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PIPP PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS ASSOCIATION, INC.

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May 19, 2015

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

Re: Submission of Written Comments
Advance Notice of Final Rulemaking
Chapter 78 (Conventional Oil and Gas Wells)

To whom it may concern:

The Pennsylvania Independent Petroleum Producers Association (PIPP) has been the voice for small, independent oil and natural gas producers in northwestern Pennsylvania since 1985. Our nonprofit association consists of over 350 independent producers, supply companies, industry personnel and supporters who have been responsibly developing Pennsylvania's shallow oil and natural gas reserves for generations. The vast majority of our members are small, family-run businesses who depend on the modest income derived from the conventional extraction of oil and gas from new and legacy wells to help supplement their incomes and feed their families. Our members live in the most rural parts of Pennsylvania, with limited access to the Internet. In fact, approximately 45% of our members do not even own a computer. In many ways, our members have more in common with Pennsylvania's Amish population than they do with large, billion-dollar unconventional well operators whose proliferation across Pennsylvania is the driving force behind the Department's regulatory effort.

Today's independent conventional oil and gas producers operate in harmony with Pennsylvania's natural environment. Unlike some employed in the unconventional oil and gas industry, conventional operators and their families have called Pennsylvania home for over five generations. As a result, we are inherently inclined to operate in a manner that preserves and protects our natural environment. Like any industry, accidents happen. When they do, today's conventional operators work in good faith to effectively remediate the damage. The strides that the conventional oil and gas industry have made since 1859 are evident from a recent study of the environmental impacts of conventional oil and gas well development on the

Allegheny National Forest (ANF), situated in the heart of Pennsylvania's oil patch. The study concluded that despite the long history of conventional well development in the region, the ANF's streams, trees, and other natural resources have prospered. Indeed, despite the approximately 12,000 wells currently in production in the ANF, a full 72% of the 2126 miles of mapped streams in the ANF were rated in the study as high value or exceptional value for water quality. This study was consistent with findings from the United States Forest Service, in its five-year Monitoring and Evaluation Report issued in November 2014, that concluded: "The majority of streams on the ANF are meeting state water quality standards. Impairments are most frequently related to acid deposition or acidity from natural sources." This follows a 2007 statement from the USFS that characterized the water quality in the ANF as "among the highest in the state."

One of the key objectives of the regulatory review process is to ensure that all citizens who will be adversely affected by proposed changes in government regulations have meaningful notice of the proposed changes and a full and fair opportunity to be heard. Unfortunately, the process that the Department has chosen to follow to solicit comments on the Chapter 78 draft final rule ("draft final rule") has greatly prejudiced our members. Simply stated, the Department has not afforded enough time to properly educate our members on the massive changes published for the first time in the draft final rule and solicit meaningful input. Time is a precious commodity in short supply for our members, many of whom work seven days a week and live without the modern conveniences of computers and Internet access. Under these conditions, a proper vetting of this draft final rule requires me to contact our members either in person or over the telephone to describe all of the proposed changes and solicit their views. That is simply impossible under the compressed time frame dictated by the Department.

Compounding the problem is the lack of input on the draft final rule from a lawfully-constituted Oil and Gas Technical Advisory Board (TAB). This is clearly evident from the language of the rule, which reflects little or no understanding of the differences between conventional and unconventional well operations. The Department's erratic treatment of the TAB – including the abrupt replacement of TAB members who expressed concerns about the regulations as originally proposed, the appointment of non-statutory board members, and the Department's aborted attempt to bypass the TAB through the creation of the Conventional Oil and Gas Advisory Committee (COGAC) – has contributed to a widely-held view that the concerns of conventional operators are secondary to the concerns of unconventional operators, whose proliferation across Pennsylvania is the stated reason for this rulemaking in the first place.

The fact that the Department previously held nine public hearings and received over 24,000 comments to the proposed regulations does not cure these deficiencies. The Department has yet to release its written response to the comments it received to the proposed regulations. Equally important, the draft final rule is dramatically different from the proposed regulations. What we were left with was a mere 45 days from official publication to submit written comments to the draft final rule and 15 minutes (over the course of three additional hearings) to provide verbal input to the Department. This is a mere fraction of the

time that was allotted for written and verbal comments to the proposed regulation published in 2013. More troubling, however, is that fact that many of our members who have a strong interest in the outcome of this regulatory effort received postcards from the Department notifying them of the hearings *after* the hearings were held. If the election of Governor Tom Wolf was supposed to mark a new era of transparency in state government operations, it is not at all evident from the Department's actions.

This letter is not intended to identify every concern that the conventional oil and gas industry has with the proposed final rule. We lack the ability to accomplish such a task in the compressed time frame dictated by the Department. Instead, we intend to speak to the most pressing concerns of our members in the time we have been allotted, who are the smallest conventional operators in the industry. We incorporate by reference the comments of the Pennsylvania Independent Oil and Gas Association (PIOGA) and Pennsylvania Grade Crude Oil Coalition (PGCC), who are better able to speak for the industry as a whole. We also incorporate by reference the comments of the Pennsylvania Chamber of Business and Industry, who is better able to speak to the impact of the draft final rule on Pennsylvania's economy.

This letter consists of four parts. First, we will identify several legal objections to the process being employed by the Department to promulgate these regulations. Second, we will feature one of our member companies – McComb Oil Inc. – to enable the Department to understand who they are regulating. Third, we will outline our most pressing concerns with the proposed final rule within the context of the Regulatory Review Act. Fourth, we will describe the impact of the proposed final rule on McComb Oil Inc., so that the Department can better understand the impact of the proposed final rule on a real family in this business.

I. Legal Objections

The process being employed to promulgate the Chapter 78 draft final rule is unlawful. First, the Department's analysis is not in compliance with the Regulatory Review Act as amended by Act 76 of 2012 requiring an economic impact statement and a regulatory flexibility analysis to accommodate the needs of small businesses engaged in conventional oil and gas operations. Second, the Department violated Act 126 of 2014 by failing to promulgate regulations governing the conventional oil and gas industry separately from the regulations governing the unconventional oil and gas industry. Third, the Governor and the Department violated Act 13 of 2014 by failing to properly constitute the Oil and Gas Technical Advisory Board (TAB) and failing to consult with a lawfully-constituted TAB on the formation and drafting of the draft final rule. As a result, the Department should restart the regulatory process anew.

Small Business Regulatory Review Act (Act 76 of 2012)

On June 29, 2012, Governor Tom Corbett signed Act 76 into law substantially amending the Regulatory Review Act to accommodate the needs of small businesses. The legislative findings specifically articulated in the Act say much about the shortcomings of the regulatory process in existence at the time:

(c) This act is intended to improve State rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small businesses in accordance with the following findings:

(1) A vibrant and growing small business sector is critical to creating jobs in a dynamic economy.

(2) Small businesses bear a disproportionate share of regulatory costs and burdens.

(3) Fundamental changes that are needed in the regulatory and enforcement culture of agencies to make them more responsive to small business can be made without compromising the statutory missions of the agencies.

(4) When adopting regulations to protect the health, safety and economic welfare of the Commonwealth, agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on small business.

(5) Uniform regulatory and reporting requirements can impose unnecessary and disproportionately burdensome demands, including legal, accounting and consulting costs upon small businesses with limited resources.

(6) The failure to recognize differences in the scale and resources of regulated businesses can adversely affect competition in the marketplace, discourage innovation and restrict improvements in productivity.

(7) Unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes.

(8) The practice of treating all regulated businesses similarly may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation.

(9) Alternative regulatory approaches which do not conflict with the stated objective of applicable statutes may be available to minimize the significant economic impact of rules on small businesses.

(10) The process by which State regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, to examine the impact of proposed and existing rules on such businesses and to review the continued need for existing rules.

71 P.S. § 745.2. The term "small business" is defined "in accordance with the size standards described by the United States Small Business Administration's Small Business Size Regulations under 13 CFR Ch. 1 Part 121 (relating to Small Business Size Regulations) or its successor regulation." 71 P.S. § 745.3.

First, Act 76 requires an agency to identify the types of small businesses that will be affected by the proposed regulation. 71 P.S. § 745.5(a)(9). The Department satisfied this requirement.

Second, the Act requires the agency to identify the "financial, economic and social impact" of the proposed regulation on small businesses and, when practicable, "an evaluation of the benefits expected as a result of the regulation." *Id.* § 745.5(a)(10). The Department did not satisfy this requirement. The Department's analysis in its regulatory analysis form consists of a mere four sentences – none of which discuss the impact on small business. While the Department does mention that the proposed regulations will increase costs, there is no discussion to what degree or the effect those increased costs will have on small businesses. The Department also states that "The majority of the proposed regulations have been designed as performance based standards, allowing each individual operator to determine which practices they will employ for extraction activities." As demonstrated in Section III of this letter, this is no longer true, if it ever was. For example, Section 78.66 strips all discretion from the operator when remediating a spill of more than 42 gallons, requiring the operator to remediate only in accordance with Act 2 standards. This is just one of many huge costs that are not included in the Department's analysis.

Third, the Act requires the agency to prepare an economic impact statement for any proposed regulation that may have an impact on small businesses that includes: "(i) An identification and estimate of the number of the small businesses subject to the proposed regulation; (ii) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record; (iii) A statement of the probable effect on impacted small businesses; [and] (iv) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation." *Id.* § 745.5(a)(10)(i)-(iv). The Department did not satisfy this requirement. For example, with regard to (ii), the Department fails to consider in analyzing reporting costs the costs of electronic reporting for the 45% of PIPP members who do not own a computer, or the costs brought about by the reporting requirements of Section 78.57a governing centralized tank storage. Also, with regard to subsection (iii) and (iv), the Department represents that it minimized costs for small businesses by exempting them from several sections of the proposed regulation. The Department then refers to a list of regulatory requirements contained earlier in the form that apply to conventional operators, which omits the most costly sections in the proposed final rule, including Sections 78.55 (control and disposal planning), 78.56 (temporary storage), 78.66 (reporting and remediating releases and spills), and 78.57a (centralized tank storage) to name a few.

Fourth, the agency is required to prepare a regulatory flexibility analysis in which the agency "shall, where consistent with health, safety, environmental and economic welfare, consider utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small businesses." *Id.* §745.5(a)(12.1). In preparing the regulatory flexibility analysis, the agency "shall consider, without limitation, each of the

following methods of reducing the impact of the proposed regulation on small businesses: "(i) the establishment of less stringent compliance or reporting requirements for small businesses; (ii) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses; (iii) the consolidation or simplification of compliance or reporting requirements for small businesses; (iv) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and (v) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation." *Id.* § 745.5(a)(12.1)(i)-(iv). We concur with the IRRC in their comments of April 14, 2014, that the Department's analysis is lacking. Much of the regulatory flexibility analysis conducted by the Department consists of three assertions: (1) most of the proposed regulations are based upon performance standards with protection of the environment as a goal; (2) the ability of conventional operators to request alternative methods of compliance with environmental mandates; and (3) the exemption of conventional operators from numerous sections of the regulations, representing that "many activities that have additional requirements only apply to unconventional operations." However, these statements no longer appear to be true under the draft final rule, if they were at all. For example, Section 78.66 strips all discretion from the small conventional operator to use alternatives to Act 2 remediation standards when faced with a spill in excess of 42 gallons. Section 78.55 (control and disposal planning) contains no flexibility in the requirement of "site specific" PPC plans, nor do the multitude of sections mandating electronic reporting. Moreover, as explained herein, there are some sections in the draft final rule that were simply lifted word for word from the draft final rule governing unconventional operators, with no flexibility in thought given to the differences between small conventional well operators and billion-dollar corporate unconventional operators. *See* Section 78.57a.

Fiscal Code – Bifurcation (Act 126 of 2014, § 1741.1-E)

On July 10, 2014, Governor Tom Corbett signed Act 126 into law implementing various provisions of the state budget. The Act included the following directive:

> Section 1741.1-E. Environmental Quality Board.
>
> (a) Regulations.--From funds appropriated to the Environmental Quality Board, the board shall promulgate proposed regulations and regulations under 58 Pa.C.S. (relating to oil and gas) or other laws of this Commonwealth relating to conventional oil and gas wells *separately* from proposed regulations and regulations relating to unconventional gas wells. All regulations under 58 Pa.C.S. shall differentiate between conventional oil and gas wells and unconventional gas wells. Regulations promulgated under this section shall apply to regulations promulgated on or after the effective date of this section.

72 P.S. §1741.1-E (emphasis supplied). "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa.C.S. § 1903(a). "We have generally used dictionaries as source material for determining the common and

approved usage of a term." *Fogle v. Malvern Courts, Inc.*, 722 A.2d 680, 682 (Pa. 1999). The term "separate" is defined to mean "to set or keep apart." *House of Leung v. Department of Health*, 38 A.3d 986, 990 (Pa.Cmwlth. 2011) (citing *Webster's Third New International Dictionary* (3d. ed. 1993)). "Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). *See also* 1 Pa.C.S. § 1922(2) ("[T]he General Assembly intends the entire statute to be effective and certain.").

In its zeal to stay on schedule, the Department has disregarded the plain language of Act 126 by failing to separate ("set or keep apart") the proposed regulations for conventional well operators from the proposed regulations for unconventional operators. Both rulemakings continue to share the same IIRC number (No. 3042) and are proceeding on the same schedule. The Department published a single Advance Notice of Final Rulemaking for both the conventional and unconventional rules, and the rules for both conventional and unconventional well operations are contained in a single document. The public is being furnished with exactly the same amount of time to submit written comments to the conventional and unconventional regulations, and Department took testimony on both sets of rules during its hearings. In all the ways that matter, the Department continues to promulgate the rules for conventional and unconventional oil and gas industry as a single rulemaking, in contravention of Act 126.

Act 126 matters. By continuing to proceed with both sets of regulations in a single rulemaking, the Department entirely misses the point of the legislation in the first place. The language of Act 126 was derived from House Bill 2350 and Senate Bill 1378. Both of these Bills passed out of their respective committees prior to insertion of the language into House Bill 278, which became Act 126. During hearings before the House and Senate Environmental Resources and Energy Committees, several Representatives and Senators remarked about the underlying purpose of the legislation. Excerpts appear below:

> House Environmental Resources and Energy Committee
> 6/25/14, 9:00 a.m., G-50 Irvis Office Building
> By Kimberly Hess
>
> HB 2350 Causer, Martin - (PN 3741)
>
> Rep. Marty Causer (R-McKean) noted conventional and unconventional industries are very different and need to apply different regulations.
>
> Rep. Matt Gabler (R-Clearfield) said it makes sense to pass the bill so the state can look at what makes sense for each industry, "and the two are inherently different."
>
> Rep. Chris Ross (R-Chester) remarked on the history of regulation of conventional wells, explaining that the regulatory process provides public comment and review. He said this bill will allow the process to look at the facts for each type of well and "appropriately regulate with everybody having a say."

He acknowledged there may be cases where both industries will have similar provisions, but argued it is best to treat them separately.

Rep. Jeff Pyle (R-Armstrong) said the salient point is that Pennsylvania has had a vibrant shallow gas industry for more than 100 years and argued the outputs on unconventional wells are significantly higher than those of conventional wells. He called for a clear line of separation between how the state deals with the two types. "It is not fair to apply" unconventional standards to conventional wells, he argued.

Rep. Kathy Rapp (R-Warren) added her support to the bill, remarking on the history of Pennsylvania crude oil and the many products that depend on it. She also commented on the "ridiculousness" of trying to regulate conventional wells the same as Marcellus Shale wells and indicated many violations can be minor, such as incorrect font size on a sign.

Senate Environmental Resources and Energy Committee
6/25/14, 10:00 a.m., Room 8E-B, East Wing
By Kati Lawson

The committee met to consider bills.

SB 1378 Scarnati, Joseph - (PN 2053)

Sen. Hutchinson clarified the subject by saying "we are talking about two separate industries here." He discussed the negative impact new regulations are having on the conventional drilling industry; he said the bill clarifies that separate industries should have separate regulations.

Sen. Scarnati said the legislative intent was not to include conventional drilling in Act 13. He said he would appreciate the committee's positive vote and said "let's keep a Pennsylvania industry that keeps people working."

Source: Pennsylvania Legislative Service.

Clearly, the members of the House and Senate Environmental Resources and Energy committees identified above had *fundamental* concerns about the singular regulatory approach that the Department was taking. The concerns expressed by these members went well beyond simple issues of drafting and word processing. What these members were saying was that the conventional and unconventional oil and gas industries were fundamentally different industries, and that regulatory review process should reflect that by proceeding separately in a manner that furthered the public interest.

The Department's interpretation of Act 126 is contained in its Advance Notice of Final Rulemaking published on April 4, 2015. In its Notice, the Department stated: "As a result of the passage of the act of July 10, 2014 (P. L. 1053, No. 126), all regulations promulgated under 58 Pa.C.S. (relating to oil and gas) were required to differentiate between conventional oil and gas wells and unconventional gas wells. The Department determined that the current rulemaking process would continue, but that the regulations would be completely bifurcated (separated into two distinct chapters) on final-form rulemaking." This explanation reflects a rather selective reading of Act 126, focusing exclusively on the requirement to "differentiate" contained in second sentence of the statute and neglecting the rest of the language requiring proposed regulations and regulations to be promulgated separately. It also ignores the fact that in order for the Environmental Quality Board (EQB) to issue a separate "final-form regulation" for Chapter 78, it must have previously published as a proposed regulation that had been submitted to the IRRC and the standing committees after the close of the public comment period. 71 P.S. § 745.3 (defining "final-form regulation"). Since Chapter 78 following bifurcation has never been published as a proposed regulation nor submitted to either the IRRC or the standing committees, it is not presently capable of becoming a final-form regulation.

The Department may also argue that Act 126 was not intended to require it to start the rulemaking process anew. However, there is evidence in the legislative record that suggests otherwise. During the debate on the floor of the House of Representatives on House Bill 278, Representative Vitali expressed concerns that the bifurcation language contained in the Bill would require the Department to start the regulatory process over again. "What we also risk if we pass this is going back to square one, going back to square one on all the Chapter 78 surface regs, all of the regulations that have been moving through the pipeline for about two years with regard to oil and gas development from the day we passed Act 13, starting at square one if we pass, if we pass this bill today." House Legislative Journal, July 2, 2014, p. 1206. Representative Vitali then moved to suspend the rules to permit the House to consider his amendment stripping the bifurcation language from the bill. In support of his motion, he stated: "If this amendment does not get in, what we are doing or what we are putting in are surface regulations of the oil and gas industry, back to square one after two years of working on them." *Id.* at 1207. Not a single member of the House challenged Representative Vitali's interpretation. His motion failed 79-121. *Id.* at 1208. While these remarks may be subject to differing interpretations about the intent of the General Assembly to require the Department to start anew, one thing is clear. When faced with the risk that its language may be interpreted to start the regulatory process back at square one, the General Assembly did not hesitate in passing language requiring the promulgation of separate regulations.

2012 Oil and Gas Act – TAB (Act 13 of 2012, § 3226)

On February 14, 2012, the Governor signed Act 13 of 2012 into law substantially amending *inter alia* the environmental standards contained in the 1984 Oil and Gas Act. 58 Pa.C.S. § 3201 *et seq.* Section 3226 of the Act codified the Oil and Gas Technical Advisory Board (TAB):

§ 3226. Oil and Gas Technical Advisory Board

(a) Creation of board.--The Oil and Gas Technical Advisory Board is created, consisting of the following members, all of whom shall be chosen by the Governor and shall be residents of this Commonwealth:

(1) Three individuals, each of whom shall be:

(i) a petroleum engineer;

(ii) a petroleum geologist; or

(iii) an experienced driller representative of the oil and gas industry with three years of experience in this Commonwealth.

(2) One mining engineer from the coal industry with three years of experience in this Commonwealth.

(3) One geologist or petroleum engineer with three years of experience in this Commonwealth, who shall be chosen from a list of three names submitted by the Citizens Advisory Council to the Governor and who shall sit as a representative of the public interest.

(b) Reimbursement.--Board members shall not receive a salary but shall be reimbursed for all necessary expenses incurred in the performance of their duties.

(c) Majority vote.--All actions of the board shall be by majority vote. The board shall meet as called by the secretary, but not less than semiannually, to carry out its duties under this chapter. The board shall select a chairman and other officers deemed appropriate.

(d) Consultation.--The department shall consult with the board in the formulation, drafting and presentation stages of all regulations of a technical nature promulgated under this chapter. The board shall be given a reasonable opportunity to review and comment on all regulations of a technical nature prior to submission to the Environmental Quality Board for initial consideration. The written report of the board shall be presented to the Environmental Quality Board with any regulatory proposal. The chairman of the board shall be invited to participate in the presentation of all regulations of a technical nature before the Environmental Quality Board to the extent allowed by procedures of the Environmental Quality Board. Nothing herein shall preclude any member of the board from filing a petition for rulemaking with the Environmental Quality Board in accordance with procedures established by the Environmental Quality Board.

58 Pa.C.S. § 3226.

The Governor's appointment of four additional members to the TAB have rendered it unlawful and unable to carry out its responsibilities. On March 19, 2015, the Governor appointed nine members to the TAB. The first five appointees (deemed voting members) met

the criteria set forth in the statute. The other four appointees (deemed non-voting members) did not meet the criteria contained in the statute, nor was the Governor authorized to appoint them at all. While it was well within the Governor's rights to replace the statutorily-authorized board members with appointees of his choosing, he had no right to take the law into his own hands and change the composition of the TAB so that it was more suited to his liking. The consequences resulting from the Governor's precedent-setting action has been that the TAB has not been able to even *begin* reviewing the Chapter 78 draft final rule and has expressed concerns that it may only have time to review "4 or 5" of the "worst" regulations.

The Department has failed to satisfy its responsibilities to consult with the Oil and Gas Technical Advisory Board (TAB) in the formation and drafting of the proposed final rule for conventional oil and gas wells. This is clearly evident from the language of the rule, which reflects little or no understanding of the differences between conventional and unconventional well operations. The Department's erratic treatment of the TAB after the arrival of the Wolf Administration – including the abrupt and secretive replacement of TAB members who expressed concerns about the regulations as originally proposed, the Governor's appointment of non-statutory board members, and the Department's aborted attempt to bypass the TAB through the creation of the Conventional Oil and Gas Advisory Committee (COGAC) – has resulted in crucial delays that are prejudicial to conventional operators.

II. PIPP Member Profile – McComb Oil Company

McComb Oil Company, Inc. is located in Stoneboro, Pennsylvania. Richard McComb, co-founder of the company, is a fifth-generation oil producer in Pennsylvania's oil patch. Approximately 15 years ago, Rich's grandfather passed away, leaving him and his family with several wells, only one of which was in production. Rich, along with this father and uncle, decided to invest to refurbish the inoperable wells in order to bring them into production. For the first 7 years, no one took a salary. All of the money generated from the operable wells was invested to fix up the inoperable wells. When the company began to turn a profit, the company incorporated and Rich and his co-owners were able to draw a small hourly salary.

The costs incurred by the company to repair one inoperable well and plug another are substantial under the current regulations. Just last year, the company completely refurbished a 1,275 foot well that was over 100 years old. The company invested in new tubing, casing, a pump jack, stuffing box, and numerous other items. The total cost to refurbish that one well was $28,302.60. The company also plugged one of its wells last year, which cost $11,052.00 under current regulations.

Currently, the company has 25 wells in production. Each well produces less than 8 barrels per month. The company sells its oil to a local refinery, who comes and collects the oil from the company's oil tanks. Rich currently receives approximately $58 per barrel, which amounts to gross revenue of $464.00 per well monthly. The company's operating costs (excluding major projects such as drilling, refurbishing, and plugging wells) are approximately $71,000 annually, and consist of the following:

- Repairs and labor ($17,000)
- Salary for co-owner (Rich's uncle) for well pumping and routine maintenance ($15,000)
- Building rent ($12,000)
- Insurance ($7,200)
- Gas and diesel fuel ($7,000)
- Accounting ($6,000)
- Heating ($4,500)
- Electrical ($1,400)
- Water disposal ($900)

When analyzed on a per-well basis, the ongoing cost to maintain each well in production (excluding major projects) is approximately $236.66 per well, resulting in a pretax profit of $227.34 per well.

Rich has permits to drill two new wells this summer. The company has already spent $13,753.13 on the project to comply with the Department's current regulatory requirements. These costs consist of $4,406.36 in a wetland survey, bond, and permit fees as well as $9,346.67 in expenses related to the drill pad and road. Fortunately, the new wells are to be located on Rich's property, meaning he will avoid expenses associated with leasing the property and paying royalties to the landowner.

McComb Oil Company has never received a notice of violation from the Department. They value their good relationship with the Department and look forward to continued cooperation with the Department and its representatives in the years ahead.

III. Pressing Concerns

Storage Tanks – Sections 78.57 & 78.57a.

The provisions of the proposed final rule governing the use of storage tanks in conventional well operations – set forth in section 78.57(d)-(h) (control, storage, and disposal of production fluids) and section 78.57a (centralized tank storage) – are not in the public interest and should be withdrawn.

There are important differences between the storage tanks used by small, independent conventional well operators and the storage tanks used by large, billion-dollar corporations in unconventional well operations. There are four basic types of storage tanks used in conventional operations: (1) oil storage tanks, which range from 100-210 barrels; (2) oil and water separator tanks, which range from 1-5 barrels; (3) water production tanks a/k/a brine tanks, which range from 140-210 barrels; and (4) gas well condensate tanks, which average approximately 100 barrels. These tanks are not permanent. When a well is plugged, the tanks are removed. Simply put, comparing storage tanks used in conventional and unconventional well operations is like comparing apples to oranges. There simply is no comparison.

The are also important differences in chemistry and salinity between conventional and unconventional production water.

Substance	Shallow Oil Well (mg/L)	Marcellus Shale Well (mg/L)
Barium	48.4	6,500
Calcium	6,179	18,000
Iron	53	60
Lithium	2.2	150
Manganese	4.2	5.0
Potassium	90	Not Measured
Sodium	19,879	48,000
Strontium	110	4,000
Bromine	638	Not Measured
Chlorine	42,954	116,900
Total Dissolved Solids	80,106	195,000

Angelika Cubbon, M.S. Environmental Engineering (April 2011).

The new proposed standards governing use of storage tanks in conventional well operations are not supported by acceptable data and will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. Indeed, these provisions are a solution looking for a problem. PGCC estimates that there are approximately 175,000 storage tanks in use in the conventional oil and gas industry. According to the

Department's online compliance reports,[1] the Department conducted 13,445 well inspections in 2014, a 78% increase over 2008. During that same period (2008-2014), there was an 83% decrease in new conventional drilling. Of the 13,445 inspections conducted in 2014, only 8 revealed leaking tanks in use in conventional well operations. This represents a mere .00059% of all well inspections conducted in 2014. It also represents just .000045% of the approximately 175,000 storage tanks in use in conventional well operations today. This is hardly justification for more stringent and expensive regulations on the use of storage tanks in conventional well operations.

The direct and indirect costs of the new proposed standards are so high that they will put small, independent conventional oil and gas well operators out of business.

- Corrosion control requirements (§ 78.57(f)(g)). The chart below demonstrates the increased costs to conventional well operators of requiring tanks that store brine and other fluid produced during the operation of the well to meet the corrosion control requirements of 25 Pa.Code § 245.531 *et seq.*

Size	Current Cost	Cathodic Protection	Corrosive Protection	New Cost	Increase
25 bbl.	$1,800.00	$350.00	$450.00	$2,600.00	44%
50 bbl.	$2,200.00	$350.00	$650.00	$3,200.00	45%
100 bbl.	$3,451.00	$350.00	$1,200.00	$5,001.00	45%
140 bbl.	$5,144.00	$350.00	$1,300.00	$6794.00	32%
210 bbl.	$6,083.00	$350.00	$1,600.00	$8,950.00	47%

With 175,000 tanks in use in conventional well operations, the total cost to the conventional industry of this requirement will be approximately $224,525,000.

- Monthly inspections (§ 78.57(h)). PIPP estimates that it will take an average of one hour per month to inspect each tank and prepare an inspection record. With an estimated 175,000 tanks in use in conventional operations, the total to the conventional industry at $30 per hour per tank will be $5,250,000 per month.

[1] "The Department's Oil and Gas Compliance Reports are designed to show all inspections that were performed by an oil and gas inspector for the oil and gas well locations in the Commonwealth of Pennsylvania. " *See* http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/HelpDocs/OG_Compliance_Help.pdf

- Bonding (§ 78.57a(d)). This section states that the amount of the bond "shall be determined by the Department in accordance with Section 6108.505 of the Solid Waste Management Act (relating to bonds)." Small, independent conventional well operators do not have the funds to secure a bond for whatever amount the Department deems appropriate.

- Insurance (§ 78.57a(e)). This section states that conventional well operators are required to procure a commercial policy of liability insurance "in an amount that the Department deems sufficient to cover third-party claims for property damage and bodily injury." Small, independent conventional well operators do not have the funds to secure an insurance policy for whatever amount the Department deems appropriate.

- Tank Features/Testing (§ 78.57a(i). This section contains a set of requirements that are so radical and extreme when applied to conventional well operations that they are difficult to evaluate and quantify in the time allotted for comments. Tightness testing? Tank gauge or monitoring devices? High-level alarm and cut off devices? Simply put, our members would not know where to begin to secure tanks with such sophisticated features, let alone be able to pay for them. Even if we could, there would be no outlet to plug the tank systems into because electricity is not always available at the tank site.

The new proposed standards will have a severe adverse effect on the productivity of small, independent conventional well operators. As explained above, the new costs alone will drive these small operators out of business. Moreover, there are provisions in these sections that will be impossible for small conventional operators to comply with, irrespective of cost. For example, section 78.57a(f)(7) states that a "centralized tank storage site" may not be "within 1,000 feet measured horizontally of an existing water well, surface water intake, reservoir or other water supply extraction point used by a water purveyor without the written consent of the water purveyor." If this setback is applicable to the storage tanks of conventional well operators, it would shut down most new conventional drilling because the setback is too large and the water purveyor is unlikely to consent to a shorter distance. Moreover, section 78.57a presents numerous insurmountable barriers for conventional well operators. The delay (and cost) of designing a tank battery that meets all of the specifications of this section would make conventional well operations impractical for anyone but the largest of conventional operators. Then there is the unfettered discretion to deny the issuance of a permit to create a tank battery to anyone who has ever violated or "has shown a lack of ability or intention to comply with" any law, rule or regulation relating to environmental protection or public health or the condition of any Department permit or license. This provision appears to be designed to allow the Department to regulate a conventional well operator it does not favor out of business.

The new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should these standards become law. With small conventional well operators extinct, the marketplace for oil and

natural gas will only be served by large conventional and unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

The new proposed standards lack clarity and are ambiguous. Most significantly, section 78.57a (relating to centralized tank storage) – which poses the greatest threat to small conventional well operators – does not define the phrase "centralized tank storage site." As drafted, this section could be interpreted by the Department to apply not only to a million-gallon tank owned by a billion-dollar corporation engaged in unconventional well operations, but also a 140-barrel tank owned by a third-generation conventional well operator to supplement his/her income as a farmer. That is too much discretion in the hands of the Department. Aggravating this omission is the fact that the terms "tank" and "storage tank" are also not defined. Finally, sections 78.57 and 78.57a contain references to "forms provided by the Department" and bonds/insurance in an amount to be "determined by the Department" that make it impossible to assess the true impact of these sections on our members.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule governing the use of storage tanks in conventional well operations.

- The Department's regulatory analysis form does not demonstrate a need for the new proposed standards governing storage tanks in conventional well operations. To the contrary, the form undermines and contradicts the Department's position. In its form, the Department states: "Conventional well operators are much smaller in scope and they generate far less waste than unconventional drilling, therefore the potential impact to the environment is significantly less." Despite this admission, the proposed standards governing the use of storage tanks are <u>virtually identical</u> for conventional and unconventional well operators. Indeed, with the exception of 78a.57(h) regarding protection from the unauthorized acts of third parties, it is obvious that the Department contradicted the finding in its own form and did not consider <u>any</u> of the differences between conventional and unconventional operations in formulating these standards.

- The Department's regulatory analysis form does not reflect the Department's consideration of the direct and indirect costs of the proposed standards or the economic impact that those standards would have on small businesses. In 2013, the Department attempted to accommodate the needs of small businesses regarding the use of storage tanks in conventional well operations by excluding

the offending provisions discussed above from the proposed regulations. This is memorialized in the form: "DEP also considered and minimized the regulatory burden on conventional well drillers to include only those provisions deemed necessary to protect public health and the environment." The Department then chose to radically rewrite these standards in the draft final rule, with no evidence (in the regulatory analysis form or elsewhere) demonstrating that they considered the direct or indirect costs of these standards or the economic impact that those standards would have on small businesses.

- The Department's regulatory analysis form does not reflect consideration of less stringent, less costly or less intrusive alternative methods to prevent leakage of production fluids from storage tanks used in conventional well operations. This is obvious from the mindless, cut-and-paste approach the Department used in making the same standards applicable to both conventional and unconventional operations. This is also clear from the Department's own oil and gas compliance reports, which demonstrate that leaking storage tanks in conventional well operations are exceedingly rare. This cavalier approach to the regulatory process is fatal to small, independent conventional well operators, who lack the financial resources of larger conventional and unconventional well operators and have more in common with the Amish than Chevron.

Finally, the new proposed standards for storage tanks used in conventional well operations so far exceed the enhanced environmental standards already contained in Act 13 of 2012 that they represent a policy decision of such a substantial nature that they require an act of the General Assembly before they can become law. Regarding corrosion control requirements, Act 13 merely requires that "[p]ermanent aboveground and underground tanks must comply with the applicable corrosion control requirements of the department's storage tank regulations." 58 Pa.C.S. § 3218.4. The Department's proposed standards omit the word "permanent" thereby extending the corrosion control requirements to all tanks. The proposed standards also fail to define the terms "tank" or "storage tank" thereby making the corrosion control requirements applicable to tanks of all sizes. Act 13 does not require monthly inspections of storage tanks, a separate bond for the construction of a centralized tank storage site, a 1,000 foot setback for a centralized tank storage site, mandatory electronic notification for all notices, or any of the requirements set forth in section 78.57a. The Department also does not identify any other State that has such onerous standards for storage tanks used in conventional well operations. If Pennsylvania is to be the first to impose such complex and onerous regulations on the use of storage tanks in conventional well operations, it should not do so on the backs of small, independent conventional well operators who are least able to absorb the increased costs of the Department's regulatory experiment.

Pits – Sections 78.56, 78.61 - 78.62, 63a

The provisions of the proposed final rule governing pits – as set forth in section 78.56 (temporary storage), 78.61 (disposal of drill cuttings), 78.62 (disposal of residual waste – pits),

and 78.63a (alternative waste management) – are not in the public interest and should be withdrawn as set forth below.

There are important differences between the pits used by small, independent conventional well operators to temporarily store brine and other production fluids and the pits used by large, billion-dollar corporations in unconventional well operations. The pits used in conventional well operations are typically no larger than 10 feet by 30 feet and hold less than 4,200 gallons. By contrast, the pits used in unconventional well operations can exceed one acre in size and hold millions of gallons. The pits used in conventional operations typically remain open for two weeks before they are closed. However, the pits used in unconventional operations can remain open for a year before they are closed. Like storage tanks, there is no comparison between conventional and unconventional well pits.

The are also important differences in chemistry and salinity between conventional and unconventional production water.

Substance	Shallow Oil Well (mg/L)	Marcellus Shale Well (mg/L)
Barium	48.4	6,500
Calcium	6,179	18,000
Iron	53	60
Lithium	2.2	150
Manganese	4.2	5.0
Potassium	90	Not Measured
Sodium	19,879	48,000
Strontium	110	4,000
Bromine	638	Not Measured
Chlorine	42,954	116,900
Total Dissolved Solids	80,106	195,000

Angelika Cubbon, M.S. Environmental Engineering (April 2011).

The new proposed standards governing use of pits in conventional well operations are not supported by acceptable data and will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. According to the Department's online compliance reports, the Department conducted 13,445 well inspections in 2014, a 78% increase over 2008. During that same period (2008-2014), there was an 83% decrease in new conventional drilling. Of the 13,445 inspections conducted in 2014, only 23 inspection reports identified pits that were improperly constructed in conventional well operations. This represents .0017 percent of all well inspections conducted in 2014. Of those 23 inspection reports, only 3 identified torn or damaged pit liners. This represents .00022 percent of all well inspections conducted in 2014. This is hardly justification for more stringent and expensive regulations on the use of pits in conventional well operations.

The direct and indirect costs of the new proposed standards are so high that they will put small, independent conventional oil and gas well operators out of business.

- Pit liner. Current regulations require the use of a 20 mils thick pit liner that costs approximately $915.00. Under section 78.56(a)(8)(ii) of the new proposed standards, small conventional well operators must use a 30 mils thick liner that costs approximately $1,864.00. This is an additional $949.00 or 103.7% increase in liner cost.

- Soil scientist. Current regulations require the bottom of the pit to be "at least 20 inches above the seasonal high groundwater table, unless the operator obtains approval under subsection (b) for a pit that exists only during dry times of the year and is located above groundwater." Section 78.56(a)(4)(iii) (current). The new proposed standards require a "soil scientist or other similarly-trained person" to make this determination for every pit containing drill cuttings or other residual waste. Section 78.62(a)(9). This cost of hiring a soil scientist to perform this task is estimated to cost $3,000 to $5,000.

The new proposed standards will have a severe adverse effect on the productivity of small, independent conventional well operators. As explained above, the cumulative effect of these new costs alone will drive these small operators out of business. Moreover, there are provisions in the proposed standards that will be impossible for small conventional operators to comply with, irrespective of cost. For example, a 30 mils thick liner is 184 pounds heavier than a 20 mils thick liner. This is important because conventional operators typically spread these liners manually without the use of machinery. Also, section 78.56(e) requires a conventional owner or operator to notify the Department "at least 3 business days before commencing construction of a pit used during servicing, plugging or recompleting a well." When a conventional well requires servicing, it must be worked on right away. When this need arises, an operator cannot wait three days before taking action. Equally important, when plugging a well it is very difficult to know for sure when to move to the next well. Bad weather or other problems can alter the timing of this process. A three-day delay is completely impractical in this situation as well. The mandatory three-day waiting period prior to disposal of drill cuttings (§ 78.61) and residual waste (§ 78.62) in a pit presents similar concerns, and is particularly nonsensical given the Department's recent findings in its TENORM study that there is "little potential for radiological exposure to workers and members of the public from the handling, hauling, and temporary storage of vertical drill cuttings." Indeed, this is hardly hazardous material. All of these concerns are especially vexing given the absence of any meaningful explanation in the Department's regulatory analysis form as to why it needs this information and what it plans on doing with the information when it is received.

The new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should these standards become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and unconventional well operators. This

"Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

The new proposed standards lack clarity and are ambiguous. The new proposed standards do not clarify the definition of "seasonal high groundwater table." Section 78.1. As explained by PIOGA, there has historically been disagreement between conventional well operators and the Department about the actual distance between the bottom of the pit and the seasonal high groundwater table, particularly when there is an accumulation of precipitation inside the pit before the liner is installed. Instead of clarifying this definition as recommended by PIOGA, the new proposed regulations require the employment of a soil scientist or other similarly trained person to make this determination when residual waste from the site is disposed in the pit. Section 78.62(a)(9). This is the most expensive option for determining the proper distance, and is inferior to simply clarifying the definition.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule governing the use of pits in conventional well operations.

- The Department's regulatory analysis form does not demonstrate a need for the new proposed standards governing the use of pits in conventional well operations. To the contrary, the Department frames the need for new standards entirely on the changes brought about by the "dramatic increase in the total number of unconventional wells drilled throughout the Commonwealth." To the extent that the Department references the conventional oil and gas industry at all in explaining the need for the new proposed standards, it is as a point of comparison – to show how unconventional well operations have changed Pennsylvania's energy landscape. This is evident from several statements in the form: (1) "Conventional well operators are much smaller in scope and they generate far less waste than unconventional drilling, therefore the potential impact to the environment is significantly less."; (2) "[T]he area of earth disturbance at an unconventional well site during drilling and hydraulic fracturing stages is at least 10 times the size of earth impacted at a conventional well site."; (3) "Throughout the history of conventional oil and gas development, brine has been beneficially used in dust suppression and road stabilization. . . . [By contrast,] [t]he road spreading of brine from unconventional wells is not approved as a beneficial use in the Commonwealth."

- The Department's regulatory analysis form does not reflect the Department's consideration of the direct and indirect costs of the proposed standards or the economic impact that those standards would have on small businesses. The Department's cost estimates for conventional operators make no mention of the 103.7% increase in the cost of every pit liner or the additional cost of $3,000 to $5,000 to employ a soil scientist.

- The Department's regulatory analysis form does not reflect consideration of less stringent, less costly or less intrusive alternative methods to prevent leakage of brine and other fluids from pits used in conventional well operations. While the Department does make brief mention in the form about providing free training to operators to avoid the cost of a soil scientist, there is nothing in the draft final rule requiring the Department to provide such training and no details about the availability of such training prior to the proposed standard taking effect. Moreover, while section 78.56 does indicate that the Department may approve the use of a 20 mils liner if the manufacturer establishes that it is as effective as a 30 mils liner, there is no requirement that the Department do so.

Finally, the new proposed standards for pits used in conventional well operations so far exceed the enhanced environmental standards already contained in Act 13 of 2012 that they represent a policy decision of such a substantial nature that they require an act of the General Assembly before they can become law. Nothing in Act 13 requires an increase in pit liner thickness, the employment of a soil scientist or similarly trained person to determine the distance between the bottom of the pit and the seasonal high water table, or a three-day notice requirement prior to constructing a pit, or disposing of drill cuttings or residual waste in a pit. If Pennsylvania is to be the first to impose such complex and onerous regulations on the use of pits in conventional well operations, it should not do so on the backs of small, independent conventional well operators who are least able to absorb the increased costs.

Borrow Pits – Section 78.67

The provisions of the proposed final rule governing borrow pits – as set forth in section 78.67 (borrow pits) – are not in the public interest and should be withdrawn as set forth below.

The Department lacks the statutory authority to subject well operators who own or control a borrow pit solely for use in oil and gas well development to the requirements set forth in 25 Pa.Code Ch. 77 (noncoal mining) Subchapter I (environmental protection standards).

- The Department identified the following authorities in its regulatory analysis form for the proposed changes to Chapter 78: 58 Pa.C.S. §§ 3215(e), 3218(a), 3218.2(a)(4), 3218.4(c), 3274; 35 P.S. § 691.5; 35 P.S. § 6018.105; 32 P.S. § 693.5; 35 P.S. § 6062.104; 71 P.S. §§ 510-17, 510-20. None of these statutes authorizes the Department to promulgate regulations applying the noncoal mining standards contained in 25 Pa.Code

Ch. 77 to the operation of a borrow pit where the minerals are extracted solely for the purpose of oil and gas well development.

- Borrow pits used solely for oil and gas well development are statutorily exempted from the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3301 *et seq.*, and its implementing regulations contained in 25 Pa.Code Ch. 77 (noncoal mining). *See* 52 P.S. § 3303 (defining "surface mining" to exclude "the extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him"); 58 Pa.C.S. § 3273.1(b)("Obligations under . . . the Noncoal Surface Mining Conservation and Reclamation Act, *or a regulation promulgated under the Noncoal Surface Mining Conservation and Reclamation Act*, for any borrow area where minerals are extracted solely for the purpose of oil and gas well development, including access road construction, shall be considered to have been satisfied if the owner or operator of the well meets the conditions imposed under subsection (a)(1) [well permits] and (2) [financial security requirements] and maintains compliance with this chapter and applicable regulations of the Environmental Quality Board.") (Emphasis supplied). The Department's proposal to hold borrow pits used in oil and gas operations to the same environmental protection standards governing noncoal mining operations runs contrary to law and legislative intent.
- The Department's regulatory analysis form reflects a fundamental legal flaw. In the form, the Department states that the proposed revisions to Section 78.67 "will ensure that borrow pits used for the construction of oil and gas access roads and well site construction meet the same environmental standards as permitted non-coal surface mines, but will not be subject to the permitting requirements. Section 3273(c) of Act 13 of 2012 provided a permitting exemption for borrow pits used by the oil and gas industry." First and foremost, there is no section 3273(c). Secondly, even if the Department intended to refer to 58 Pa.C.S. § 3273.1(b), its interpretation of this statute as only exempting borrow pits used in oil and gas operations from the permitting requirements of the Noncoal Surface Mining Conservation and Reclamation Act is contrary to the statute's plain language. Clearly, 58 Pa.C.S. §3273.1(b) refers to all obligations under the Act and implementing regulations, not just permitting.

The new proposed standards governing borrow pits used for conventional well operations are not supported by acceptable data and will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. Borrow pits that are used in oil and gas operations are already subject to a long list of environmental protection statutes and regulations. In Document No. 563-2111-115, entitled Borrow Pits for Oil and Gas Well Development Activities, the Department identified those environmental statutes and regulations as follows:

- Oil and Gas Act, 58 P.S. § 601.603 (now 58 Pa.C.S. § 3273.1(b)) (see above).
- Clean Streams Law, 35 P.S. § 691.1 *et seq.* Borrow pits must be operated in a manner that does not result in pollution of surface waters or groundwater.

- Solid Waste Management Act, 35 P.S. § 6018.101 *et. seq.* Borrow pits cannot be used for disposal or storage of solid waste unless the owner or operator complies with the Solid Waste Management Act. *See also* 25 Pa.Code Ch. 287-289, 299.
- Dam Safety and Encroachments Act, 32 P.S. § 693.1 *et seq.* Well operator must locate and operate a borrow pit to protect any stream, body of water, or watercourse and wetland. *See also* 25 Pa.Code Ch. 105.
- Surface Mining Reclamation and Conservation Act, 52 P.S. § 1396.1 *et seq.* If a borrow pit encounters coal, then authorization under the Department's Coal Mining Program is required in order for the coal to be removed from the site.
- General Safety Law, 43 P.S. § 25-2(f). Providing that all pits and other excavations be properly constructed and operated to protect workers.
- 25 Pa.Code Ch. 102 (requirements for erosion and sediment control). See 25 Pa.Code § 78.53; Document No. 800-2100-008 (Policy for Erosion and Sediment Control and Stormwater Management for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities).
- 25 Pa.Code Ch. 92 (NPDES). Borrow pits regulated by the Noncoal Surface Mining Conservation and Reclamation Act that have a disturbed area of five acres or greater, or one acre with a point-source discharge to surface water, must obtain a NPDES permit in accordance with 25 Pa.Code Ch. 102. If there is a point source discharge of pollutants to surface waters of the Commonwealth, an NPDES permit must be obtained and a water quality management plan part II permit must be obtained for the treatment facility.
- 25 Pa.Code Ch. 93 (water quality standards). If a borrow pit is located in a designated special protection watershed or the existing use of the watershed is High Quality or Exceptional Value, the anti-degradation requirements of this chapter must be satisfied.

According to the Department's online compliance reports, the Department conducted 13,445 well inspections in 2014, a 78% increase over 2008. During that same period (2008-2014), there was an 83% decrease in new conventional drilling. Of the 13,445 inspections conducted in 2014, none resulted in a notice of violation for operating a borrow pit in a manner contrary to these existing laws or regulations. This is no basis for more stringent regulations on the use of borrow pits in conventional well operations.

The direct and indirect costs of the new proposed standards are so high that they will put small, independent conventional oil and gas well operators out of business.

Requirement	Cost
License	$300.00
Sign	$500.00
Soil Tests	$1,500.00
Seeding	$500.00
Inspection (one-time)	$300.00
Silt fencing	$3,000.00
Sedimentation ponds	$5,000.00

TOTAL	**$11,100.00**

These costs will have a severe adverse effect on the productivity of small, independent conventional well operators, who will be forced out of business, leaving only bigger operators.

The new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should these standards become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule governing the use of borrow pits in conventional well operations.

- The Department's regulatory analysis form does not demonstrate a need for tougher standards for borrow pits in conventional well operations. In the form, the Department refers to unspecified "environmental risks" posed by borrow pits. What risks? As explained above, the Department's online oil and gas compliance reports do not support such a finding. Moreover, in the form the Department states: "Conventional well operators are much smaller in scope and they generate far less waste than unconventional drilling, therefore the potential impact to the environment is significantly less." Despite this admission, the proposed standards governing the use of borrow pits are identical for conventional and unconventional well operators. It is obvious that the Department contradicted its own findings and did not consider any of the differences between conventional and unconventional operations in formulating these standards.

- The Department's regulatory analysis form does not reflect the Department's consideration of the direct and indirect costs of the proposed standards or the economic impact that those standards would have on small businesses. As noted above, the total costs of the proposed standards are at least $11,100.00. There is no evidence in the form suggesting that this fact was taken into consideration.

- The Department's regulatory analysis form does not reflect consideration of less stringent, less costly or less intrusive alternative methods to prevent the harm sought to be avoided regarding borrow pits in conventional well operations. This

is obvious from the mindless, cut-and-paste approach it used in making the same standards applicable to both conventional and unconventional operations. For example, the size of conventional borrow pit is usually .25 acre to 5 acres, as compared to the unconventional industry, who has removed whole sides of mountains to form its borrow pits. This cavalier approach to the regulatory process is fatal to small, independent conventional well operators, who lack the financial resources of larger conventional and unconventional well operators.

Finally, the new proposed standards for borrow pits used in conventional well operations represent a policy decision of such a substantial nature that they require an act of the General Assembly before they can become law. As explained above, the Department's attempt to rewrite Act 13 of 2012 and the Noncoal Surface Mining Conservation and Reclamation Act to remove the statutory exemption for borrow pits used in oil and gas development by way of regulation is improper. In its regulatory analysis form, the Department admits that neither West Virginia nor Ohio have regulations governing borrow pit reclamation, which "places the Commonwealth in a position that is more attuned to landowner concerns." Also, why should the oil and gas industry be treated more severely than the timber industry, which also uses borrow pits for their operations? If Pennsylvania is to be the first in the region to impose such onerous regulations on the use of borrow pits in conventional well operations, it should not do so on the backs of small, independent conventional well operators who are least able to absorb the increased costs.

Electronic Notification – Sections 78.15, 17, 51, 52, 56, 57-63a, 65, 67, 70, 73, 121-122

The provisions of the proposed final rule requiring electronic notification to the Department are not in the public interest and should be withdrawn as set forth below.

There are important differences between the capabilities of small, independent businesses engaged in conventional well operations and large, billion dollar corporations engaged in unconventional well operations. The vast majority of our members are extremely small, family-run businesses who depend on the modest income derived from the conventional extraction of oil and gas from new and legacy wells to help supplement their incomes and feed their families. Our members live in the most rural parts of Pennsylvania, with little or no access to the Internet. In fact, approximately 45% of our members do not even own a computer. In many ways, our members have more in common with Pennsylvania's Amish population than they do with large, unconventional well operators whose proliferation across Pennsylvania are the driving force behind the revisions to Chapter 78.

The new proposed standards requiring electronic notification to the Department will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. While the movement towards solely electronic reporting will make it easier for the Department to carry out its functions with regard to regulation of large conventional and unconventional well operators, it will have the opposite effect with regard to small, independent conventional well operators. With nearly half of our members not owning a

computer, and those that do living in rural areas where Internet access is spotty at best, the Department will receive less rather than more information from our members.

The direct and indirect costs of the new proposed standards requiring electronic notification to the Department are so high that they will put small, independent conventional well operators out of business when combined with the other costs generated by the draft final rule. With the price of a decent desktop or laptop computer running anywhere from $500 - $750 (excluding options and non-basic software), and home Internet access (where available) costing $25-$75 per month on average, our members who do not own a computer are facing an expenditure of approximately $1,225 in the first year, and approximately $600 per year in Internet service fees after that.

The new proposed standards requiring electronic notification will have a adverse effect on the productivity of small, independent conventional well operators. As explained above, the new costs alone will drive these small operators out of business when the other costs generated by the proposed draft rule are considered. Moreover, there are provisions that will be impossible for small conventional well operators to comply with, irrespective of cost. For example, those conventional well operators living in rural areas without Internet access will simply be unable to comply with the electronic notification requirements. Also, for those conventional well operators who are not proficient in the use of a computer, the new electronic notification requirements present a serious hardship. Finally, the shear number of notifications (25) over those required by Act 13 of 2012 (12) make small business compliance difficult if not impossible to keep up with. Most of our member companies do not have administrative personnel, unlike the billion-dollar corporations engaged in unconventional drilling.

The new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should the standards in the proposed final rule become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

The new proposed standards lack clarity and are ambiguous. The new standards require the submission of information electronically to the Department "on forms provided through its web site." These Internet forms are not included in the proposed final rule, making it difficult to estimate how much time it will take to complete the forms. There is also noting in the draft final rule requiring the Department to provide technical support to members of the regulated

community. This is particularly problematic given the problems operators have had with the Department's web site in the past.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule requiring the use of a computer to satisfy the rule's reporting requirements.

- The Department's regulatory analysis form does not demonstrate a need for mandatory electronic notification to the Department. In the form, the Department frames the electronic notification requirement as a measure that will "enhance efficiency for both industry and the Department." The Department also states that: "Electronic reporting will consolidate or simplify reporting requirements for all operators." While this is a nice-to-have for the Department, it is not something that is necessary for the Department in order to carry out its functions. It also places an undue burden on our membership, nearly half of whom do not own a computer.

- The Department's regulatory analysis form reflects an inaccurate and incomplete understanding of the direct and indirect costs of the proposed standards requiring electronic notification. In the form, the Department frames the requirement as a *savings* in postage costs for conventional well operators, without any consideration to the nearly 50% of our members who do not own a computer. When the costs of purchasing a computer and Internet access (where available) is factored in (approximately $1,225 in first year, $600 per year in later years), the new electronic notification requirement is a net loss, not a net gain, for many of our members.

- The Department's regulatory analysis form does not reflect consideration of less stringent, less costly or less intrusive alternative methods to achieving the goal of enhancing efficiency in reporting for both the industry and the Department. This is clear from the Department's approach in making the <u>same</u> standards applicable to both small, independent conventional well operators and large, corporate unconventional well operators. The Department should consider making electronic reporting optional rather than mandatory for conventional well operators.

<u>Control and Disposal Planning (PPC Plans) – Section 78.55</u>

The provisions of the proposed final rule regarding the preparation and implementation of a Preparedness, Prevention, and Contingency (PPC) plan for each site is not in the public interest and should be withdrawn as set forth below.

There are important differences between the environmental hazards presented by large-scale, unconventional well operations conducted by billion-dollar corporations and small,

conventional well operations conducted by small businesses who have been drilling in Pennsylvania's oil patch since 1859. The Department readily acknowledges this fact in its regulatory analysis form: "Conventional well operators are much smaller in scope and they generate far less waste than unconventional drilling, therefore the potential impact to the environment is significantly less." In addition to differences in the size of the tanks/well sites and the volume of material that could be released in an accidental spill, the regulated substances and pollutants present at a conventional well site do not vary from site to site. Moreover, the distance between conventional well sites is much smaller, sometimes as little as 150 feet.

The new proposed standards requiring site-specific PPC plans will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. The Department does not identify a single conventional well accident where the use of a non-site specific PPC plan (lawful under Department's existing regulations) contributed to a worsening of a spill or negatively impacted the quality of the environment or public health, safety and welfare. Moreover, local fire departments and first responders are often trained on how to respond to problems at well sites, and do not need to read a form to know what to do. In the absence of such evidence, the requirement of a site-specific PPC plan is meaningless.

The direct and indirect costs of the new proposed standards requiring site-specific PPC plans are so high that they will put small, independent conventional well operators out of business when combined with the other costs generated by the draft final rule. Under the Department's *Guidelines for the Development and Implementation of Environmental Emergency Response Plans*, specifically referenced in section 78.55(f) of the draft final rule, the Department contemplates the need of some operators who lack engineering experience to hire an outside consultant to prepare a PPC plan. *See* Document No. 400-2200-001, p. 6. The cost of hiring an outside consultant to prepare a PPC plan is estimated to be $500. Under existing regulations, that cost is the same regardless of the number of well sites maintained by a conventional well operator. Under the new proposed standards, that cost is fifty times higher if the operator maintains 50 well sites and 100 times higher if the operator maintains 100 well sites. Factor in the cost of installation ($25 per site), annual update/repair costs ($125 per site) and the cost per additional site maintained by an operator skyrockets to $650 per site.

The new proposed standards requiring a site-specific PPC plan will have a severe effect on the productivity of small, independent conventional well operators. When the cost of developing, installing, updating, and repairing a site-specific PPC plan is factored into all of the other costs that will be generated by the draft final rule, conventional well operators will be discouraged from drilling new wells. This in turn will negatively affect the conventional well operator's total production of oil.

The new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should the standards in the proposed final rule become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and

unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

The new proposed standards requiring site-specific PPC plans lack clarity and are ambiguous. The new proposed standards require conventional well operators to develop site-specific PPC plans that comply with 25 Pa.Code §§ 91.34 and 102.5(l). Section 91.34 applies to locations where pollutants are both produced and stored. Section 102.5(l) applies to oil and gas activities, which include pipelines and processing. It is unclear whether site-specific PPC plans on site at the well and at the tank locations would also satisfy section 102.5(l) for the pipelines and equipment in between.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule requiring site-specific PPC plans.

- The Department's regulatory analysis form does not demonstrate a need for site-specific PPC plans for conventional well operators. In fact, it is totally silent on this point. The Department does not identify a single conventional well site accident (in the form or otherwise) where the use of a non-site specific PPC plan under current regulations contributed to a worsening of an accidental spill or otherwise negatively impacted the quality of the environment or public health, safety and welfare.

- The Department's regulatory analysis form does not reflect the direct and indirect costs of the proposed standards requiring site-specific PPC plans at conventional well sites. Once again, the form is completely silent on this point. As noted above, the cost of hiring an outside consultant to prepare a PPC plan is estimated to be approximately $500. Factor in the cost of installation ($25 per site), annual update/repair costs ($125 per site) and the cost per additional site maintained by a conventional well operator skyrockets to $650 per site. This cost was not considered by the Department.

- The Department's regulatory analysis form does not reflect consideration of less stringent, less costly or less intrusive alternative methods to achieving the goal of ensuring that conventional well operators are taking steps to prevent harm to the environment and are prepared to respond to accidental spills when they occur. As noted in IRRC's comments on the proposed rulemaking issued April 14, 2014,

allowing conventional well operators to prepare a single PPC plan for multiple sites would lessen the fiscal impact of the regulation.

Finally, requiring site-specific PPC plans for small conventional well operators raises concerns about fairness in Departmental enforcement. Differing interpretation about the requirements of the proposed standard raises concerns that this regulation will become an "NOV trap" for unsuspecting conventional well operators, allowing the Department to rack up fines and costs at alarming rates.

Area of Review – Section 78.52a, 78.73(c)

The provisions of the proposed final rule requiring a conventional well operator who intends to stimulate a well using hydraulic fracturing to identify the location of active, inactive, orphaned, and abandoned wells within 500 feet of the well bore is not in the public interest and should be withdrawn.

The new proposed standards for the identification of other active, inactive, orphaned or abandoned wells represent a policy decision of such a substantial nature that it requires an act of the General Assembly before they can become law. Act 13 of 2012 tasks the Department – not well operators – with the obligation to find previously undiscovered orphaned and abandoned wells and plug them when no responsible party has been identified. In fact, well operators pay the Department to perform this very task. 58 Pa.C.S. § 3271 (relating to well plugging funds). *See also* 58 Pa.C.S. § 2315(a.1) (providing for state grant funds to eligible applicants to plug orphaned and abandoned oil and gas wells). While Act 13 does require well operators to notify the Department of the existence of abandoned wells located on property leased by the operator within 60 days of discovery, it does not currently saddle them with the historically difficult task of searching for undiscovered wells, abandoned years ago by prior, often unidentified owners, dating back to the birth of the oil drilling industry in the 1850's. Evidence of the difficulty of this endeavor is reflected in the Department's own publications, as well as Act 13 itself. *See* 58 Pa.C.S. § 3213(b) (permitting an extension of one-year time period contained in 3213(a) due to the "practical difficulties of locating unpermitted wells and complying with the reporting requirements of this chapter."); *Pennsylvania's Plan for Addressing Problem Abandoned Wells and Orphaned Wells*, DEP Document No. 550-0800-001. This difficulty is also evident in the fact that the Department has only been able to identify and plug 3,489 of the approximately 300,000 orphaned and abandoned wells believed to be in existence today in the last 20 years under its Abandoned & Orphaned Well Program. The policy decision to shift more of the burden for locating these wells onto the backs of small conventional well operators – who are already paying to fund the Department's Abandoned and Orphaned Well Program – is unconscionable. In any event, such a sea change in policy cannot be implemented by regulatory fiat. Rather, such a change in policy is reserved solely for the General Assembly, especially given the specificity with which Act 13 articulates a well operator's pre-drilling responsibilities *vis–a-vis* nearby orphaned and abandoned wells. *See* 58 Pa.C.S. § 3213(a.1). Clearly, if the General Assembly believed that the danger of communicating with an orphan or abandoned well was so great that it justified requiring small, conventional

well operators to expend thousands of dollars more to do what they are already paying the Department to do anyway, it would have included that in Act 13.

The new proposed standards regarding well identification in conventional well operations are not supported by acceptable data and will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. According to the Department's online compliance reports, the Department conducted 13,445 well inspections in 2014, a 78% increase over 2008. Of the 13,445 inspections conducted in 2014, only 1 inspection revealed an accidental breach of an abandoned well during conventional drilling operations. This is hardly justification for more stringent and expensive regulations on the identification of active, inactive, orphaned and abandoned wells within 500 feet of the well bore prior to the use of hydraulic fracturing. Moreover, the Department has not explained why the current procedures for plugging orphan or abandoned wells breached during hydraulic fracturing are inadequate to protect the environment and the public health, safety and welfare of the people.

The direct and indirect costs of the new proposed standards requiring well identification are so high that they will put small, independent conventional oil and gas well operators out of business.

Subsection	Task	Description	Cost
(b)(1)	Database Review	Operator must review Department databases. Make appointment. Travel 1-3 hours each way to regional office. Review database for 1-3 hours.	$500.00
(b)(2)	Historical Review	Operator must hire expert to research historical sources of information, such as farm line maps	$1,500.00
(b)(3)	Landowner Questionnaire	Operator must submit DEP questionnaire (does not yet exist) to landowners regarding location of abandoned and orphaned wells	Unknown
(c)(1)	Plat	Operator must submit a plat showing the location and GPS coordinates of all wells identified in (b).	$700.00

Subsection	Task	Description	Cost
(c)(2)	Proof of Notification	Operator must submit proof that questionnaires submitted under (b)(3)	$30.00
(c)(3)	Monitoring Plan	Operator must submit plan for monitoring wells required under 78.73(c). Installation of monitoring tank may be required.	$1,200.00 - $2,700.00 (depending on type of monitoring plan)
(c)(4)	Well Depth	Operator must submit true vertical depth of wells, if known	Unknown
(c)(5)	Source of Information	Operator must identify source of information for identified wells, if available	Unknown
(c)(6)	Well Integrity	Operator must furnish surface evidence of failed well integrity, if available	Unknown
TOTAL			**$5,430.00**

The new proposed standards requiring well identification will have a severe adverse effect on the productivity of small, independent conventional well operators. As explained above, the new costs alone will drive these small operators out of business. Moreover, there are provisions in these sections that will be impossible for conventional operators to comply with, irrespective of cost. For example, if the other identified well lies off the property line, the well operator cannot simply trespass onto an adjoining property in order to monitor the well pursuant to subsection (c)(3). Moreover, it is not unusual for an operator to have difficulty determining who the owner of an adjoining property is and/or how to contact them. In this situation, the well operator will be unable to prove submission of the questionnaire in accordance with subsection (c)(2). Finally, delays in getting appointments to view the database(s) at the Department's regional offices is out of our control.

The new proposed standards requiring well identification lack clarity and are ambiguous. For example, subsection (b)(1) requires a review of the Department's databases and "other available well databases." What are the other databases? How many are there? How does an operator gain access to all of them? Subsection (b)(2) requires a review of "historical sources of information, such as applicable farm maps, where accessible." What else is included within the definition of "historical sources of information."? Subsection (c)(3) requires the preparation of a "monitoring plan." What is an acceptable "monitoring plan" to

the Department? Subsection (c)(6) requires operators to include in their report to the Department "surface evidence of failed well integrity for any identified well." What does this mean? The Department's own Technical Advisory Board (TAB) shares our concerns about the breadth and vagueness of these sections. See TAB Report, July 18, 2013, Page 5-6.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule requiring identification of other active, inactive, orphaned or abandoned wells.

- The Department's regulatory analysis form does not sufficiently demonstrate a need for the new proposed standards governing other well identification. In the form, the Department states: "Abandoned and orphan wells could pose a serious issue to the commonwealth if an operator inadvertently alters one during the drilling or hydraulic fracturing process. Altering an abandoned well can lead to a number of issues including methane migration and water supply impacts." Unfortunately, the Department does not offer any support for its assertions, and its own data undermines this position. As noted above, the Department's own compliance reports reveal that of the 13,445 inspections conducted in 2014, only 1 revealed an accidental breach of an abandoned well during conventional drilling operations. This is hardly justification for more stringent and expensive regulations on the identification of active, inactive, orphaned and abandoned wells within 500 feet of the well bore prior to the use of hydraulic fracturing.

- The Department's regulatory analysis form does not reflect the Department's consideration of the true direct and indirect costs of the proposed standards or the economic impact that those standards would have on small businesses. In its form, the Department assigns a zero cost for compliance with Section 78.52a. This estimate is wholly at odds with reality given the anticipated costs outlined above. It is also at odds with other sections of the form, where the Department states: "Similarly, DEP expects that many operators will utilize consultants to help in the identification of abandoned and orphaned wells . . . ." Does the Department think that consultants work for free?

- The Department's regulatory analysis form does not reflect consideration of less stringent or less costly alternative methods to prevent communication of wells. Clearly, the Department is capable of searching its own well databases for any known orphan or abandoned wells in the 500 foot radius of the well bore. It does not need small, independent conventional well operators to do it for them. Also, to the extent that a questionnaire is necessary, there is no reason why the Department cannot do it. In the alternative, section 78.52a(b)(3) could be amended to mirror the language of 58 Pa.C.S. § 3211(b.1) (requiring notification to surface owners of permit application "by sending notice to those persons to whom the tax notices for the surface property are sent, as indicated in the assessment books in the county where the property is located").

Finally, the new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should these standards become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

Reporting and Remediating Spills and Releases (Section 78.66)

The provisions of the proposed final rule requiring that spills that exceed 42 gallons or pollute or threaten to pollute the waters of the Commonwealth ("qualified spills") are to be remediated using the standards set forth in the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2) and its implementing regulations are not in the public interest and should be withdrawn.

The central purpose of Act 2 is to encourage the voluntary remediation of existing commercial and industrial land presenting public health and environmental hazards so that it may be reused as a source of employment, housing, recreation and open space areas. "The reuse of industrial land is an important component of a sound land-use policy that will help prevent the needless development of prime farmland, open-space areas and natural areas and reduce public costs for installing new water, sewer and highway infrastructure." 35 P.S. § 6026.102(1). "Incentives should be put in place to encourage responsible persons to voluntarily develop and implement cleanup plans without the use of taxpayer funds or the need for adversarial enforcement actions by the Department of Environmental Resources which frequently only serve to delay cleanups and increase their cost." *Id.* at § 6026.102(2). In the case of Act 2, the "incentive" is the elimination of legal liability.

The Department's authority to apply the environmental remediation standards in Act 2 outside the stated scope of the Act by either policy or regulation is legally suspect:

> The environmental remediation standards established under this act shall be used whenever site remediation is voluntarily conducted or is required under the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law, the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the Air Pollution Control Act, the act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act, the act of July 13, 1988 (P.L. 525, No. 93), referred to as the Infectious and Chemotherapeutic Waste Law, the act of October 18, 1988 (P.L.

> 756, No. 108), known as the Hazardous Sites Cleanup Act, and the act of July 6, 1989 (P.L. 169, No. 32), known as the Storage Tank and Spill Prevention Act, to be eligible for cleanup liability protection under Chapter 5. In addition, the remediation standards established under this act shall be considered as applicable, relevant and appropriate requirements for this Commonwealth under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 96-510, 42 U.S.C. § 9601 et seq.) and the Hazardous Sites Cleanup Act.

35 P.S. § 6026.106. This section does not include reference to either the 1984 or 2012 Oil and Gas Acts, nor do those Acts reference Act 2. Under the maxim *expressio unius est exclusio alterius,* "the express mention of a specific matter in a statute implies the exclusion of others not mentioned." *West Penn Allegheny Health Sys. v. Med. Care Availability and Reduction Error Fund (MCARE),* 11 A.3d 598 (Pa. Cmwlth. 2010). Moreover, nothing in Act 2 vests the Department with discretion to apply its remediation standards outside the scope of § 6026.106 as a matter of policy or regulation.

The new proposed standards requiring Act 2 remediation for qualified spills will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. The Department has not produced any evidence that the alternatives to Act 2 remediation are insufficient to remediate accidents at conventional well sites.

The mandatory application of Act 2 remediation standards to spills of crude oil or conventional production water in amounts as little as 42 gallons is completely unreasonable.

- Pennsylvania grade crude oil is paraffin-based oil, making spills suitable for bioremediation. Indeed, the Environmental Protection Agency (EPA) recognizes that bioremediation is a proven alternative tool that can be used to treat crude oil spills and has issued fact sheets and similar technical materials on the subject. See NRT Fact Sheet: *Bioremediation in Oil Spill Response*, A.D. Venosa, U.S. EPA Region 4; *Voodoo Science: The Practical Application of Bioremediation Techniques as a Removal Response Option at Oil Spill Sites in Northwestern Pennsylvania Oil Patch*, V.E. Zenone, US EPA Region III (April 2004).
- As explained earlier in this document, there are important differences between conventional and unconventional production. *See* chart.
- Act 2 environmental remediation standards are highly disruptive to the environment for small spills of Pennsylvania grade crude oil and production water. For example, in a spill earlier this year of no more than 10 barrels of oil, the Department required the operator to cut down trees to make room for heavy equipment, dig up a section of a nearby creek, excavate 31 tri-axel loads of dirt from the site and haul it to a landfill, only to flush the remaining oil at the site using non-Act 2 techniques.

The direct and indirect costs of the new proposed standards requiring Act 2 remediation for qualified spills are so high that they will put small, independent conventional well operators

out of business when combined with the other costs generated by the draft final rule. PIPP concurs in PIOGA and PGCC estimates that Act 2 remediation costs are at least 3-4 times higher than a traditional remediation. In one recent case involving a conventional operator, a remediation that would cost $10,000 using traditional methods has already cost $200,000 thus far under Act 2, and that cost is expected to climb to $250,000. These increased costs will in turn have a severe adverse affect on the productivity of small, independent conventional well operators, who will be discouraged from further well development for fear that the risk of incurring exorbitant costs from a small/moderate spill of oil or production water is too great.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule requiring Act 2 remediation for qualified spills.

- The Department's regulatory analysis form does not sufficiently demonstrate a need for the new proposed standards requiring Act 2 remediation for all qualified spills. In the form, the Department states: "Spills or releases from containment of regulated substances at oil and gas well sites pose a substantial risk to the environment and public health, including impacts to water resources." Unfortunately, this one sentence does not address the most important question presented by the new proposed standards: Why are alternatives to Act 2 remediation inadequate to remediate a qualified spill?

- The Department's form does not reflect the Department's consideration of the direct and indirect costs of the proposed standards or the economic impact that those standards would have on small businesses. The Department's form is completely silent on increased cost of requiring an Act 2 remediation for all qualified spills. As explained above, PIPP, PGCC, and PIOGA estimate that the costs of an Act 2 remediation is 3-4 times more expensive than a traditional remediation. This is a critical omission.

- The Department's regulatory analysis form does not reflect consideration of less stringent or less costly alternative methods to Act 2 remediation for qualified spills. This "my way or the highway" approach is not only contrary to the RRA, it also is contrary to the Department's assertion in the form that "[m]ost of these proposed regulations are performance based in lieu of prescriptive standards to allow operators the flexibility of choosing the best option to meet compliance." Under the new proposed standards, the operator has no options for qualified spills other than Act 2.

Finally, the new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should these standards become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who

purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

Application Requirements (Section 78.15, 78.1)

The provision of the proposed final rule requiring a conventional well operator who proposes to construct a well site in a location that will impact a "species of special concern" to obtain approval from the Department as part of the permitting process is not in the public interest and should be withdrawn.

The Department's definition of "other critical communities" to include "species of special concern" is not consistent with the statutory authority of the Department or with the intention of the General Assembly. Act 13 provides that "[o]n making a determination on a well permit, the department shall consider the impact of the proposed well on public resources, including but not limited to . . . [h]abitats of rare and endangered flora and other critical communities." 58 Pa.C.S. § 3215(c)(4). The phrase "other critical communities" is not defined by statute, and was carried over verbatim from the 1984 Oil and Gas Act. 58 P.S. § 601.205(c)(4) (repealed). When the 1984 Oil and Gas Act was enacted, the concept of "species of special concern" – which are species of plants and that are neither threatened nor endangered – did not even exist. According to the Pennsylvania Biological Survey, that concept was first introduced in a publication entitled *Species of Special Concern in Pennsylvania*, H.H. Genoways and F.J. Brenner, eds, Carnegie Museum of Natural History, Special Public No. 11, Pittsburgh PA 1985), pgs. 3-5, the year *after* the 1984 Oil and Gas Act was enacted. The concept of species of special concern does not appear in statute. While Act 13 does authorize the EQB to develop regulations implementing 58 Pa.C.S. § 3215(c), that does not give the Department a blank check to codify an amorphous concept that did not even exist in 1984. Indeed, the decision to equate "other critical communities" with "species of special concern" represents a policy decision of such a substantial nature that it requires an act of the General Assembly before it can become law. PIPP joins with IRRC, TAB, PIOGA, PGCC and others who have questioned the legal authority of the Department to define "other critical communities" in this manner.

The definition of "other critical communities" to include the Department's concept of "species of special concern" lacks clarity and is highly ambiguous. The proposed final rule defines "other critical communities" to mean "(1) plant and animal species that are not listed as threatened or endangered by a public resource agency, including: (i) plant and animal species that are classified as rare, tentatively determined or candidate, (ii) taxa of conservation concern; (iii) special concern plant populations; (2) The specific areas within the geographical area occupied by a threatened or endangered species designed in accordance with the

Endangered Species Act of 1973, 16 U.S.C. §1531 et seq., that exhibit those physical and biological features essential to the conservation of the species and which may require special consideration or protections; and (3) significant non-species resources, including unique geological features, significant natural features or significant natural communities." Section 78.1. The actual database of special concern species, upon which permit applications are based, is not public, viewable or printable. Special concern species, other than threatened or endangered species, are added by agencies and scientist volunteers without public notice or comment. How is a conventional well operator to know whether a proposed well site will impact "other critical communities" under these conditions?

Confidence in the Department's ability to develop a single, publicly-available database of species of special concern that will not result in a major cessation of oil and gas development is lacking. The Pennsylvania National Diversity Inventory (PNDI) includes every natural plant community that occurs in Pennsylvania as a species of special concern. The Pennsylvania Natural Heritage Program (PNHP) also maintains a list of special concern species, which includes non-species, partial designations, and entries with no designations at all. The PNHP list also changes on a regular basis.

The process to be employed following a determination that the location of a proposed well site will impact "other critical communities" is equality unclear and ambiguous. The operator is required to contact the public resource agency responsible for managing the public resource upon which the critical community is located and provide a copy of a plat and mitigation plan in order to solicit its comments and recommendations. Then the operator has to provide all of this information to the Department so that it can determine whether the well site "poses a probable harmful impact to a public resource." If it does, than the Department can include unspecified conditions in the permit to avoid or mitigate those impacts. There are no standards limiting the Department's discretion. If the operator appeals to the Environmental Hearing Board (EHB), the department has the burden of demonstrating that "the conditions were necessary to protect against a probable harmful impact of the public resource." This is a one-sided standard, which ignores the requirement that the regulations reflect a balanced approach taking into account the "optimal development of oil and gas resources" and "property rights of oil and gas owners." 58 Pa.C.S. §3215(f)(1).

The direct and indirect costs of the new proposed standards are so high that they will discourage small, independent conventional oil and gas well operators from further development. First, because a small, independent conventional well operator does not have the expertise to determine the presence of a special concern species, the operator will be required to hire an expert on animals and plants to make that determination in almost every case. Second, should the expert conclude that the desired well site may impact "other critical communities," the operator will have to make a choice between the costs of developing a mitigation plan and pursuing the permit and the cost of being deprived of the value of his/her minerals. Given the lack of guidance as to what an acceptable mitigation plan would look like, the cost to develop such a plan is unknown. Third, because the meaning of "other critical

communities" is so uncertain, the risk of being found in violation of the regulation at some point in the future is high.

The new proposed standards will have a severe adverse effect on the productivity of small, independent conventional well operators. The up-front costs to investigate whether a desired well location will impact "other critical communities" will make it less likely that those operators will commit the funds necessary to develop a new conventional well. This in turn will make them less productive.

The new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should these standards become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule governing well operations that impact "other critical communities."

- The Department's regulatory analysis form is silent on the need for greater protection for species of special concern. It also does not explain how conventional oil and gas operations place these species in danger of becoming threatened or endangered.

- The Department's regulatory analysis form does not reflect the Department's consideration of the direct and indirect costs of the proposed standards or the economic impact that those standards would have on small businesses. As explained above, in order to avoid running afoul of this regulation, a small independent conventional well operator will have to incur – at a minimum – the cost of hiring an expert in animals and plants in order to determine whether a desired well location will impact "other critical communities." If the project is to move forward, the operator will then incur the cost of preparing a mitigation plan and negotiating with the public resource agency and the Department on well location and permit conditions. All to extract his own minerals.

- The Department's regulatory analysis form does not reflect consideration of less stringent, less costly or less intrusive alternative methods to prevent the harm sought to be avoided.

Site Restoration – Section 78.65

The provisions of the proposed final rule regarding the preparation of a Post Construction Stormwater Management (PCSM) Plan that meets the requirements of 25 Pa.C.S. § 102.8(g) (PCSM Plan Analysis) as a component of a conventional well operator's site restoration plan is not in the public interest and should be withdrawn as set forth below.

There are important differences between the environmental hazards presented by large-scale, unconventional well operations conducted by billion-dollar corporations and small, conventional well operations conducted by small businesses who have been drilling in Pennsylvania's oil patch since 1859. The Department readily acknowledges this fact in its regulatory analysis form: "[T]he area of earth disturbance at an unconventional site during the drilling and hydraulic fracturing stages is at least 10 times the size of earth impacted at an unconventional site."

The new proposed standards requiring a PCSM Plan that is § 102.8(g) compliant will do nothing to improve the quality of the environment or the public health, safety, and welfare of the people. Section 102.8(g) specifies the stormwater analysis and design criteria required by the Department. These design criteria, as well as additional information regarding PCSM requirements and best management practices (BSM's) can be found in the *Pennsylvania Stormwater Best Management Practices Manual.* Under this section, BMP's must be used to manage the net change in stormwater volume and water quality between predevelopment and post-development conditions for storms up to and including 2-year/24-hour storm event. BMP's must also be used to ensure that the post-development runoff rates do not exceed that of predevelopment conditions for the 2, 10, 50, and 100-year/24 hour storm events or will meet the rate criteria specified in the applicable Department approved Act 167 plan, whichever is more restrictive. The Department does not identify any reason whatsoever why a PCSM Plan must satisfy these strict requirements of § 102.8(g).

The direct and indirect costs of the new proposed standards requiring PCSM Plans that comply with § 102.8(g) are so enormous that they will put small, independent conventional well operators out of business. The total cost of this new requirement is estimated to be $22,000 - $84,000.

- Engineering services to prepare PCSM Plan satisfying §102.8(g): $10,000 - $15,000.
- Engineering services to prepare NPDES Permit application: $2,000 - $5,000.
- Construction cost for storm water best management practices only: $10,000 - $50,000.
- Detailed topographical survey: $2,000 - $4,000 (if not provided)

- Wetland determination, ecological screening, and environmental permitting: $2,000 - $10,000 depending on location, amount of disturbance, and type of permit needed.

The new proposed standards requiring the preparation of PCSM Plans that are § 102.8(g) compliant will have a severe adverse effect on the productivity of small, independent conventional well operators. As explained above, the new costs alone will drive these small operators out of business. Moreover, there are provisions in this section that will be impossible for conventional operators to comply with, irrespective of cost. For example, this section requires that the operator must restore the well site to its approximate original contours/conditions. This may be impossible depending on the circumstances. If well construction required an operator to cut into the side of a hill, any effort to build the hill back up to its original contours may prove pointless due to the effects of erosion, regardless of how hard the ground is tamped down. In addition, the presence of trees and other impediments at the site may prevent operators from returning the land to its approximate original conditions.

The Department did not comply with the provisions of the Regulatory Review Act or the regulations of the IRRC in promulgating the proposed standards in the draft final rule requiring PCSM Plans that are § 102.8(g) complaint:

- The Department's regulatory analysis form does not demonstrate a need for PCSM Plans that are § 102.8(g) complaint.

- The Department's regulatory analysis form does not reflect the direct and indirect costs of the proposed standards requiring PCSM Plans that are § 102.8(g) complaint. As noted above, the estimated cost of compliance is $22,000 - $84,000. This cost was not considered by the Department.

- The Department's regulatory analysis form does not reflect consideration of less stringent, less costly or less intrusive alternative methods to achieving the goal of reducing the adverse effects of stormwater runoff.

Finally, the new proposed standards will have an adverse effect on competition because small, independent conventional well operators will be driven out of business should the standards in the proposed final rule become law. With small conventional well operators extinct, the marketplace for oil and natural gas will only be served by large conventional and unconventional well operators. This "Wal-Mart" effect will stifle competition and limit the options of area refineries who purchase Pennsylvania crude oil for processing. It will also have an adverse effect on local businesses that depend on small conventional well operators to survive, including: (1) oil and gas service providers that assist oil and gas producers in drilling, leasing, logging, marketing, and well management; (2) professionals service firms that provide engineering, consulting, accounting, and legal services; and (3) hotels, restaurants, and other

service businesses that cater to the 10-15 workers typically present at conventional well site during the extraction process. It will also have an adverse effect on royalty owners.

IV. Revisiting McComb Oil Company

At explained in Section II, McComb Oil Company – owned by three members of the McComb family including Rich McComb – currently has 25 wells in production. Each well produces less than 8 barrels of oil per month. Selling oil to the local refinery at $58 per barrel, Rich receives gross revenue of $464.00 per month per well. With the on-going costs to maintain each well (excluding major projects like drilling, refurbishing, and plugging wells) currently holding at $236.66 per well, Rich makes a pre-tax profit of $227.34 per well per month. In other words, McComb Oil Company is surviving under current market conditions and the Department's existing Chapter 78 regulations.

Now let's look at *some* of the additional costs that will be generated if the draft final rule becomes law:

Requirement	New/Increased Cost	Amount
Corrosion Control	New	$1,550 per tank (100 bbl)
Monthly Inspections	New	$30 per hour per tank
Bonding (Tanks)	New	Unknown
Insurance (Tanks)	New	Unknown
Tank Features/Testing	New	Unknown (extremely high)
Pit Liner (Pit Construction)	Increased	$949.00 per liner
Soil Scientist (Pit Construction)	New	$3,000 - $5,000
Borrow Pit	Increased	$11,100.00 (per pit)
Electronic Notification	New	$1,225 first year (if no computer). $600 after that.
Site Specific PPC Plan	Increased	$650 per additional plan
Abandoned/Orphaned Wells	New	$5,430.00
Act 2 Remediation	New	Unknown. If spill of 42 gallons more occurs, remediation will be at least 3-4 times.
Other critical communities	New	$1,000.00 (plant/animal expert only. Other costs limitless)
Site Restoration	Increased	$22,000 - $84,000 per site

As for McComb Oil Company's costs to maintain their existing wells, just the requirement for a site specific PPC plan adds $650.00 to the cost all of his wells except one, totaling $15,600 or $624.00 per site. That will wipe out nearly three-months worth of profit on 24 of his 25 wells alone.

Tank inspection costs of $30 per tank per month (10 Oil Tanks, 10 Brine Tanks, 25 Oil/Water Separator Tanks) further cuts into McComb's modest profit. For a total cost of $1,350 per month, this removes another $54 per month per well in profit. Then a deduction must be made for bonding and insurance costs for the company's tank battery, which at this point is undetermined.

Assuming Rich replaces two tanks per year, the additional costs to McComb Oil Company will be $3,100 extra per year or $125 per well for corrosion control alone. The costs of outfitting each new tank with monitoring devices, high-level alarms, leak detection, emergency containment system, and the like are unknown, but suspected to be expensive if they are available at all.

The cost of the two new wells the company is planning to drill this summer would rise substantially under these regulations. As explained in Section II, Rich has already spent $13,753 on the project under the Department's existing regulations. Moving to a 30 mils liner raises the cost to $15,651 if two pit liners are purchased. A soil scientist to determine the seasonal high groundwater table is another $3,000 conservatively, raising the tab to $18,651.00. If the company maintains a borrow pit, that is going to cost an additional $11,100.00, raising the price to $29,751. Performing a search for abandoned and orphaned wells prior to drilling will raise the total to $35,181.00. This represents an increased cost of $21,428, and the company has not even started drilling yet. At this rate, the increase of $21,428 alone will take over 47 months of lost profit on each new well to recoup.

V. Conclusion

The families that have come together to form the Pennsylvania Independent Petroleum Association (PIPP) respectfully submit these written comments to the Chapter 78 draft final rule. We ask that the Department and the IIRC give these comments careful consideration. The existence of our industry depends on it. Thank you.

Respectfully Submitted,

PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS

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