

3042

RECEIVED
IRRC

2016 APR 18 PM 4: 10



Citizens for Pennsylvania's Future
610 North Third Street
Harrisburg, PA 17101
info@pennfuture.org
www.pennfuture.org

April 18, 2016

Submitted Electronically: irrc@irrc.state.pa.us

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

Re: IRRC Number 3042

Regulation No. 7-484

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

Dear Chairman Mizner:

On behalf of Citizens for Pennsylvania's Future (PennFuture) and its members, we submit these comments on the referenced final rulemaking of the Environmental Quality Board (EQB), which is scheduled for consideration and action at the public meeting of the Independent Regulatory Review Commission (Commission or IRRC) on April 21, 2016.

PennFuture is a statewide, public interest environmental organization that works to create a just future in which nature, communities and the economy thrive. In pursuing this mission, PennFuture has devoted significant resources to promoting the adoption, implementation, and enforcement of statutes, regulations, and policies that provide effective, up-to-date standards for addressing the impacts of oil and gas development on the environment. Included in those efforts were the submission of extensive comments to the EQB on March 14, 2014 on the proposed rulemaking in this proceeding, as well as the submission of two separate sets of comments (one addressing Chapter 78, the other addressing Chapter 78a) to the EQB on May 19, 2015 in response to the advance notice of final rulemaking in this proceeding.

PennFuture supports the EQB's final rulemaking. As briefly explained below, PennFuture requests that the Commission find that the final rulemaking is within the EQB's statutory authority, conforms to the intent of the General Assembly, and is in the public interest, and accordingly that the Commission approve the final rulemaking. *See* 71 P.S. § 745.5b(a), (b).

1. The EQB’s final rulemaking is within the EQB’s statutory authority and conforms to the intention of the General Assembly.

In determining whether a regulation is in the public interest, the Commission first must “determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.” 71 P.S. § 745.5b(a).

A. Statutory Authority

On the question of statutory authority, the principal contention of those who object to the EQB’s final rulemaking is that a 2014 amendment to the Fiscal Code, Act of July 10, 2014, No. 126, P.S. 1053, § 13.2, 72 P.S. § 1741.1-E, effectively mandated that the regulatory process begin anew with the publication of new proposed rules separately addressing conventional and unconventional oil and gas development.

That is not, however, what § 1741.1-E says, or what it requires. The operative provision of § 1741.1-E of the Fiscal Code states:

(a) Regulations. – From funds appropriated to the Environmental Quality Board, the board shall promulgate proposed regulations and regulations under 58 Pa.C.S. (relating to oil and gas) or other laws of this Commonwealth relating to conventional oil and gas wells separately from proposed regulations and regulations relating to unconventional gas wells. All regulations under 58 Pa.C.S. shall differentiate between conventional oil and gas wells and unconventional gas wells. Regulations promulgated under *this section shall apply to regulations promulgated on or after the effective date of this section.*

72 P.S. § 1741.1-E(a) (emphasis added).

By its plain, prospective terms, this provision, which took effect on July 10, 2014, does not apply to retroactively to the proposed rulemaking in this proceeding, which had been approved for publication by the EQB on August 27, 2013 and published for public comment on December 14, 2013. *See* 43 Pa. Bull. 7377 (Dec. 14, 2013). Although § 1741.1-E(a) incorrectly uses the term “promulgate” with respect to *proposed* regulations,¹ by its prospective terms, it is wholly inapplicable to the EQB’s proposed rulemaking in this proceeding, for which the comment period had closed nearly four months before the

¹ The Regulatory Review Act defines “Proposed regulation” as “[a] document intended for promulgation as a regulation,” and defines “Promulgate” as “[t]o publish an order adopting a final-form or final-omitted regulations in accordance with the . . . Commonwealth Documents Law.” 72 P.S. § 745.3. Thus, while it is a necessary, preliminary step toward promulgation, the approval of proposed regulations for public comment is not correctly termed “promulgation.” In Pennsylvania, a regulation is not promulgated until the fully-approved version is published as binding law following the completion of all of the steps set forth in the Commonwealth Documents Law, 45 P.S. §§ 1101-1602, and the Regulatory Review Act, 71 P.S. §§ 745.1-745.15.

enactment of § 1741.1-E. The fact that the EQB's proposed rulemaking contained just one set of regulations applicable to both conventional and unconventional operations therefore is of no moment, because nothing in § 1741.1-E prohibits the EQB from *continuing* with a rulemaking proceeding growing out of such a proposed rule so long as the EQB's *future* actions comport with the prospective terms of § 1741.1-E.

Once § 1741.1-E took effect on July 10, 2014, the EQB acted strictly in compliance with the statute. The final rulemaking as approved by the EQB on February 3, 2016 fully complied with the requirement in § 1741.1-E(a) to "differentiate between conventional oil and gas wells and unconventional gas wells" by adopting separate and differing chapters for conventional operations (Chapter 78) and unconventional operations (Chapter 78a). 72 P.S. § 1741.1-E(a). Any future promulgation of those distinct chapters will likewise comply with the requirement to "promulgate . . . regulations . . . relating to conventional oil and gas wells separately from proposed regulations and regulations relating to unconventional gas wells." *Id.* As a result, the 2014 Fiscal Code amendment codified at 72 P.S. § 1741.1-E does not deprive the EQB of the authority to adopt the regulations as presented in the final rulemaking.

B. Conformity with Intention of the General Assembly

Section 5.2(a) of the Regulatory Review Act also requires the Commission to determine "whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based," 71 P.S. § 745.5b(a). In this instance, the "statute upon which the regulation is based" within the meaning of Section 5.2(a) of the Regulatory Review Act, 71 P.S. § 745.5b(a), is not the 2014 Fiscal Code amendment, 72 P.S. § 1741.1-E, but rather a series of environmental statutes including the 2012 Oil and Gas Act,² The Clean Streams Law,³ and the Solid Waste Management Act.⁴ *See* 43 Pa. Bull. 7377 (col. 1-2) ("Statutory Authority"). Thus, the intention of the General Assembly in enacting § 1741.1-E is irrelevant to the Commission's analysis of whether the final rulemaking is in the public interest.

Even if § 1741.1-E were relevant to that inquiry, however, for the reasons explained in the preceding subsection of these comments, it is clear that the EQB's action comported with the General Assembly's intention as expressed in that Fiscal Code amendment. It is axiomatic that "[a] statute's plain language generally provides the best indication of legislative intent." *Board of Revision of Taxes v. City of Philadelphia*, 4 A.3d 610, 622 (Pa. 2010). *See* 1 Pa. C.S. § 1921(b). Here, the plain language of § 1741.1-E(a) is purely prospective,⁵ and the EQB properly gave that language prospective effect by bifurcating the proposed regulation into two separate chapters – one addressing conventional operations and the other unconventional operations – before taking any further action on the ongoing

² 58 Pa. C.S. §§ 2301-3504.

³ 35 P.S. §§ 691.1-691.1001.

⁴ 35 P.S. §§ 6018.101-6018.1003.

⁵ *Cf.* 1 Pa. C.S. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.")

rulemaking. In so doing, the EQB acted within its statutory authority and in accordance with the intention of the General Assembly as expressed in the plain language of § 1741.1-E(a). The Commission therefore should find that the EQB's final rulemaking satisfies the requirements of Section 5.2(a) of the Regulatory Review Act, 71 P.S. § 745.5b(a).

2. The EQB's final rulemaking is in the public interest.

After determining that a regulation is within the agency's statutory authority and consistent with the intention of the General Assembly, the Commission must consider the criteria listed in Section 5.2(b) of the Regulatory Review Act, 71 P.S. § 745.5b(b), in assessing whether the regulation is in the public interest. PennFuture briefly addresses several of those criteria.

There is a clear "[n]eed for the regulation," 71 P.S. § 745.5b(b)(3)(iii). The 2012 Oil and Gas Act adopted new standards governing unconventional operations and authorized, and in several instances, directed, the EQB to adopt regulations implementing the statute. *See, e.g.*, 58 Pa. C.S. §§ 3211(j), 3214(e), 3218(a), 3218.4(c), 3274. Moreover, Pennsylvania's regulations governing oil and gas wells and related operations have not been updated comprehensively since 1989, *see* 19 Pa. Bull. 3229 (July 29, 1989), and lag behind both technological developments in the industry and regulatory advancements in other jurisdictions.

The need for the EQB's final rulemaking overlaps substantially with another enumerated factor in the public interest considerations, namely "[t]he protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources." 75 P.S. § 745.5b(b)(2). Although the proposed regulations are not as protective of the environment and public health as they could be, the updated standards and prohibitions in the EQB's final rulemaking indisputably would provide greater protection of public health, safety, and welfare than the current Chapter 78 regulations do. Among other things, the proposed changes:

- provide clearer standards for remediation of drinking water supplies that have been contaminated by oil and gas operations;
- provide the opportunity for agencies in charge of "public resources," including playground owners and school districts, to review and comment on plans for oil and gas drilling operations that may impact public resources entrusted to them;
- eliminate the use of pits that have been shown to leak and cause soil and groundwater contamination for the storage of polluting substances such as brines, stimulation fluids, and production fluids;
- substitute the use of current best available technology, namely tanks, for the storage of brines, stimulation fluids and production fluids;
- improve the use of secondary containment to prevent on-site soil and groundwater contamination from spills;
- require registration and improve construction standards for well-development impoundments;

- require the closure or re-permitting of centralized impoundments, which have been shown to leak and cause groundwater contamination, under the same regulations that apply to all other residual waste storage impoundments in the Commonwealth;
- require disposal pits to comply with the same regulations that apply to all other residual waste disposal facilities in the Commonwealth;
- better address the reporting and remediation of on-site spills;
- enhance protection for streams from horizontal drilling for pipelines from unconventional well operations, which has caused numerous incidents of stream pollution;
- memorialize the standards and goals to prevent harm to streams from water withdrawals for unconventional well operations; and
- affix responsibility for plugging abandoned wells that have been damaged by fracking.

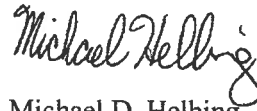
While leaving room for further improvement, the updated standards in the final rulemaking would substantially enhance the protection of the public health, safety, and welfare as well as Pennsylvania's environment and natural resources.

These environmental and public health, safety, and welfare impacts also must be considered in the context of the first public interest factor, the "[e]conomic or fiscal impacts of the regulation." 71 P.S. § 745.5b(b)(1). The operational and administrative costs of complying with the new regulations are properly considered under this provision. So, too, however, are the difficult-to-monetize benefits to the Commonwealth, its businesses, and its citizens of maintaining a healthy environment that sustains critical industries like agriculture and tourism and promotes significant sources of private and public well-being – from clean drinking water supplies to abundant outdoor recreational opportunities. Moreover, internalizing all costs of production promotes the efficient allocation of resources, so by helping to prevent oil and gas operations from externalizing costs in the form of adverse impacts on the environment and natural resources, the final rulemaking serves the public interest by advancing economic efficiency. In short, the protections of the public and the environment offered by the final rulemaking are properly considered *economic* benefits, and therefore must be placed on the scale when the Commission weighs the "[e]conomic or fiscal impacts of the regulation." 71 P.S. § 745.5b(b)(1).

Overall, the final rulemaking is an important step forward in providing responsible oversight for an industry that today has exponentially larger impacts than it had just a decade ago. The extensive public input received by the EQB and the thorough consideration of that input throughout the development of the regulations has resulted in a final rulemaking that, while not fully satisfactory to any particular party, properly accounts for and balances the relevant interests. The Commission should find that Regulation 7-484 is in the public interest and should approve the regulation as adopted by the EQB.

Thank you for your consideration of these comments.

Sincerely,



Michael D. Helbing
Staff Attorney
helbing@pennfuture.org

Kurt J. Weist
Senior Attorney
weist@pennfuture.org

cc: (all via electronic mail only)
David Sumner, Executive Director (dsumner@irrc.state.pa.us)
Fiona E. Wilmarth, Director of Regulatory Review (fwilmarth@irrc.state.pa.us)
Michelle L. Elliott, Regulatory Analyst (melliott@irrc.state.pa.us)
Scott R. Schalles, Regulatory Analyst (sschalles@irrc.state.pa.us)