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United States Department of the Interior



FISH AND WILDLIFE SERVICE
Pennsylvania Field Office
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State College, Pennsylvania 16801-4850

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DEP Policy Office

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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

Dear Board Members:

This letter serves as the U.S. Fish and Wildlife Service (Service) comments on the draft Environmental Protection Performance Standards at Oil and Gas Well Sites (25 Pa Code Chapter 78, Subchapter C) Proposed Rulemaking. We are submitting these comments in accordance with the requirements of the Fish and Wildlife Coordination Act (16 U.S.C. 661-667e) and the Endangered Species Act of 1973 (ESA; 87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*). The Service's primary concerns relate to the potential effect of inadvertent releases or waste disposal on federally listed endangered and threatened mussel species and on habitat disturbance of federally listed bat species and migratory birds that may result from the construction and operation of well sites.

§ 78.15. Application requirements:

78.15 (d) The Service supports requiring well permit applicants to consult with the Pennsylvania Natural Diversity Inventory Environmental Review Tool (PNDI ER Tool) and we strongly recommend that the Pennsylvania Department of Environmental Protection (Department) *Policy for Pennsylvania Natural Diversity Inventory (PNDI) Coordination During Permit Review and Evaluation* (Document Number 021-0200-001) be followed during this environmental review process. The PNDI ER Tool provides immediate access to a database of *known* occurrences of federally listed threatened and endangered species. The PNDI ER Tool is continually updated. Although field habitat or species surveys may reveal previously unknown locations, the PNDI ER Tool will assist the Department with avoiding

issuance of a permit that may result in take¹ of known federally listed species in a proposed permit area. Section 9 of the Act prohibits the take of any federally listed animal species by any person² subject to the jurisdiction of the United States. Section 11 of the Act provides for both civil and criminal penalties for those convicted of section 9 violations. When no federal nexus (*i.e.*, a Federal agency funds, authorizes, or carries out an action) exists, take incidental to an otherwise lawful activity may be authorized, and a section 9 violation avoided, through issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act should be obtained. The Service may issue such a permit upon completion of a satisfactory habitat conservation plan for the listed species that would be taken by the project.

78.15 (f)(1) This section states that the applicant is to contact the resource agency if the well is within 200 surface-feet of high priority habitats. To be effective this distance provision must be measured from the edge of disturbance from the well site, not measured from the actual well(s) as many well sites are large, with actual wells centrally located. Assessing risk of resource disturbance from actual well locations may not be predictive of either the actual exposure to disturbance, including that associated with supporting staging areas and access roads, or are locations for storage and transport of toxic chemicals.

78.15 (f)(2) The Service is extremely concerned that the 15-day review period is not adequate for jurisdictional resource agencies, including the Service, to develop and provide written comments to the Department regarding possible affects to sensitive and protected public resources in proximity to proposed well sites or access roads. Thirty (30) days is a reasonable time frame for such reviews and is consistent with review times applied to industries other than oil and gas.

78.15 (g) The Service has concerns about how the Department will determine and adopt compensatory mitigation for loss of public resources. We recommend that the Department be required to consult with the state or federal agencies that oversee the specific public resource in question. For national wildlife refuges, the Service must determine the mitigation, whereas the National Park Service should be consulted for national parks and scenic rivers.

78.55 (d)(2) If federally listed species are identified in the PNDI online project review receipt, known species occurrences are in proximity to the proposed project permit site. The Service should be afforded the option of requesting a copy of the Preparedness, Prevention

¹ As defined in the Act, take means "... to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." "Harm" in the definition of take means an act that kills or injures wildlife. Such act may include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering (50 CFR part 17.3). "Harass" means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

² The term "person" is defined as "... an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal government, of any State, municipality, or political subdivision of a State, or any other entity subject to the jurisdiction of the United States."

and Contingency Plan (PPC) to avoid placing the Department and the applicant at risk of an ESA section 9 violation.

78.56 (5) The presence of workers at the site does not ensure that wildlife will not access a disposal pit. Fencing should be mandatory. In addition, pits containing regulated substances must be covered with netting to prevent birds and bats from inadvertently entering the pit.

§ 78.59c. Centralized impoundments:

This section appears to lack the fencing clause present for pits and freshwater impoundments. The clause needs to be added and revised as recommended for 78.56(5).

78.59 (c)(5) Not all streams are depicted as a blue line on a 7.5 minute topographic quadrangle map of the United States Geologic Survey. The Service recommends changing the language in this item from "*Within 100 feet measured horizontally from any solid blue line stream, spring or body of water*", to "*Within 100 feet measured horizontally from the bank of any watercourse or body of water or wetland*" as defined in 25 Pa Code § 105.1 Dam Safety and Waterway Management.

§ 78.66. Reporting and remediating releases:

78.66 (b)(2) The Service should be notified "of a regulated substance causing or threatening pollution of the waters of this Commonwealth." Agencies of the Department of the Interior should be notified via the National Response Center (NRC) and Pennsylvania Emergency Management Agency (PEMA). We recommend that the NRC be included in this Section to be notified of a release.

§ 78.68. Oil and gas gathering lines:

78.68 (i) The Service has concerns regarding the release of bentonite in addition to regulated substances from horizontal drilling under streams. While bentonite is not chemically toxic, it can be physically lethal to fresh water mussels. The Service requests that reporting of substantial releases of bentonite to waters with federally listed mussels be required via NRC or PEMA.

§ 78.70. Road-spreading of brine for dust control and road stabilization

78.70 (c) and 78.70a (c) These sections should include a requirement for a PNDI Environmental Review Tool receipt documenting that, at a minimum, there are no known occurrences of state and federally listed species in the vicinity of the application area. Fresh water mussels, including federally listed endangered and threatened species, are highly sensitive to salts that wash from roads receiving brine treatments during storm events. The Service should be notified of brine application on roads in the vicinity of federally listed mussels.

Please contact our office at 814-234-4090 to speak to Dr. Kathleen Patnode to discuss water quality issues or Robert Anderson for Endangered Species Act regulations.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lora L. Zimmerman', with a long, sweeping horizontal stroke extending to the right.

Lora L. Zimmerman
Field Office Supervisor

cc: H. Smiles, PFBC
N. Welte, PFBC
A. Bergdale, EPA