

36TH DISTRICT
JIM FERLO

SENATE BOX 203038
HARRISBURG, PA 17120-3038
(717) 787-6123
FAX: (717) 772-3695

3519 BUTLER STREET
PITTSBURGH, PA 15201
(412) 621-3006
FAX: (412) 621-0373

1633 PACIFIC AVENUE
NATRONA HEIGHTS, PA 15065
(724) 230-2000
FAX: (724) 230-2003

E-MAIL: ferlo@pasenate.com
WEBSITE: www.SenatorFerlo.com

3042



Senate of Pennsylvania

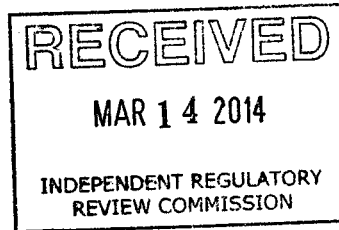
COMMITTEES

LAW & JUSTICE, MINORITY CHAIR
APPROPRIATIONS, MINORITY VICE CHAIR
CONSUMER PROTECTION
& PROFESSIONAL LICENSURE
ENVIRONMENTAL RESOURCES & ENERGY

URBAN REDEVELOPMENT AUTHORITY
OF PITTSBURGH, BOARD TREASURER
ALLEGHENY RIVER TOWNS ENTERPRISE
ZONE (ARTEZ), MEMBER
PORT OF PITTSBURGH COMMISSION,
BOARD MEMBER
PITTSBURGH GREEN INNOVATORS,
VICE-PRESIDENT
PRESERVATION PENNSYLVANIA,
BOARD MEMBER
PA HISTORICAL & MUSEUM COMMISSION,
BOARD MEMBER
LGBT EQUALITY CAUCUS, MEMBER
ARTS AND CULTURE CAUCUS, MEMBER
THIRD CLASS CITIES CAUCUS, MEMBER

March 14, 2014

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477



Re: Comments to Proposed Rulemaking- Vol. 43, Pa. Bull. 7377-7415, Dec. 14, 2013

Dear Environmental Quality Board Members:

I am pleased to submit the below comments, regarding Proposed Rulemaking, Vol. 43, Pa. Bull. 7377-7415, Dec. 14, 2013 (regarding “Environmental Protection Performance Standards at Oil and Gas Well Sites”) [hereinafter the “Proposed Regulations”], which I intend to submit both as an “interested person” who may submit public comments under 45 P.S. §1201(4), and as a member of the General Assembly who may submit regulatory review comments under 71 P.S. § 745.5b(a). Please direct any questions to my Chief of Staff, Stephen Bruder, at (717) 787-6123, or sbruder@pasenate.com. Thank you for your continued diligence in this matter.

These comments were drafted according to four principles: (1) to protect “Pennsylvania’s public natural resources” Pa. Const. art. I, § 27 (the “Environmental Rights Amendment” or the “ERA”), consistent with the Pennsylvania Constitution; (2) to support the regulatory review of my colleagues in the Pennsylvania House and Senate Environmental Resources & Energy Committees, which oversee the Department of Environmental Protection (the “DEP”); (3) to support the Independent Regulatory Review Commission (the “IRRC”) in its review of the Proposed Regulations, specifically with respect to questions concerning (a) whether the Proposed Regulations are consistent with legislative intent, and (b) whether they are in the public interest; (4) to support predictable regulations that are consistent with the views of Pennsylvania residents, as expressed by their public comments and correspondences with my office.

I have been impressed by the level of public discourse surrounding this rulemaking process. Many commenters have submitted their observations and arguments, and this will assuredly do much to guide the Environmental Quality Board (the “EQB”) and the IRRC. Determining how to protect Pennsylvania’s public natural resources from the environmental harms associated with unconventional natural gas extraction may well be the Commonwealth’s defining task of this decade. I am honored to provide the following comments.

Comments

A. The Proposed Regulations should be rescinded and the proposed rulemaking process should be reinitiated at the conceptual summary stage. Days after the Proposed Regulations were published in the Pennsylvania Bulletin, the Pennsylvania Supreme Court decided *Robinson Township v. Commonwealth of Pennsylvania*, 2013 WL 6687290 (Pa. Dec. 19, 2013) [hereinafter *Robinson Township*]. For the following reasons, I believe that this intervening decision calls into question the validity of the Proposed Regulations.

- 1. The legislative intent of Act 13, and in-turn the administrative purpose of the Proposed Regulations are invalid or substantially compromised.** By overruling lower court precedent concerning the ERA, which had “weakened the [ERA’s] clear import,” the decision in *Robinson Township* invalidated and altered the standards under which the act of February 14, 2012 (P. L. 87, No. 13) (Act 13), codified at 58 Pa.C.S. §§ 2301—3504 [hereinafter “Act 13”], and the Proposed Regulations were passed and promulgated, respectively. For example, Act 13’s primary purpose is to “permit the optimal development of oil and gas resources,” *See* 58 Pa.C.S. § 3302; *Robinson Township* at 54, but this fundamental subordination of Pennsylvania’s public natural resources to economic prosperity is inconsistent with and repugnant to the standard set forth by the court in *Robinson Township*, whereby “the Commonwealth’s obligations as trustee [are] to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come...” *Id.* at 53. The Proposed Regulations provide a framework for the enforcement of Act 13, *See* Vol. 43, Pa. Bull. 7377, Dec. 14, 2013, and therefore assume the same inadequate standard that was invalidated by *Robinson Township*. The DEP Regulatory Analysis Form further supports the proposition that the proposed regulations were promulgated prematurely, because the form failed to identify *Robinson Township* as a “relevant state or federal court [decision].”
- 2. Act 13 may be entirely invalidated when *Robinson Township* is finally resolved.** *Robinson Township* invalidated and enjoined the application and enforcement of key provisions of Act 13. *See Robinson Township* at 76 (invalidating and enjoining the application and enforcement of 58 Pa.C.S. §§ 3215(b)(4), 3215(d), 3303, and 3304, and enjoining the application and enforcement of 58 Pa.C.S. §§ 3215(c), 3215(e), and 3305-3309). Commenters have noted that this calls into question the validity of key sections of the Proposed Regulations. For example, on January 9, 2014, Pennsylvania General Energy Company submitted comments (the “PGE comments”) stating that as a result of the decision in *Robinson Township*, “[t]he continued rulemaking activity to include any potential promulgation of rules within or associated with Sections 78.15 (d) through (g) must be discontinued and all proposed revisions... that would apply or implement those regulations sections should be removed from the rulemaking proposal.” Furthermore, the *Robinson Township* court’s decision implied that additional provisions of Act 13 are likely to be either invalidated or severed, where it remanded the case to the Commonwealth Court concerning the question of “whether any remaining provisions of Act 13, to the extent that they are valid, are severable,” *Robinson Township* at 77.

For the above reasons, the Proposed Regulations should go back to the figurative “drawing board. Alternatively, the proposed rulemaking process should be stayed pending the disposition of *Robinson Township*.

B. The Proposed Regulations should establish stronger protections of public resources. § 78.15 of the Proposed Regulations addresses well permit application requirements. On January 16, 2014, the League of Women Voters submitted detailed comments (the “LWV comments”) regarding this section. I generally support the LWV comments, both because they are premised on the assumption that environmental rights trump property rights in Pennsylvania, and because they recognize that “economic development related to oil and gas extraction... [should not come] at the expense of tourism related to natural recreation areas.”

In particular, I support the LWV comments with respect to “[e]xpanding distances around proposed surface locations,” *see* § 78.15(f)(1) and “[i]ncluding conditions in the permit for cumulative as well as site specific modifications to avoid and mitigate impacts to public resources,” *see* § 78.15(g). Importantly, the LWV comments are correct and consistent with *Robinson Township*, where they state that the DEP should not bear the burden of proving that the conditions it places on well permitting are necessary to protect against a probable harmful impact to a public resource. Rather, the applicant should bear the burden of showing that the DEP’s conditions will not protect against a probable harmful impact of a public resource. Again, *Robinson Township* stands for the proposition that in Pennsylvania, environmental rights are fundamental rights on par with individual rights. Environmental rights trump property rights or any other right granted under the General Assembly’s plenary powers to promote the public convenience or the general prosperity.

Respectfully, this point appears to have escaped some of the industry trade groups and operators that submitted comments to the Proposed Regulations. On January, 9, 2014, the Marcellus Shale Coalition submitted comments (the “MSC comments”) which state that the Proposed Regulations should “maintain a balance between strong environmental protections and a competitive economic climate.” Regulations that maintain such a balance would be contrary to the mandate of the ERA if they fail to place greater importance on protecting Pennsylvania’s public natural resources than on protecting property rights and economic prosperity. On January 9, 2014, WPX Energy submitted comments (the “WPX comments”) with respect to § 78.15, and these comments were based on the same incorrect assumption as the MSC comments.

Furthermore, with respect to § 78.15(f)(1)(iv), the PGE comments assert that the DEP is without the authority to “designate species or condition well permits based on species apart from the ‘habitat’ of species that have otherwise been properly designated by the governing resource agency.” Unfortunately, this assertion was left unsubstantiated. The allegation seems to be that DEP does not have the authority to regulate animal species, and therefore may not establish well permit application standards that consider the proximity of certain animal species to the proposed well site. This allegation fails to consider that under *Robinson Township*, the ERA applies to “Pennsylvania’s public natural resources,” and these include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora and fauna (including fish).” *Robinson Township* at 36 [emphasis added]. The DEP’s purpose is to enforce the ERA and other Pennsylvania environmental laws. Regulating “fauna (including fish”) is undoubtedly within the scope of the DEP’s authority.

- C. The Proposed Regulations should establish stronger protections of water supplies:** § 78.51 of the Proposed Regulations address protection for water supplies. § 78.51(d)(2) provides that “the quality of a restored or replaced water supply will be deemed adequate if it meets... Pennsylvania Safe Drinking Water [standards]... or is comparable to the quality of the water supply before it was affected by the operator if that water supply [did not initially meet the Pennsylvania Safe Drinking Water standards].” Dozens of commenters have offered the view that well operators should be required to restore *all* contaminated water supplies to Pennsylvania Safe Drinking Water Act standards. For example, on January 9, 2014, Carol J. Ward of Ardmore, PA submitted comments in support of this view, and described the devastating effects brought about by industry-related water contamination. Furthermore, the Duke University Nicholas School of the Environment has published a series of peer-reviewed studies which suggest that the problem of water contamination caused by hydraulic fracturing operations in northeastern Pennsylvania is far more commonplace and widespread than had been known previously. I support Ms. Ward’s comments, as well as the many other comments that were consistent with her comments in this regard. Previously contaminated water supplies, are legacy costs of the industrial exploitation that the ERA was adopted to address. Seeking the assistance of industrial actors such as drilling operators to manage them is a reasonable exercise of the DEP’s authority.
- D. The Proposed Regulations should maintain and enhance the duties they impose on well operators with respect to abandoned and orphaned wells:** §§ 78.52a and 78.73 require well operators to identify, inspect, monitor, and in some cases plug abandoned and orphaned wells. This final requirement is triggered only when an operator alters an abandoned or orphaned well during the course of its own hydraulic fracturing operation. I support these sections, along with the comments that offer a concrete enhancement.

On January 22, 2014, the Clear Air Council submitted comments (the “CAC comments”) urging a revision to § 78.52, such that operators would have to identify abandoned and orphaned wells in proximity to the vertical and horizontal well bore prior to site construction, rather than prior to hydraulic fracturing. This is a common-sense change that would benefit operators because it would increase the predictability of site development costs. Some commenters have suggested that these sections impose “open-ended,” unpredictable obligations on well operators. I disagree, because the Proposed Regulations establish a clear process that includes the identification, inspection, and monitoring of orphaned and abandoned wells. The alternative would be to leave Pennsylvania residents and tourists at risk of serious bodily harm and death. As the CAC comments point out, disasters can result when a hydraulic fracturing operation alters an abandoned or orphaned well.

Furthermore, on January 9, 2014, Berks Gas Truth submitted comments (the “Berks comments”), highlighting the Commonwealth’s compelling interest in managing and plugging abandoned and orphan wells. The Berks comments illustrate the scale and significance of the problem by citing numerous expert sources. For example, DEP officials have estimated that of the 325,000 oil and gas wells that have been drilled in Pennsylvania, the status of 184,000 are unknown. A study from Carnegie Mellon University estimated that it would take 160 years for DEP to cap all of the orphaned and abandoned wells at 2004 funding levels. Abandoned and orphaned wells, like previously contaminated water supplies, are legacy costs of previous industrial exploitation. Again, DEP is correct and perhaps even obligated to seek assistance from drilling operators in addressing these costs.

E. The Proposed Regulations should: (1) ban the use of pits and open-top structures for storage of regulated substances and wastes; (2) ban the use of centralized impoundments for storage of hazardous materials. §§ 78.56, 78.57, 78.59c address requirements regarding the containment, processing, and storage of regulated substances and wastes associated with well site development and drilling operations. On January 9, 2014, the League of Conservation Voters submitted comments (the “LCV comments”) asking for the Proposed Regulations to impose an across-the-board ban on the use of open pits for waste-storage. I support the LCV comments, which were reiterated by dozens of other commenters, because adopting this approach will strengthen environmental protections as well as impose more predictable and enforceable requirements.

§ 78.56 gives drilling operators the option to temporarily store regulated substances and wastes in either pits or tanks. Whereas, § 78.57 bans the use of open top structures and pits to store brine and other production fluids, except where permitted by The Clean Streams Law. Both sections dedicate most of their subsections to describing elaborate and prescriptive standards for the approval and construction of pits. Given the scarcity of the DEP’s resources, compared to the rate at which new well sites are being developed by drilling operators, it is unrealistic to expect the DEP to efficiently enforce these elaborate standards. Regulations that overburden the DEP with the need to make case-by-case determinations may be even worse than having no regulations at all, because not only do such regulations lead to lax enforcement and raise the risk of environmental harm, but they contribute to a situation where the DEP is perpetually short on resources, understaffed, and without the means to take a proactive approach to enforcing the mandate of the ERA.

On January 22, 2014, the Clean Air Council submitted comments (the “CAC comments”), “calling for a complete ban on open [centralized] wastewater impoundments.” *See* § 78.59c. On January 9, 2014, and on January 19, 2014, both Penn Future and the Appalachian Mountain Club submitted comments (the “Penn Future comments,” the “AMC comments”) that were amendable to some use of centralized impoundments to store wastewater, but called for enhanced setback requirements. I support a complete ban on centralized wastewater impoundments. In the alternative, I support enhanced setback requirements, specifically with respect to extending setback requirements to all bodies of water.

F. The Proposed Regulations should ban the on-site disposal and land application of residual waste. §§ 78.61-63 and 78.70-78.70a provide for certain waste disposal methods. §§ 78.61-63 address the methods by which drill operators may dispose of residual waste, including drill cuttings, at the well site where it was generated, or by land application. The Penn Future comments address § 78.62, and state that the Proposed Regulations should ban the disposal of residual waste at well sites. I support the Penn Future comments in this regard. However, the Proposed Regulations should also ban both the on-site disposal of drill cuttings from above the casing seat, and the land application of drill cuttings from below the casing seat. *See* § 78.61. The Proposed Regulations should also ban the disposal of residual waste by land application at the well site. *See* § 78.63.

Certain oil and gas exploration and production wastes, including drilling fluids and drill cuttings, are exempt from the United States Environmental Protection Agency (the “EPA”) hazardous waste regulations, promulgated under the authority of Resource Conservation and Recovery Act (the “RCRA”), Subtitle C. Otherwise, the waste disposal methods provided for under §§ 78.61-78.63 of the Proposed Regulations would be prohibited by federal law. The decision in *Robinson Township* established that under the ERA, the Commonwealth is a trustee of Pennsylvania’s public natural resources. The court reasoned that, “[a]s a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust – the public natural resources – with prudence, loyalty, and *impartiality*.” *Robinson Township* at 38 [emphasis added]. The *impartiality* element of this duty should preclude the Commonwealth from promulgating regulations which enable oil and gas operators to take advantage of the aforementioned federal hazardous waste exceptions. The Commonwealth cannot be said to act impartially toward Pennsylvania’s public natural resources by permitting an oil or gas well operator to dispose of the hazardous waste it generates by methods that are prohibited for other industries operating in Pennsylvania.

Finally, §§ 78.70-78.70a address the methods by which brine from oil and gas wells may be spread across roads for the purported purposes of dust control, road stabilization, pre-wetting, anti-icing, and de-icing. This practice is unnecessary, and amounts to a windfall for operators at the expense of Pennsylvania’s public natural resources. On February 15, 2014, the Potter County Water Dogs submitted comments (the “PCWD comments”) in opposition to this practice. I support the PCWD comments in this regard, and agree with their assessment that the guidelines which regulate this practice are effectively unenforceable.

JIM FERLO
38th District
Pennsylvania State Senate
Room 535 Main Capitol Building
Harrisburg, PA 17120
jferlo@pasenate.com