

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-484 (IRRC #3042)

### Environmental Protection Performance Standards at Oil and Gas Well Sites

April 14, 2014

We submit for your consideration the following comments on the proposed rulemaking published in the December 14, 2013 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

#### 1. RRA Section 2 – Reaching of consensus.

This proposal updates existing requirements related to surface activities associated with the development of oil and gas wells and establishes new provisions related to a variety of topics from the regulation of centralized impoundments to the road-spreading of brine. It also addresses recent statutory changes made by the Oil and Gas Act, Act 13 of 2012 (Act 13), codified at 58 Pa.C.S. §§ 2301—3504. While it is not the sole statute guiding the EQB in the promulgation of this regulation, Act 13 is a major factor in this proposal. Chapter 32 of Act 13 describes the well permitting process and defines statewide limitations on oil and gas development. Section 3202 of Act 13 establishes the purpose of Chapter 32. One of the enumerated purposes is to “[p]ermit 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.A § 3202(1).

In addition to the challenge presented by Act 13, EQB must develop a regulation that takes into consideration the regulatory review criteria of the RRA. To illustrate, we note that Section 5.2(b)(2) of the RRA (71 P.S. § 745.5b(b)(2)) is the criterion related to the protection of the public health, safety and welfare, and the effect on the Commonwealth’s natural resources and Sections 5(a)(12.1) and 5.2(b)(8) of the RRA (71 P.S. §§ 745.5(a)(12.1) and 745.5b(b)(8)) relate to regulatory flexibility for small business. We acknowledge that devising a regulation that meets all of these requirements is not an easy task.

This proposal has generated a great deal of interest from the regulated community. The 90-day public comment period and the numerous public hearings held throughout the Commonwealth allowed many people, associations and businesses to participate in the rulemaking process. As a result of the efforts of EQB, a large number of written comments have been received and substantial testimony has been submitted on the rulemaking. It is evident that those who took the

time to submit written comments or to provide testimony at one of the public hearings have strong opinions on many aspects of the proposal. We thank EQB and all parties that have participated in the process thus far in an effort to shape a regulation that benefits all citizens of the Commonwealth.

Many provisions of the proposal have also generated interest from legislators, local governments, federal agencies, parties representing the oil and gas industry, and parties representing environmental concerns. The issues raised by the parties are often in direct conflict with each other. As a general example, we point out that § 78.70 relates to the road-spreading of brine for dust control and road stabilization. Some commentators question why there is a prohibition of spreading brine from unconventional wells while other commentators call for the complete ban on this practice for brine from both conventional and unconventional wells. A more specific example can be found at the comments offered on § 78.56(a)(16). This subsection of the regulation requires either a licensed professional engineer or a geologist to certify that pit liners are compliant with the requirements of § 78.56. One commentator has suggested that an “appropriately trained professional” could provide the necessary certifications while another commentator has suggested that only a licensed professional engineer be permitted to make the required certification. We offer these examples to demonstrate the opposing viewpoints expressed by commentators on many provisions of the regulation.

Section 2 of the RRA (71 P.S. § 745.2) explains why the General Assembly felt it was necessary to establish a regulatory review process. Given the interest this proposal has generated, we believe it is appropriate to highlight the following provision of Section 2(a) of the RRA. The provision states, “To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.”

Through these comments, we encourage EQB to continue its efforts to strike the appropriate balance of protecting the health, safety, environment and property of Pennsylvania citizens while allowing for the optimal development of the oil and gas industry in Pennsylvania. Input from legislators and interested parties should continue to be included as EQB moves forward with this proposal. We also ask EQB to continue to consult with the Oil and Gas Technical Advisory Board (TAB), created by Act 13, as it develops the final-form regulation. In addition, we recommend EQB issue an Advance Notice of Final Rulemaking to help facilitate the reaching of consensus on the issues this proposal presents.

## **2. RRA Section 5.2(b)(2) – Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources.**

As noted above, this proposed regulation has generated a substantial amount of public comment from a variety of entities and individuals. Our comments reflect our review of the numerous issues raised by commentators and how those issues pertain to the review criteria in the RRA. While we ask EQB to further clarify and justify numerous provisions that have been raised as concerns by representatives of the oil and gas industry, we remain concerned that the final-form regulation fulfill EQB’s obligation to protect the quality and sustainability of the Commonwealth’s natural resources. To that end, we ask EQB to explain how the standards set

forth in the regulation meet the criterion under Section 5.2(b)(2) of the RRA (71 P.S. § 745.5b(b)(2)) pertaining to the protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources while imposing reasonable operating standards on the oil and gas industry.

### **3. RRA Section 5.2(a) – Legislative comments.**

Numerous legislators have submitted comments on the proposal. Like the comments submitted by the regulated community, the issues raised by legislators touch upon many aspects of the rulemaking. Some of the comments ask for more environmental protections, some raise concerns about the impact the rulemaking will have on the oil and gas industry, and some question if the rulemaking is properly aligned with Act 13 and the intention of the General Assembly. We will review EQB's responses to all of the issues raised by legislators in our determination of whether the final-form regulation is consistent with the intent of the General Assembly and in the public interest.

### **4. RRA Section 5.2(a) – Statutory authority.**

On December 19, 2013, the Pennsylvania Supreme Court ruled that the well location restrictions and waiver process found in Act 13 are unlawful. Robinson Twp., et al v. Commonwealth of PA, 83 A.3d 901 (PA 2013). Consequently, the court invalidated Sections 3215(b) through (e) of Act 13, among other provisions, and enjoined the application of those sections. In light of the Robinson Twp. case, we ask EQB to explain its authority to regulate well location restrictions, particularly as they relate to setbacks, waivers, and impact analyses for well permits.

### **5. RRA Section 5.2(b)(3)(ii) and (iv) – Clarity and lack of ambiguity; Reasonableness of requirements.**

EQB has stated that this rulemaking is being made under the authority of the following laws: Act 13, the Clean Streams Law, the Solid Waste Management Act (SWMA), the Dam Safety and Encroachments Act, the Land Recycling and Environmental Remediation and Standards Act (Act 2), and the Administrative Code of 1929. Section 13 of the Regulatory Analysis Form (RAF) lists nine other chapters of the Department of Environmental Protection (Department) regulations that language was derived from or cross-referenced in this proposal. Commentators have expressed concern that certain provisions of the regulation adopt concepts or requirements from all of these laws, and the regulations promulgated thereunder, and impose those requirements upon the oil and gas industry, even though those laws may not be applicable to the oil and gas industry. In the Preamble to the final-form regulation, EQB should explain the applicability of the referenced laws and regulations.

### **6. RRA Sections 5.2(b)(3)(v) and (b)(7) – Whether the regulation is supported by acceptable data.**

Section 28 of the RAF relates to the regulatory review criterion of whether the regulation is supported by acceptable data. If data is the basis for a regulation, this section of the RAF asks for a description of the data, how the data was obtained, and how it meets the acceptability

standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. EQB has indicated that data is not the basis for this regulation. If data is not the basis for this regulation, how did EQB determine that the many standards being imposed are adequate? As noted in our first comment, various segments of the regulated community have opposing views on many provisions of the proposal. Those commentators often call for either: more stringent regulations, less stringent regulations, no regulations at all or a more flexible regulatory approach to standards being put forth. Since the regulation is not based on data, we ask EQB to explain how it determined that the numerous standards being proposed are appropriate and why it believes those standards strike the appropriate balance between environmental protection and the optimal development of the oil and gas resources of this Commonwealth.

#### **7. RRA Section 5.2(b)(3)(iii) – Need for the regulation.**

Section D of the Preamble to this rulemaking relates to background and purpose. It notes the following: “The 2012 Oil and Gas Act contains new environmental protections for unconventional wells and directs the Board to promulgate specific regulations. For these reasons, the [EQB] initiated this proposed rulemaking.” (Emphasis added.) Commentators representing the conventional oil and gas industry believe this rulemaking will have a serious negative impact on their businesses. While we understand that EQB has the authority to amend its regulations relating to conventional wells, we ask for a detailed explanation of why more stringent regulations for the conventional oil and gas industry are needed at this time. Has EQB witnessed an increase in environmental mishaps or violations from conventional well operators? What problem is EQB attempting to correct through this proposal with respect to conventional wells?

#### **8. RRA Section 5.2(b)(1) – Economic or fiscal impacts.**

##### *Regulated community*

The fiscal analysis provided by EQB in the RAF indicates that the proposal will cost the regulated community between \$79,572,410 and \$102,792,950 with an approximate savings of \$22,071,380. The oil and gas industry, especially the conventional operators, believe EQB’s cost estimates are greatly understated. To illustrate, we note that EQB has calculated the annual cost for the conventional oil and gas industry to be between \$5,389,360 and \$12,006,000. The Pennsylvania Grade Crude Oil Coalition has estimated the annual maintenance cost for this industry to be between \$181,238,215 and \$387,300,715 with a first-year compliance cost of between \$567,063,975 and \$1,510,488,975.

We are concerned that there is such a large disparity between the cost estimates prepared by EQB and the cost estimates prepared by the industry as a whole. There appears to be a basic misunderstanding of what this proposal will require and when those requirements will become effective. As this proposal moves forward, we strongly encourage EQB to consult with both conventional and unconventional operators and their associations so that all parties can gain an understanding of what will be required, when it will be required, and what it will cost to comply with the rulemaking. In the RAF accompanying the final-form regulation, EQB needs to explain

why its cost estimates are appropriate compared to the vastly different estimates presented by commentators.

#### *Local government*

According to the RAF, EQB does not anticipate that there will be any costs or savings to local governments. The Pennsylvania State Association of Township Supervisors (PSATS) disagrees with EQB on this matter. They believe the costs associated with the requirements for using conventional well brine for road stabilization or pre-wetting roads would outweigh any benefit of using the brine. We ask EQB to work with PSATS to develop a cost estimate associated with these provisions of the rulemaking. EQB also needs to demonstrate that the benefits of such a program outweigh the costs.

#### **9. RRA Sections 5(a)(12.1) and 5.2(b)(8) – Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small business.**

Section 5(a)(12.1) of the RRA (71 P.S. § 745.5(a)(12.1)) requires promulgating agencies to provide a regulatory flexibility analysis and to consider various methods of reducing the impact of the proposed regulation on small business. Commentators, including legislators, do not believe that EQB has met its statutory requirement of providing a regulatory flexibility analysis or considering various methods of reducing the impact the proposed regulation will have on small business in its responses to various sections and questions on the RAF. While we appreciate the effort put forth by EQB to meet its “small business” obligations under the RRA, we agree that more information is needed in the RAF. We ask EQB to provide the required regulatory flexibility analysis for each section of the proposed rulemaking.

#### **10. RRA Sections 5.2(b)(3)(ii) and (iv) – Clarity; Implementation procedures.**

Commentators suggest that the clarity of the proposal could be improved by segregating the regulation into separate chapters for conventional operators and unconventional operators. We believe this suggestion has merit and would help to dispel existing misunderstandings related to effective dates for, applicability of and costs associated with various provisions. The final-form regulation should clearly identify the effective date for each provision, what provisions, if any, will be subject to grandfather clauses and which sections or provisions will apply to conventional wells, unconventional wells, or both.

#### **11. Section 78.1. Definitions. – Clarity and lack of ambiguity; Need for the regulation; Implementation procedures.**

##### *Approximate original conditions*

This definition concludes with the phrase, “. . . to the extent practicable.” This phrase is vague and should be deleted or further clarified.

### *Body of water*

This definition is a cross-reference to § 105.1 (relating to definitions) of the Department's regulations. Chapter 105 pertains to dam safety and waterway management. Why is this definition appropriate for the regulation of the oil and gas industry?

### *Gathering pipeline*

Since the federal government and the Pennsylvania Public Utility Commission have jurisdiction over pipelines, we ask EQB to ensure this definition does not conflict with any definitions from those regulatory agencies.

### *Mine influenced water*

The second sentence of this definition states, "The term may also include surface waters that have been impaired by pollution mine drainage as determined by the Department." This sentence is not regulatory because it does not establish a binding norm. It is unclear under what circumstances this sentence would apply, what criteria the Department will use to determine impairments, and how the regulated community is advised that surface waters have been impaired by pollutional mine drainage. We recommend that the sentence either be amended or deleted.

### *Oil and gas operations*

This definition deviates from the same definition found in Section 3301 of Act 13. What is the reason for the differences? We also note that the term "oil and gas activities" is used throughout the regulation. Do these two terms mean the same thing? If so, we recommend that the defined term be used consistently throughout the regulation. If not, we recommend that "oil and gas activities" also be defined.

### *Process or processing*

This definition is a cross-reference to the definition found in Section 103 of the SWMA (35 P.S. § 6018.103). Why is this definition appropriate for the regulation of the oil and gas industry?

### *Regulated substance*

This term is defined as, "Any substance defined as a regulated substance in section 103 of Act 2 (35 P.S. § 6026.103)." Act 2 is a land recycling program that encourages the voluntary cleanup and reuse of contaminated commercial and industrial sites. Why is this definition appropriate for the regulation of the oil and gas industry?

*Words or terms that should be defined to improve the clarity of the regulation*

Commentators suggest that the clarity of the regulation could be improved if the following words or terms are defined: Additive; brine; discrete area; freshwater; hydraulic fracturing; leak protection system; occupied dwelling; pipeline infrastructure; residual waste; responsible party; seasonal high groundwater table; temporary storage; and waste. We ask EQB to consider defining the words or terms above to assist the regulated community with compliance.

**12. Section 78.15. Application requirements. – Statutory authority; Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Clarity and lack of ambiguity; Implementation procedures.**

This section includes references to wells, well sites and access roads. Do the requirements of this section pertain to all activities included under the definition of “oil and gas operations”?

*Subsection (f)*

This subsection outlines certain requirements in the well permit application process in accordance with Act 13. We have five concerns.

First, how are all of the distance standards included in this subsection measured? The final-form regulation should specify if the measurements are from the edge of the well pad or from some other fixed point.

Second, commentators believe it would be appropriate to add certain waters, streams and wetlands to Paragraph (f)(1). Does the list of locations under this paragraph adequately protect all of this Commonwealth’s natural resources?

Third, what is meant by the term “corridor” under Subparagraph (f)(1)(ii)? We believe the clarity of the rulemaking could be improved by defining this term.

Fourth, Subparagraph (f)(1)(iv) requires applicants to notify certain parties if the proposed surface location of the well is located in a location that will impact “other critical communities.” For the purposes of this subparagraph, “other critical communities” means “species of special concern.” What is EQB’s authority to define “other critical communities” as “species of special concern”? In addition, it is unclear what the scope of species of special concern can be, how a species becomes a species of special concern, how this provision will be implemented, and the costs associated with complying with this provision. For these reasons, we ask EQB to provide a more detailed explanation of the rationale for this subparagraph, why it is needed, how it will be implemented, why it is legal, and why it is consistent with the intent of the General Assembly and Act 13.

Fifth, commentators are concerned that the 15-day timeframe for public resource agencies to provide comments to the Department and the applicant under Paragraph (f)(2) is not a sufficient amount of time, and that it is unclear if the 15-day timeframe is 15 calendar days or business

days. EQB should clarify whether the timeframe is calendar or business days, and consider extending the timeframe to allow for adequate consideration by the public resource agency.

*Subsections (f) and (g)*

Paragraph (f)(2) includes the phrase “probable harmful impacts,” and Subsection (g) includes the phrase “probable harmful impact.” These phrases are vague. As written, we question if this standard adequately protects this Commonwealth’s natural resources. We suggest that the final-form regulation include criteria that will allow the regulated community to know how the Department will determine if an application poses a probable harmful impact.

**13. Section 78.51. Protection of water supplies. – Statutory authority; Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements; Implementation procedures.**

*Subsection (b)*

Regarding Subsection (b), a commentator suggests that neighboring land owners and land management agencies be notified of claims of pollution. Another suggests including e-mail notification procedures. EQB should explain in the Preamble and RAF of the final-form regulation the reasonableness of the notification procedures in this subsection, and explain how the procedures adequately protect public health and safety.

*Subsections (b) and (c)*

Subsections (b) and (c) include “well site construction” in the list of activities which trigger the reporting and investigation activities set forth in Section 3218(b) of Act 13. However, Section 3218(b) does not include “well site construction” as a cause of pollution or diminution of water supply. Some commentators question EQB’s authority to expand the list to include “well site construction,” and other commentators recommend that EQB expand the list to include all activities under the proposed definition of “oil and gas operations.” We ask EQB to provide its authority for expanding the list, and to explain why the activities included in the list adequately protects the environment.

*Subsection (c)*

EQB amends Subsection (c) to clarify that the presumption of liability established in Section 3218(c) of Act 13 does not apply to pollution resulting from well site construction activities. Some commentators state that the presumption of liability should extend to well site construction activities. We ask EQB to explain how this amendment is consistent with Section 3218(c) of Act 13, and explain why pollution from well site construction should be exempt from the presumption of liability as established in Section 3218(c) of Act 13.

*Subsection (d)*

Paragraph (d)(2) implements a new provision provided in Act 13 that specifies that a restored or replaced water supply must meet the standard in the Pennsylvania Safe Drinking Water Act (35 P.S. §§ 721.1—721.17) or be comparable to the quality of the water supply before it was affected if that water exceeded those standards. Commentators raise concerns regarding the reasonableness and cost of such requirements, and question whether the proposed regulation goes beyond what was envisioned by the General Assembly. We ask EQB to explain how it will enforce this requirement to conform to the intent of the General Assembly and Act 13.

**14. Section 78.52. Predrilling or prealteration survey. – Clarity and lack of ambiguity; Implementation procedures and timetables for compliance.**

Subsection (g) incorporates Act 13 requirements that unconventional well operators provide written notice to water supply owners that the presumption established in Section 3218(c) of Act 13 may be voided if the landowner or water purveyor refuses to allow the operator access to conduct predrilling or prealteration surveys, provided that the operator submits proof of the notice to the Department. Commentators question how this subsection will be implemented. We believe the clarity of the provision would be improved if a timeframe for a response by the landowner or water purveyor to the written notice was included in the regulation. The regulation should also clarify when a landowner or water purveyor is deemed to have refused access for survey purposes.

**15. Section 78.52a. Abandoned and orphaned well identification. – Statutory authority; Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Clarity and lack of ambiguity; Reasonableness of requirements; Implementation procedures and timetables for compliance.**

*Subsection (a)*

The new language of this section sets forth requirements related to identification of abandoned and orphaned wells and has generated significant interest from the regulated community. Subsection (a) requires operators to identify orphaned and abandoned wells in proximity to the vertical and horizontal well bore prior to hydraulically fracturing a well. While some commentators suggest that this requirement should apply to all new wells, not just those that are hydraulically fractured, others believe that EQB lacks statutory authority under Act 13 to impose the requirements of this section on operators. We ask EQB to provide its authority for this requirement and explain how the requirement aligns with the intent of the General Assembly and Act 13. We also ask EQB to explain in the Preamble and RAF of the final-form regulation why this new section is reasonable, how it protects public health and the environment, and how the benefits outweigh any costs.

*Subsections (b) and (c)*

Subsections (b) and (c) address requirements related to identification of abandoned and orphaned wells. Commentators question in Paragraph (b)(2) what is meant by “a review of applicable farm line maps, where accessible.” Other commentators ask for clarification of what is expected from operators regarding submitting the questionnaire to landowners under Paragraph (b)(3) and proof of submitting the questionnaire to landowners under Subsection (c). We agree that it is unclear as to how the regulated community is expected to comply with these provisions. Are there expectations for operators beyond submitting questionnaires to landowners and submitting proof of submitting the questionnaires? Will there be a timeframe for compliance? What proof of notification will EQB require from operators? We ask EQB to clarify the implementation procedures related to these subsections.

**16. Section 78.55. Control and disposal planning; emergency response for unconventional well sites. – Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Need for the regulation; Reasonableness of requirements; Implementation procedures.**

*Subsection (a)*

This subsection requires persons conducting oil and gas operations to prepare and implement site specific preparedness, prevention and contingency (PPC) plans. As suggested by commentators, allowing conventional operators to prepare a single PPC plan for multiple sites would lessen the fiscal impact of the regulation. Would this Commonwealth’s natural resources be adequately protected if the regulation allowed conventional operators to prepare one PPC plan for multiple sites? If so, we suggest that this subsection be amended accordingly.

*Subsection (f)*

In addition to providing a copy of the PPC plan to the Department, this revised subsection will now require well operators to provide a copy of the PPC plan to the Fish and Boat Commission or the landowner, upon their request. Did EQB consider the possibility of also allowing local governments to request a copy of the PPC plan?

**17. Section 78.56. Temporary storage. – Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements; Implementation procedures and timetables for compliance.**

*Subsection (a)*

Paragraphs (a)(5)-(7) address security for pits, tanks and approved storage structures. Commentators raise a variety of concerns related to these provisions, such as timelines for implementation, safety issues related to installing locks and locking lids, reasonableness of equating the presence of a person to a fence, cost of installing a fence and/or locks, and whether a person, lock and/or fence can ensure prevention of damage or access. We ask EQB to explain

in the Preamble and RAF of the final-form regulation how the security requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

Paragraph (a)(9) provides technical requirements related to pit liners. Commentators suggest amending this provision to make liner thickness dependent upon pit depth, require certification of pit liners, and require liners to cover freeboard. Other commentators state that visual inspections of liner seams should suffice. We ask EQB to explain in the Preamble and RAF of the final-form regulation how the technical requirements for pit liners in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

Paragraph (a)(10) implements a new requirement for pit slopes which commentators say is impractical and unnecessary. Commentators state that the new requirement would dramatically increase the size of the pits, thereby increasing the environmental impact. We ask EQB to explain in the Preamble and RAF of the final-form regulation the need for this change. We also ask EQB how the slope requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

**18. Section 78.57. Control, storage and disposal of production fluids. – Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect of this Commonwealth’s natural resources; Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements.**

*Subsection (a)*

A commentator states that this subsection could be interpreted as excluding the use of centralized impoundments at Section 78.59c. EQB should ensure that the intent of this subsection is clear.

*Subsection (c)*

Commentators express concern that this subsection only applies to threats of pollution to the waters of Pennsylvania, whereas the Section 3218.2(a) of Act 13 expressly states that containment also applies to “the ground surface or spills off the well site.” This concern also applies to Section 78.66(b)(1)(i). We ask EQB to ensure that all containment provisions align with intent of the General Assembly and the standards set forth in Act 13.

*Subsection (e)*

Subsection (e) is new language addressing the removal of existing underground or partially buried storage tanks. Commentators assert that this new requirement is unnecessary and unjustified, and that EQB did not consider the cost of replacing the tanks in its analysis of the fiscal impact of the regulation. Other commentators state that this new requirement contradicts the grandfathering provision of Act 13. We ask EQB to explain how this provision aligns with the intent of the General Assembly and Act 13. We also ask EQB to explain in the Preamble and

RAF of the final-form regulation how this subsection reasonably and adequately balances protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

**19. Section 78.58. Onsite processing. – Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Possible conflict with or duplication of statutes or existing regulations; Reasonableness of requirements; Implementation procedures.**

The new language of this section governs the disposal, processing and storage of residual wastes generated at well sites. Commentators express concern that the requirements of this section should align with the requirements of the Solid Waste Management Act in order to simplify compliance requirements and avoid conflicting management standards between the Department’s oil and gas management and its solid waste management programs. We ask EQB to ensure that the provisions of this section do not conflict with or duplicate statutes or existing regulations. We also ask EQB to explain in the Preamble and RAF of the final-form regulation how the requirements for onsite processing in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

*Subsection (f)*

Subsection (f) requires an operator to hold sludges, filter cake or other solid waste remaining after the processing of certain fluids at the well site until they are characterized. A commentator states that requiring an operator to hold these solid waste remains during this timeframe is not practical and suggests revising the provision to add “for disposal” to the end of the paragraph. We ask EQB to explain why this requirement is reasonable or consider revising it.

**20. Section 78.59a. Impoundment embankments. – Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Possible conflict with or duplication of statutes or existing regulations; Clarity and lack of ambiguity; Reasonableness of requirements; Implementation procedures.**

The new language of this section establishes requirements related to impoundments and has generated significant interest from the regulated community. Commentators express concern that the requirements of this section are much more stringent than the design criteria for residual waste or hazardous waste under the SWMA. Commentators also note that the Dam Safety and Encroachments Act regulates freshwater impoundments. Some commentators assert that EQB has significantly underestimated the cost of the standards imposed by these requirements. Other commentators suggest additional requirements regarding soil testing and volume limits. We ask EQB to ensure that the provisions of this section do not conflict with or duplicate statutes or existing regulations. We also ask EQB to explain in the Preamble and RAF of the final-form regulation how the requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

We have similar concerns related to impoundment requirements in Sections 78.59b and 78.59c, and ask EQB to ensure that these sections do not conflict with or duplicate statutes or existing regulations. We also ask EQB to explain in the Preamble and RAF of the final-form regulation how the impoundment requirements in these sections reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry

**21. Section 78.59b. Freshwater impoundments. – Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Possible conflict with or duplication of statutes or existing regulations; Clarity and lack of ambiguity; Reasonableness of requirements; Implementation procedures and timetables for compliance.**

*Subsection (d)*

Subsection (d) addresses security for impoundments. We have concerns related to the timeline for implementation, the reasonableness of equating the presence of a person to a fence, the cost of installing a fence, and whether a person or fence can ensure prevention of damage or access. We ask EQB to clarify the implementation procedures related to this provision. We also ask EQB to explain in the Preamble and RAF of the final-form regulation how the security requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

*Subsection (f)*

Subsection (f) addresses restoration of freshwater impoundments. Commentators state that these impoundments should be restored in accordance with applicable site restoration plans rather than to “approximate original conditions.” Other commentators state that the provision does not address how or where the removed water is to be disposed. We ask EQB to clarify for the regulated community how this provision is to be implemented and to what standards.

Subsection (f) also provides for a two-year restoration extension under Section 3216(g) of Act 13. Commentators assert that Act 13 does not directly address freshwater impoundments, so extensions under this subsection should not be limited to two years. We ask EQB to explain how this provision aligns with the intent of the General Assembly and Act 13. We also ask EQB to explain in the Preamble and RAF of the final-form regulation how the restoration requirements in this subsection reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry

Commentators suggest that Subsection (f) include additional precautions related to restoration of freshwater impoundments that held mine influenced water, given that Subsection (g) allows for such storage. We ask EQB to explain in the Preamble and RAF of the final-form regulation how the requirements related to restoration of impoundments that held mine influenced water in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

### *Subsection (g)*

Subsection (g) allows for storing mine influenced water in a freshwater impoundment. Commentators question whether the storage standards in this provision are sufficiently stringent with regard to mine influenced water. We ask EQB to explain in the Preamble and RAF of the final-form regulation how this provision reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

Subparagraph (g)(1)(i) requires a demonstration that the escape of mine influenced water stored in the freshwater impoundment will not result in air pollution. Commentators assert that the regulation of air falls under the jurisdiction of another program. We ask EQB to provide its authority and to ensure that the provisions of this section do not conflict with or duplicate statutes or existing regulations.

### **22. Section 78.59c. Centralized impoundments. – Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Reasonableness of requirements; Implementation procedures and timetables for compliance.**

The new language of this section provides requirements for centralized impoundments and generated significant interest from the regulated community. Commentators note that certain provisions, such as Clause (e)(3)(viii)(B) which allows operators to direct leak collection from failed impoundment systems back into the same failed system, are improper or inadequate. Other commentators express concern that certain requirements, such as Subparagraph (e)(2)(vi) which requires an authorized representative of a liner manufacturer to supervise the installation of the liner, are unreasonable or excessive. We ask EQB to explain in the Preamble and RAF of the final-form regulation how the requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

A commentator questions why EQB does not require security measures for centralized impoundments as EQB requires security for temporary storage in Section 78.56(a)(5). We note that EQB requires security for freshwater impoundments in Section 78.59b(d). We ask EQB to explain in the Preamble and RAF of the final-form regulation how this provision adequately protects public health and natural resources without a provision for security. If a security provision is added in the final-form regulation, we ask EQB to explain in the Preamble and RAF of the final-form regulation how the security requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

### **23. Section 78.62. Disposal of residual waste–pits. – Economic or fiscal impacts; Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements.**

Paragraph (a)(1) has been amended to prohibit solid waste generated by hydraulic fracturing of unconventional wells and solid waste generated by processing of fluids to be disposed of on the well site. What is the need for this prohibition? We raise a similar concern with § 78.63(a)(1),

relating to disposal of residual waste via land application. We ask EQB to explain in the Preamble and RAF of the final-form regulation the reasonableness of the requirements in these subsections.

In Paragraph (a)(9), who qualifies as an “other similarly trained person”? We ask EQB to clarify what is meant by this term or delete it.

**24. Section 78.64a. Containment systems and practices at unconventional well sites. – Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements; Implementation procedures.**

*Subsection (c)*

Section 3218.2(c) of Act 13 lists six specific substances that must be stored in containment systems. This subsection broadens the scope of that statutory list to include “all regulated substances, including solid wastes and other regulated substances in equipment or vehicles.” How is this expansion consistent with the intent of the General Assembly and Act 13? What is the need for this requirement? We ask EQB to explain in the Preamble and RAF of the final-form regulation how the list in the final-form regulation reasonably and adequately balances protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

*Subsection (f)*

We have three concerns. First, Section 3218.2(d) of Act 13 does not require secondary containment systems. However, Subsection (f) does require secondary containment when storing additives, chemicals, oils or fuels. Why does EQB believe this provision is consistent with the intent of the General Assembly and Act 13?

Second, Subsection (e) establishes the standards for containment systems. Do secondary containment systems referenced in Subsection (f) have to meet the same standards as containment systems? This should be clarified in the final-form regulation.

Third, as noted by a commentator, the last sentence of this subsection is vague. EQB should clarify the intent of this sentence in the final-form regulation.

*Subsection (j)*

Stormwater that comes into contact with regulated substances stored within the secondary containment area must be managed as residual waste under this subsection. If the stormwater is not discharged, a commentator believes it should not be classified as residual waste. What is EQB’s rationale for classifying this type of stormwater as residual waste?

*Subsection (k)*

Under this subsection, inspection reports and maintenance records must be available at the well site for review by the Department. A commentator has noted that it would be difficult to maintain the records at the well site and has suggested that the records be available upon request by the Department. We agree with this suggestion and ask EQB to include language in the final-form regulation that specifies how long and where the reports and records must be kept.

**25. Section 78.65. Site restoration. – Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Reasonableness of requirements; Implementation procedures.**

Amendments to this section address well site restoration requirements. The amendments have generated significant interest from the regulated community, especially new language found under Subsection (d). Some commentators believe that the language conflicts with Section 3216 of Act 13 and would impose significant costs to the oil and gas industry without a corresponding benefit. Other commentators have suggested additional language that is more protective of the environment. We ask EQB to explain why it believes the proposed language is properly aligned with Act 13. We also ask EQB to explain in the Preamble and RAF of the final-form regulation how the requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

**26. Section 78.66. Reporting and remediating releases. – Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Need for the regulation; Reasonableness of requirements; Implementation procedures and timetables for compliance.**

This section uses the term “regulated substance” and incorporates concepts of Act 2 for the remediation of releases. Similar to our comment on the definition of “regulated substance,” we ask EQB to explain why it is appropriate to apply Act 2 standards to active oil and gas operations.

*Subsection (b)*

This subsection pertains to the reporting of releases. It requires additional notification requirements that are above and beyond what is required under § 91.33, relating to incidents causing or threatening pollution. What is the need for these additional requirements?

A commentator has suggested that Paragraph (b)(4) be amended to allow treatment of released material, with DEP approval, as a temporary solution to spills or releases. We ask EQB to consider this option if it does not pose a threat to the natural resources of the Commonwealth.

*Subsection (c)*

This subsection addresses the remediation of releases. Commentators note that the lack of a statewide health standard for chloride would make this provision costly and difficult to implement. Has EQB considered alternative methods of remediation for spills involving chloride?

In addition, a commentator has described the alternative remediation process provided under paragraph (c)(3) as more onerous than aspects of Act 2 cleanups because of restrictive timetables for compliance. We ask EQB to reconsider the timetables for compliance. We ask EQB to explain in the Preamble and RAF of the final-form regulation how the compliance requirements in this subsection reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

**27. Section 78.68. Oil and gas gathering lines.**

**Section 78.68a. Horizontal directional drilling for oil and gas pipelines.**

**Section 78.68b. Temporary pipelines for oil and gas operations. – Statutory authority; Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Need for the regulation; Reasonableness of requirements.**

Commentators question EQB’s statutory authority for these three sections and also question if these provisions are consistent with the intent of the General Assembly and Act 13. The commentators assert that the subject matter addressed by these sections is extensively covered by both federal and state law, and consequently these sections are not needed. In the Preamble to the final-form regulation, we ask EQB to explain its statutory authority for these sections and how they are consistent with the intent of the General Assembly and Act 13. We also ask for an explanation of why these sections are needed, in light of other federal and state laws that cover these matters.

Similar to our previous comments, we note that these sections have generated significant interest from the regulated community. Some commentators believe that the language would impose significant costs to the oil and gas industry without a corresponding benefit. Other commentators have suggested additional language that is more protective of the environment. We ask EQB to explain in the Preamble and RAF of the final-form regulation how the requirements in this section reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry.

**28. Section 78.69. Water management plans. – Intent of the General Assembly; Clarity and lack of ambiguity; Reasonableness of requirements; Implementation procedures and timetables for compliance.**

*Subsection (b)*

Section 78.69 provides new requirements related to water management plans (WMPs). Subsection (b) addresses implementation requirements related to WMPs for unconventional

operators. Commentators assert that this section is vague, and should include specific citations to the Susquehanna River Basin Commission regulation 18 CFR § 806.30. Commentators also note that water withdrawals should be in accordance with Act 220 and 25 Pa. Code Chapter 110, and that the provision fails to recognize the Ohio River Basin. We agree that EQB should clarify the implementation requirements of this provision.

*Subsections (d), (f), (g), (h) and (i)*

Based on comments received, we believe that the implementation procedures for these subsections related to approval, renewal, suspension and revocation, termination and denial of WMPs lack clear implementation procedures for the regulated community. What are the timeframes for the Department to act on these decisions? What criteria are these decisions based upon? Is there a process for amending a WMP? Does the proposed language related to denying a WMP align with the intent of the General Assembly and Act 13? How and when will the Department notify an applicant of an approval, suspension, termination or denial? Is there a process to appeal a suspension or revocation? What are the criteria and requirements for monitoring and reporting? EQB should revise these subsections to provide clear and reasonable implementation procedures and compliance requirements.

**29. Section 78.70. Road-spreading of brine for dust control and road stabilization.**

**Section 78.70a. Pre-wetting, anti-icing and de-icing. – Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Reasonableness of requirements; Clarity and lack of ambiguity; Implementation procedures.**

These two sections propose new language related to the use of brine from oil and gas wells. It is unclear as to why EQB proposes to place requirements related to road-spreading of brine under regulations addressing performance standards at oil and gas well sites. Why is it reasonable to include these sections within Chapter 78?

Commentators note that beneficial use of brine is subject to regulations under SWMA. Other commentators state that PennDOT has allowed brine application on unpaved roads for years. We note that these sections generated questions and concerns from local governments, who believe that these requirements are excessive. We agree that certain provisions, such as Paragraph (c)(7) under each section which requires an applicant to provide the name of each well and associated geologic formation from which the brine was produced, seem unreasonable, particularly for local governments. EQB should ensure that these proposed regulations align with existing applicable statutes. We ask EQB to explain in the Preamble and RAF of the final-form regulation how the provisions related to the use of brine in Sections 78.70 and 78.70a reasonably and adequately balance protection of the public health and natural resources against the fiscal impact on the oil and gas industry and others who must comply.

**30. Section 78.73. General provision for well construction and operation. – Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements; Implementation procedures.**

Subsections (c) and (d) establish new requirements related to the monitoring of orphaned and abandoned wells during the hydraulic fracturing activities. We have four concerns. First, the regulation fails to specify if these new provisions apply to conventional well operators, unconventional well operators, or both. This should be clarified in the final-form regulation.

Second, Subsection (c) requires operators to visually monitor orphaned and abandoned wells that “likely” penetrate a formation intended for stimulation. The term “likely” is vague and renders the provision open to interpretation by different operators. We recommend that a clearer standard be included in the final-form regulation.

Third, these subsections assume that the land owner will allow operators access to the land to visually monitor those wells. What is an operator’s obligation if access is denied by the landowner? This should be explained in the Preamble and final-form regulation.

Finally, under Subsection (d), an operator that alters an orphaned or abandoned well by hydraulic fracturing must plug that well. Section 3203 of Act 13 defines the term “alteration.” Is it EQB’s intent to use that statutory definition to administer this provision? We recommend that this term be further clarified in the final-form regulation.

**31. Section 78.122. Well record and completion report. – Statutory authority; Intent of the General Assembly; Economic or fiscal impacts; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources; Need for the regulation; Reasonableness of requirements.**

According to the Preamble, this section addresses Act 13 requirements, including new well report and stimulation record requirements. Commentators point out several provisions of this section that are beyond the scope of Act 13. Other commentators request that this provision be expanded to require more information that would be protective of the environment. We ask EQB to provide a more specific citation to the section or sections of Act 13 that this provision is implementing.