SENECA RESOURCES

3042

March 14, 2014

Via Electronic Submission and Express Mail

Environmental Quality Board
Rachel Carson State Office Building, 16th Floor
400 Market Street
Harrisburg, PA 17101-2301

RE: Comments on Proposed Amendments to 25 Pa. Code Chapter 78, Environmental Protection Performance Standards at Oil and Gas Well Sites [43 Pa.B. 7377-7415]

To Whom It May Concern:

Enclosed for filing are Seneca Resources Corporation's *Comments to the Proposed Rulemaking to Amend the Provisions of 25 PA Code, Chapter 78, Environmental Protection Performance Standards at Oil and Gas Well Sites.*

Should you have any questions about our Comments or have any issues with the electronic version submitted to RegComments@pa.gov, please feel free to contact me at (412) 548-2537 or trejchelc@srcx.com.

Best regards,

Christopher M. Trejchel
Assistant General Counsel

Enclosures

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BEFORE THE
ENVIRONMENTAL QUALITY BOARD

Proposed Rulemaking to Amend The Provisions of 25 PA Code, Chapter 78, Environmental Protection Performance Standards at Oil and Gas Well Sites [43 Pa.B.7377-7415]	: : : : :	COMMENTS

COMMENTS OF
SENECA RESOURCES CORPORATION
TO THE PROPOSED RULEMAKING

To the Environmental Quality Board:

I. INTRODUCTION

On August 27, 2013, the Environmental Quality Board (the "EQB") adopted a proposed rulemaking to amend 25 PA Code Chapter 78 to update requirements for surface activities associated with development of oil and gas wells and to address statutory changes under the act of February 14, 2012 (P.L. 87, No. 13) ("Act 13"). The Proposed Rulemaking was subsequently published in the Pennsylvania Bulletin on December 14, 2013, at 43 Pa.B. 7377, allowing for comments to be submitted by interested parties on or before February 12, 2014. The deadline for submitting written comments was later extended to March 14, 2014.

Seneca Resources Corporation ("Seneca") is the exploration and production segment of National Fuel Gas Company. Seneca explores for, develops and produces natural gas and oil reserves in California, Kansas and Pennsylvania, including the Marcellus and Utica Shales.

In addition, the Marcellus Shale Coalition (the "MSC"), of which Seneca is a member, is contemporaneously submitting comments regarding this Proposed Rulemaking. Seneca incorporates herein and supports the Comments submitted by the MSC.

II. GENERAL COMMENTS

Seneca has operated in Pennsylvania for over 100 years and owns/leases oil and gas interests in approximately 780,000 net acres in the Commonwealth. As a result, Seneca has a vested interest in conducting its development operations in a safe and effective manner to protect the environment. In that regard, Seneca expects and supports strong meaningful regulatory oversight by the Pennsylvania Department of Environmental Protection (the "DEP") of oil and gas development in the Commonwealth.

However, the EQB, in interpreting and implementing Act 13 or any other existing statute, must interpret and give effect to the legislative intent of the statute. See, 1 Pa. C.S. §1921. That is, when promulgating regulations based on a statute, the EQB must do so in a manner that is not contrary to the clear and plain meaning of that statute. See, Bethenergy Mines, Inc. v. Commw. Dept. of Environ. Protection, 676 A.2d 711 (Pa. Commw. 1996).

In Seneca's opinion, the proposed revisions/additions to Chapter 78 are not wholly consistent with the legislative intent of Act 13. In fact many of the proposed changes go well beyond the requirements of Act 13 and impose additional requirements on oil and gas development that provide no meaningful environmental benefits and increase costs to the industry by imposing additional administrative and operational burdens. Many of the proposed changes appear to derive from the EQB's or DEP's own opinions/initiatives rather than being based on statutory guidance from the General Assembly.

III. COMMENTS TO SPECIFIC SECTIONS

§ 78.1. Definitions

The definition of "Well Site" should be updated to expressly narrow it to the surface area required for oil and gas development. This would clarify that a horizontal well bore does not

expand the well site beyond what is intended by the regulations. Seneca recommends modifying the definition of well site to read as follows: "the area occupied *at the surface* by the equipment or facilities necessary for or incidental to the drilling, production or plugging of a well."

§ 78.15. Application Requirements

i. § 78.15(f)(1)(ii)

Section 78.15(f)(1)(ii) references a "corridor" of a state or national scenic river. This term is not defined within the regulations and the subparagraph does not reference a separate law, rule or regulation for the definition of "corridor." As a result it is unknown what the meaning of "corridor" is for purposes of this subparagraph and Chapter 78. Seneca recommends that the EQB define the term "corridor."

ii. § 78.15(f)(1)(iii)

Section 78.15(f)(1)(iii) states that critical communities "means special concern species." Although neither the term "critical communities" nor "special concern species" are in any way defined in Chapter 78, it seems that the EQB is attempting to inappropriately merge two very different concepts into one for purposes of triggering the notice requirement under § 78.15(f). Seneca suspects that critical communities is intended to refer to critical habitat as that term is defined under the *Endangered Species Act of 1973*, 16 U.S.C. §§ 1531 *et seq.*, and that the reference to special concern species is referring to that term as defined in the DEP's *Policy for Pennsylvania Natural Diversity Inventory (PNDI) Coordination During Permit Review and Evaluation.* Assuming that is the case, treating PNDI as equivalent to the *Endangered Species Act* is inappropriate as the standards for PNDI are vague, undeveloped and significantly different from the *Endangered Species Act.* It is rather arbitrary for the EQB, absent any direction from the General Assembly and absent vetting the processes, procedures and standards of PNDI

through full regulatory review and scrutiny in accordance with the *Regulatory Review Act*, 71 P.S. §§ 745.1 *et seq.*, to take a DEP Policy and make it equivalent to a Federal standard for purposes of state well permit applications. Seneca recommends that this subparagraph be revised to solely reference impact to a critical habitat or species as defined in the *Endangered Species Act*.

§ 78.52. Predrilling or Prealteration Survey

i. § 78.52(c)

Under § 78.52(c), EQB proposes to require predrill or prealteration surveys to be performed by independent "Pennsylvania accredited" laboratories. The existing language only requires that the laboratory be "certified." Notably, 58 Pa. C.S. § 3218(e) states that an operator seeking to preserve its defenses under the section needs to "retain an independent certified laboratory to conduct a predrilling or prealteration survey of the water supply." The General Assembly clearly did not seek to restrict survey work to solely Pennsylvania certified laboratories. Although the EQB does not define the term "accredited" it is presumably attempting to grant some element of control/discretion to DEP to grant official authorization or status to laboratories that perform this work. The Proposed Regulation does not describe the process for getting such an accreditation or what standards will apply. It is unclear why the EQB is attempting to impose this new standard that inappropriately creates a higher standard than that required by the statute for routine work that can be performed by numerous laboratories all across the United States.

ii. § 78.52(d)

Existing and proposed § 78.52(d) require that predrilling or prealteration surveys be submitted to the DEP within 10 business days of receiving the results or the survey may not be

used to preserve the operator's defense that it is not responsible for the pollution. This strict bright-line rule is both arbitrary and unnecessarily punitive, especially considering that the statute does not expressly or impliedly impose such a harsh evidentiary rule. Without any rational or legal basis, DEP's rule requires it to totally disregard valid direct evidence of pre-existing conditions on what can only be described as a "technicality." Facts are facts and they should not be deemed inadmissible before a complaint is even submitted to the DEP. This prejudicial rule is totally inconsistent with well-established rules of evidence and should be modified.

What does the DEP do with all of these surveys? Where does DEP store them? How does DEP log them to guarantee that an administrative error on their part in receiving, documenting or storing a survey does not unjustifiably prejudice an operator who properly submitted a survey? Why should DEP manage and maintain all of this paperwork for complaints that will never be submitted?

Seneca is not suggesting that operators should not provide a copy of survey results within a reasonable time frame to the landowner or water purveyor as that is important to maintaining good relations at the local level and to minimize complaints at the outset. Also, given the tight timeframes set forth in 58 Pa. C.S. § 3218(b) for the DEP to perform its investigation after a complaint is submitted to it by a landowner or water purveyor, Seneca would agree that operators should have a firm timeframe of 10 days after receiving notice of the complaint from DEP to send a copy of the applicable survey and other relevant evidence to the DEP. However, Seneca does not see the value in providing survey information to DEP in advance of a complaint being submitted, and Seneca does not understand the legal justification for DEP to maintain a procedural rule that requires it to reject sound, valid, relevant, and well-documented evidence

simply because it did not receive a copy days, months or even years before a complaint is submitted. Seneca recommends that this rule be modified to require operators to submit surveys to DEP after receiving a demand for the same from DEP in response to a landowner or water purveyor complaint. This change would bring this regulation in line with established evidentiary practices, reduce administrative burdens on the DEP, and appropriately place the record-keeping burden for surveys on the operators, thereby avoiding the potential scenario where an operator is needlessly and unduly prejudiced as the result of an unintended administrative record-keeping error by DEP.

§ 78.56. Temporary Storage

EQB proposes numerous changes to § 78.56. A change that occurs throughout the regulation is to modify the former reference to "pollutional substances" to now read "regulated substances." "Regulated substance" is proposed to be added as a new defined term in § 78.1 as follows: "Any substance defined as a regulated substance in section 103 of The Pennsylvania Land Recycling and Environmental Remediation Act (Act 2) (35 P.S. § 6020.103)." However, "regulated substance" is not a defined term under 35 P.S. § 6020.103, and therefore, its meaning in the context of Chapter 78 is unclear. EQB must either define the term "regulated substance" or select an appropriate term that is already clearly defined in another statute or regulation.

Additionally, it is unclear whether the provisions of § 78.56 apply solely to storage of regulated substances or whether some provisions also apply to storage of freshwater. The introductory provision of subparagraph (a) seems to imply that all of the following subparts apply only to storage of regulated substances, but, some of the subparts expressly reference regulated substances and some do not. As drafted it is unclear whether (for example) a freshwater pit must comply with all of the requirements set forth in § 78.56.

Also, if § 78.56 applies to more than just regulated substances (ie, freshwater storage), then where an operator constructs a water impoundment that services multiple well sites, must it satisfy the requirements for a "pit" set forth in § 78.56 considering that the proposed definition of "pit" set forth in § 78.1 limits that term to a facility "that services a single well site." Seneca assumes that is not EQB's intent for the provisions of § 78.56 to apply to an impoundment as separate provisions for impoundments are addressed under §§ 78.59a, 78.59b and 78.59c, but clarification is needed.

§ 78.59c. Centralized Impoundments

Seneca's concern regarding this section requires reference back to the proposed definition of centralized impoundments in § 78.1. The definition of centralized impoundments expressly includes "mine influenced water." Hence, the EQB seems to be equating mine influenced water to wastewater, which is an inappropriate classification. Also, including mine influenced water in the definition for centralized impoundments conflicts with § 78.59b(g), which allows for mine influenced water to be stored in a *freshwater* impoundment upon submission and approval of a water storage plan to DEP. To clarify this matter, Seneca recommends that the EQB delete the reference to mine influenced water from the definition of centralized impoundments. Besides, contrary to the definition of centralized impoundment, mine influenced water is not a "fluid or semi-fluid associated with oil and gas activities."

§ 78.64a. Containment Systems and Practices at Unconventional Well Sites

Section 78.64a(k) requires that "Inspection reports and maintenance records shall be available **at the well site** for review by the Department." (emphasis added) It is unreasonable and impractical to require operators to maintain inspection and maintenance documentation at

the well site. Such business records are better kept and maintained at the operator's office and can easily be made available to DEP upon request.

§ 78.65. Site Restoration

Clarification is required as to when the 9-month time period for site restoration begins to run. In reviewing 58 Pa. C.S. § 3216, it is Seneca's opinion that the General Assembly's use of the phrase "completion of drilling of a well" indicates its intent for the 9-month time frame to begin when the well is properly equipped for production or the date the well is abandoned. *See*, 58 Pa. C.S. § 3203, definition of "completion of a well." This is consistent with the General Assembly's references to completing activity as an activity that causes earth/soil disturbance in 58 Pa. C.S. § 3216(a) and (b). It is illogical to start the clock for performing restoration for an activity that is clearly recognized as causing or requiring earth/soil disturbance before that activity has been finished. Based on 58 Pa. C.S. § 3216, Seneca recommends that the EQB clarify that the 9-month restoration period commences on the date the well is properly equipped for production or the date the well is abandoned.

Seneca also disagrees with the proposed requirement under § 78.65(d)(4) to acquire the written consent of the landowner regarding site restoration. This section does not clearly identify who is supposed to acquire this consent, but in Seneca's opinion, whether it is the operator or DEP, that documentation may be difficult to obtain as surface use can be a very sensitive issue between landowners and operators, sometimes even being addressed via litigation before drilling even occurs. Seneca is not aware of any statutory authority under the Oil & Gas Act for DEP to require landowner consent to restoration. This consent requirement is an unnecessary intrusion on the landowner-operator relationship as the operator's use of the surface is a contractual and legal matter that is governed by the parties' agreements (*e.g.*, deed or lease) and well-established

legal precedent. Matters of surface use, including the extent of surface use, should be left to the parties themselves to resolve and is not something that DEP should be unilaterally and arbitrarily attempting to dictate, control and manage through regulation.

§ 78.68. Oil and Gas Gathering Lines

Soil segregation is required during construction of gas gathering lines pursuant to § 78.68(c). Seneca is not opposed to a rule that requires reasonable segregation of topsoil and subsoil as live topsoil is important for stabilization and restoration success. However, the strict mandate to segregate soil in all circumstances is not feasible. Notably, these proposed standards for unregulated gathering lines go above and beyond what the Federal Energy Regulatory Commission requires for construction of regulated transmission pipelines. The EQB fails to explain its rationale for imposing more costly and burdensome standards on unregulated facilities than the federal government imposes on regulated pipelines. Seneca recommends that the EQB modify the Proposed Rule by removing the strict requirements for soil segregation and replacing them with standards requiring reasonable segregation of topsoil and subsoil to allow flexibility during construction operations.

§ 78.68a. Horizontal Directional Drilling for Oil and Gas Pipelines

Under § 78.68a(i), a directional drilling operator shall immediately report a loss of drilling fluid circulation to DEP and request an emergency permit if necessary. This requirement fails to recognize that a temporary loss of drilling fluid circulation is a rather common occurrence during HDD operations, but it is not an absolute indicator that there is a problem and it certainly does mean there is a discharge of fluid. Seneca presumes that the intent of this rule is to report discharges of fluid, however, EQB is incorrectly equating a loss of drilling fluid circulation to a discharge. That is an erroneous and arbitrary presumption that is not supported

by any facts. Reporting every loss of drilling fluid circulation to the DEP would be unduly burdensome, would not further any regulatory or environmental objective, would create an unnecessary administrative burden on the DEP, and would provide no benefit to the operator, the DEP or the public. Seneca recommends that the EQB remove the reference to "loss of drilling fluid circulation" from the proposed rule so that the rule properly focuses on reporting of actual drilling fluid discharges to DEP.

§ 78.68b. Temporary Pipelines for Oil and Gas Operations

Section 78.68b(b) imposes a blanket restriction on burying pipelines that are carrying any fluids other than fresh ground water, surface water, water from water purveyors or other approved sources. Seneca disagrees with this restriction as it is an unreasonable limitation on field construction and operations. Operators should be encouraged rather than discouraged from piping water sources to/from their well sites to reduce truck traffic, allow for efficient recycling of water, and better protection of the water line. If an operator desires to install its water lines underground to better protect the lines from the elements, damage and vandalism, it should not be restricted to only using those lines for freshwater. Operators should be able to utilize buried water lines to transport both fresh and flowback water as needed from the wellhead to/from storage and to/from active frac sites. Yes, there are risks associated with buried pipelines, but many of those risks are the same if the pipeline is placed on the surface. As the risks are similar, and burying the line can actually provide much greater protection to the pipeline than simply placing it on the surface, EQB should remove this blanket restriction on burying water lines.

Additionally, EQB must clarify § 78.68b(i), which requires inspections prior to and during each use. What is meant by "during each use?" For example, if fluid is flowing for 14 consecutive days, how often is the operator to inspect the facilities based on this regulation?

IV. CONCLUSION

Seneca Resources Corporation appreciates this opportunity to provide comments regarding the proposed modifications to 25 Pa. Code, Chapter 78 and looks forward to working with the DEP to implement rules that implement the legislative intent of Act 13.

Respectfully submitted,

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