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Citizens for Pennsylvania's Future
610 North Third Street
Harrisburg, PA 17101
info@pennfuture.org
www.pennfuture.org

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Submitted electronically to RegComments@pa.gov

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

**Re: Advance Notice of Final Rulemaking re: Environmental Protection
Performance Standards at Conventional Oil and Gas Well Sites (Chapter
78)**

To whom it may concern:

Citizens for Pennsylvania's Future, or PennFuture, is a charitable organization that works to create a just future where nature, communities and the economy thrive. PennFuture's law staff works to protect Pennsylvania's natural resources for this and future generations by, among other things, commenting on proposed regulatory packages that have the potential to significantly affect our environment. PennFuture respectfully submits the following comments on behalf of its members and supporters who live in areas hosting oil and gas wells, and who hike, hunt, fish, camp and recreate in the parks, forests, lakes and streams potentially impacted by the natural gas industry and this rulemaking package.

PennFuture submitted comments on March 14, 2014 in response to the Department of Environmental Protection's ("Department's") December 2013 Notice of Proposed Rulemaking ("March 2014 PennFuture Letter"). Those comments included analysis from expert Kathy J. Martin, a registered professional engineer and former Board member and Environmental Stakeholder of the State Review of Oil & Natural Gas Environmental Regulations ("STRONGER"). The Department incorporated some of our proposed changes into the proposed regulations published with the Advance Notice of Proposed Rulemaking, and we thank the Department for its adoption of those changes. In deference to the Department's request that "commentators focus comments on language that is changed from the proposed rulemaking," we are not repeating in this letter the recommendations in March 14, 2014 letter that the Department did not adopt. PennFuture does, however, stand by all of the analysis contained in its earlier letter and asks that the Department revisit our suggestions and modify the final rulemaking accordingly.

We recognize that allowing for public comment on an advance notice of final rulemaking is not required by law, and we thank the Department for the opportunity to provide these written comments about its Chapter 78 regulations concerning conventional oil and gas well sites.

§ 78.1 (Definitions)

Oil and gas operations. PennFuture supports the clarification that the term “oil and gas operations” includes activities related to pipelines for all purposes – well development, gathering, and transmission – in the production and transportation of oil and gas.

PennFuture supports the revisions throughout the proposed regulations to eliminate the term “oil and gas activities” in favor of consistent use of the defined term “oil and gas operations.”

Other critical communities. PennFuture supports the Department’s efforts to define the term “other critical communities” and to clarify its meaning beyond simply “special concern species,” as in the previous draft of § 78.15. The inclusion of “rare, tentatively undetermined, or candidate” plant and animal species in the definition of “other critical communities” will ensure that public resource agencies receive notice to take adequate measures to protect vulnerable species under § 78.15(f). Section 2 of the definition will help to ensure protection of areas that may provide future home to an endangered or threatened species.

The first sentence of section 1 of the definition of “other critical communities” could be read as including within that category all “plant and animal species that are not listed as threatened or endangered.” To avoid that (likely unintended) interpretation, PennFuture suggests revising the first sentence of section 1 to read: “Plant and animal species that are not listed as threatened or endangered by a public resource agency, but are included in one or more of the following.”

§ 78.15 (Application Requirements)

PennFuture generally **supports the added requirement in § 78.15(b.1) that applicants demonstrate protection of water courses or water bodies located within 100 feet of oil and gas operations.** We believe, however, that the requirement should be expanded and strengthened. We suggest expanding the area requiring a demonstration of protection from 100 feet to 150 feet. Riparian buffers are one of the most effective means of protecting waterbodies. Industrial activity, such as oil and gas operations, within close proximity to a waterbody will undermine the buffer’s effectiveness and create the possibility of degradation of the waterbody. The Chapter 102 regulations recognize a 150 buffer for protection of special protection streams. *See* 25 Pa. Code § 102.14. Considering the nature of the activities permitted under Chapter 78, it seems appropriate to require a water protection demonstration for any oil and gas operations that occur within 150 feet of a water body.

We support the Department’s inclusion of schools and playgrounds in the list of public resources addressed in §78.15(f).

We support the Department’s revision of 25 Pa. Code § 78.15(d) to require of the use of Pennsylvania Natural Diversity Index Project Environmental Review Receipt (“PNDI”) and a demonstration that the proposed oil and gas operations will avoid or minimize and mitigate any potential harm to threatened or endangered species. It is appropriate to rely on the established, well understood PNDI process to achieve the aims of Chapter 78.

We support the Department’s extension of the comment period for resource agencies from 15 days to 30 days in § 78.15(f). The additional time will make it more feasible for the resource agency to assess impacts and develop mitigation recommendations to protect the attributes of the public resource that will be affected.

§ 78.51 (Protection of Water Supplies)

PennFuture supports the Department’s effort to clarify the water supply restoration standard in subsection (d)(2). PennFuture supports the Department’s revision to §78.51(d)(2), which requires that water supplies be restored either to Pennsylvania Safe Drinking Water Act standards, or if applicable, to a higher quality if such higher quality existed prior to oil and gas operations. If oil and gas operations degrade a public or private water supply, the companies that profit from the resource extraction that led to the pollution are properly responsible for ensuring that all residents who were harmed by the diminished water quality have water that meets government safety standards. Consequently, PennFuture supports the Department’s application of Safe Drinking Water Act standards to water supplies adversely affected by oil and gas operations. PennFuture also supports, as a matter of policy and fundamental fairness, the Department’s position that persons who had water supplies of better quality than drinking water standards have a right to expect that water quality will be maintained and not adversely affected by oil and gas operations. Among other things, such a policy recognizes the economic value of a high quality water supply, and the importance of readily-available clean water to the value of property for residential, agricultural, manufacturing, recreational, and other productive uses. The Department’s revision to the proposed regulation should help to ensure that the regulation is properly and consistently interpreted.

§ 78.52a (Area of Review)

PennFuture strongly supports the extension of § 78.52a to include all active and inactive wells in the pre-drilling review required of oil and gas operators that will use hydraulic fracturing to stimulate wells. We also support the Department’s decision to require the submission of this information at least 30 days prior to commencement of drilling, but we suggest that the review be submitted even earlier still. **PennFuture suggests that it would be better to have any wells identified 30 days before site construction** so as to ensure that well operators have as much advance notice as possible to inform well placement, or prepare mitigation measures should placement appear that it will affect abandoned or orphaned wells.

§ 78.56 (Temporary Storage)

PennFuture supports the addition of new subsection §78.56(a)(3) requiring the operator to receive Department approval for site specific installation of modular aboveground storage structures.

§ 78.57 (Control, Storage, and Disposal of Production Fluids)

PennFuture strongly supports the elimination of the use of pits to manage brine and production fluids (§ 78.57(a)). PennFuture is especially **supportive of the Department’s proposal to mandate the closure of all existing pits within one year** of the effective date of the regulations. Allowing existing pits to remain in place unnecessarily exposes the Commonwealth’s water resources to the threat of pollution. Better technology for the storage of these materials is available, and it should be used.

PennFuture also supports the new proposed requirement that all tanks used to manage brine and production fluids be inspected at least once per month (§ 78.57(h)). Regular inspections can help to identify and/or prevent leaks that may result from damaged or improperly designed tanks.

PennFuture, however, **disagrees with the Department’s new proposal to allow the use of underground storage tanks to manage brine and production fluids.** Although underground tanks are preferable to the use of pits, they are inferior to above-ground storage tanks. It is easier to detect and contain leaks from above-ground storage tanks, which makes them less likely to release pollutants to the soil and water table. We recommend that the Department revert back to the prohibition on the use of underground tanks for the storage of brine and production fluids that it proposed in December 2013. Alternatively, if the Department chooses to allow the use of underground storage tanks, we suggest that the Department adopt release detection requirements similar to those for underground storage tanks at 25 Pa. Code §§ 245.441 - 245.446.

§ 78.57a (Centralized Tank Storage)

PennFuture prefers the use of tanks to the use of pits for the storage of materials related to oil and gas operations. PennFuture offers the following comments about the newly added section regarding centralized tank storage:

We suggest the Department clarify which materials (residual waste, production fluids, freshwater, wastewater, etc.) may be stored in centralized tanks. Subsection (h) suggests that centralized tanks will be used to store residual waste. If that is the intent of section 78.57a, we suggest that that be made explicit in the section title or early in the text of the regulation. *Cf.* § 78.57 (“Control, storage, and disposal of *production fluids*”) (emphasis added); § 78.59a(a) (“Embankments constructed for *freshwater impoundments* for oil and gas activities...” (emphasis added).

Section 78.57a(m) should be revised to clarify when the 30 business day review period begins. We suggest revising the end of the last sentence of § 78.57a(m) to read “... within

30 business days of the Department’s receipt of the Facility Completion and Final Notification Report.”

§ 78.59a (Impoundment Embankments)

We support the Department’s revisions to §§ 78.59a(a)(5) and 78.59a(a)(8)(iv) to incorporate standard methods for soil testing. We believe, however, that the operator should be required to **report results to the Department**, rather than making them available to the Department upon request. The Department’s failure here and elsewhere to require the submission of information that must be generated by the operator prevents the public from obtaining access to the information.

§ 78.59b (Freshwater Impoundments)

Section 78.59b(a) states that “any new freshwater impoundments must be in compliance with this section” (emphasis added), thereby indicating that section 78.59b as a whole applies only to “new” impoundments,” that is, those constructed after the effective date of the pending rulemaking. However, the next subsection, § 78.59b(b), applies exclusively to freshwater impoundments that are not “new,” i.e., those constructed before the effective date of the rulemaking. PennFuture recommends that this section be restructured to avoid this apparent inconsistency.

Freshwater impoundments will be allowed to receive polluted water – namely “mine influenced water.” *See* § 78.59b(h). The proposed “mine influenced water storage plan” is a first step toward addressing the concern, but the Department should go further. **The construction standards for freshwater impoundments containing mine influenced water should be commensurate with the threat of harm to ground and surface waters.** At a minimum, the Department should establish, for the required synthetic liner, standards for: maximum permeability, maximum seepage rate, and material type. See March 2014 PennFuture Letter at 14-15.

§ 78.59c (Centralized Impoundments)

PennFuture strongly supports the Department’s requirement that centralized impoundments either be closed or be permitted under the Department’s Chapter 289 regulations. § 78.59c(a). PennFuture also supports the Department’s proposed improvements to the requirements for closing and restoring centralized impoundments. § 78.59c(b). Centralized impoundments for oil and gas operations are residual waste disposal impoundments and should be properly regulated as such.

§78.61 (Disposal of Drill Cuttings)

PennFuture strongly supports the Department’s proposal for § 78.61(a)(3) that would eliminate the possibility of waivers of the requirement prohibiting disposal of drill cutting within 100 feet of a watercourse or body of water, or within the flood plain. We believe, however, that the requirement should be expanded and strengthened. We suggest expanding

the area ineligible for a waiver from 100 feet to 150 feet. As discussed above, riparian buffers are one of the most effective means of protecting waterbodies, and the Department's Chapter 102 regulations recognize a 150 buffer for protection of special protection streams. *See* 25 Pa. Code § 102.14. We suggest that the Department's proposed waiver ineligibility requirement be extended to 150 feet to minimize buffer disturbance and better protect our surface waters.

PennFuture supports the Department's proposed revision to § 78.61(f) that would require the well operator to provide notice of any drill cutting disposal to the land owner within ten business days of the completion of disposal. Knowing the locations of these disposal areas is essential both to prevent possible hazards associated with unintended disturbance and in planning for the use or development of the property.

§ 78.63 (Disposal of Residual Waste – Land Application)

PennFuture supports the Department's proposed revision to § 78.63(a)(5) that would require the well operator to provide notice of the land application of residual waste to the land owner within ten business days of the completion of disposal.

§ 78.63a (Alternative Waste Management)

Alternative systems should be certified by a licensed professional. Section 78.63a sets forth the procedure by which an alternate waste management system may be approved. PennFuture supports the requirement that the operator demonstrate that the alternate management practice provide equivalent or superior protection to the regulatory requirements. We suggest that the regulation be revised to further require that the determination of equivalence or superiority be certified by a licensed professional engineer.

§ 78.64 (Containment around Oil and Condensate Tanks)

PennFuture supports the Department's proposed addition of subsection (e) to § 78.64. That new subsection makes clear that existing condensate tanks must receive the containment protections required under § 78.64 within two years. Containment is important to protecting our natural resources from pollution that may otherwise result from faulty or leaking tanks. There is no reason that this protection should be limited to newly constructed tanks.

§ 78.65 (Site Restoration)

PennFuture supports the Department's reorganization of § 78.65 to clarify the requirements for post-drilling and post-plugging activities. The Department's reorganization helps to make the regulation easier to follow and implement.

Regarding the substantive changes to § 78.65, PennFuture supports the requirement that, to be considered "restored," and therefore eligible for the exemption under § 102.8(n), disturbed areas must either be returned to meadow in good condition, or incorporate antidegradation

best available combination of technologies (“ABACT”) or non-discharge alternative post-construction stormwater management BMPs. §§ 78.65(b)(5); 78.65(d). For the restored areas of the well site, these requirements will help ensure that stormwater is managed properly long after oil and gas operations are finished.

PennFuture also supports the Department’s proposed requirement that any areas not restored must comply with all requirements in Chapter 102. § 78.65(d). It is important that the exception provided in § 102.8(n) not be applied to the unrestored areas of the well site. Among other things, unrestored areas of the well site need to undergo the PCSM stormwater analysis required under § 102.8(g) – a provision that is not incorporated into the § 102.8(n) requirements for restored areas. Although a PCSM analysis may not be necessary for areas restored to meadow in good condition, it is vitally important for disturbed areas that are not restored.

PennFuture supports the requirement that all post-drilling and post-plugging restoration reports be sent to the land owner in all cases.

Despite these improvements, § 78.65 does not go far enough to ensure adequate site restoration. As discussed at length in the March 2014 PennFuture Letter, § 78.65 should require that well sites be restored to conditions in which the land can support uses that are the same as or ecologically equivalent to the uses supported before the start of oil and gas operations, should require operators to apply for restoration certificates, and should condition certification on a field assessment that demonstrates compliance with both general and site-specific restoration criteria. March 2014 PennFuture Letter at 22-29.

§ 78.66 (Reporting and Remediating Spills and Releases)

PennFuture strongly supports the proposed addition of § 78.66(b)(4), which mandates the testing of water supplies that are threatened by a spill or release of a regulated substance. This testing is important to ensure the welfare of individuals who rely on water supplies that may be adversely affected by drilling.

PennFuture supports the elimination of an “alternative” means for remediating pollution events, previously contained in § 78.66(c)(3).

PennFuture supports the striking of the second sentence of § 78.66(c)(2)(iv) [formerly § 78.66(c)(3)(iv)], which had seemed to exempt the party responsible for a release from portions of Act 2’s notice and review provisions. Although some remedial actions may be exempt from certain of Act 2’s notice and review requirements if they are completed within 90 days of release (See Act 2, sections 302(e)(4) and 303(h)(4)), it does not appear that the exemption contained in subsection (c)(3)(iv) was so limited. We are not aware of any provision in Act 13 or any other statute that would allow for the waiver of Act 2’s notice and review requirements. See March 2014 PennFuture Letter at 30-31. Without such authority, the Department is right to strike the second sentence of subsection (c)(2)(iv).

§ 78.68 (Oil and Gas Gathering Lines)

PennFuture opposes the Department's proposal to eliminate § 78.68, which contains requirements for oil and gas gathering lines for conventional operators. There is little difference between oil and gas gathering lines used in conventional operations and those used in unconventional operations. The concerns associated with the construction and maintenance of gathering lines are common to both, and so should be the requirements imposed by § 78.68. For example, the threats to wetlands and endangered species posed by a gathering pipeline are not affected by whether the pipeline carries gas produced by conventional or unconventional drilling. As a result, the flagging required by § 78.68(b) would offer the same protection regardless of whether the gathering line carries conventional or unconventional gas, and there is no reason to apply those protections to one (unconventional) and not the other (conventional). Similarly, the requirement of proper erosion and sedimentation and post-construction stormwater management in § 78.68(g) is equally meaningful in a conventional as unconventional setting. The Department should restore § 78.68 as originally proposed.

Thank you for your consideration of these comments.

Sincerely,

/s/

George Jugovic, Jr.
Chief Counsel



Michael D. Helbing
Staff Attorney