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May 19, 2015

**RE: Environmental Protection Performance Standards at Oil and Gas Well Sites Advance Notice of Final Rulemaking**

On behalf of the Pennsylvania Chamber of Business and Industry (the Chamber), the largest, broad-based business advocacy association in the Commonwealth, I am writing in regards to the Department of Environmental Protection's (DEP) Environmental Protection Performance Standards at Oil and Gas Well Sites Advance Notice of Final Rulemaking (ANFR).

For the past several decades, the Chamber has been actively involved in issues relating to the stewardship of the environment and the responsible extraction, development and use of our abundant natural resources. The Chamber continues to bring the perspective of the regulated community to the development and refinement of various standards, policies, regulations and legislation concerning natural resource development in the state. Both the extraction of natural gas in conventional and unconventional shale plays and the many downstream uses of that gas in manufacturing, residential, commercial and industrial sectors continue to afford considerable economic opportunities to the state's economy. Continued development and use of natural gas is paramount to the health of our economy as well as meeting various state and federal regulatory mandates regarding the improvement in air quality. Indeed, DEP appears to share this perspective as it notes in the Pa. Bulletin notice announcing the comment period for the ANFR that "this industry is a major economic generator within this Commonwealth."<sup>1</sup>

The Chamber recognizes the considerable amount of staff time and resources that have been expended in developing this regulatory package. However, the membership of the Chamber has a number of significant concerns regarding these regulations. The Chamber appreciates the Department's full consideration of these comments, which express these concerns.

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<sup>1</sup> Environmental Protection Performance Standards at Oil and Gas Well Sites; Advance Notice of Final Rulemaking. 45 Pa.B. 1615. <http://www.pabulletin.com/secure/data/vol45/45-14/597.html>

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**The Use of the Advance Notice of Final Rulemaking to Incorporate Significant and Substantial Revisions to a Draft Regulation Sets a Troubling Precedent for the Future Development, Review and Promulgation of Regulations – and DEP Must Pay Close Attention to the Internal and External Costs of This Regulatory Package**

Throughout its existence, the General Assembly has delegated various powers and duties, including the development of regulations, to various agencies in the executive branch. Act 181 of 1982, or the Regulatory Review Act, was a clear expression by the General Assembly to “establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability [and] to provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function.”<sup>2</sup>

The Regulatory Review Act established a clear process which executive agencies must follow when drafting and promulgating regulations. Within this process is the requirement that the Independent Regulatory Review Commission (IRRC) must review and comment on an agency’s proposed regulation. IRRC must also review and take action on the final version of the regulation before it is published as a final rule. Executive agencies are provided the option to notice publicly intended changes from the proposed version of a regulation to its final version via an Advance Notice of Final Rulemaking. But, importantly, as IRRC notes in its 2015 Regulatory Review Process in Pennsylvania Manual, the ANFR is “not a part of the formal rulemaking process under the RRA.”<sup>3</sup> While executive agencies may use an ANFR, they may not abdicate the requirements of the Regulatory Review Act, particularly the requirement to provide an estimate of the direct and indirect costs that will be borne by both state government and the regulated community as well as a preamble explaining the need for and statutory basis of the regulations. The Department notes in its ANFR notice that the “draft final rulemaking contains significant changes in several areas.”

It is troubling that the Department has not provided an updated preamble or cost estimate to IRRC outlining what the costs of these “significant changes” will be to both the regulated community and the state, nor an updated demonstration of need as to why these regulations should be promulgated. The Department operates its oil and gas program on restricted revenue accounts funded by permit fees, penalties, and fines. Various regulatory obligations and an increase in oil and gas activity have led the Department in recent years to conduct two substantial oil and gas permit fee increases to staff its oil and gas program. DEP has also needed an infusion of revenue via the impact fee established by Act 13 of 2012 to keep its complement funded. It can also be surmised that, given one tenet of Governor Wolf’s severance tax package is to provide DEP with an additional \$10 million for oil and gas oversight, current and/or future revenues will not be sufficient to fund the Department’s oil and gas program. The Chamber questions if it is appropriate for the Department to propose additional, significant regulations with this ANFR without a proper accounting of the cost to the Department. Further, the substantial changes to the regulation will very likely impose considerable additional costs to the regulated community. To not provide an update cost estimate that includes the cost of the newly proposed regulatory requirements violates the clear intent of the Regulatory Review Act.

<sup>2</sup> See Act 181 of 1982.

<sup>3</sup> 2015 Regulatory Review Process in Pennsylvania. Independent Regulatory Review Commission.  
[http://www.irrc.state.pa.us/resources/docs/Regulatory\\_Review\\_Process\\_Manual.PDF](http://www.irrc.state.pa.us/resources/docs/Regulatory_Review_Process_Manual.PDF)

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More broadly, using the ANFR process to add various increased regulatory burdens or substantially change what was originally proposed circumvents the Regulatory Review Act and essentially obviates the intent of the Regulatory Review Act. The ANFR notice outlined many substantial changes to the original Chapter 78 Subchapter C regulatory package. IRRC and the standing committees of the House and Senate have not been formally able to comment on these changes. While the Chamber appreciates the opportunity to comment on the regulations, as well as the briefly extended public comment period, the Department must respect IRRC's role as defined by the Regulatory Review Act, which is to ensure that the executive branch justify its authority before imposing costs on the economy. The legislative intent section of the Regulatory Review Act notes the Act was passed due to "regulations being promulgated without undergoing effective review concerning cost benefits, duplication, inflationary impact and conformity to legislative intent." Without an updated cost statement and a chance for IRRC to formally review the significant changes outlined in the ANFR notice, this regulatory package can be reasonably said to have been promulgated without effective review concerning costs and conformity to legislative intent – the very same type of concern that spurred the creation of the Regulatory Review Act.

The Chamber is troubled by such a dangerous precedent that would be established here that allows regulations to be significantly altered between the proposed and final stages without formal review by IRRC. It is vital that IRRC's crucial role in providing oversight of certain executive branch activities continue to be respected.

**Various Components of the Draft Regulations are Vague in Definition, Intent or Authorizing Statute**

The PA Chamber expects that other trade associations whose membership is more concentrated in oil and gas extraction activities, including the Associated Petroleum Industries – Pennsylvania, the Marcellus Shale Coalition, and the Pennsylvania Independent Oil and Gas Association, will file more detailed comments regarding specific components of the proposed regulations. The PA Chamber urges that the Department fully consider and address these comments prior to crafting a final rulemaking to be considered by IRRC. The PA Chamber also wishes to highlight a few concerns regarding components of the regulations.

The definition of "mine-influenced water" is overly broad as defined in § 78.1. Operators intending to use mine-influenced waters will be obligated to submit for approval and subsequently comply with a mine-influenced water storage plan that includes regular testing, records retention and a demonstration that pollution to air, water or land will occur. While pollution prevention is a worthy policy goal, the proposed definition of "mine-influenced water" ("water in a mine pool or a surface discharge of water caused by mining activities that pollutes, or may create a threat of pollution to waters of the Commonwealth") could be construed to include water from any waterway downstream of a mining activity, as mining activity is or has taken place in many parts of the state. There are also about 5,000 miles of streams in the state impaired due to mining activity. In sum, the definition is overly broad and will only lead to arbitrary and untenable results. The PA Chamber recommends that DEP delete the use and definition of the term "mine-influenced water" removed from this rulemaking and that DEP invite further comment and dialogue with stakeholders and the regulated community regarding the issues and process outlined in the

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Department's November 2011 "Establishment of a Process for Evaluating the Proposed Use of Mine Influenced Water (MIW) for Natural Gas Extraction" whitepaper.<sup>4</sup>

In § 78a.15 Application requirements, DEP has also proposed that operators must notify the relevant public resource agency if the well site is located within certain distances of certain public resources. While the regulations outline a specific distance from parks, gamelands and national natural landmarks that would trigger notification requirements, the Department requires operators to notify public resource agencies if the well pad is "in a location that will impact other critical communities." This proposed requirement is problematic, vague and unenforceable. The threshold distance is unclear, as is the level of impact. "Other critical communities" is proposed to be defined as "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 undetermined or candidate, (ii) taxa of conservation concern, (iii) special concern plant species." Is it the Department's intent to prevent the taking of any such flora and fauna, even if the species is not endangered or threatened? Prevention of takings of threatened and endangered species is managed by the U.S. Fish and Wildlife Service, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission and the Pennsylvania Department of Conservation and Natural Resources, not DEP. Further, the Pennsylvania Natural Diversity Index tool from which applicants are obligated to obtain a receipt for their projects is appropriately protective of threatened and endangered species and special concern species and resources. Because PNDI captures any potential impacts to such flora and fauna, it is redundant and unnecessary for the regulated community to notify relevant public resource agencies for those species. As such, the definition and use of the term "other critical communities" should be removed from the rulemaking.

In § 78a.41, operators would be required to submit for approval and comply with a noise mitigation plan. It is unclear under which statute the General Assembly delegated to the Department the obligation to regulate noise from oil and gas operations. Act 13 of 2012 spoke to noise but only for compressor stations and processing facilities and even then it was only in the context of municipal ordinances. The requirements in this section would authorize the Department to order the suspension of drilling activities if noise mitigation measures are not sufficient. The PA Chamber seriously questions whether the Department has the ability to take an action by the Department without express statutory authority. Finally, and most importantly, IRRC has not had a chance to formally review and comment on this section, DEP has not expressed to IRRC a demonstration of need for the regulations, and DEP has also not provided a cost estimate for this section. As such, the PA Chamber urges that § 78a.41 and any other component of the regulatory package concerning noise mitigation be deleted.

Finally, there are numerous instances throughout the ANFR and the Subchapter C regulatory proposal as a whole where various activities are authorized or prohibited or regulatory obligations deemed met "as determined by the Department." These include sections relating to water replacement, noise mitigation and mine-influenced water. The PA Chamber objects to such broad use of yet-to-be-finalized technical guidance documents as placeholders in a proposed regulation. While technical guidance is often useful in filling in some of the gray areas of a regulation for both DEP staff and the regulated community, the regulations themselves must establish clear, binding norms for staff and the regulated community to follow in applying that guidance.

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<sup>4</sup> White Paper: Establishment of a Process for Evaluating the Proposed Use of Mine Influenced Water (MIW) for Natural Gas Extraction. Pennsylvania Department of Environmental Protection, November 2011.

[http://files.dep.state.pa.us/Mining/Abandoned%20Mine%20Reclamation/AbandonedMinePortalFiles/MIW/Final\\_MIW\\_White\\_Paper.pdf](http://files.dep.state.pa.us/Mining/Abandoned%20Mine%20Reclamation/AbandonedMinePortalFiles/MIW/Final_MIW_White_Paper.pdf)

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In closing, the PA Chamber finds the draft final regulations deficient in many respects. As noted above, we find that the Department has failed to fully address the cost impact the newly proposed provisions of the regulation will incur on the oil and gas industry, as well as clearly identify the need for and statutory basis of these new provisions as required by the Regulatory Review Act. The Department's use of the ANFR process to circumvent the Regulatory Review Act is an unacceptable precedent to the regulated community and the Chamber's members. Unless these significant deficiencies (and the other areas noted above) are corrected, the Department's rulemaking package should be reconsidered and restarted.

Sincerely,



Gene Barr  
President and CEO  
Pennsylvania Chamber of Business and Industry