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April 18, 2016

The Honorable George D. Bedwick, Chairman
The Honorable John F. Mizner, Vice Chairman
The Honorable W. Russell Faber
The Honorable Murray Ufberg
The Honorable Dennis A. Watson
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: No. 3042 Environmental Quality Board #7-484: Chapters 78 & 78a Environmental Protection Performance Standards at Oil and Gas Well Sites

Dear Commissioners:

On Thursday you will have the opportunity to vote on one of the most significant environmental regulations ever put forward by the Environmental Quality Board in terms of its measures to protect the environment, prevent pollution and protect Pennsylvania's air, land, water and natural resources from harm.

I encourage you to vote to approve Chapters 78 and 78a.

I served as Secretary of the Department of Environmental Protection under Governors Tom Ridge and Mark Schweiker and have been involved in environmental policy making, legislation and regulation from the standpoint of both DEP and the General Assembly for nearly 40 years.

I was involved in the passage of the 1984 Oil and Gas Act, the first attempt to more comprehensively regulate oil and gas drilling, in 1983 and 1984 in the Office of Legislative Affairs in the old Department of Environmental Resources.

We were then dealing with the environmental consequences of 124 years of drilling-- garden hoses and faucets catching on fire from migrating natural gas and dirty, yellow water from poorly constructed wells, innumerable spills, cleanup costs to fix wells that fell back on taxpayers because drillers were without the resources to deal with them and with no financial assurance posted.

I can tell you from personal experience with that legislation and since, most conventional oil and gas drillers come to the table with an attitude that they don't want to be regulated by anyone

because their “activity” is environmentally benign. That sentiment was actually included in the preamble to Senate Bill 1378 and House Bill 2350 as recently as 2014 when members of the General Assembly wanted to delay DEP’s drilling regulations.

We now know better, of course, and DEP’s regulations before you are the latest attempt by the environmental professionals at DEP to put in place the kinds of modern environmental safeguards to prevent the kinds of impacts we’ve seen in the past.

I would also point out, the environmental professionals who manage DEP’s Oil and Gas Program have been in place through the Rendell, Corbett and now Wolf administrations. Those administrations have had differing approaches to environmental protection, but all agreed on at least one thing-- DEP’s regulations of conventional and unconventional oil and gas drilling needed significant and comprehensive updates.

The regulations you have before you are the result.

The facts are--

1. Conventional Wells Cause Water Loss, Contamination Just Like Unconventional Wells: Conventional wells are just as likely to cause water well loss and contamination as unconventional wells, even more so because there are more conventional wells than unconventional wells.

2. Conventional Wells Have More Violations: DEP inspections found conventional drillers had a higher rate of violations of the existing regulations than unconventional drillers.

3. Both Use Fracking: Both conventional and unconventional wells use fracking to increase production and conventional well drillers are also exploring the use of horizontal drilling to increase yields.

4. Conventional Wells Are Drilled Through Same Sensitive Aquifers: Conventional wells can be drilled to a depth of 1,500 to 21,000 feet and unconventional wells can be drilled to a depth of 5,000 to 9,000 and then laterally another 10,000 feet or more, both passing through sensitive groundwater aquifers.

5. Conventional Wells Create A Bigger Footprint: To develop the same amount of natural gas, conventional well drillers must drill 16 or more wells, while unconventional drillers use as few as 8 in 75 percent less land area.

6. Smaller Companies, Fewer Resources: Conventional oil and gas well drillers tend to be smaller companies with fewer resources to deal with environmental and water replacement problems when they do develop and that means taxpayers may have to foot the bill much more often.

I’ve been hearing the same things from the conventional oil and gas industry since 1983-- you’re

going to put us out of business with modern environmental regulations and complying will cost them too much.

The evidence that these statements are not true is simple-- the industry is still here through all the economic ups and downs of the industry for the last 32 years and successive updates to Pennsylvania's environmental regulations.

A more complete discussion of the myths the conventional industry tries to perpetuate is available online.

Both the conventional and unconventional industries have tried to attack these regulations on whether they comply with a 2014 amendment to the state Fiscal Code directing the Environmental Quality Board to adopt separate regulations for conventional and unconventional oil and gas drilling.

I believe they have complied, but to get to the root of this issue, you must look at the substance of the regulations in Chapters 78 and 78a.

DEP started the regulatory process for the drilling regulations in August of 2013 before the Fiscal Code amendment was passed a year later. After the law was passed in 2014, during the Corbett Administration, DEP separated the regulations into a chapter for conventional and another chapter covering unconventional, shale drilling, and put the entire separated package out for another round of public review in April 2015.

In announcing the final regulation in January, DEP itemized the list of the major differences between the chapters covering conventional and unconventional drilling requirements.

In terms of a compelling reasons for adopting this regulation, I believe there is more than enough justification both in existing law and the practical circumstances in the field.

When the House Environmental Resources and Energy Committee considered these regulations on April 12, Rep. Jeff Pyle (R-Armstrong) said he was unaware Act 13 of 2012, which was used by DEP to justify the original proposed regulations in part, covered conventional oil and gas drilling.

It was clear at least to Sen. Joseph Scarnati (R-Jefferson), President Pro Tempore of the Senate, Act 13 covered both conventional and unconventional wells because he said so during a Senate Environmental Resources and Energy Committee meeting in June 2014.

Act 13 clearly applies to both conventional and unconventional wells and makes the distinction only when the General Assembly felt the restrictions on unconventional wells needed to be greater, for example, with setback requirements.

Yes, the Pennsylvania Supreme Court did declare some provisions of Act 13 of 2012 unconstitutional, but the Environmental Quality Board has ample statutory authority under other

environmental laws and court decisions to adopt the measures contained in Chapters 78 and 78a. The list of statutes included the Clean Streams Law which gives DEP broad authority to protect the Commonwealth's water resources.

There are other Pennsylvania Supreme Court decisions that have also supported DEP's ability in regulations to protect public resources and public facilities like schools and parks, including the 1973 Payne v. Kassab decision.

The regulation before you has been through the most extensive public review and comment process ever undertaken by the Department of Environmental Protection and the Environmental Quality since they were first formed in 1971.

The fact there are disagreements over them is not surprising, but it's the job of DEP and the unique 20-member Environmental Quality Board to balance those interests and adopt a regulation that follows the statutory and constitutional mandates of the agency and balances economic impacts. You have a similar obligation.

I believe they have the right balance and, objections to the contrary by the drilling industry that has a record of crying "wolf" repeatedly on these issues, I recommend you approve Chapters 78 and 78a and bring Pennsylvania's oil and gas regulations up to modern standards of environmental protection.

Thank you for consideration of these comments. If you have any questions, please feel free to contact me at 717-576-0420 or send email to: dhess@CrisciAssociates.com.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Hess".

David E. Hess
Former Secretary
Pennsylvania Department of Environmental Protection