#3042

Senate of Pennsylvania

February 2, 2016

Independent Regulatory Review Commission
333 Market Street
Harrisburg, PA 17101

Re: Environmental Quality Board, 25 Pa. Code Chapter 78 Subchapter C; IRRC #3042

Chairman Mizner and Honorable Members of the Commission:

We, the undersigned members of the Pennsylvania Senate Environmental Resources & Energy Committee, submit comments concerning modifications proposed by the EQB to the regulations governing Pennsylvania's conventional oil and gas industry (25 Pa. Code Chapter 78 Subchapter C). The comments are based upon the most recent version of the rulemaking package published on October 13, 2015. The comments are submitted pursuant to the provisions of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, No. 181, as amended, ("RRA").

In making these comments, we take into account the legislation governing the adoption of regulations, including the RRA and the Commonwealth Documents Law (45 P.S. § 1201-1208), the Oil and Gas Act of 2012 (58 Pa.C.S. §§ 2301--3504), the comments published by the Independent Regulatory Review Commission (IRRC), the Regulatory Analysis Form published by the Pennsylvania Department of Environmental Resources ("Department"), public comments, input from the Technical Advisory Board[1] formed under the Oil and Gas Act, and information supplied by the regulated community.

The law requires that new regulations be conceived in balance; as noted in the IRRC comments of April, 2014, the balancing requires care. The RRA contains criterion related to the protection of health, safety and natural resources; it also requires regulatory flexibility for small business and many procedural steps designed to curb what it terms "excessive regulation" and "hidden costs" (RRA Section 2(a)). Further, one of the enumerated purposes of the Oil and Gas Act of 2012 is to "(p)ermit optimal development of oil

[1] The Technical Advisory Board (TAB) is formed under the authority of the Oil and Gas Act of 2012. The Department formed the Conventional Oil and Gas Advisory Committee (COGAC) in March 2015 to serve as an advisory board to the Department. The bylaws of the COGAC charge it with the "review and comment on all...regulations" promulgated under the 2012 Oil and Gas Act prior to submission of the regulations to the EQB. On October 27, 2015 the TAB adopted a resolution which provides that TAB would "incorporate the comments or reports on Chapter 78 that are developed by COGAC into the written report concerning the Department's proposed amendments to Chapter 78 and Chapter 78a that TAB will present to the Environmental Quality Board under Section 3226(d) of Act 13." (Act 13 is the Oil and Gas Act of 2012; Chapter 78 is the proposed regulations that pertain to conventional oil and gas operations; Chapter 78a is the proposed regulations that pertain to unconventional oil and gas operations. In effect TAB is to comment on Chapter 78a unconventional operations and COGAC is to comment on Chapter 78 conventional operations.)

and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens." 58 Pa.C.S.A. § 3202(1).

We recognize that Pennsylvania's natural resources such as clean water, fine agricultural land, and vast woodlands must be shepherded with care, as they are the inheritance of Pennsylvania's future generations. We also recognize that for generations, Pennsylvania's citizens have relied upon conventional oil and gas resources; for over a century the natural gas produced by Pennsylvania's conventional wells have heated our homes, businesses and schools, and Pennsylvania boasts the world's oldest continuously operating oil refinery in Bradford. Nearly all conventional oil and gas producers are small businesses with their owners making their homes in the same communities where they operate wells. Many are third, fourth, or even fifth generation producers with heritage and community ties that, in many ways, are characteristic of Pennsylvania's farming and timber families.

We are cognizant of the current regulatory framework governing conventional oil and gas operations; that framework was primarily established thirty years ago with the adoption of the Oil and Gas Act of 1984. Under that framework many tens of thousands of conventional oil and gas wells have been drilled, with new drilling reaching some five thousand wells per year approximately ten years ago. It is our observation that the tens of thousands of conventional wells drilled and operated under the current regulatory framework have been adequately and well regulated. We are aware that conventional oil and gas operators who have acted to harm Pennsylvania's clean waters have been successfully prosecuted under the current regulatory framework. There is a public record of violators and the subsequent criminal and civil penalties imposed upon them that demonstrates our state's commitment to the protection of her environment and her ability to achieve that protection. Indeed, we are aware that, utilizing the current regulations, the Department successfully banned a particularly egregious operator from conducting ANY oil and gas operations in the State of Pennsylvania. We believe this public record is a testament to the commitment to shepherd our resources for future generations and to the effectiveness of that current framework of regulations.

It is also under our purview to be familiar with the status of our state's resources. We are aware that during the thirty years in which the current regulatory framework has been in place, the goal of shepherding our resources has been achieved. In the very watersheds where the thousands of conventional oil and gas wells have been drilled these past thirty years, we find some of Pennsylvania's highest quality streams; indeed, we note that in several of those watersheds the state's ranking of water quality has risen with many of the streams now being accorded "high quality" or even "exceptional value" status—the highest status accorded by the Department under Chapter 93.

Public comments have also informed us of a study done by our Federal neighbor, the Allegheny National Forest (ANF), situated in northwestern Pennsylvania. The ANF estimates that it is home to some 12,000 producing conventional oil and gas wells. In its 2007 ANF Land and Resource Management Plan ("2007 Forest Plan") the ANF noted that of the 2,126 miles of mapped streams within the ANF proclamation boundary, an area of 720,000 acres, fully 72% are rated as high quality or exceptional value for water quality. The ANF estimated "...that oil and gas clearing (including associated oil and gas access roads) currently occupy 1.4% of the ANF land base." That percentage amounts to approximately 7,000 acres of converted land from a 513,000 acre land base. The 2007 Forest Plan characterized the Forest's water quality as "among the highest in the state."

Further, in November, 2014 the ANF released its five-year Monitoring and Evaluation Report for the period from 2008 through 2013. It focuses on oil and gas development during that period. The 2014 ANF Monitoring Report concludes that "The majority of streams on the ANF are meeting state water quality standards. Impairments are most frequently related to acid deposition or acidity from natural sources." Of particular note is the Clarion University study undertaken to compare the results of oil and gas

development on benthic macroinvertebrate communities in a high development watershed as compared to a very low to no-development watershed. The study reviewed detailed data from a 2010 survey as well as results of studies conducted in the early 1980's, 1990's, and 2008. The report concluded that these macroinvertebrate studies "...did not detect a negative impact to water quality from this development." The findings of the ANF as to its geographical area are consistent with our knowledge of the larger geographical area encompassing all conventional oil and gas operations.[2]

Against this background the first question to be examined is why changes are being made to the current regulatory framework. The proposed changes are very substantial both in quantity and in quality of obligations required. We would expect that for such major changes to be proposed for an industry of both long existence and governed by extensive current regulation, there exists a cogent and thorough statement of need. That statement does not exist.

We cite with approval the well-stated comments published by the IRRC in April, 2014:

> Section D of the Preamble to this rulemaking relates to background and purpose. It notes the following: "The 2012 Oil and Gas Act contains new environmental protections for ***unconventional*** wells and directs the Board to promulgate specific regulations. For these reasons, the (EQB) initiated this proposed rulemaking." (Emphasis in original.) Commentators representing the conventional oil and gas industry believe this rulemaking will have a serious negative impact on their businesses. While we understand that EQB has the authority to amend its regulations relating to conventional wells, we ask for a detailed explanation of why more stringent regulations for the conventional oil and gas industry are needed at this time. Has EQB witnessed an increase in environmental mishaps or violations from conventional well operators? What problem is EQB attempting to correct through this proposal with respect to conventional wells?

In light of the thirty-year existence of the current regulatory framework it was very much within the ability of the Department to have provided the "detailed explanation" cited by the IRRC, at the time the proposed regulation was published.[3] The statement of need contemporaneous with publication of the proposed regulation is required by the RRA precisely because the detailed explanation informs commentators of the need being addressed.[4] That information then allows a review process as contemplated by the law, including public comment anticipated under the Commonwealth Documents Law and the many interactive steps set forth in the RRA, including the solicitation of "the ideas and comments of small businesses" (RRA Section 2(c)(10)), the examination of "the impact of proposed and existing rules on such (small) businesses" (RRA Section 2(c)(10)), and the "reaching of a consensus among the commission, the standing committees, interested parties, and the agency" (RRA Section 2(a)). In its statement of legislative intent the legislature has set forth expected outcomes, including "oversight to curtail excessive regulation" and "executive branch accountability" (RRA Section 2(a)), discussion of whether the proposed regulations efficiently achieve the need or whether the regulations introduce

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[2] Page 69 of the Department's 2014 Pennsylvania Integrated Water Quality Monitoring and Assessment Report contains a table setting forth major sources of groundwater contamination. The table lists several contaminants as high priority sources such as Chemical facilities, Manure/fertilizer applications and Coal mining/acid mine drainage; however, Existing oil/gas wells is not set forth as a high priority.

[3] Section 5(a) of the RRA provides that "On the same date that an agency submits a proposed regulation to the Legislative Reference Bureau for publication of notice of proposed rulemaking in the Pennsylvania Bulletin as required by the Commonwealth Documents Law, the agency shall submit to the commission and the committees a copy of the proposed regulation and a regulatory analysis form which includes the following:" The RRA then sets forth over one dozen paragraphs with subparts, containing required elements such as statement of need, estimate of costs, etc.

[4] The Commonwealth Documents Law requires the opportunity for written comments.

unnecessary paperwork or other burdens stifling the balanced environment contemplated by law, whether there exist alternatives by which small businesses can reasonably achieve the need or whether the small businesses can be exempted from the need, and the like (RRA Section 2(c)).

We agree with the IRRC, that with its focus on unconventional operations, the statement of need published in the RAF was not adequate to inform as to the need for regulatory changes proposed with respect to the conventional oil and gas industry. This is an oversight with profound impact because the statement of need is the requisite building block upon which the above recited procedure of comment and interaction is predicated. While we observe that no such "detailed explanation" has been published by the Department or EQB since the IRRC comments of April, 2014, we also observe that such tardy publication would not rescue the failure to publish an adequate statement of need contemporaneously with the proposed regulations. It would be impossible at this date to carry out the process required by law, or achieve the consensus contemplated by it, without the foundational element of a statement of need. With the thirty-year history of regulating conventional operations the Department should have been able to provide a statement that answered the question posed by the IRRC of why more stringent regulation is required. Until such statement of need is published, the comment, consensus, impact input and other processes contemplated by law cannot be properly accomplished.

We next turn to the RRA requirement of financial analysis of the proposed regulations. We are gravely concerned that the RAF failed to attribute <u>any</u> cost to 10 of 13 new or revised regulatory sections that would affect conventional oil and gas operations, that the DEP's cost estimate addressed only new conventional wells and ignored the costs incumbent upon the large number of existing (legacy) wells, and that the DEP failed to analyze the ongoing costs of the proposed regulations (as opposed to merely the initial costs of implementation). This failure is inconsistent with the expectations of the legislature. In the Legislative Intent (Section 2(a)) the RRA provides: "The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania." At Section 5 (Procedure for Review) the legislature requires the regulatory body to provide estimates of costs as to all of the proposed regulation (not merely 3 of 13 sections). The statute is specific as to the financial data to be provided and that the same is to be delivered at the time the proposed regulation is initially published.

The failure to provide an adequate financial analysis is a failure fatal to the accomplishment of the goals and requirements of the RRA. The nature of the problem is revealed in the report of the Pennsylvania Department of Environmental Protection's Conventional Oil and Gas Advisory Committee (COGAC) to the Environmental Quality Board (EQB), which comments were approved by the COGAC on December 22, 2015 (and which report is appended hereto). The COGAC report cites the detailed estimate of costs prepared by a trade group and which analyzed the costs for <u>all</u> 13 sections of the proposed regulations, the costs as to both new and legacy wells, and the costs of maintenance as well as initial implementation. The costs stated in that estimate to comply with the proposed conventional oil and gas regulations are a shocking amount measured by the word billion rather than millions. The billion dollar amount is untenable for an industry that does not measure its entire gross annual sales at a billion dollars. Yet when the RAF fails to analyze the majority of the regulatory sections, fails to account for the costs incumbent upon legacy wells, and fails to analyze the costs of maintenance, the only comprehensive document to which any party can turn is that prepared by the industry and cited with approval by the COGAC. We make no judgment as to the accuracy of the industry's estimated dollar amounts. What that industry statement does demonstrate, however, is that a comprehensive financial analysis addressing all proposed regulatory sections and both new and legacy wells can be prepared, that by contrast the RAF does not contain such a statement, and that the small businesses that would be subject to the proposed regulations are desirous and capable of providing the impact data the regulating agency is directed to solicit from

them under the provisions of the RRA. The IRRC should determine that the proposed regulations have been promulgated in violation of the RRA's mandate to take into account costs at the initial stage of regulatory development. This is fundamentally important because it is not now possible to turn back the clock or to know what the regulatory product might have looked like had the requisite analysis been timely performed.

Next, we turn to the RRA requirement that all forms required for implementation be provided on the same date as submission of the proposed rule (RRA Section 5(a)5). We are aware that several new forms are required by the proposed regulations, that such forms were not provided on the same date the proposed rule was submitted, and that such forms are still not provided at this late date. The problem presented by that failure is illustrated in the COGAC's discussion of the proposed regulation pertaining to Area of Review (AOR), sections 78.52a and 78.73, which is incorporated herein by reference.

The full impact of the newly proposed AOR sections is not knowable without the necessary documents. Indeed, the AOR provisions are illustrative not only of the impact of the missing documents, but also of the impact of other missing elements required by the RRA. The absence of a relevant statement of need explaining what deleterious impacts the new AOR provisions will protect against, the absence of a statement of costs informing as to the steps that will have to be taken to comply, and, of course, the absence of the required document(s) (such as the questionnaire required by the proposed AOR regulation), make it is frustratingly impossible to understand what is required by the newly proposed AOR provisions. Indeed, at the COGAC meeting of October 29, 2015, and available for listening at this site:http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/OilGasConventional/Pages/default.aspx#.VomcFkQo6po, three different Department officials provided very different interpretations of the impact of the AOR provisions. One stated that the provisions would not have the impact of a new permitting process, another stated that the Department's power to review the new "Monitoring Plan" required under section 78.52(a) would result in the DEP having the power to deny the plan and thus disallow completion of a new well, and yet a third stated that the Monitoring Plan review process would not be that cumbersome and that the Department would merely "spot check" submitted Monitoring Plans.[5] A reading of the newly proposed AOR Monitoring Plan requirements makes it clear that the ensuing leg-work, out of pocket costs, and potential time delays to prepare, submit and implement such a plan are significant. We are deeply troubled that if the Department's intention is to merely "spot check" the plans then the commensurate justification for the burden of the plan does not exist. And it is inconsistent with the spot check mentality that the DEP would also claim the significant authority to disallow the completion of a new well, thus effectively imposing a new permitting requirement and requiring forfeiture of the investment to date in that well, in the event that a spot check revealed some problem. Moreover, what that problem might potentially be is not articulated by the Department in a statement of need or in any data.[6] This is merely one example of the substantive concerns that flow from the procedural failure to provide the documents (as well as the statement of need, financial analysis, etc.).[7] We impress upon the IRRC that these procedural failures are fatal flaws which violate the requirements of the RRA. The integrity of the procedural process required by the RRA cannot be honored by anything less than actual compliance with the RRA, meaning that the required documents (as well as a complete

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[5] The referenced discussion occurs between 2:34:50 and 2:36:00 of the October 29, 2016 webinar.

[6] Under the RRA the IRRC has the duty to determine "whether the regulation is supported by acceptable data" (RRA Section 5.2(b)(3)(v) and (b)(7)). We observe that in its April, 2014 comments the IRRC asked the question: "If data is not the basis for this regulation, how did EQB determine that the many standards being imposed are adequate?" We regard that as a fundamental question and looks to the IRRC to continue pursuit of the question.

[7] The appended report of the COGAC addresses the substance of several proposed regulatory sections; we defer to the COGAC members concerning substance. However, the COGAC observes, and we concur, that the failure to comply with the procedural requirements of the RRA results in numerous substantive problems and questions.

statement of need, financial analysis, etc.) must be provided "on the same date" the regulations are proposed for publication.

Next, we turn to the RRA requirement that the RAF contain a regulatory flexibility analysis and that the RAF consider various methods of reducing the impact of the proposed regulation on small business. (RRA Sections 5(a)(12.1) and 5.2(b)(8)). We observe that the proposed regulations for conventional oil and gas do not contain any accommodation for small business. This is so despite the fact the majority of Pennsylvania's conventional oil and gas operators are small businesses. We note with approval that in its April, 2014 comments the IRRC stated: "...we agree that more information is needed in the RAF. We ask EQB to provide the required regulatory flexibility analysis for each section of the proposed rulemaking."

The importance of including Pennsylvania's small business community in the regulatory balancing process is underscored by the findings made by the legislature when the RRA was amended to include the requirement of the flexibility analysis. Citing ways in which the regulatory process was deficient the legislature characterized the specific consideration of small businesses as a means to "improve" state rulemaking. Legislative findings include that a vibrant small business sector is critical to creating jobs in a dynamic economy, that "fundamental changes...are needed in the regulatory and enforcement culture...", that uniform regulations can impose disproportionate burdens on small businesses, and that "the process by which state regulations are developed and adopted to be reformed to require agencies to solicit the ideas and comments of small business, to examine the impact of proposed and existing rules on such businesses and to review the continued need for existing rules." In contravention of these clearly articulated matters the process used to develop the proposed regulations violated the fundamental reforms adopted in the RRA.

Before we specifically discuss the failure to prepare a regulatory flexibility analysis we must return to the failure to properly state the need for revised regulations, the failure to provide a complete financial analysis, and the failure to carry the burden of bringing forward data supporting the proposed regulations. It is entirely impossible to comply with the RRA and "examine the impact of proposed rules" on small businesses when the regulatory agency falls far short of conducting the financial analysis. Similarly, one cannot consider whether the less stringent alternatives for small business, contemplated in the RRA, meet a legitimate regulatory need, when the regulatory agency fails to state that need. And it is impossible to analyze whether alternative performance or operational standards will meet a legitimate regulatory need when the regulatory agency fails to state the data that underlies the regulatory need, because without that data one cannot measure the utility of the "ideas" and "alternatives" the RRA expressly expects will be brought to the table.

Relative to those ideas it is our observation that the process followed in the development of these regulations did not result in the agency effectively "solicit(ing) the ideas and comments of small business" as contemplated in the legislative findings. We direct the attention of the IRRC to that portion of the COGAC report entitled "Failure to Engage in Steps Necessary to Achieve Consensus." We agree that meaningful input could not possibly be garnered from small businesses without the required financial analysis, statement of need, and documents required under the RRA.

With this context in mind it is quite clear why the proposed regulations do not contain any alternatives for small business and why, in its April, 2014 comments, the IRRC asked the EQB to provide the required regulatory flexibility analysis for each section of the proposed rulemaking. The process required in the RRA was not followed in the preparation of these proposed regulations. We note that 20 months since the IRRC made its request, the EQB has not provided the required flexibility analysis for <u>any</u> section, let alone for <u>each</u> section of the proposed rulemaking. At this date, meaning a few months before the time expires to adopt the regulation in final form, it is too late to engage in the reformed process required by

the RRA, including the taking of informed input from small businesses and the carefully considered discussions of alternatives designed to meet the unique needs of small businesses. We respectfully call upon the IRRC to recognize the reform expressly articulated in the RRA and to require that the small business considerations be accorded their legislatively directed importance, namely that they be a part of the construction of the proposed regulations and that they not be ignored entirely or appended as a mere footnote in the waning months of the process.

In light of the failure of the RAF to include an adequate regulatory flexibility analysis, financial analysis, statement of need, and documents required under the proposed regulations, it becomes incumbent upon the IRRC to assess whether the regulation "conforms to the intention of the General Assembly." Indeed, this is described as the "first and foremost" duty of the IRRC under section 5.2(a) of the RRA.

On this "foremost" matter the legislature has already made its determination, passing in both the House and Senate in June, 2015, S.B. 655, which expressly finds that: "as to conventional oil and gas wells (i) The rulemaking procedure is invalid as not in compliance with the rulemaking standards of the...Regulatory Review Act (and) (ii) Regulations promulgated under the rulemaking procedure are abrogated."[8] S.B. 655 further delineates the process to be followed in the case of future rulemaking, namely that "The formulation, adoption or promulgation shall be accompanied by the submission of a regulatory analysis form which is prepared following the effective date of this paragraph."

We believe that the determination by the legislature is the same determination which must be made by the IRRC. The EQB possesses only that authority which is given by the legislature. For reasons articulated in the RRA, including concerns of hidden costs, excessive regulation, unfair burdening of small businesses, and the like, the legislature requires the EQB's authority to be exercised in accord with a detailed procedure. That procedure requires certain analyses and documents to be completed by the time the proposed regulations are initially published in order that the analyses and documents inform and so that they are a part of the fabric of the proposed regulations.

Undeniably, that procedure was not followed and it is not feasible to turn back the clock and determine how the requisite steps would have informed the process and how the analyses would have affected the fabric of the proposed regulations. For these reasons, we respectfully request the IRRC to conclude as did the legislature, that the proposed rulemaking was not accomplished in accordance with the Regulatory Review Act and that if the new rulemaking is to be pursued the failure to comply must be remedied by the submission of a new regulatory analysis form.

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[8] S.B. 655 of 2015 was vetoed by Governor Wolf. However, in one year earlier, the legislature passed, and the governor signed, Act 126, which requires the DEP to promulgate separate regulations for Pennsylvania's conventional oil and gas industry. We assert that Act 126 required the DEP to begin the process anew for regulatory revisions applicable to the conventional industry, and for the DEP to publish a proposed rulemaking, regulatory analysis form, and preamble including a statement of need, financial impact, and small business alternatives, separate and unique to the conventional industry.

Sincerely,

Senator Gene Yaw
Chairman

Senator Camera Bartolotta
Vice-Chairman

Senator Joe Scarnati
Ex-Officio

Senator Scott Hutchinson
21st Senatorial District

Senator Elder Vogel
47th Senatorial District

Senator Kim Ward
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41st Senatorial District