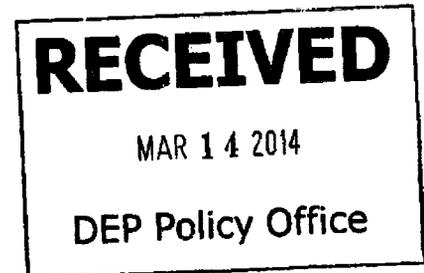
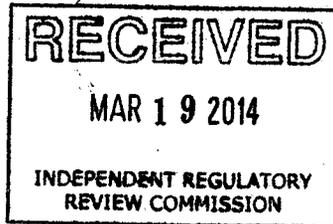


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**PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
OIL AND GAS TECHNICAL ADVISORY BOARD**

March 11, 2014

Environmental Quality Board
P. O. Box 8477
Harrisburg, PA 17101-8477



RE: Chapter 78 Proposed Rulemaking

Dear Honorable Members of the Environmental Quality Board:

By letter dated July 18, 2013, the Oil and Gas Technical Advisory Board (TAB) submitted a request to the Environmental Quality Board (EQB) asking you to withhold publication in the Pennsylvania Bulletin of the Chapter 78 proposed rulemaking. It was TAB's belief at that time that the regulatory package had not been fully developed and that it contained numerous flaws. TAB noted that the proposed rule did not comply with Executive Order 1996-1 that requires rules to address "compelling public interests" in a cost effective manner. TAB also stated its belief that certain provisions exceeded the statutory authority of the Department. Nevertheless, the proposed rules were subsequently published in the Pennsylvania Bulletin on December 14, 2013. In response to that publication TAB's formal comments on the proposed rule package are attached for the Board's consideration.

As noted in TAB's July 18th letter to you, TAB, in a first ever step, formed an Ad Hoc Technical Workgroup and convened two meetings to review and discuss four critical components of the proposed rule. This Technical Workgroup was comprised of representatives from industry, NGOs and citizen groups and the meetings were conducted by TAB with oversight by the DEP. These public meetings were held in Greensburg and State College and each lasted approximately one and one half days. Opportunities were provided for all sides to be heard including those in the audience. TAB's goal was to ascertain what, if any, changes it should accept relative to its recommendations on the four key provisions of the proposed rules. After listening to all sides of debate and reviewing the published minutes of the Greensburg meeting and our notes on the State College meeting, TAB's position is clear – our original concerns and recommendations on these proposed rules remain essentially unchanged. Additionally, TAB's concerns with these proposed rules exceeding Executive Order 1996-1 and provisions exceeding the Department's statutory authority, while not addressed in these workgroup meetings, still remain and are also addressed in the attached comments.

Consequently, TAB is resubmitting a revised version of its July 18, 2013 comments as our comments on this current proposal. We appreciate your consideration of TAB's issues and concerns. TAB members are willing at any time to discuss our concerns with the Board. Please feel free to contact me if you have any questions or would like to meet with TAB.

Sincerely,


Gary E. Slagel

For the Oil and Gas Technical Advisory Board:

Dr. Robert W. Watson - Chairman
Samuel E. Fragale
Gary E. Slagel
Burt A. Waite
Arthur E. Yingling

Attachment: TAB Chapter 78 Comments

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**PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL
PROTECTION
OIL AND GAS TECHNICAL ADVISORY BOARD**

**COMMENTS
25 Pa. Code Chapter 78, Subpart C
March 11, 2014**

- I. The proposed regulation does not meet the requirements of Executive Order No.1996-1 or Departmental policy, which require rules to address “compelling public interests” in a manner by which the costs do not outweigh the benefits.**

Before initial publication, the Department must rigorously review a proposed rule in accordance with Executive Order No. 1996-1, 4 Pa Code Chapter 1, Subchapter FF, and the *Policy for the Development, Approval and Distribution of Regulations* (Doc. No. 012-0820-001), all of which require that:

- regulations address a “compelling public interest” and “definable public health, safety or environmental risks,”
- the costs of regulations do not outweigh the benefits,
- viable non-regulatory alternatives are explored and preferred over regulation; and that
- regulations “shall not hamper Pennsylvania’s ability to compete effectively with other states.”

In spite of these requirements, the Department’s proposed revisions include numerous new obligations that would increase operational costs and complexity without clear justification or environmental necessity. For example:

Section 78.15 (Application Requirements) proposes to equate Act 13’s reference to habitats of “critical communities” with the phrase “special concern species” without justification in fact or law. This rule would significantly expand the time, expense and resources required for the permit application process because oil and gas operators are not currently obligated by law to mitigate impacts to special concern species, the designations of which far outnumber listings of threatened and endangered species protected under federal and state law.

This section of the proposed rule also requires unbounded additional time, effort and costs to engage in consultation with other Commonwealth agencies, such as the Department of Conservation and Natural Resources, the Pennsylvania Game Commission, and the Pennsylvania Fish and Boat Commission regarding impacts to listed public resources and to obtain comments and recommendations from those agencies regarding potential well permit conditions for the protection of public resources.. The proposal creates, in effect, another permit requirement that is not authorized under Act 13 or any other statute. The potential costs of the proposal far outweigh the potential benefits of such a process. Consultation and satisfaction of the other

Commonwealth agencies as a precondition for well permits can take several months, imposing costs of field surveys and mitigation measures above and beyond what is legally required.

In addition, this section—which substantially expands both the obligations of permit applicants as well as the apparent authority of other Commonwealth agencies to suggest well permit conditions for the Department’s consideration—is contrary to the express direction of Act 13 Section 3215 (e),¹ which created a limitation, not an expansion, of the Department’s authority to impose well permit conditions related to public resources.

Section 78.52a (Abandoned and Orphaned Well Identification) proposes an obligation to identify the location of orphaned or abandoned wells within 1,000 feet of the well bore and along the entire length of a horizontal well bore, the costs of which could far outweigh any realizable benefits.

Section 78.73 (Well Construction and Operation) proposes an obligation to monitor orphan or abandoned wells and to notify the Department of “any change,” take “action to prevent pollution of waters of the Commonwealth,” and plug any orphan or abandoned well “altered” by hydraulic fracturing. In addition to obvious problems surrounding access to property not owned by the well operator, this provision includes ambiguous and sweeping obligations that are not clearly delineated.

Section 78.57 (Production Fluids) proposes the removal, within three years of promulgation of the final regulations, of all underground or partially buried storage tanks used to store brine or other production fluids. This requirement fails to recognize the impact that it could have on conventional operators with dozens of such tanks.

Section 78.59a-c (Impoundments) would create excessive requirements for freshwater and flowback impoundments that are more stringent than requirements for hazardous waste impoundments.

Section 78.66 (Reporting and Remediating Releases) would require small spills of less than 42 gallons of brine to be cleaned up and documented through the Land Recycling and Remediation Standards Act (known as Act 2, the Pennsylvania brownfields statute) process outlined in 25 Pa. Code 250. This proposal substantially increases the time and costs for addressing such small spills, costs that far outweigh any benefit to be realized in most circumstances.

Section 78.68 (Oil and Gas Gathering Lines) would impose requirements for pipelines used in the oil and gas industry that are not imposed on any other industry utilizing pipelines.

While each of these provisions will not affect every operator equally, the cumulative effect of this regulatory package will create significant impacts to the oil and gas industry and Pennsylvania’s economy. Most of the Department’s proposals impact both conventional and unconventional operators, but smaller operators will bear a disproportionate share of these

¹ Act 13 instructs EQB to develop criteria “for the department to utilize for conditioning a well permit based on its impact to the public resources identified under subsection (c) and for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners.” Section 3215(e)

regulatory costs and burdens. The rule, as proposed, could very well eliminate a significant portion of Pennsylvania's conventional oil and gas economy and will depress unconventional operations.

The Department's Policy requires that regulatory strategies should be designed to achieve the desired goal at the "lowest possible cost." It does not appear that the Department has considered the economic impacts of this regulation, especially in light of other recent development of permits and policies that have substantially increased the cost of doing business in Pennsylvania, such as the Act 9 (Emergency Planning) regulations, ESCGP-2 (Erosion and Sedimentation Control and Post-Construction Stormwater Management Permit), the Spill Policy, the Pennsylvania Natural Diversity Index (PNDI) Policy, and others. The Department is required to consider economic impacts of its proposed rules and cannot do so in a vacuum. Each of these rules, policies and permits, while intended to achieve laudable environmental goals, must be considered for its cumulative impact on the oil and gas industry in Pennsylvania.

Regulation, which can stifle and prohibit short and long term economic growth when overly broad, should be narrowly tailored to meet actual needs while staying true to the purpose of Act 13, which is to "permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens." 58 Pa. C.S. §3202(1). The required cost-benefit analysis must be done before a regulation is proposed for public comment. The proposed regulation is legally incomplete without this analysis and would change substantially from its proposed form upon such review.

The Department should also consider the costs of a regulation that spurs litigation if it is proposed before it is fully developed in accordance with both legal and practical requirements.

II. Significant portions of the rule are yet to be reviewed in TAB workgroups.

The Department recognized at the April 23, 2013 TAB meeting that several provisions of the Chapter 78 revisions were not fully analyzed and that all stakeholder comments had not been considered. The Department created four workgroups to further review and develop the following topics:

1. Public resource protection
2. Pre-hydraulic fracturing assessment (orphaned and abandoned wells)
3. Waste management at well sites
4. Water supply restoration standards

As noted in the cover letter, and after consideration of all the comments received in the two workgroup sessions, TAB position on these key issues remains unchanged.

A. Public resource protection – Section 78.15

This section as proposed complicates a whole host of unresolved problems facing the oil and gas industry relating to well permit applications and the mitigation of impacts to public

resources. The Department has acknowledged that it received numerous and conflicting comments regarding this provision that are not easily resolved. The subcommittee on this topic has been formed because the Department did not even attempt to incorporate stakeholder input in the current draft rule. Two of the most pressing issues are the following:

Special concern species.

- Act 13 (section 3215(c)) limits the Department's authority to consider impacts only to "habitats of rare and endangered flora and fauna and other critical communities" when reviewing well permit applications. However, section 78.15(f)(iv) of the Chapter 78 revisions equates the term "critical communities" to a much broader category of "special concern species," which the Department's May 25, 2013 PNDI policy defines as those that are not listed as threatened or endangered. Proposed section 78.15 complicates rather than clarifies the well permit application review by ignoring the limitation on the Department's Act 13 authority. And the proposal exceeds the Department's statutory authority because special concern species are not critical communities because, by definition, special concern species cannot be included in other classifications due to limited evidence and insufficient data.

Standard for reviewing well permit applications.

- According to Act 13, Section 3215(e)(1), the EQB must develop regulatory criteria for conditioning well permits based on impacts to public resources and to ensure optimal development of oil and gas resources and respecting the property rights of oil and gas owners. The Chapter 78 revision, while creating a burdensome and open-ended process by which applicants must consult with other Commonwealth agencies before well permits will be issued, nevertheless fails to propose any regulatory criteria for the eventual imposition of permit conditions that might be imposed as a result of this process. The proposed rule must clearly articulate the standards and criteria for imposing such conditions on well permits.
- Section 3215(e)(2) of Act 13 requires the Department to prove that any conditions it imposes in well permits are necessary to protect against a "probable harmful impact of the public resources." The rule, however, fails to implement this requirement of Act 13, because it does not establish a clear and convincing evidentiary standard that the Department must meet to condition a well permit to protect against probable harm to public resources

An operator's application for a permit for a well that may affect public resources will require resolution of the above issues and related complicated problems including obtaining clearance letters from resource agencies such as the Pennsylvania Fish and Boat Commission and the Pennsylvania Game Commission. This process is time consuming and costly. Section 78.15 will have far reaching impacts and significant public interest. EQB will not have met its obligation under Act 13 if it proposes this preliminary draft as written.

B. Pre-hydraulic fracturing assessment (abandoned wells) - Sections 78.52a and 78.73

Proposed section 78.52a would require an operator, before hydraulically fracturing a gas well, to identify the location of all orphaned and abandoned wells within 1,000 feet from the vertical well bore and 1,000 feet from the entire length of a horizontal well bore. Section 78.73 would require an operator to plug and orphaned or abandoned well that it "alters" during hydraulic fracturing.

TAB is very concerned with breadth and vagueness of these sections. First, Act 13 does not require identification of abandoned or orphaned wells to obtain a drilling permit nor does it require operators to plug these wells. Express statutory authority for these sections is lacking. Second, the Department's proposal raises many practical compliance problems. As examples, there is no definition of what it means to "alter" an abandoned or orphaned well. The necessary diligence to identify and subsequent obligations related to abandoned wells remain unclear and could potentially create unreasonable burdens without coincident environmental benefit. Access may be denied to property on which abandoned or orphaned wells are located. A well may be identified on the DEP database or historic farm maps but cannot be field-located. The regulation does not address what happens in any of these circumstances. Even if identifying abandoned or orphaned wells before hydraulic fracturing is good standard practice in certain circumstances, the rule does not provide operators the flexibility to identify such wells during various other stages of permitting, drilling, or completion.

C. Waste management at well sites – Sections 78.56, 78.57, 78.58, 78.59a – 78.59c

Section 3273.1 of Act 13 carries forward the provision of the 1984 Oil and Gas Act that Chapter 78, rather than the Pennsylvania Solid Waste Management Act, governs the disposal, processing or storage of residual wastes generated at the well site. This regulatory treatment is critical to the industry because it simplifies compliance requirements and avoids conflicting management standards between the Department's oil and gas management and its solid waste management programs. **However, the prescriptive nature of these proposed rules will significantly impact the design, construction and use of impoundments and open top tanks. Some of TAB's concerns include:**

- The Department provides no rationale explanation for its restricted use of open topped containment.
- Requires an engineer to certify construction of any proposed impoundment - essentially requiring full time supervision by the engineer of the construction phase.
- The design criteria and construction standards for impoundments are more stringent than those required for residual and hazardous waste containment.
- The complexity of the impoundment standards as well as the restrictions on open top tanks will either discourage reuse and recycling or make it more expensive.

TAB believes the Department needs to reevaluate and revise these proposed sections to embrace more reasonable standards in light of existing practices within the industry and the effectiveness of current standards for the design and use of these facilities. Additionally, the Department should continue to seek assistance from stakeholders with practical field experience on how to align the oil and gas program with the solid waste program to avoid unintended consequences. These include:

- The Department proposes to provide approvals to process drill cuttings at the well site where they were generated (§ 78.58(c)). The Department should consider a permit-by-rule for this activity.
- The Department would similarly consider permit-by-rule approvals to process fluids generated during well completion activities at the well site (§ 78.58(a)).
- The Department should expand the list of approved activities listed under Section 78.58(b) to include activities to remove solids and the removal of hydro-carbons.
- The broad requirement to characterize, in the manner set forth by the residual waste regulations, residue remaining after the on-site processing or handling of drilling fluids is potentially unnecessary and will be very expensive to operators.

D. Water supply restoration standards – Section 78.51(d) (2)

Section 3218 of Act 13 requires an operator to restore an affected water supply to Pennsylvania Safe Drinking Water Act standards or “comparable to the quality of the water supply before it was affected by the operator if the water supply exceeded those standards” (emphasis added). Section 78.51(d)(2) adopts the statutory word “exceeded.” The Department has suggested that it is interpreting Act 13 and this regulatory section to require an operator to restore a water supply to a minimum of SDWA standards.

The Department’s position is a dramatic departure from current law, which simply requires operators to restore affected water supplies to their pre-drilling condition. Many water supplies do not meet SDWA standards in areas not served by public water utilities because there is no legal requirement for a Pennsylvania homeowner to treat his or her private water supply to SDWA standards. TAB believes it is unreasonable to require the oil and gas industry to upgrade private water supplies, at industry expense, beyond that which existed pre-drilling. No other industry is required to do this.

III. Several provisions of the rule exceed their statutory authority.

The Department’s Policy for the development of regulations acknowledges that regulations should “explain but not enlarge the scope of statutory provisions.” TGD No. 012-0820-001, at 2. The Department is not following the law or its own policy because the following revisions to Chapter 78 plainly are beyond the Department’s authority under Act 13. Rulemaking should be allowed to proceed to a proposed rule stage when parts of it are not authorized by law.

A. Abandoned and orphaned wells; public resources

The revisions to the Chapter 78 provisions dealing with abandoned and orphaned wells and with public resources exceed the Department’s Act 13, as discussed above. TAB believes

the regulatory package should be withheld from publication until these deficiencies are corrected.

B. Site Restoration – Section 78.65

Section 3216(e) of Act 13 requires sites to be restored in accordance with the Clean Streams Law, for which the applicable regulations are found in Chapter 102. Section 102.8(n) of these regulations, as amended in 2010, exempts oil and gas activities from extensive post-construction stormwater design criteria that apply to other earth disturbance activities such as commercial construction projects. This was done in recognition of the fact that post-construction footprint of a producing oil or gas well is much different from a stormwater management perspective than the impact of a commercial development.

However, section 78.65(d)(1)(i) as proposed ignores this exemption and purports to subject oil and gas site restoration to the much more extensive Chapter 102 criteria. This will impose significant costs on the industry and hamper development, contrary to Act 13's command to "permit optimal development of oil and gas resources" (section 3202(1)). It will also burden landowners by requiring more extensive stormwater control features (such as oversized sedimentation ponds and drainage ways) on their property than are necessary under current law.

C. Pipelines and horizontal direction drilling – Sections 78.68a, 78.68b

Act 13 does not give the Department authority to regulate pipelines or horizontal direction drilling. Yet, the Chapter 78 revisions would heavily regulate each.

These provisions would treat oil and gas operations differently from other industries that use pipelines. The Pennsylvania Clean Streams Law and its implementing regulations in Chapter 102 already address the environmental impacts of pipeline placement for all industries. Pipeline safety is largely preempted by federal law and comprehensively governed by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration. There is no statutory requirement or need for the Department to further regulate oil and gas pipelines. Doing so only adds cumulative regulatory burden with no appreciable environmental or safety benefit.

Contrary to the Department's apparent belief, industry is not asking the Bureau of Oil and Gas Management to add safety or environmental protection requirements to pipelines in addition to Chapter 102 and federal law. TAB believes that sections 78.68a and 78.68b should be deleted from the Chapter 78 revisions.

D. Tanks and containers – Sections 78.56 and 78.57

Section 78.57(e) would require operators to remove existing underground or partially buried brine or produced fluid storage tanks within three years of adoption of the Chapter 78 revisions. This contradicts the Act 13 grandfathering provision.

Act 13 states that all activities initiated under the Oil and Gas Act:

“shall continue and remain in full force and effect and may be completed under 58 Pa. C.S. Chs. 32 and 33. Orders, regulations, rules and decisions which were made under the Oil and Gas Act and which are in effect on the effective date of Section 3(2) of this act shall remain in full force and effect until revoked, vacated or modified under 58 Pa. C.S. Ch. 32 or 33. “

58 Pa. C.S. §4. The Department has no authority to impose retroactive requirements on existing sites and operations unless clearly authorized under Act 13, which authority is lacking with respect to underground storage tanks. Apart from the lack of legal authority, the Department is attempting to treat brine, especially brine from conventional operations, more stringently than hazardous waste, which may be stored in underground tanks. TAB believes that is unreasonable.

IV. The Department must conduct its required small business review before submitting a comprehensive regulatory proposal to EQB.

All of the concerns noted above, including the cumulative economic impact of rules for which the costs exceed the benefits, are of particular concern to small businesses in Pennsylvania, including hundreds of conventional well owners and operators.

In June 2012, the Pennsylvania General Assembly amended the Regulatory Review Act to expressly recognize that small businesses are critical to Pennsylvania’s economy and that uniform regulatory and reporting requirements can impose unnecessary and disproportionately burdensome demands—including legal, accounting, and consulting costs—upon small businesses with limited resources. Act 76 of 2012, Act of Jun. 29, 2012, P.L. 657, No. 76.

Accordingly, in any new rule proposed, the Department must consider:

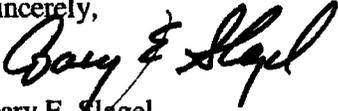
- the establishment of less stringent compliance requirements for small businesses,
- the establishment of less stringent schedules or deadlines for compliance or reporting requirements,
- the consolidation of compliance or reporting obligations,
- performance standards to replace design or operational standards, AND
- the exemption of small business from all or any part of the requirements contained in the proposed regulation.

There is no indication, express or implied, of the incorporation of any of these considerations in the proposed rule. It makes little sense to propose a rule that has not yet considered or adequately provided flexible regulatory approaches for small businesses in accordance with the law. This analysis must be a part of the proposed rule so that small businesses and the public at large have the opportunity to review and comment on all proposed accommodations.

Conclusion

The members of the Oil and Gas Technical Advisory Board respectfully present these comments to the Environmental Quality Board and are available at the Board's request to discuss any questions or comments the Board may have.

Sincerely,



Gary E. Slagel

For the the Oil and Gas Technical Advisory Board:

Dr. Robert W. Watson - Chairman
Samuel E. Fragale
Gary E. Slagel
Burt A. Waite
Arthur E. Yingling