evaluation of a restored or replaced water supply to those parameters which were, in fact, affected by oil and gas activities. The EQB considered an amendment which would have specifically stated that an operator's obligation was limited to those parameters identified by DEP as being related to

oil and gas activities. Yet, despite DEP verbally stating at the EQB meeting that this is how the agency intended to implement this provision, DEP argued against the amendment, and it was defeated. (Sections 78.51(d)(2) and 78a.51(d)(2))

Forms

At the EQB's February 3, 2016 meeting, counsel for DEP acknowledged that the RRA requires all forms called for by the new regulations to be included in the RAF, which accompanies proposed and final-form rulemakings,[2] yet admitted that the department had failed to provide such forms to the EQB. Remarkably, DEP counsel stated that the department routinely failed to meet this obligation, and in most cases, simply waited until a rulemaking was final before proceeding to draft the necessary forms. The department admittedly ignored this provision of the RRA, as if the Act's requirements are optional. Furthermore, past practice of failing to adhere to the statutory requirements of the RRA is not license to continue the practice.

This is no minor issue. The sheer number of new and revised forms is significant. Some 25 new or revised draft forms and associated instructions were first made available in the 723-page document submitted to IRRC on March 3, 2016. These forms often have the effect of imposing de facto regulatory standards – many times deviating from the statutory or regulatory provisions they purport to implement. They often are lengthy, complex, and introduce variables into the decision making process, both for the regulated community as well as DEP field staff, that make definitively understanding and interpreting an obligation under the final rulemaking difficult and ambiguous.

In several cases, the forms and supporting instructions required under the final rulemaking are simply excluded from the RAF submitted to IRRC and the legislative committees. Those that are included are in draft form, with no clear indication of what, if any, public review and input process will be employed or assurance that they will be finalized by the time this rulemaking is effective.

It also seems wholly unreasonable that the department insists that this final rulemaking take effect immediately upon publication in the *Pennsylvania Bulletin*. At a minimum, IRRC should insist that any final rulemaking not be effective until all forms and related documents necessary to effectuate it have been drafted, subjected to meaningful public comment, discussed at the TAB, and that adequate training opportunities for both department staff and the regulated community have occurred.

Public Resources

One of the primary obligations of IRRC is to ensure that an agency promulgating a rulemaking is adhering to the statutory authority granted by the General Assembly, and as interpreted and determined by the courts of the Commonwealth. With this in mind, it is imperative that IRRC review sections 78.15(f) & (g) and 78a.15(f) & (g) of the final rulemaking, which purport to implement the public resources sections of Act 13 of 2012[3] (Act 13). Of critical note, the statutory authority for the EQB to implement these provisions of Act 13 was enjoined entirely by the Pennsylvania Supreme Court.[4] In preparing this final rulemaking for the EQB, DEP has not only ignored the Supreme

[2] §5(a)(5) of Act 181 of 1982, known as the Regulatory Review Act

[3] 58 Pa.C.S.§3215(c)&(e)

[4] Robinson Township et al v Commonwealth of PA (pg. 161) – *"D. The remaining parts of Section 3215(b) are not severable from Section 3215(b)(4) and, as a result, the application or enforcement of Section 3215(b) is enjoined in*

Court's ruling, but also seeks to expand the list of public resources enumerated in Act 13 through the addition of two new public resources: 1) within 200 feet of common areas on a school's property or a playground; and 2) within zones 1 or 2 of a wellhead protection area.

In addition to expanding the list of public resources, DEP has also significantly expanded the definition of 'public resource agencies'. Whereas historically public resource agencies have been a defined, limited number of entities with explicit legal authority to manage a designated resource, this final rulemaking expands public resource agencies to include every county, municipality and playground owner, and presumably school districts, in the Commonwealth. Such a significant expansion of the number of entities an applicant must potentially consult is simply unwieldy and unworkable. DEP seeks to provide a legal role for numerous entities in the permitting process to which they are not legally entitled. IRRC should insist that these provisions be removed from the final rulemaking to ensure that it is not in conflict with the law of the Commonwealth.

Moreover, DEP is improperly seeking to create a binding regulatory requirement in excess of its statutory authority. Permit applicants will be required to undertake extensive and expensive procedures, pursuant to Section 78a.15(f)(1)(iv), if a well site is "in a location that will impact other critical communities," and as such it is essential to know exactly what species and communities are covered. However, "other critical communities" is now defined in the final rulemaking to include whatever species show up on a Pennsylvania Natural Diversity Index (PNDI) receipt. Species are placed into the PNDI database without any rulemaking or other public process and are not, simply by inclusion, threatened or endangered species. Moreover, DEP has expanded the roster of species within the 'critical communities' definition to include those which are proposed or being considered for inclusion on the threatened or endangered lists. In other words, the identification of almost any species in a PNDI search could preclude the issuance of a permit for natural gas development. Most importantly, in terms of IRRC's evaluation of the final rulemaking, the PNDI receipt can create a binding requirement without following the required regulatory process. Throughout this section, the department simply ignores both binding court decisions as well as the direction of the General Assembly, and seeks to exercise authority it does not have.

Cost Compliance Estimates

Based on surveys and solicitation of feedback from our membership, the MSC estimates that the final rulemaking will increase costs to the regulated community by approximately $2 million per well, or approximately $2 billion annually if 1,000 wells are drilled. This is an increase over the prior estimate contained in our May 19, 2015 comment – an estimate constrained by the limited time afforded for public comment; the lack of a cost-compliance estimate by DEP for the new and significantly revised provisions included in the ANFR; and continued due diligence and evaluation of the rule by the MSC after the May 19, 2015 public comment period deadline.

It is the opinion of the MSC that DEP has significantly underestimated the cost of compliance. There was little, if any, outreach to the regulated community to ascertain costs of provisions in the final rulemaking. As a result of DEP's failure to complete a RAF, including cost compliance estimates, to accompany the ANFR, none of the department's estimates have been formally reviewed or evaluated

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*its entirety. Moreover, Sections 3215(c) and (e), and 3305 through 3309 are not severable to the extent that these provisions implement or enforce those Sections of Act 13 which we have found invalid and, in this respect, their application or enforcement is also enjoined."*

by the public, the legislative committees or IRRC or, most importantly and relevantly, the operators which are the only entities with the knowledge to equate the impact of the rules with the cost of implementation.

Ironically, in the final rulemaking DEP has actually *reduced* its total cost compliance estimate compared to the December 2013 proposed rulemaking. This is implausible given that DEP has significantly expanded regulatory requirements with new provisions in the final rulemaking, such as:

- Phasing out and closing centralized impoundments;
- New construction standards for well development impoundments;
- Implementation of secondary containment standards;
- Expanding the number of public resources and agencies;
- Expanding the area of review survey and monitoring requirements;
- Imposing new criteria for spill and release cleanup standards;
- Monthly waste reporting; and numerous other matters.

To illustrate this concern, while the proposed rulemaking put the estimated annual cost of compliance at $74 million - $97 million for unconventional operators, DEP puts the estimated cost of compliance for the final rulemaking at $6 million - $31 million for unconventional operators, with initial, one-time costs of $41 million - $73 million over the first three years following the effective date of the final rulemaking.

Moreover, in many portions of the RAF accompanying the final rulemaking, DEP assigns no cost and instead asserts that, because the underlying policy is driven by statute, the regulation itself imposes no additional cost. This assertion wrongly assumes that all provisions of the final rulemaking are mandatory under statute and that there is only one manner in which to implement the policy. At a minimum, DEP's cost compliance estimates and assertions should have been vetted publicly through a public comment period, but they were not.

Conclusion

These new rules come at a time of historic and sustained economic challenges within the industry. National natural gas prices are at twenty year lows, averaging approximately $1.71 per thousand cubic feet,[5] while producers in Pennsylvania are receiving, in many cases, only half that price ($0.92 per thousand cubic feet).[6] The national U.S. onshore rig count is the lowest it has been since the 1940s.[7] The current price regime makes most drilling operations uneconomic, and these challenges are only exacerbated by additional, costly rules with questionable legal basis and even more questionable environmental benefit.

The lack of support from both TAB and COGAC, coupled with the significant concerns raised by members of the regulated community, demonstrate a lack of consensus building and engagement by the department with those it regulates. IRRC raised the importance of attempting to reach consensus in its comments of April 14, 2014 and noted that the RRA is "*intended to encourage the resolution of*

[5] NYMEX – Natural Gas Contract Settlement Price History (March 2016)

[6] MSC weighted price average for PA – based on Platt's Inside FERC (March 2016)

[7] Baker-Hughes Incorporated – weekly rig count – March 11, 2016

*objections to a regulation and a reaching of a consensus among the commission, the standing committees, interested parties and the agency.*" That has simply not occurred here.

There are numerous substantive policy matters worthy of IRRC's consideration that are not included here, and are again incorporated by reference to the MSC's prior submitted comments.

The Marcellus Shale Coalition and its members support strong, consistent environmental standards that both protect our natural resources and ensure the Commonwealth attains a competitive economic environment. We have sought to be engaged partners throughout enactment of Act 13 as well as subsequent statutory and regulatory considerations, including this rulemaking.

As currently presented, these regulations fail to comply with the requirements of the Regulatory Review Act and fail to adhere to the directives of the General Assembly. We, therefore, request that IRRC disapprove of this final rulemaking in its current form. We further request that IRRC urge the EQB to modify the rulemaking in a manner that would allow a revised version to proceed consistent with the requirements of the Regulatory Review Act. Specifically, the rulemaking should be modified with the changes necessary to provide clarity, as noted by IRRC and other commenters, and to conform with the intent of the General Assembly. In addition, those provisions introduced in the ANFR should be withdrawn and re-proposed, if the EQB wishes, in full compliance with the Regulatory Review Act.

Thank you for your consideration of these comments.

Sincerely,

David J. Spigelmyer
President

cc: Commissioner George D. Bedwick
Commissioner W. Russell Faber
Commissioner Murray Ufberg, Esq.
Commissioner Dennis A. Watson, Esq.
David Sumner, Executive Director, IRRC
Senate Environmental Resources & Energy Committee
House Environmental Resources & Energy Committee