PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C.

120 Market Street
Warren, PA 16365

Phone: 814-723-3230
Fax: 814-723-3502

January 9, 2014

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

Re: Chapter 78 – Proposed Rulemaking – Comments, Suggestions, and Objections

Sent via e-mail to RegComments@pa.gov and by U.S. Mail

1. Introduction and Statement of Interest

Pennsylvania General Energy Company, LLC ("PGE"), headquartered in Warren, Pennsylvania, is a privately-owned, independent oil and gas company. Originally founded in 1978, PGE now employs 150 people and does business with hundreds of contractors and other energy firms in the oil and gas industry. PGE currently holds leases or fee simple interests on over 400,000 acres of oil and gas rights in Pennsylvania. Within this acreage it has privately owned reserved and outstanding oil and gas leasehold interests or what is commonly called split estate rights in approximately 40,000 acres of land underlying the Allegheny National Forest ("ANF"), 30,000 acres of land underlying State Forest lands (DCNR), and 30,000 acres of land underlying State Game-lands (SGC). Additionally, PGE has active leases with the Federal Bureau of Land Management (BLM), the DCNR, and the Pennsylvania State Game Commission (PGC) comprising a total of about 50,000 acres of oil and gas development rights where the oil and gas is owned by the public agency and development occurs on the public lands. PGE has been actively drilling oil and gas wells on its lands for more than 30 years and currently owns and operates approximately 1400 wells with 120 of these wells being unconventional Marcellus Shale wells.

On December 14, 2013, the EQB published the proposed revisions to Chapter 78 and opened the public comment period. Today PGE is submitting comments on Section 78.15 of the proposed revisions. For the reasons stated PGE objects to the promulgation of the rules proposed in Sections 78.15 (b) through (g).

2. Discussion

A. General Objection to Sections 78.15 (d) through (g).

1. The 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 to 25 Pa. Code Chapter 78 that would apply or implement those

regulation sections should be removed from the rulemaking proposal. The Pennsylvania Supreme Court in the recent December 19, 2013 decision in *Robinson Township v. Commonwealth of Pennsylvania*, No. 63 MAP 2012, has ruled that Sections 3215 (c) and (e) of Act 13 – the statute sections delegating authority to the DEP/EQB to develop regulations and apply the statutory requirements therein – has been enjoined. Specifically, at pages 158 & 159 (*pages attached*) of the *Robinson* decision Sections 3215 (c) and 3215 (e) of Act 13 have been held to not be severable from Section 3215 (b) which was enjoined in its entirety.

> "Moreover, insofar as Section 3215 (c) and (e) are part of the 3215 (b) decisional process, these provisions are as well incomplete and incapable of execution in accordance with legislative intent. Application of Section 3215 (c) and (e) is therefore, also enjoined."

2. The Section fails to comply with the Act 13 section 3215 (e) statutory requirement to develop "criteria" for 1) conditioning a well permit based on its impact, 2) ensuring optimal development of oil and gas resources, and for 3) respecting property rights of oil and gas owners. Put simply, no "criteria" or standards whatsoever are identified or articulated in the proposed regulations that would carry these mandates into effect.

B. Specific Objections to Section 78.15

1. Section 78.15 (b): The Section is inadequate for at least four reasons. *First*, the Department has no authority to designate or regulate 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. *Second*, for a permit application to be considered "complete" the applicant must provide "information contained in subsections (c) - (e)." Existing subsection (d) describes a negotiation process and both applicant and department duties rather than an information requirement. It requires the applicant to "consult" and "demonstrate," and provide "proof of consultation." None of this is clear with respect to anyone knowing what it is that is the required "information" to be supplied in order to satisfy subsection (b) and have a complete application. In effect, an endless merry-go-round of dialogue is proffered seemingly designed to force applicants to submit to whatever demonstrations or responses that the Department or a resource agency demand before an application may be considered complete. *Third*, the standard of "may adversely impact" is in conflict with the Act 13 Section 3215 (e) statutory standard of "probable harmful impact" and for that reason the "may impact" standard is illegal as DEP was not delegated the authority to condition well permits unless the impact was "probable." *Fourth*, the subsection is in direct conflict with and appears to duplicate what appears in proposed subsection (f) (iv). Special concern species is discussed below, but any use or application of the term in what PGE has observed has always included threatened and endangered species. For the foregoing reasons, subsection (d) should simply be stricken from the proposed regulations.

2. Section 78.15 (f) (iv): This clause is unlawful as DEP cannot logically or responsibly decide, conclude, or interpret that the term "critical communities" was intended by the legislature to mean "special concern species." The Act 13 section, 3215 (c) (4), wherein the term "critical communities" appears is unchanged from and carried forward from the 1984 Oil and Gas Act or what was Act 223. Act 223 was signed by the Governor in December 1984. The original inventory itself, the terminology, and the concept of "species of special concern in Pennsylvania" first appeared in 1985 with the publication of a Carnegie Museum of Natural History Special Public, No. 11 Volume titled "*Species of Special Concern in Pennsylvania.*" In short, the Pennsylvania legislature did not intend in 1984 to have a term mean something that did not exist in 1984, and the Department should not pretend that it did. In keeping with other legislative enactments, the reasonable interpretation to the Act 223 phrase is that the legislature intended it to cover the habitat of a properly designated threatened or endangered species and nothing more.

3. Section 78.15 (g): This clause does not identify the quality of the evidence that would be required to determine if an impact amounted to a probable harmful impact or not. A requirement that the quality of the evidence should be clear and convincing should be made part of any rule. If the Department adopts and applies such an evidentiary standard or criteria it will have gone a long way in satisfying the requirements to respect private property rights and allowing for the optimal development of the oil and gas resources. Decisions will likely be well considered and reasoned. It should be remembered that responsible regulation includes measures to conserve or use, and not waste, mineral resources. Moreover, appeals of determinations using such an exacting standard by either operators or others would likely be reduced and reversal of such determinations on appeal even less likely.

3. Conclusion

PGE appreciates the opportunity to comment and respectfully submits these comments.

Sincerely,

PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C.

Craig L. Mayer, Vice President – Government Relations

Cc: IRRC

ordinance purportedly does not comply. The prerogatives of acting upon policy judgments and enacting local legislation, while limited by the General Assembly's enactment, remain ultimately with local government under the Act 13 scheme. No valid separation of powers concern exists regarding Section 3305(a). See 828 A.2d at 1051. As against this claim, the Commonwealth Court's decision is affirmed, on these different grounds.

V. Severability

The citizens' requested relief is a declaration that Act 13 is unconstitutional in its entirety, based solely on arguments related to the discrete provisions discussed above. We recognize that certain of the provisions we have held to be unconstitutional represent core aspects of Act 13. But, by the same token, several provisions appear relatively independent of other parts of Act 13. See, e.g., 58 Pa.C.S. § 2302 (unconventional gas well fee); § 2505 (appropriations for Marcellus Legacy Fund). Notably, neither the parties nor Act 13 itself address the potential severability of provisions found unconstitutional. Nevertheless, our holding that Sections 3215(b)(4) and (d), 3303, and 3304 violate the Environmental Rights Amendment does not automatically require finding Act 13 unconstitutional in its entirety. Mockaitis, 834 A.2d at 502. Indeed, the presumption is that "[t]he provisions of every statute shall be severable." 1 Pa.C.S. § 1925 (constitutional construction of statutes).[69] Notably, while not citing to the Section 1925 severability

[69] Section 1925 of the Statutory Construction Act provides that:

> If any provision of any statute . . . is held invalid, the remainder of the statute . . . shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision . . . that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the

(continued...)

presumption expressly, the Commonwealth Court obviously recognized that the issue was implicated because, upon finding Section 3304 unconstitutional, the panel was careful to enjoin only those "provisions of Chapter 33 that enforce 58 Pa C S § 3304" Robinson Twp, 52 A.3d at 485

Setting aside the question of global severability – *i.e.*, whether the specific provisions held to be unconstitutional require that the entire Act be enjoined – there are obvious consequences of certain of our holdings Thus, we have already recognized that Section 3215(b)(4), which addresses waivers of the general rule requiring setbacks for the protection of certain waters of the Commonwealth, is a key part of the Section 3215(b) scheme. It would appear that the General Assembly did not intend for the setback provision to operate without allowing industry operators to secure waivers from the setbacks. Absent the enjoined Section 3215(b)(4), the remaining parts of Section 3215(b) -- which the citizens do not challenge on appeal – are incomplete and incapable of execution in accordance with the legislative intent. Having held that Section 3215(b)(4) is unconstitutional, we conclude that the remaining parts of Section 3215(b) are not severable. Accordingly, application of Section 3215(b) is enjoined.

Moreover, insofar as Section 3215(c) and (e) are part of the Section 3215(b) decisional process, these provisions as well are incomplete and incapable of execution in accordance with legislative intent. Application of Section 3215(c) and (e) is, therefore, also enjoined Finally, Sections 3305 through 3309 are those parts of the statutory scheme that establish a mechanism by which to enforce compliance with the Municipalities Planning

---

(...continued)

> court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925.