

PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C.

120 Market Street
Warren, PA 16365

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

3042

May 15, 2015

Department of Environmental Protection
Policy Office
400 Market Street
P.O. Box 2063
Harrisburg, PA 17105-2063

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IRRC

Re: 25 Pa. Code Chapters 78 and 78a – Advanced Notice of Final Rulemaking (ANFR) – April 4, 2015

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

1. Background and Statement of Interest

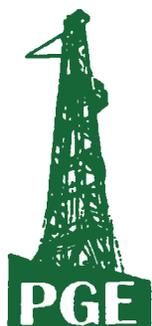
The following comments address selected newly proposed regulations published in the subject ANFR that fail to conform to Pennsylvania statutory and case law. Pennsylvania General Energy Co. L.L.C. (PGE), a Pennsylvania-based company that explores for and produces oil and natural gas from conventional and unconventional wells, submits these comments in opposition to the proposed regulations.

The comments are focused on the public resources provisions of the subject ANFR. While the comments are intended to apply to both Chapter 78 and 78a, the references in the comments cite to the Chapter 78a version of the regulations.

2. Introduction

In conjunction with Section 3215(c) of Act 13, which directs the department to consider the impact of a proposed well on public resources, Section 3215(e) grants to the Environmental Quality Board (EQB) authority to “develop by regulation criteria for the department to utilize for conditioning a well permit based on its impact to the public resources identified in subsection (c) and for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners.”

Despite this limited grant of rulemaking authority, the department attempts to create - by way of a newly added definition - a novel form of a government or quasi-government entity called a “Public Resource Agency,” to then summarily designate thousands of new things in Section 78a.15(f)(i - vii) as “public resources” eligible for protection by coercive government measures, and to imbue both itself and these new agencies or entities with rights and authority that have not been authorized by the legislature.



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Specifically, PGE urges the department, the EQB, Legislative Committees and the Independent Regulatory Review Commission (IRRC) to reject and disapprove the rulemaking initiative(s) that undertake to implement Sections 3215(b) (c) (d) and (e) of Act 13. These regulatory initiatives or proposals include: 1) 78a.1. Definitions. "Other Critical Communities," and "Public Resource Agency;" 2) 78a.15(b.1); 3) 78a.15(d); 4) 78a.15(f)(i thru viii); 5) 78a.15(g); and, 6) 78a.15(h).

3. The authority for the EQB or department to engage in rulemaking on the subject of conditioning well permits based on their association with identified public resources has been enjoined by the Supreme Court and may not go forward.

Sections 3215(b) through (e) of Act 13 have been invalidated on constitutional grounds. Accordingly, they may not serve as the basis for developing regulations purporting to address or effect the prescriptions of those statutory sections in the context of oil and gas development. See *Robinson Township v. Commonwealth of Pennsylvania*, 83 A3d 901 (Pa. Dec. 19, 2013).

With respect to Sections 3215(b)(4) and (d) the *Robinson* Court found them to be unconstitutional. The Court then found them to not be severable from otherwise valid provisions on the grounds that the otherwise valid provisions were then rendered incomplete because in the absence of the invalid provisions, the provisions that might otherwise have been valid were incapable of being executed in accordance with the intent of the legislature. In the opinion in *Robinson*, the Court held with respect to Sections 3215(c) and (e) as follows:

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

Robinson, 83 A3d 901 at 999. In the concurring opinion Justice Baer stated:

Given that I would strike Section 3215 (b)(4) and (d), I further agree with the lead opinion that the entirety of subsection (b), as well as subsections (c) and (e) would be "incapable of execution" and must be enjoined.

Robinson, 83 A3d 901 at 1009. Accordingly, the newly proposed regulations, which rely in whole or in part upon the authority of the enjoined statutory Sections – namely: 3215(b), (c), (d), and (e), are also invalid and enjoined.

The adoption and implementation of the proposed regulations noted in paragraph 2 above - like the enjoined statutory provisions upon which they rely - cannot now be effected as the legislature intended as they too are missing a key component or components. Accordingly, they must be removed from the ANFR regulatory proposal or otherwise disapproved.

4. The proposed regulations are flawed as they do not articulate or identify criteria specifically required to be developed for utilization in the conditioning of well permits.

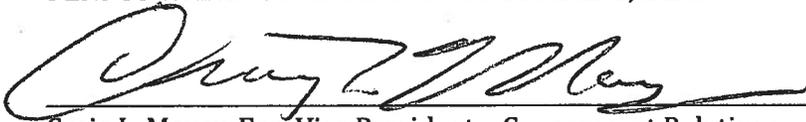
The newly proposed regulations that purport to effect the legislative mandate of Section 3215(e) requiring the development of criteria (i.e. standards by which something may be judged or decided)

for conditioning a well permit do not articulate or identify the criteria required to determine if the purposes enumerated in Sections 3215(e) (1) and (2) have been satisfied.

Accordingly, without prescribing uniform standards that the department is required to “develop” and “to utilize” for judging whether the various enumerated purposes have been satisfied, the department may not under any circumstances condition well permits under the authority of Section 3215. Pointedly, the proposed regulations offer no reference whatsoever to any requirement that the department is even obligated to consider the Commonwealth’s environmental statutes or the limitations of Section 3215 itself, such as the prohibition against abridgement of prior contracts or leases as expressed in subsection 3215(g), in rendering its decisions on and fashioning the terms of well permit conditions. The regulations as proposed would result in ad hoc administration, providing no objective standard to guide industry, the department, or the public, which in turn will inevitably lead to controversy and costly litigation.

Sincerely,

PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C.

A handwritten signature in black ink, appearing to read "Craig L. Mayer", written over a horizontal line.

Craig L. Mayer, Esq. Vice President – Government Relations

Copy to: Independent Regulatory Review Commission