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Department of Environmental Protection
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Comments to the Pennsylvania Department of Environmental Protection's Draft Final Chapter 78, Subchapter C Rule for Conventional Oil and Gas Wells

I. Introduction

The Pennsylvania Grade Crude Oil Coalition ("PGCC") is an industry group representing drillers, operators and support services necessary for conventional oil and gas wells. PGCC's members operate tens of thousands of conventional oil and gas wells in the Commonwealth and constitute the majority of entities conducting new conventional oil and gas well drilling. All of PGCC's members are "small businesses" as that term is used in the Regulatory Review Act.

On April 4, 2015, the Pennsylvania Department of Environmental Protection published an Advance Notice of Final Rulemaking ("ANFR") in the *Pennsylvania Bulletin.* The ANFR solicits comments on changes PADEP is recommending to 25 Pa. Code Chapter 78, Subchapter C, which provides environmental protection standards for oil and gas operations.

PGCC respectfully suggests that the Draft Final Rule for conventional operations be withdrawn entirely. The process employed to arrive at the ANFR is irretrievably flawed. Key procedural steps were missed entirely or were performed far below the law's requirements. Inasmuch as the procedural steps are intended to inform the process, the resulting proposed regulations are tainted by the procedural failures. That taint is irretrievable because that missing process (analysis of financial impact, identification of need, and so forth) cannot be added as an afterthought after the proposal has matured to near completion.

The only remedy that redresses the procedural missteps is the commencement of a fresh process. If this suggestion is not heeded, however, PGCC submits the following general and specific comments to the Draft Final Rule. That Rule would impose profound burdens on the

conventional oil and gas industry if finalized in its current form. Indeed, some of the proposal's consequences are so severe and ill-fitting that it is safe to conclude the drilling of new conventional wells would draw to a halt, and the operation of existing wells would be plagued by highly inefficient burdens under the proposed regulations. The Department has not provided data or shown a need with respect to the environmental impacts of conventional oil and gas operations that would justify such harsh and economically devastating results. The comments below cannot fully rectify the procedural errors and the proposed regulations would undoubtedly be different had the requisite process been followed. However, in making its comments, PGCC has made its best effort to intuit the goals, needs, and data assumed by the DEP.

II. Background

A. On December 14, 2013, proposed revisions to Chapter 78, Subchapter C, were published in the *Pennsylvania Bulletin* (hereinafter the "2013 Proposal").

The 2013 Proposal was accompanied by the DEP's Regulatory Analysis (the "2013 Analysis"). The 2013 Analysis was shockingly incomplete, and the 2013 Proposal was inconsistent with the requirements of the Regulatory Review Act:

1) DEP failed to conduct a proper analysis of the economic and fiscal impact on the public and private sector. The 2013 Analysis failed to analyze, at all, the economic impacts of majority of the regulatory provisions proposed for conventional oil and gas operations. In other instances, the 2013 Analysis took into account only the costs for new conventional wells, ignoring entirely the economic impact of the proposed regulations upon the tens of thousands of facilities already in place.
2) DEP admitted that acceptable data was not the basis of the regulations set forth in the 2013 Proposal. The 2013 Analysis cited needs specific to the then burgeoning unconventional oil and gas operations. However, the 2013 Analysis was virtually silent as to the need or basis for changing the regulatory framework already incumbent on Pennsylvania's conventional oil and gas industry. Without a statement of the need for change, it is impossible to measure whether the proposed regulations meet a legitimate need or even a legislative purpose.
3) The 2013 Proposal completely failed to consider whether a less costly or less intrusive method of achieving the goals was available. The 2013 Analysis gave no realistic consideration of alternative procedures and the "flexible regulatory approaches" mandated by Pennsylvania's Regulatory Review Act.
4) The 2013 Proposal was not consistent with legislative authority or intent. The underlying legislation requires the promulgation of rules that would "permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens." 58 Pa.C.S. 3202(1) (Declaration of Purpose). The 2013 Proposal would have imposed over a billion dollars of new costs upon Pennsylvania's conventional oil and gas industry, which costs would have had an extraordinary chilling effect. Rather than "permit optimal development" of oil and gas resources, the 2013 Proposal would have brought conventional operations to a virtual halt without measurable environmental benefit or benefit designed to meet any enunciated environmental purpose or need.

B. *Robinson Twp. v. Commonwealth of Pennsylvania* enjoined Sections 3215 (b) through (e) of Act 13:

On December 19, 2013, the Pennsylvania Supreme Court held that:

> Moreover, insofar as Sections 3215(c) and (e) [of Act 13] are part of the 3215(b) decisional process, these provisions are as well incomplete and incapable of execution in accordance with legislative intent. Application of Section 3215 (c) and (e) is therefore also enjoined.
>
> *Robinson Township, et al., v Commonwealth of Pennsylvania*, at 999 (emphasis added).

The April 14, 2014 Comments of the Independent Regulatory Review Commission ("IRRC") noted that the Pennsylvania Supreme Court invalidated Sections 3215 (b) through (e) and enjoined the application of those sections. The Department, nonetheless, has included sections in its Draft Final Rule to implement these voided sections of Act 13, and has expanded those sections through several new definitions of species to be protected and public resource agencies to be consulted in a process that would impose well permit conditions to address impacts to public resources. Neither the Department nor the EQB has the legal authority to proceed with the promulgation of rules under the invalidated sections of Act 13.

C. Act 126 of 2014 requires EQB to promulgate rules separately for conventional oil and gas operations.

Following passage of Act 126 of 2014, which requires EQB to promulgate "proposed regulations and regulations . . . relating to conventional oil and gas wells separately from proposed regulations and regulations relating to unconventional gas wells," PGCC offered to assist the Department of Environmental Protection in drafting a separate rule for conventional operations. In a response letter of September 9, 2014, the Department noted that it would be developing two sets of regulations to be presented to the Technical Advisory Board and would reach out to PGCC to discuss "additional changes that should be made to the proposed regulations." Despite inquiries and renewed offers to assist, PGCC has never heard from the Department to engage in those discussions.

PGCC believes that the Department's approach since Act 126 was passed is legally incorrect. The new draft rule, as presented at the September 25, 2014 TAB meeting, simply separated the previously proposed revision of 25 Pa. Code Chapter 78 that was already published for public comment in 2013. Neither the initial posting of the separated rule or the publication of a Draft Final Rule through the ANFR provides the statutorily required analysis and justification for the proposed rule (such as a statement of need for the many changes to conventional regulations or the small business analysis required under the Regulatory Review Act). The Department has not provided the public with sufficient notice or an opportunity to comment on this rulemaking for conventional oil and gas operations.

It is clear that Act 126 required DEP and EQB to undertake numerous statutory steps for any promulgation of a separate conventional rule. In particular, the Commonwealth Documents Law requires an agency to give public notice of its intention to promulgate, amend or repeal any administrative regulation. Such notice must provide the text of the regulation, state the statutory authority, explain the change, and request written comments by interested persons. Promulgation of a separate rule for conventional oil and gas operations clearly falls within this statutory requirement and requires a new notice and comment period.

Now that the legislature has required EQB to promulgate separate rules for conventional oil and gas operations, the current notice and comment process is not legally sufficient to satisfy the substantive or procedural requirements for the newly proposed rule, which requires its own justification and regulatory analysis under the Regulatory Review Act. The draft final rule published in the ANFR exacerbates, rather than rectifies, the fundamental failures to comply with the Regulatory Review Act through the addition of numerous new revisions without any explanation, justification, or regulatory analysis. Accordingly, the Draft Final Rule should be entirely withdrawn.

III. General Comments

Neither PGCC nor its members has had sufficient time to review the vast revisions proposed in the Draft Final Rule from the 2013 Proposal. The number of subsections affected, which exceeds 45, and the short time offered for review and comment, preclude a thorough examination of the meaning, let alone the implications, impacts or costs of the revisions. PGCC has offered detailed cost analysis in the past, analysis that took months to prepare and refine for accuracy, but is unable to provide such information for each new revision to the rule. That being said, there are several general comments that the Department should consider as applicable to the entire rulemaking package.

First, none of the procedural flaws discussed above has been addressed or resolved with the publication of a Draft Final Rule. The 2013 Analysis remains flawed and has not been replaced. The April 4, 2015 notice in the *Pennsylvania Bulletin* was entirely lacking in any explanation of why the Department made revisions to its 2013 Proposal, provided no regulatory analysis or the Department's response to the 24,000 comments received from the IRRC, legislators, and members of the public, including PGCC. Due to the lack of analysis by the Department regarding the purpose and need for the 2015 revisions, PGCC and it members are hampered from conducting an informed review that would result in constructive alternatives to assist the Department in achieving its goals. It is impossible for PGCC to comment upon the balance between the substantial 2015 changes and the interests being considered, because the ANFR is entirely silent as to those interests. Regulations should only address compelling public interests, and definable public health, safety or environmental risks. If any revisions to the existing Chapter 78 rule are necessary for conventional operations, DEP and EQB should make such a proposal and fully inform the public regarding the purposes, impacts, necessity and justification for such a rulemaking.

Second, PGCC, along with the IRRC, is concerned with DEP's and EQB's proposals that are either contrary to or exceed legal authority. Many required procedural steps were not taken, and the Draft Final Rule includes several provisions beyond DEP's or EQB's statutory authority.

As noted above, *Robinson* enjoined Sections 3215 (b) through (e) of Act 13, which removed any authority to promulgate rules under those sections. The Draft Final Rule, however, includes numerous provisions purportedly proposed under those sections, including new definitions for public resources and public resource agencies and a process that would create new obligations for well permit applicants to provide notice, consult, and inform DEP about steps to be taken to mitigate impacts to public resources. These provisions, as noted in PGCC's prior comments, also exceed the bounds of Pennsylvania property and contract law and would interfere with existing legal relations between operators and landowners. Further examples of specific provisions in excess of legal authority are discussed in detail below, including the proposal to require operators to identify and monitor abandoned and orphaned wells for which operators have no legal responsibility. No rule for the conventional oil and gas industry can be finalized where legal authority is lacking.

Third, the Regulatory Review Act was revised in 2012 to require deliberate and detailed analysis of impacts of rulemaking on small businesses. Section 12.1 of the Regulatory Review Act ("RRA") requires DEP to conduct a regulatory flexibility analysis in which it must consider methods that would accomplish the objectives of the applicable statutes while minimizing adverse impacts on small businesses. Such analysis must include consideration of:

1) less stringent compliance or reporting requirements;
2) less stringent schedules or deadlines for compliance or reporting requirements;
3) consolidation or simplification of compliance or reporting requirements;
4) establishment of performance standards to replace design or operational standards; and
5) the exemption of small businesses from all or any part of the requirements contained in the rule.

DEP failed to provide an adequate Regulatory Flexibility Analysis under the RRA and provides NO express accommodations for small businesses in any section of the rule. Simply referring to operational differences and provisions that may or may not apply to conventional operations does not substitute for an alternative for small businesses. Please see PGCC's prior comment for a detailed analysis of the 2013 Analysis of the 2013 Proposal. The Draft Final Rule is equally flawed in this respect because no exemptions or alternatives for small businesses have been provided.

Fourth, and as noted in PGCC's prior comments, DEP's estimated costs for the 2013 Proposal were either entirely lacking or shockingly incomplete. The DEP's 2013 estimate put the total compliance cost between $5 million and $12 million. PGCC estimated the initial compliance alone would cost $.5 billion to $1.5 billion. The Draft Final Rule removes two of the cost-generating provisions, but it also contains several dozen new provisions—many of which also impose grave costs. One of these new provisions alone will add new costs of $74 million to $272 million per year as detailed below. While PGCC has not had time to analyze each of the new provisions in the same depth it analyzed the 2013 Proposal,[1] it is safe to say the cost of the

[1] In 2013, PGCC devoted several months to the study of the actual costs and performance of approximately 1,300 wells. PGCC's 2014 comments included a 60-page analysis of the financial impact of the 2013 proposed regulations.

provisions that remain from the 2013 Proposal and the costs new 2015 provisions analyzed to date place the compliance burden at the same starting range of $.5 billion. This is an unbearable sum both because the DEP has failed to identify any need or benefit would which justify such an amount and, because at today's reduced commodity prices, the entire sales generated by the conventional oil and gas industry is less than $.5 billion per year. In other words, even the entire gross revenue from all annual sales (before payment of any salaries, supplies, or other costs) would be inadequate to meet the costs of complying with the proposed new regulations.

Fifth, no rule for oil and gas operations should be adopted without appropriate data, analysis and justification. DEP admitted in its 2013 Analysis that no data was utilized to draft the 2013 Proposal. PGCC suspects that empirical data and analysis is equally lacking for the Draft Final Rule, which undermines the DEP's entire rulemaking process. PGCC has tried, unsuccessfully, to obtain data, analysis or studies that were used in drafting the proposed rules, both in 2013 and in 2015. The Department responded that no such records exist or that they must be withheld under exceptions in Pennsylvania's Right to Know law. Either response is particularly problematic in the context of a comprehensive rulemaking process and further demonstrate its fundamental failings. Subjective or uninformed requests from the public to regulate this industry more strictly cannot be the driving force for revisions when the existing rules address all of the issues regarding impacts to land, water, air and species. Absent data demonstrating a need for revisions, DEP should stand firm to defend its program and its administration of existing law.

IV. Conclusion

PGCC and its members have spent significant time, effort and resources since PGCC formed in May 2013 to engage in constructive conversations with the Department about regulatory and policy revisions for conventional oil and gas operations in Pennsylvania. We have seen a few successes where workable solutions have been developed to meet the objectives of the Department while reducing unnecessary burdens on the industry. We are extremely disappointed that the Draft Final Rule was developed and published without any effort by the Department to work with PGCC or its members to craft rules that make sense for conventional operations. As noted in the general comments above, and the specific comments in the attached, the rulemaking package is replete with fundamental errors and omissions, reflecting a complete absence of attention to the needs of small businesses that are providing a key service to the citizens of this Commonwealth. We ask, once again, that the rulemaking revisions to this chapter be halted and that the Department engage in discussions that it has promised in public and private for the past year.

Sincerely,

David Clark, President
Pennsylvania Grade Crude Oil Coalition

Attachment A

Specific Comments to Subsections of 25 Pa. Code Chapter 78 Draft Final Rule

As noted above, neither PGCC nor any of its members has sufficient time during this limited comment period to thoroughly review and respond to the Draft Final Rule, which is extraordinarily broad in its proposed revisions to existing law and would create as yet an incalculable number of new obligations for conventional oil and gas operations. While PGCC would like to provide PADEP, EQB and IRRC with an evaluation of the purpose, legal authority, expected costs, clarity, and small business impacts of each revision, it is not possible to do so during this comment period. Accordingly, although each of the subsections below raises significant concerns for PGCC's members, the level of detailed review varies as time has permitted. PGCC stands ready to engage in conversations with PADEP on any of the points below to discuss in further detail.

§ 78.1 Definitions

Other Critical Communities

The Department has proposed a new definition of "other critical communities" that is without legal or scientific foundation. The proposed definition sweeps in vague and limitless "resources" to be reviewed in the well permit application process:

> (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 undetermined or candidate,
> (ii) taxa of conservation concern, and
> (iii) special concern plant populations.
> (2) the specific areas within the geographical area occupied by a threatened or endangered species designated 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.

This definition—which expressly includes *all* species that are *not* listed as threatened or endangered, as well as various non-species resources—would come into play in the well permit application process, where applicants would be required to give notice to Public Resource Agencies "responsible for managing" the habitats of these critical communities. See proposed §78.15 (f)(1-4).

As noted above, the Department has no legal authority to develop such rules because the Pennsylvania Supreme Court invalidated Sections 3215 (b) through (e) of Act 13. But the Draft Final Rule not only lacks authority under Act 13, it is also overly broad and unworkable, creating

unpredictable and unlimited obligations to protect unknown and unknowable species and non-species resources.

Presumably, one would be informed of the presence of non-listed species and non-species resources by utilizing the Pennsylvania Natural Diversity Index ("PNDI") database and obtaining a PNDI receipt with a hit for such non-listed species and non-species resources. PNDI, however, does not use the term "critical communities," but when certain non-listed species come up in the PNDI database, a PNDI receipt indicates that "special concern" species may be impacted by the project. "Special concern" species, however, are not defined in any state or federal statute or regulation, and no agency or entity that populates the PNDI database utilizes a consistent or public standard or process for the categorization of such species. These decisions are made without public notice, input, rulemaking or peer review.

Thus, the proposed list of "critical communities" to be newly protected through the creation of well permit conditions, pursuant to a new process that would have agencies other than PADEP create such well permit obligations, cannot create certainty or predictability for those who would obtain well permits in Pennsylvania because the definition incorporates lists of species and non-species resources that could change without notice on a daily, weekly or monthly basis.

And while the term "critical communities" is not defined in Act 13 or elsewhere, its meaning should be considered in the context in which it was used—alongside of "rare and endangered" flora and fauna. "Rare" and "endangered" are terms that do have definitions and a process for categorization by the Pennsylvania agencies tasked with the protection of species, such as the Department of Conservation and Natural Resource, the Pennsylvania Game Commission, and the Pennsylvania Fish and Boat Commission. By protecting all non-listed species, and adding such categories as "tentatively undetermined" and "candidate" to its proposed definition, PADEP has departed far from the General Assembly's use of the word "critical communities" in Act 13. The use of the term "critical communities" indicates that such communities are in dire need of protection, comparable to the status of threatened or endangered species. Threatened and endangered species, however, are only listed after thorough review, public notice and rulemaking procedures, and generally accepted scientific review. PADEP's definition of "critical communities" would elevate all non-listed species, as well as various non-species resources, to levels of protection comparable to those for threatened or endangered species without any public input or science to justify such protection.

Further, having inserted a definition of "critical habitat" (borrowed from the PNDI Policy) in subpart (2) of its proposed definition of "critical communities," PADEP would read Act 13 as creating an obligation for PADEP to consider the "habitats" of "critical habitats." The context and language of Act 13 Section 3215 (c)(4) simply do not support a definition of "critical communities" that would include any non-species resources, such as those listed in subparts (2) and (3) of the new definition in the Draft Final Rules.

Public Resource Agency

PADEP's Draft Final Rule would add municipalities, school districts and water purveyors to its list of "public resource agencies," along with new obligations for well permit applicants to provide notice to such agencies. This contrived definition of such agencies

beyond the state and federal agencies that are authorized by statute to protect the public natural resources of the Commonwealth is outside the scope of EQB's authority, is unnecessary, and is contrary to the express purpose of Act 13 to promote the optimal development of oil and gas resources. Like the numerous new proposals throughout the rulemaking for notice to landowners and other entities, this expansion appears to be a deliberate attempt to obstruct, rather than optimize, development of oil and gas resources. Oil and gas operators have communicated with local municipalities, school districts and community members for decades and will continue to do so in a manner that is consistent with both the law and good community relations. There is no authority or need for EQB to require additional consultation between conventional operators and local communities.

In addition, under Section 3212.1 of Act 13, municipalities are provided with the express opportunity to submit comments describing local conditions and circumstances that should be considered in the issuance of well permits for unconventional oil and gas wells, and PADEP is fully empowered to consider those comments.[2] It is unauthorized, redundant and unnecessary to add further avenues for comments in section 78.15, sweeping in conventional operations where the legislature has made its policy determination regarding the timing and avenue for the comments of municipalities.

Threatened or Endangered Species

The definition proposed in the Draft Final Rule is entirely unnecessary and inconsistent with those terms as they are already defined by the applicable statutes. The Department has no authority or jurisdiction to create different definitions or additional protection for any species and should not confuse and complicate a well-established legal framework for the protection of threatened or endangered species, as defined under state and federal law. Any definition included here must be identical to existing definitions under relevant law, none of which includes species simply "proposed" for listing as endangered and threatened. This manufactured definition is well beyond the Department's legal authority and would purport to create obligations that do not exist under any applicable law.

§ 78.15 Permit Applications

Section 78.15(f) would add several new Public Resources to the list established by the General Assembly, adding wellhead protection areas, schools, and playgrounds to the existing

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[2] Section 3212.1 provides:

> The municipality where the tract of land upon which the unconventional well to be drilled is located may submit written comments to the department describing local conditions or circumstances which the municipality has determined should be considered by the department in rendering its determination on the unconventional well permit. A comment under this subsection must be submitted to the department within 15 days of the receipt of the plat under section 3211(b) (relating to well permits). The municipality shall simultaneously forward a copy of its comments to the permit applicant and all other parties entitled to a copy of the plat under section 3211(b), who may submit a written response. A written response must be submitted to the department within ten days of receipt of the comments of the municipality (emphasis added).

list of natural or entirely public resources that may trigger consideration by PADEP in its well permitting. The new public resources are described as locations:

- **WITHIN 200 FEET OF COMMON AREAS ON A SCHOOL'S PROPERTY OR PLAYGROUND.**

- **WITHIN AN AREA DESIGNATED AS A WELLHEAD PROTECTION AREA AS PART OF AN APPROVED WELLHEAD PROTECTION PLAN.**

First, even if PADEP has the authority to expand the list of public resources, common areas of schools and playgrounds are simply not comparable to:

- Publicly owned park, forest, game land or wildlife area;
- State or National scenic river;
- National natural landmark;
- A location that will impact other critical communities; or
- Historical or archeological site listed on the Federal or State list of historic places.

"Common areas" on a school's property or playground are not publicly accessible and lack the clarity of the resources listed in Act 13, which include state and national resources of a limited nature, all of which are clearly known because of precise listing procedures for inclusion or clear geographic boundaries, in the case of parks, forests, and game lands. It is also notable that each public resource listed in Act 13 is limited in number and unlikely to be altered or expanded without significant public notice. The sheer number of "common areas" that PADEP would add to the list illustrates the incongruity of the additions. Even if one were to limit "schools" to public school districts, permit applicants, school officials and permit reviewers will be overwhelmed with the variety and uses of "common areas," as well as the universe of measures that could be recommended by schools and parents for the mitigation of impacts. These additions create tremendous regulatory uncertainty and will certainly create numerous unintended consequences, including the consideration of hundreds of proposed mitigation measures to address thousands of different types of "common areas."

Second, Act 13 expressly provides for the protection of water wells under Section 3215(a) through a setback requirement that can be waived by the owner of that supply. Given that the legislature already considered and addressed wellhead protection in this manner, there is no authority for PADEP to create either duplicative or additional protection by expansion of the listed public resources in Section 3215(c). The legislature considered and comprehensively provided for the protection of water supplies in the adoption of Act 13 in 2012. The legislators deliberately chose to add precise protection with respect to unconventional well locations in Section 3215(a) and drinking water supplies in Section 3215(c) and created obligations for PADEP in Section 3218.1.[3] In the face of this comprehensive statutory scheme, the inclusion of

[3] Section 3215(a) provides that "Unconventional gas wells may not be drilled within 1,000 feet measured horizontally from the vertical well bore to any 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" (emphasis added).

wellhead protection areas in the permit review process is clearly beyond PADEP and EQB's statutory authority and should be deleted.

Further, if PADEP intends to protect some "area" beyond the setbacks and protections already specified in Act 13, neither the need nor purpose for such expansion can be gleaned from the proposed revision, preventing PGCC or anyone else from providing a well-informed comment on whether the revision properly addresses either a need or PADEP's purpose in making the revision. And even if there were legal authority for PADEP or EQB to add wellhead protection areas to the list of public resources provided by the legislature, and the need for such protection justified the proposed revision, "wellhead protection area" is not a defined term, and approved wellhead protection plans are not readily available, preventing both compliance and enforcement of the rule.

Regulation must provide clear and predictable direction to the public and the agency tasked with its enforcement. The proposed addition of wellhead protection areas to a list of public resources to be considered by PADEP in the course of issuing well permits has no clear legal authority, purpose, justification or direction with respect to compliance or enforcement. It is clear, however, that, as written, it will open the door to protracted and costly discussion and debate between and among permit applicants, permit reviewers and the public. If this is the purpose of the revision, it is certain to succeed.

Act 13—if the relevant sections had not been invalidated under *Robinson*—expressly requires EQB to develop criteria by regulation for PADEP to use if it imposes permit conditions based on impacts to any public resources, including habitats of critical communities. Such criteria must ensure the "optimal development of oil and gas resources" and respect "property rights of oil and gas owners." The Draft Final Rule, however, does not create any criteria for the PADEP to utilize in conditioning well permits to protect against harmful impacts to public resources, further compounding the uncertainties created by the proposed definition of "critical communities." PADEP has failed to comply with one of the very few express commands of Act 13.

Finally, PGCC repeats and reaffirms its prior comment to the process of notice and comment proposed under Section 78.15(f)(2), which has been revised in a manner that exacerbates rather than resolves the problems created in the prior draft through the inclusion of additional public resource agencies to be notified and additional public resources to be considered. DEP's proposed revisions in paragraph (f)(2) would result in significant costs because the revisions do not comply with Pennsylvania law and do not contain a process for respecting private property rights of oil and gas owners.

Section 3215(c) provided that "Sources used for public drinking supplies in accordance with subsection (b)" be considered by PADEP when issuing well permits. Section 3215(b), which was stricken by the Pennsylvania Supreme Court in *Robinson Township v. Commonwealth of Pennsylvania*, had provided setbacks from certain surface waters, allowing waivers from such setbacks where appropriate.

Section 3218.1. provides: "Notification to public drinking water systems. Upon receiving notification of a spill, the department shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that the event occurred. The notification shall contain a brief description of the event and any expected impact on water quality" (emphasis added).

In contrast to the process established under Pennsylvania property law, the proposed regulations create a burdensome and open-ended process in which discussion is abandoned. Instead, the process bypasses that discussion in favor of vesting in the DEP the unilateral right to impose operating conditions. Specifically, the regulations allow the array of public resource agencies to simply communicate concerns to the DEP. The give and take of the established due regard process[4] is eradicated because, under the proposed regulations, the DEP becomes the judge of what the operating conditions should be on public lands.

Not only is this a remarkable usurpation of private property rights in the face of the legislature's express protection of same, but the proposed regulations are without any limit as to what concerns the resource agencies might submit, what constitutes a "harmful impact" under the regulations, or what the limits of mitigation might be. The proposed regulations are not even tied to the standard of "reasonable use" which has been a part of Pennsylvania Common Law for over 100 years and which, by virtue of extensive practice in the conventional oil and gas fields, is marked by established practices.

The process outlined by PADEP's Draft Final Rule unlawfully intrudes on established relationships under property and contract law, and would invite unbounded suggestions for the mitigation of perceived impacts from state agencies, local municipalities and schools, in what appears to be a plan to obstruct, rather than foster, the optimal development of the oil and gas resources of this Commonwealth.

§ 78.51 Water Restoration

§78.51(d)(2) has been revised to state:

> (2) *Quality.* The quality of a restored or replaced water supply will be deemed adequate if it meets the standards established under the Pennsylvania Safe Drinking Water Act (35 P.S. §§ 721.1 – 721.17). **IF, PRIOR TO POLLUTION, A WATER SUPPLY WAS OF A HIGHER QUALITY THAN REQUIRED UNDER PENNSYLVANIA SAFE DRINKING WATER ACT STANDARDS, THE RESTORED OR REPLACED WATER SUPPLY SHALL MEET THE PRE-POLLUTION QUALITY OF THE WATER ~~[, or is comparable to the quality of the water supply before it was affected by the operator if that water supply [did not meet these] [exceeded those standards]~~].**

PGCC commented on the 2013 Proposal, stricken here, that PADEP that would impose an obligation on oil and gas operators that is neither legally required under Act 13 nor practically achievable under certain circumstances. Act 13 requires impacted water supplies to be restored for the purposes served by those supplies. Chapter 78 defines water supplies to include commercial, industrial and agricultural supplies, all of which may include impaired water of varying qualities and none of which necessarily require drinking water standards. Restoring such supplies to Safe Drinking Water Act standards could be an act of sheer futility, with excessive cost and absolutely no underlying rationale. This result is neither authorized nor required under Act 13 or elsewhere.

[4] The due regard process is described in greater depth in PGCC's 2013 comments.

The revised language in the Draft Final Rule would likewise impose obligations on oil and gas operators that are neither legally required nor practically feasible, and, in fact, PADEP has increased the level of practical infeasibility with the revision.

First, requiring the restoration of water supplies to SDWA standards or better exceeds PADEP's legal authority to implement and enforce environmental laws and would alter well established principles of both property and contract law. PADEP is authorized to enforce environmental law, which is fully satisfied by the existing language of Section 78.51(d)(2) and should not enter an arena where it determines whether parties are "made whole" in the process of water replacement.

Second, requiring a restored supply to "meet" the pre-pollution quality of water creates a standard that invites prolonged debate and increases costs, chasing a standard that is effectively meaningless in the overall quality of water. For example, if a water supply sample taken prior to drilling showed 50 ppm of some constituent, and the SDWA standard is 250 ppm, would a replaced supply of 80 ppm satisfy the rule as stated? In effect, the 80 ppm is comparable to the 50 ppm where a standard is 250 ppm and it would be unreasonable to require continued efforts to "meet" the 50 ppm pre-drill result.

This section should not be revised at all from the existing rule.

§ 78.52a and § 78.73 Area of Review

The 2013 Proposal titled this section "Abandoned and orphaned well identification." The DEP's accompanying Regulatory Analysis stated: "This section does not apply to conventional operators."

The 2015 amendment expressly applies this section's provisions to conventional operators. Moreover, the 2015 proposal introduces many new "identification" and notice requirements that were not part of the 2013 Proposal that applied to unconventional operations. Several problems pertain:

1) Failure to State Purpose: The proposed regulations have transitioned from the DEP's 2013 position (that "this section does not apply to conventional operators") to the 2015 version which applies expressly to conventional operations, without any statement of the reason for change. As evidenced by the 2013 Regulatory Analysis, there was reason for the DEP, in 2013, to distinguish between conventional and unconventional oil and gas operations, and to regard the identification requirements as not necessary for conventional operations. Now, in 2015, without discussing the need with the Technical Advisory Board or representatives of the conventional industry, and without stating its purpose for change, the DEP has expressly made the regulatory requirements incumbent upon the conventional oil and gas industry.

The DEP's failure to discuss or state its purpose for applying this section to conventional operations makes it impossible to now comment meaningfully. Without an understanding of the goals the DEP is seeking in 2015, one can only speculate on why the provision is now applicable

to conventional operations. PGCC knows of no technical or field conditions that have changed between 2013 and 2015. Indeed, PGCC can confirm that the hydrofracture techniques utilized in conventional operations have gone unchanged for the last several decades. Therefore, PGCC cannot participate in one of the most fundamental purposes of the comment process, namely, a discussion of the need for the proposed regulatory provision.

As noted in more detail, below, it is also impossible to engage in a meaningful commentary on alternatives for small businesses. Without a statement, by the DEP, of the purposes to be achieved in applying this provision to conventional operations, it is not possible to fashion or discuss alternatives to meet those "phantom" purposes.

2) Failure of Statutory Authority: The 2015 Proposal contains a regulatory regimen much more cumbersome than the 2013 proposal applicable to unconventional operations. The requirements new in 2015 include the submission of a report to the DEP at least 30 days prior to the commencement of the drilling of a well. Due to the DEP's silence, one must speculate as to the need for that lengthy period; presumably, one purpose is to allow for the DEP to review, and, if not satisfied, deny permission for drilling or stimulation to commence.

Also new in 2015 is the preparation of a document entitled a "Monitoring Plan," which plan must include a statement of the methods employed to monitor adjacent wells. The 2015 Proposal contemplates that the monitored wells might be on adjacent parcels—indeed another provision (section 78.73) requires yet another new notice, of least 72 hours, to be given to operators of wells on adjacent properties. As to wells on the adjacent properties the 2015 Proposal requires an inspection before submission of the monitoring plan as well as visual monitoring of the well(s) during the hydrofracture operation.

These are remarkable new requirements. The preparation of the plan and the lengthy DEP review time are the equivalent of an entirely new permitting process not sanctioned by any statutory authority. Indeed, each time it has addressed the Oil and Gas Act, the legislature has shown sensitivity to the need for the prompt processing of permits and for the provision of an appeals process in the event of permit denial. The new monitoring plan creates an entirely new permitting burden, not rooted in any legislation, and which is bereft of any appeal protection.

The burden to trespass is equally remarkable. Under the 2015 proposal, when active wells are on a neighboring parcel, a conventional operator will have to make at least two trips to that adjacent parcel, one to gather "surface evidence" as to the neighboring wells before submitting the Monitoring Plan (section 78.52a(c)(6)), and one to visually monitor the adjacent well (section 78.52a(c)(3)) during hydrofracture activities. When orphaned or abandoned wells are on a neighboring parcel, two similar trips must be made. There is no legislative authority to either allow such trespass or to protect or define the rights of the trespassing party or the adjacent property owner who is subject to the trespass.

In the context of conventional oil and gas operations, one can normally expect cordial neighborly relations. In the majority of cases, it would be possible to gain permission to go on neighboring parcels to inspect orphan or active wells and to even "monitor" active wells

(depending on what the DEP might mean by that broad term). However, the 2015 Proposal requires access in all cases. Without underlying legal authority for that obligation, the 2015 proposal is seriously flawed.

3) Failure to Consider Costs: The DEP's 2013 Regulatory Analysis, which considered the inspection provisions to apply to unconventional well operations only, estimated the compliance cost at $2,000 per new well. That DEP estimate was made before the introduction of significant new requirements introduced in 2015, including;

a. Researching the depth of identified wells;
b. Gathering surface evidence concerning condition of identified wells;
c. Gathering GPS data for identified wells;
d. Development of monitoring methods for identified wells, including visual monitoring under accompanying section 78.73;
e. Provision of 72 hours advanced notice to adjacent operators under accompanying section 78.73; and
f. The gathering of the above data in a monitoring plan and the submission of same at least 30 days prior to the commencement of drilling the well.

With the burden of the additional items, the cost of compliance will obviously exceed $2,000 per well. It is difficult to comment on the extent of the new costs due to other problems inherent in the proposed provisions, including the difficulty of ascertaining the purpose and scope of the new provisions. Under the proposed regulation, conventional operators must now identify active, inactive, orphan and abandoned wells on both their own and neighboring parcels (where those adjacent parcels are within close proximity). The first three categories of wells are not burdensome inasmuch as the records of same are filed with and available through the DEP. However, infinite resources could be spent identifying (or failing to identify) abandoned wells, and, inasmuch as the proposed regulation does not contain a limitation as to the extent of effort that is expected, the proposed regulation is an invitation for an aggressive compliance officer to require unlimited expenditures of time and money.

The DEP's website dealing with abandoned and orphaned wells acknowledges that 300,000 oil and gas wells have been drilled in the state, that only since 1956 has Pennsylvania been permitting new drilling operations, and that only since 1985 have operators been required to register old wells.[5] While many of the ancient wells are now plugged or identified under the new permits or registrations (and thus easily identified), there remain ancient wells lost to memory. Surface evidence of these ancient wells can be non-existent due to natural changes such as tree growth or manmade changes such as building construction, excavation and so forth.

Thus, when the new proposal requires a review of "historical sources of information," what resources must be expended to examine old courthouse records, historical society records, and so forth? Such a review could be nearly endless, as could other provisions of the section such as the visual inspection required under accompanying section 78.73. Does this mean occasional checking or full-time individual monitoring of each adjacent well?

[5] http://www.portal.state.pa.us/portal/server.pt/community/abandoned__orphan_well_program/20292

Because the DEP has been silent as to both purpose and costs for the implementation of this provision (as to the conventional industry), it is impossible to meaningfully comment on the necessary cost benefit analysis. However, it can be said that even at $2,000, the new requirement represents an increased well cost of 1% to 2%, that with the additional burdens introduced in 2015, the costs will obviously exceed $2,000 per well, resulting in something more than an increased well cost of 2%, and that the conventional oil industry cannot sustain such increased costs, the evidence of this inability being the serious drop in new conventional oil and gas well permits over the last several years and the current environment of layoffs, decreased oil refinery supply, and the like.

4) Failure to Demonstrate Need: The stimulation of conventional wells results in fractures of short length making the risk of communication small. The conventional industry has successfully stimulated shallow wells for many years without formal abandoned and orphan well identification procedures and without widespread environmental problems.

A good example of the negligible communication difficulties in the context of conventional operations is found in the Allegheny National Forest (ANF). The ANF is in northwestern Pennsylvania and is the state's only federal forest. The ANF comprises 513,000 acres. Approximately 92% of the oil, gas and minerals on the ANF are privately owned, it being the decision of the federal government to purchase only surface parcels when the forest was assembled in the early part of the 20th century.

The ANF is located in the heart of Pennsylvania's conventional oil region. Drake's well, drilled in 1859, is located 15 miles from the western boundary of the ANF. The ANF region remains a vital producer of conventional oil today, supplying much of the feedstock for products refined at the Bradford, Pennsylvania ARG refinery (the world's oldest continuously operating refinery employing approximately 400 Pennsylvania citizens).

Since 1859, tens of thousands of conventional oil and gas wells have been drilled upon the lands which now make up the ANF. The ANF estimates that today there are about 12,000 wells currently in production on the ANF. Despite this long history of oil and gas development upon the ANF, the streams, trees and other treasured resources of the ANF have prospered.

Of the 2,126 miles of mapped streams within the ANF proclamation boundary, fully 72% are rated as high quality or exceptional value for water quality. Moreover, the Forest Service, in 2007, characterized the water quality in the ANF as "among the highest in the state."

In November 2014, the U.S. Forest released its five-year Monitoring and Evaluation Report for the ANF for the period from 2008 through 2013. It focuses on oil and gas development during that period. The 2014 ANF Monitoring Report concludes that "[t]he 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." Of particular note is the Clarion University study undertaken to compare the results of oil and gas development on benthic macroinvertebrate communities in a high development watershed as compared to a very

low to no-development watershed. The study reviewed detailed data from a 2010 survey as well as results of studies conducted in the early 1980s, 1990s, and 2008. The Report concluded that these macroinvertebrate studies "...*did not detect a negative impact to water quality* from this development" (emphasis added).

While there can occur communication with old wells during new conventional operations, the above information puts into context the fact that such communication incidents are very few and that water quality is prospering, and even improving, in the heart of Pennsylvania's conventional oil operations. Thus, while no one would disagree that communication with abandoned wells is a risk, what has been notoriously absent in the DEP's promulgation of regulations is a meaningful examination of the context of that risk. The law does not allow new regulations to be adopted in such a vacuum.

5) Failure of Ascertainable Standards: The proposed regulation, and in particular, many of the components introduced in the 2015 Proposal, contains standards which are difficult or impossible to ascertain.

a. What constitutes compliance? As noted above, the regulation contains required tasks that can be infinite in nature.
b. What are the consequences for the failure to identify wells?
c. What constitutes GPS coordinates and is the DEP requiring that the operator GPS all mapping data? For example, the coordinate records (both in DEP's database and in operators' databases) for many active and inactive wells were prepared and filed years or decades ago, without the benefit of GPS. With the introduction of the term "GPS" in the 2015 Proposal, the DEP appears to be requiring that all of that existing data be supplanted with new GPS data.
d. What is required if a well is identified on an applicable map but cannot be located in the field? This question speaks to the infinite nature of the responsibilities inherent in the proposed regulation and discussed in greater depth above.
e. What is required in a surface inspection to determine well integrity? This language is found at section 78.52a(c)(6). While the language has generated much speculation among PGCC members, two facts are known: 1) such broad language could entail infinite responsibilities; and 2) the DEP has never discussed the language with the Technical Advisory Board or with members of PGCC.
f. What constitutes visual monitoring of orphan or abandoned wells under the accompanying section 78.73?
g. What level of monitoring of an identified well, active or inactive, will be required to satisfy the monitoring plan?

These many unascertainable standards contribute to the impossibility of commenting meaningfully on the costs of implementing this proposed regulatory provision.

6) Failure to Account for Small Business: All of the conventional operators comprising PGCC's membership are small businesses as that term is used in the RRA. Section 12.1 of the RRA requires DEP to conduct a regulatory flexibility analysis in which it must consider methods that would accomplish the objectives of the applicable statutes while minimizing adverse impacts on small businesses. Such analysis must include consideration of: 1) less stringent compliance or reporting requirements; 2) less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishment of performance standards to replace design or operational standards; and 5) the exemption of small businesses from all or any part of the requirements contained in the rule.

That regulatory flexibility analysis was not performed, and its absence is obvious. Indeed, the "Area of Review" regulations, proposed by the DEP in 2015 for application to conventional operations, are nothing more than a photocopy of the same regulations proposed by the DEP for the unconventional industry in 2013—the only change being the addition of numerous regulatory provisions discussed above, such as the preparation of the monitoring plan and its submission 30 days before drilling, depth information, gathering of surface evidence, and the like.

Certainly there are flexible options to discuss. A key tenet of such discussion is the recognition that communication with another well results in a serious financial loss to the operator. The loss will always include poor performance of the well being stimulated and may also include the costs of cleanup or freshwater replacement in the unusual event the communication is so serious as to migrate out of an old well bore. The fact that migration spells financial disaster means there is already considerable incentive for the operator to prudently identify migration risks and that the costs of preparing yet another report, gathering new GPS data for adjacent wells, and submitting a monitoring plan 30 days in advance are not sensible.

Indeed, a prudent operator is already doing the following things:

a. Making a reasonable attempt to identify and be aware of the location of all active, inactive and orphan wells within the stated radius;
b. Making a field examination for abandoned wells that is limited to a "reasonable" standard and that entails neighboring property only when permission can "reasonably" be gained without compensation.

A second tenet is the new language introduced in 2015 in accompanying section 78.73 concerning treatment pressure changes indicative of abnormal fracture propogation. This is indeed the most likely evidence of a migration problem. Upon encountering such change, the operator should cease stimulation and investigate each of the active, inactive, orphan and abandoned wells that the operator previously familiarized himself with.

An alternatives analysis would test whether those steps, if followed, would be a meaningful response to the risk of migration. An alternatives analysis would also test whether

such suggested standards are sufficiently ascertainable by the operator, and enforceable by the DEP, so as to be realistically counted upon. PGCC believes the answer to both questions is yes.

An alternatives analysis would also test whether the submission of the reports, monitoring plan and other data called for in proposed section 78.52a. adds to the protection against migration and, if so, whether the substantial paperwork costs (both for the operator and the DEP) are worth the expenditure. PGCC believes the answer is no.

These problems with the "Area of Review" provisions are instructive as to why the process is irretrievably broken. The above alternative is but one feasible alternative for small business. Yet the process now underway never included discussion of any alternative and no opportunity for the public to comment on such alternatives. Moreover, the proposed regulations have been substantially formed without the benefit of a statement of need, a financial analysis and the resulting informed cost/benefit analysis. Because these key steps are intended to inform the process, these steps cannot now be meaningfully performed by adding them at the end. The "Area of Review" provisions are a prime example of why the proposed regulations should be withdrawn.

§ 78.53 E&S and Stormwater

PADEP would revise this section to list numerous manuals that may provide best management practices for erosion and sediment control and stormwater management. There is no need, however, to list or refer to manuals in the regulation, which already provides a reference to the mandatory obligations in Chapter 102 with which anyone conducting earth disturbance activities must comply. The first sentence thus provides all of the instruction necessary for this subsection; the second sentence is not only unnecessary but also creates the very real risk that PADEP staff in regional offices will require rigid adherence to manuals that do not have the same legal authority as the regulations themselves. Operators and staff are well aware that manuals exist and may be useful. Elevating manuals to the status of regulations is legally improper and potentially limit the best practices that may be developed outside of the manuals and utilized with better efficiency and results. The second sentence should be deleted or qualified with an express statement that manuals do not create legally binding obligations.

§ 78.55 Site Specific PPC plans

This section appeared in the 2013 version. However, in informal conversation following 2104 testimony, and in response to PGCC's statement that this proposed section would generate high cost for little or no benefit, PADEP employees stated this section was not intended to require PPC plans at each conventional well site. Nevertheless, when the 2015 version was published, language remained requiring a "site specific" plan that meets the requirements in 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. Therefore, a logical reader would conclude that the site specific

requirement would apply to both individual wells and to tank locations, and any pipeline or equipment in between.[6]

Accordingly, PGCC submits these comments. Under current practice, conventional operators employ a generic PPC plan that meets the requirements of existing section 78.55. Among other items, the generic plan lists the company contacts and internal spill cleanup resources and lists the outside contractors who might be called upon to assist in the response.

This information is and has been a sufficient guide on how to handle materials and respond to releases or threatened releases because (i) conventional well and tank sites are small, (ii) the volume of material that could be released from an accidental spill is small, and (iii) there are fewer different materials on site at conventional versus unconventional operations to manage.

The site specific proposal will have a serious debilitating effect on the conventional industry. While individual conventional sites are very small and treat with very small quantities of materials, conventional sites are numerous. Including wells and tanks, the estimated number is 200,000. (This number excludes pipelines—PGCC cannot discern how or where PPC plans would be maintained on pipelines.) To achieve initial compliance, the cost will range between $33 million and $100 million. Thereafter, the annual burden of keeping 200,000 paper plans both legible and updated will also be financially debilitating. The estimated annual cost of maintaining all these pieces of paper (and their storage units) is $25 million.

There are three key problems with the proposed regulation. First, the DEP never engaged in any discussion of the purpose of such additional burden in the context of conventional operations. Given the large number of conventional wells and tanks, the cost is extraordinary, but the benefit would be small—if not nonexistent. In addition to containing small amounts of materials, conventional well and tank locations are highly similar. There do not exist unique chemicals or other pollutants, from site to site, which would render a site specific plan useful in the conventional well context. Instead, the critical information of who to contact and where to locate cleanup resources is already contained in the generic plans.

Second, the DEP never engaged in any discussion or analysis of the costs of compliance. Nowhere has the DEP provided its estimate of the cost to initially prepare each plan and install a storage unit; it has not provided its estimate of the number of individual sites; and it has not provided its estimate of the cost to annually update the plan and repair the storage units.

The DEP's failure to discuss both the purpose and cost makes it now impossible to comment meaningfully. The comments are intended to be a reflection, responsive to an articulated need. The intended process is to include technical input from the industry as well as cost estimates that can be vetted. This site specific requirement is being made applicable to the conventional industry without either of these precedent steps having been taken by the DEP.

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[6] It cannot be ascertained whether "site specific" plans on site at the well and at the tank locations would also meet the site specific requirement for the pipelines or equipment in between. The proposed regulatory provision is open-ended in its requirements.

Because the process is thus tainted, PGCC can only speculate as to what the DEP might intend...and "respond" accordingly. But, in fact, one will never know what the comments might have looked like had the process unfolded properly. And, indeed, new regulations will eventually be adopted with that taint in place, and with uninformed comments being the basis of same.

Nowhere is that procedural failure more evident than in the third problem, namely, the failure to consider alternatives for small businesses under the RRA. Pennsylvania law requires the DEP to consider the disproportionate burden this proposed change would impose upon small businesses and to specifically consider whether less stringent requirements are balanced by the recognition that the regulatory culture must change to recognize the differences in scale and resources of regulated businesses. This proposed regulatory change is a prime fit for such discussion since the generic plans presently in use substantively meet the objectives of the planning requirement and because the cost of the new burden is so dramatically out of balance with the benefit (if any) that might be achieved.

Indeed, PGCC believes that, with the application of technology, one or more alternatives might be conceived which do away with paper altogether and thus offer the opportunity for information sharing with cost savings. But without the DEP beginning the process with its statement of need for change, and without there having been a dialogue of how to adapt the regulatory culture to the needs of small business, it is quite impossible to comment on alternatives that meet the DEP's goals—whatever those goals might be in this instance of change.

§ 78.56 Temporary Pits

By making 1,000 square feet the actuation footprint for a 2-to-1 slope on drill pits is to essentially mandate a much larger location footprint to accommodate the drill cuttings and fluid returns. This will both displease landowners and increase the cost of exploration, resulting in a feasibility tipping point. 2,500 square feet is a more reasonable threshold for a new pit slope obligation. In addition, the requirement should only apply to pits that would remain open more than 90 days, because most pits used for conventional operations are very short term and a new slope requirement is unnecessary for such uses.

§ 78.57 Control, storage and disposal of production fluids

A difficulty with the 2015 Proposal is its failure to clarify the applicability of this section. For example, in its comments to the 2013 Proposal, PGCC noted the situation of underground drips. Drips trap and separate fluids from natural gas. They are used to facilitate the safe operation of pipelines, and most drips are evacuated to larger holding tanks, some of which are aboveground and some of which are buried.

Although they are located underground, the drips are not regulated under 25 Pa. Code 245.432. The definition of underground storage tanks at 245.1 exempts drips under 245.432(ix) as "traps" or under 245.432(xii) as a device holding less than 110 gallons. Nevertheless, at section 78.57(g), the 2015 Proposal states that all underground storage tanks must comply with

the applicable corrosion control requirements in 245.432. It is unclear whether these corrosion control requirements are being imposed in the case of all underground devices that store brine or other fluid regardless of the applicability of the exemptions in existing regulations, or whether the term "applicable" means 78.57(g) only applies to those devices not exempted under the definitions at 245.1.

There has been no opportunity for PGCC to discuss this question with the DEP. Nevertheless, this significant uncertainty must be resolved before PGCC can meaningfully comment on the full impact.

Similarly, section 78.57(f) would require all new, refurbished, or replaced aboveground tanks to comply with the applicable corrosion control requirements in 25 Pa. Code 245.531 through 245.534. However, the definition of aboveground storage tanks at 245.1 specifically excludes "tanks which are used to store brines, crude oil, drilling or frac fluids and similar substances or materials and are directly related to the exploration, development or production of crude oil or natural gas regulated under the Oil and Gas Act (58 P. S. § § 601.101 - 601.605)." It is unclear whether the corrosion control requirements discussed at section 78.57(f) are intended to be imposed in the case of all aboveground tanks that are new, refurbished or replaced, or whether the term "applicable" means section 78.57(f) does not apply to aboveground tanks that store "brines, crude oil, drilling or frac fluids and similar substances," because tanks put to such storage purposes are exempted from the corrosion control requirements under the definition at 245.1.

If the intention of the DEP is to impose the corrosion control requirements upon all new, refurbished or replaced tanks that store "brines, crude oil, drilling or frac fluids, and similar substances," then PGCC comments that the DEP's proposal exceeds its statutory authority. Act 13 of 2012 specifically addresses corrosion control requirements at section 3218.4; therein, the legislature provides that tanks "must comply with the applicable corrosion control requirements in the storage tank regulations" (emphasis added). Clearly those regulations do not impose the corrosion control requirements upon aboveground tanks that store "brines, crude oil, drilling or frac fluids and similar substances" and, therefore, proposed section 78.57(f) must be rewritten to make clear that it is not imposing a corrosion control burden more stringent than the legislature contemplated in Act 13.

Again, there has been no opportunity to discuss this matter with the DEP. But as with the uncertainty surrounding drips, PGCC cannot meaningfully comment on the full impact of the proposed regulations. If the proposed regulation is intended to impose the corrosion control provisions contained at 245.531 through 245.534 on all aboveground tanks, there would be required very significant and expensive measures certainly never discussed by DEP or quantified financially in its Regulatory Analysis. These expensive measures include, for example, cathodic protection – a measure not currently used at virtually any conventional oil and gas facility in Pennsylvania.

Similarly, if the proposed regulation is intended to impose the protection measures on all aboveground tanks, it would be necessary to comment that the DEP failed to engage, in any way, in accommodations or considerations for small businesses. All of the conventional operators

comprising PGCC's membership are small businesses, as that term is employed in the RRA. Section 12.1 of the RRA requires DEP to conduct a regulatory flexibility analysis in which it must consider methods that would accomplish the objectives of the applicable statutes while minimizing adverse impacts on small businesses. Such analysis must include consideration of: 1) less stringent compliance or reporting requirements; 2) less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishment of performance standards to replace design or operational standards; and 5) the exemption of small businesses from all or any part of the requirements contained in the rule.

That none of the conventional oil and gas tanks in Pennsylvania conform to measures such as cathodic protection speaks loudly to the need for consideration of the alternatives contemplated under the RRA. However, if the DEP does intend that such protection measures apply to all new, replaced or refurbished aboveground tanks, the DEP has entirely failed to conduct the required alternatives analysis.

That the DEP may be interpreting section 78.57(f) to apply to all aboveground storage tanks is portended by new section 78.57(h), found for the first time in the 2015 Proposal. That section introduces new requirements including a monthly inspection obligation and a new reporting obligation for any deficiencies found. These new requirements appear to apply to all tanks inasmuch as the obligation attaches to "all tanks storing brine or other fluids produced during the operation of the well." This new inspection provision would effectively eliminate the current exemption from the tank program for tanks storing brine. Without legislative amendment or express direction, the Department cannot remove exemptions for existing tanks and has failed to provide any data, analysis or justification for this revision.

Several problems exist with the new requirements in this subsection of the Draft Final Rule:

1) Failure to Demonstrate Need: A leaking storage tank causes financial loss in the forms of lost product and cleanup liability. It behooves a prudent operator to inspect storage facilities regularly, and such inspections are the norm without the burden of yet another report to be prepared and submitted to the State.

To the extent one acknowledges the form is not necessary from the prudent operator, but is intended to enforce inspections by non-prudent operators, one must question the logic of the premise that a non-prudent operator will conduct the inspection that underpins the completion of the form.

The DEP has not provided any data that would support the spurious proposition that the completion of a form will prevent tank breaches. The DEP has access to all records of tank leakage in Pennsylvania and can analyze what leakage was preventable by inspection and submission of a form. However, the DEP has not taken this requisite step. The imposition of monthly inspections of over 100,000 tanks, and the subsequent generation of over a million new forms per year, should not be imposed without that requisite step having been fulfilled.

2) Failure of Statutory Authority: In 2012, Act 13 added a limited obligation related to tanks that cannot be interpreted to remove existing exemptions from the tank program or to authorize the Department to create new inspection obligations for tanks in Chapter 78. The legislature recently considered this precise question and adopted the measures it determined to be necessary for oil and gas operations. The Department has exceeded its legal authority in attempting to create a new inspection program for tanks used for the control, storage or disposal of production fluids.

3) Failure to Consider Costs: The DEP's 2013 Regulatory Analysis obviously did not address the costs of the new monthly inspection obligation introduced in the 2015 Proposal. And to the extent the proposed regulations are to be read as imposing corrosion control upon all new, refurbished or replaced aboveground tanks and all buried tanks regardless of size or use, the DEP's 2013 Regulatory Analysis did not address such costs.

It is not feasible for PGCC to completely or meaningfully comment on these new costs inasmuch as the applicability is uncertain as described above, and because the short period for comment does not afford time for a proper analysis. The DEP has not provided any cost estimate for the compliance with the new burdens contained in the 2015 Proposal; and to the extent the 2015 Proposal portends the applicability of the corrosion protection obligations discussed above, the DEP has not provided any estimate of those costs either.

There is not time for PGCC to conduct the thorough cost analysis it performed in response to the 2013 proposal. In 2013 and 2014, PGCC exploited the several months' comment time to convene a committee and to obtain data from several of its members. PGCC analyzed actual costs and other data involving 1,300 conventional wells. Following a process that involved both committee and Board review, PGCC convened its entire membership to review the accuracy of the assembled data and conclusions before submitting the same as a formal comment.

The comment period of 45 days to respond to the 2015 Proposal does not allow for a similar process. All that can be said is that operating costs will be significantly increased by virtue of the new proposed obligations. Given that the obligations necessarily involve over a million reports annually, it is safe to conclude that the cost will involve millions of dollars.

What is ascertainable, however, is that the DEP did not perform the financial analysis required by law. This is a fundamental procedural failure that prevents PGCC from commenting meaningfully and, most important, prevents an analysis of whether the proposed regulations meet the dictates of the RRA.

4) Failure to Account for Small Business: As noted, all of the conventional operators comprising PGCC's membership are small businesses; the RRA requires DEP to conduct a regulatory flexibility analysis.

The DEP has not conducted that analysis, and it is impossible for PGCC to meaningfully comment about potential alternatives inasmuch as DEP has failed to state why there is a need to introduce new obligations in the 2015 Proposal. Since we do not have a statement as to what

goal(s) the DEP is seeking to achieve via change, it is impossible to discuss alternatives which might achieve that goal or goals.

As with the DEP's other failures to engage in the requisite statement of need and alternatives analysis, the time for that discussion is now inescapably behind us. Section 78.57 has been distributed for "comment" without the benefit of the statement of the underlying rationale, financial analysis, or alternatives discussion—and hence groups like PGCC and its members can never properly comment on the very items on which the RRA is designed to seek input.

§ 78.57a Centralized Tank Storage

As an initial matter, PGCC recommends removing this section entirely from the rule for conventional operations because it is not well suited to the nature of those operations. In addition, DEP will not encourage the reuse and recycling of extraction wastewater through this proposal because of the excessively onerous provisions in the lengthy and complicated subsection. Because the Draft Final Rule would impose significantly more stringent requirements than those currently affecting centralized tank facilities associated with wastewater, it will likely act as a disincentive to reuse and recycling.

Because of their relatively benign character, tanks that are used to store brines, crude oil, drilling or frac fluids and similar substances directly related to the exploration, development or production of oil or gas are exempted from the Storage Tank Act. *See* 35 P.S. § 6021.102. Additionally, a facility employed for the disposal, storage or processing of residual waste that is generated by drilling or production of an oil or gas well, and is located on the well site, is exempted from the residual waste regulations in Chapter 287.

It is clear that the legislature and EQB exempted tanks that hold oil and gas extraction waste from more stringent statutory and regulatory requirements in the past because extraction waste is not as harmful as other types of industrial wastes. It is unclear why PADEP would propose regulations contrary to this legislative direction and create obligations that are in some instances more stringent than the regulations found in Chapters 245 and 287. As proposed, the ANFR provisions will likely be irrelevant to current recycling and reuse operations and lead to increased disposal rather than reuse. And the Draft Final Rule fails to enhance the flexibility of short-term operations, because it contains provisions that are as stringent, or more stringent, than the regulations applied to permanent industrial waste facilities.

Comments on Specific Subsections

- Subsections 78a.57a(d) through (e) contain bonding and insurance requirements that are not required for aboveground storage tanks in Chapter 245.
- The setback requirements in § 78a.57(f) are similar to those for municipal waste landfills, residual waste landfills, and waste tire facilities and are significantly more stringent that the setback regulations for aboveground and underground storage tank facilities in Chapter 245. Additionally, several of the setback requirements for municipal waste landfills, residual waste landfills, and waste tire

facilities contain written waiver provisions, but no such written waiver allowances are provided in the Draft Final Rule.

- The permeability standard in § 78a.57a(i)(11) is orders of magnitude more stringent than the permeability standard for aboveground storage tanks in Chapter 245. There is no indication as to how PADEP calculated the ANFR permeability requirement.
- The closure requirements in 78a.57a(n) mimic those for residual waste landfills, municipal waste landfill, and construction/demolition waste landfills. The ANFR's use of landfill closure requirements as a basis for centralized storage tank facility closure requirements presumes that the area is contaminated and will require monitoring and reporting.
- Some of the proposed subsections are similar to those storage tank requirements in Chapter 245 related to reportable releases. Spills are handled under existing law, and there is no need to impose such burdens on a new and temporary facility.

§ 78.59a (impoundment embankments) and § 78.59b (freshwater impoundments)

In the 2015 Proposal, the DEP significantly expands the requirements for freshwater impoundments beyond the requirements introduced in the 2013 Proposal. In response to the 2013 requirements, PGCC commented that the proposed regulations were out of touch with the nature of freshwater usage in the conventional context. Indeed, a new conventional well uses only a few hundred barrels of freshwater. That freshwater is drawn from either streams or impoundments. The "impoundments" are nothing more than small ponds, indistinguishable from what one knows as a small "farm pond." A single pond might serve a hundred or more new wells over the span of many years, and the frequency and impact of the ponds is so small that the types of items regulated in the 2013 Proposal were strangely ill-fitting. The 2015 Proposal compounds that problem in that the regulatory requirements are heightened. As with the 2013 Proposal, there is no statement of need for the new regulations, the requirements are out of touch with the actual nature of the ponds (like any pond, the impoundments are aesthetically pleasing and serve the needs of wildlife), and the regulatory cost is not analyzed by the DEP. PGCC specifically incorporates its previous comments inasmuch as they are even more applicable to the heightened requirements contained in the 2015 Proposal.

In addition, PGCC objects to the Department's attempt to expand the scope of Chapter 78 beyond wells and well sites. Oil and gas operators are subject to numerous environmental statutes, including the Pennsylvania Clean Streams Law, the Dam Safety Act, the Air Pollution and Control Act, the Solid Waste Management Act, as well as applicable federal laws and regulations. Chapter 32 of Act 13 applies to wells and well sites. Chapter 78 should be accordingly limited in scope to avoid the application of unnecessary and duplicative requirements on this particular industry when other industries are not similarly regulated. Accordingly, freshwater impoundments used for oil and gas operations are sufficiently regulated under existing law and should not be subject to additional regulation through the oil and gas program. Absent compelling justification, which the Department has not provided, these sections must be deleted from the final rule.

§ 78.60 - § 78.63 Discharge and Disposal

The Department proposes to use the term "regulated substances" throughout these sections, which is overly broad and lacking in clarity necessary for regulatory guidance to the agency and the regulated community. "Regulated substances" as defined would include sediment or other natural constituents of tophole water or soil, which would effectively prohibit the discharge of tophole water and the disposal of uncontaminated drill cuttings, entirely defeating the purposes of subsections 78.60 and 78.61. The term should be removed from 78.60(b)(1), 78.61(a)(2), 78.61(b)(2), and elsewhere in these sections to avoid absurd results and unintended consequences.

The Department has also added a new prohibition to the discharge of tophole water or disposal of drill cuttings "within the floodplain," which lacks both clarity and justification. Floodplains may extend thousands of feet beyond water courses in flat areas of the Commonwealth, which could improperly prohibit typical practices of conventional oil and gas operations unnecessarily. Without a Comment/Response Document explaining why the Department is suggesting this revision, however, PGCC cannot provide a fully informed comment on the proposal.

The Department has also added new notice requirements. DEP is an agency tasked only with the enforcement of environmental laws and regulations, and should not require or dictate landowner/operator communications beyond any provisions expressly provided in Act 13 or other enabling statutes.

The overall import of both the 2013 Proposal and the new burdens in the 2015 Proposal is to treat these very small quantity materials as regulated substances without supporting data, statement of need, cost analysis or examination of alternatives. Similar problems were discussed by PGCC in its previous comments and those comments are incorporated herein inasmuch as they are even more applicable now in the face of the heightened burdens introduced in 2015.

§ 78.65 Site Restoration

The 2015 version of the Site Restoration requirements include two major changes: the obligation to return well sites to **original** contours, and the obligation to comply with 25 Pa. Code section 102.8(g) (relating to stormwater analysis and construction).

Under the 2015 Propoal, the obligation to return to "original" contours pertains to sites of plugged wells and the portions of new well sites not occupied by production facilities. This is a marked departure from the 2013 version, which called for the operator to simply "restore the well site...." The addition of the word "original" is, obviously, purposeful; the consequences of that change are many.

The return to "original" contour presupposes that one has recorded the original contour. Thus, for new well construction, the 2015 version would impose the burden of detailed mapping and contour recording. For older wells that are being plugged, the 2015 version asks the impossible—or at least sets the stage for dispute. Many operating conventional wells in

Pennsylvania are over 100 years of age. Contour records have not been previously kept—this is, after all, a new requirement in Pennsylvania oil and gas development—and who is remaining to describe the "original" contour of a well site that has outlived several working generations? When the DEP inspector says to change a slope from this to that, what records will be available to support or contest that position?

The return to "original" contour also collides with the natural conditions found in the field. Pennsylvania is hilly. The contour of a hill is changed precisely to gain flat ground upon which to operate, and when drilling is completed on a well site in hilly Pennsylvania, there is flat ground and there is modified ground all around same—meaning uphill and downhill slope, that is more exaggerated than the original contour. But the 2015 regulation would require the "portions of the well site not occupied by production facilities" to be "returned to approximate original conditions." This would mean undoing the exaggerated uphill and downhill slopes—which would result in the destruction of the well site. The concept is, to put it bluntly, impractical.

Beyond impracticality, the addition of the "original" contour obligation suffers from several familiar regulatory problems:

1) Failure to State Purpose or Need: The DEP has failed to state a need for the new standard of "original" contours. The legislature's wisdom in requiring a statement of need is particularly apt in this situation. Literally hundreds of thousands of conventional wells have been developed in Pennsylvania, and many of those are now plugged. The wells have been operated and plugged without the standard of returning to "original" contour. What is the purpose for changing that standard?

With that long history and the lack of any identified purpose, the 2015 requirement of "original" contour comes as a complete surprise to industry. There has been no discussion by the DEP with industry as to the source of this new requirement, and the 2015 changes were issued without the benefit of any statement of need.

Moreover, the new requirement begs the question: what condition is not being satisfactorily addressed by other regulatory provisions already in place? Well sites are developed and reclaimed in accordance with erosion and sedimentation control plans and other protective measures. What resource within the jurisdiction of the DEP is not being adequately protected such that an additional burden of "original" contours must be imposed?

2) Failure to State Authority: The underlying statute provides as follows: "Each oil or gas well owner or operator shall restore the land surface within the area disturbed in siting, drilling, completing and producing the well." Absent is the obligation to return to "original" contour[7].

In addition to exceeding the authority of the statute, the requirement is in conflict with common law. It is settled law in Pennsylvania that the owner of the subsurface rights enjoys the

[7] The only mention of original contour in the underlying statute is found at Section 3216. This section is unique to the circumstance of requesting an extension for the restoration period.

right to utilize and change the shape of the surface. *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 295, 25 A. 597, 598 (1893). *See also*, *Babcock Lumber Co. v. Faust*, 156 Pa. Super. 19, 28, 39 A.2d 298, 303 (1944). In *Chartiers*, the Pennsylvania Supreme Court stated:

As against the owner of the surface, [the mineral purchaser has] the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and to remove the product thereof. *Chartiers*, 25 A. at 598. *See also, Belden & Blake Corp. v. Commonwealth, Department of Conservation and Natural Resources,* 969 A.2d 528, 532 (Pa. 2009) (citing *Chartiers* and characterizing the same at n. 6 as "seminal"); and *Dewey v. Great Lakes Coal Company*, 236 Pa. 498, 84 A. 913 (1912) (citing *Chartiers*). The OGM interest is the dominant estate. *Babcock*, 39 A.2d at 303.

In hundreds of cases, the various courts of this Commonwealth have recognized the right of the subsurface owner to permanently reshape the surface not only for well sites but for mine shafts, tailings piles, removal of the right of support, ponds, and countless other uses. The ability to make such changes is part of the bundle of property rights enjoyed by the subsurface owner, and the manifestation of that right is observed in literally tens of thousands of well sites, both active and plugged, across Pennsylvania.

The 2015 regulation would be a remarkable usurpation of that property right, and it would be a usurpation certainly beyond that which was contemplated in the express language of the statute.

The second new obligation in the 2015 version of the Site Restoration regulation is the duty to comply with 25 Pa. Code section 102.8(g) (relating to stormwater analysis and construction). Among other things, section 102.8 requires analysis by a certified professional as well as the installation of post-construction stormwater structures. Historically, oil and gas activities have been exempt from this complicated stormwater requirement. Section 102.8(n) creates an alternative approach for small earth disturbance activities such as conventional oil and gas operations.

The 2015 version elevates the burden for both plugging activities and for the development of all new conventional well sites. The post-plugging requirement is found at section 78.65(a)(2). The requirement as to new conventional well sites is found in the new requirements regarding the restoration plan. While that planning component is currently carried out in the context of the E&S plan, the new 2015 version requires a much more complex plan that demonstrates a return to preconstruction runoff rate, volume and quantity in accordance with section 102.8(g). Moreover, areas not restored, presumably such as roads and well site operation areas, are separately addressed and are required to comply with all provisions of chapter 102—which provisions, of course, include section 102.8(g). In fact, the 2015 version specifically renders the exception under section 102.8(n) inapplicable.

The burden under this new regulatory provision is severe. In the limited time available to it, PGCC obtained an estimate from a professional firm[8] providing the services necessary to comply with section 102.8(g). The estimate of the cost to comply ranges from $22,000 to $84,000 per new conventional well. PGCC's 2014 economic study found that the cost of a new conventional well ranges from $110,000 to $275,000. For the wells at the low end of that range, the imposition of the stormwater cost of $22,000 to $84,000 per well represents new costs of 20% to 80%! That same 2014 PGCC study contains tables showing average rates of return for new conventional wells. It is obvious that cost increases of even 10% to 15% result in new wells being financially infeasible.

In addition to financial infeasibility, the stormwater obligation suffers from the same familiar regulatory problems as noted above:

1) Failure to State Purpose or Need: The DEP has failed to state a purpose for the new stormwater requirement. Like the "original" contour requirement, the stormwater obligation comes as a complete surprise to industry. There has been no discussion by the DEP with industry as to the source of this new requirement. The 2015 changes were issued without the benefit of any statement of need.

The new requirement also begs the question: what aspect of the current practice was not working? The current practice recognizes the small footprint of activities like conventional oil and gas operations and takes into account the return to vegetative state routinely achieved in such operations. In fact, compliance with the 2015 version will require post-construction stormwater structures that will enlarge the overall footprint of conventional well pads, potentially create environmental destruction, create long-term operation and maintenance obligations for operators and landowners, require covenants to be placed on the surface property, and reduce land available for surface owner uses. These are demonstrably more intrusive measures than practices now in place and long established.

Entirely missing from, but necessary to comply with law, is the data underlying this draconian and expensive change. Among other things, the Regulatory Review Act requires the DEP to provide: "A description of any data upon which a regulation is based with a detailed explanation of how the data was obtained and why the data is acceptable data. An agency advocating that any data is acceptable data shall have the burden of proving that the data is acceptable."

Inasmuch as the new regulation involves data driven components, such as hydrologic computations, calculation of runoff changes, and the like, it is reasonable to expect that the DEP would provide data showing how stormwater is not satisfactorily addressed at conventional well sites that are in compliance with existing regulations. In other words, if existing regulations are not working (meaning that current well sites in compliance with those regulations are causing stormwater problems) the ability to quantify stormwater means that the DEP can provide data

[8] The proposed regulation will require the services of a professional consultant. The legislative findings of the RRA warn of the damaging effects upon small business of a host of regulatory impositions, specifically including the dangers of: "...consulting costs upon small businesses with limited resources."

supporting its need for change. Indeed, under the Regulatory Review Act, the DEP carries the burden to prove its data is acceptable.

2) Failure to State Authority: The DEP has failed to cite any statutory authority for this significant change. Neither Clean Streams Law nor Act 13 requires PCSM BMPS for such small earth disturbances, and the excessive costs would be contrary to Act 13's express purpose to optimize the development of oil and gas resources.

Additional procedural failures plague both of the 2015 changes to the Site Restoration provision (return to "original" contours and stormwater analysis). These mutual problems include:

3) Failure to consider costs: The DEP has not provided any cost estimate for compliance with either of the new provisions. Because the DEP has been silent as to both purpose and costs for the implementation, it is impossible to meaningfully comment on the necessary cost benefit analysis.

4) Failure to Account for Small Business: The DEP has not conducted a regulatory flexibility analysis for either of the new provisions, and it is impossible for PGCC to meaningfully comment about potential alternatives inasmuch as DEP has failed to state why there is a need to introduce new obligations in the 2015 Proposal. Since we do not have a statement as to what goal(s) the DEP is seeking to achieve via change, it is impossible to discuss alternatives which might achieve that goal or goals.

As with the DEP's other failures to engage in the requisite statement of need and alternatives analysis, the time for that discussion is now inescapably behind us. The Site Restoration provision has been distributed for "comment" without the benefit of the statement of the underlying rationale, financial analysis, or alternatives discussion – and, hence, groups like PGCC and its members can never properly comment on the very items the RRA is designed to seek input on.

§ 78.66 Spills and Releases

In September 2013, PADEP finalized a policy addressing spills on oil and gas well sites, including access roads. That document created a policy unique to the oil and gas industry, but could not impose new binding obligations beyond existing statutes and regulations. The policy includes references to *mandatory* provisions outside the policy and provides *recommendations* for reporting and remediation steps that would help operators "clearly protect themselves" from potential liability. See PADEP's Comment and Response Document, September 2013, pp. 6, 9, 10, and 11.[9] The stated purpose of the policy is to increase uniformity of handling spills on oil and gas well sites.

[9] Addressing spills and releases at oil and gas well sites or access roads (800-5000-001) Final technical guidance document; Comment and response document. Available at http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-96768/Final%20Spill%20Policy%20Comment%20%20Response%20%282013-09-18%29.pdf.

Relevant and applicable law, outside the policy, includes the Pennsylvania Clean Streams Law, 25 Pa. Code Chapter 91.33, 25 Pa. Code 78.66, and Pennsylvania's Land Recycling and Reclamation Act, Act 2. Pennsylvania Clean Streams Law, Act 2, and the reporting obligations under Section 91.33 fully provide for the reporting and cleanup of typical accidental spills that occur on conventional oil and gas well sites, which may include brine or oil spills. Under the existing provisions of section 78.66, conventional oil and gas operators are further required to report releases of brine, depending on the quantity spilled and the total dissolved solids in the brine. This provision addresses what may be unique to oil and gas operations, namely brine spills.

DEP has failed to state any need to revise section 78.66, and PGCC is unaware of any such need. PGCC strongly recommends that no revisions be made to this section of the rule for conventional operations. Neither brine nor oil presents a hazardous situation or significant threat to the environment or public health or safety in the course of typical conventional oil and gas operations that would justify revision. If conventional oil and gas operations present remediation challenges under existing law, PADEP should work to address those concerns with its existing authority and its vast arsenal of enforcement tools. PGCC is unaware of any spills on conventional oil and gas operations that cannot be addressed under current law.

In fact, the situation of oil spills presents an excellent opportunity to develop small business alternatives as contemplated under the RRA. Spilled oil can and has been successfully remediated by measures far less intrusive and costly than the inflexible requirements spelled out in Act 2. For example, oil is lighter than water; a highly successful non-intrusive spill methodology is to contain the spill area by earthen berm, introduce freshwater, and "float" the oil so that it can be collected by vacuum truck. Another methodology discussed in PGCC's prior comments is bioremediation, a method specifically contemplated by other regulatory agencies. DEP has failed entirely to discuss any such alternatives.

Moreover, the Draft Final section 78.66 would increase the reporting and cleanup obligations beyond the 2013 Proposal through the elimination of the alternate method for spill cleanups that was developed under the 2013 Spill Policy. The Draft Final Rule would not only require full compliance with Act 2 for all spills, but would require operators to demonstrate Act 2 attainment through specific procedures with restrictive deadlines that are not found in Act 2. These additional requirements are virtually identical to the procedural requirements under the Storage Tank and Spill Prevention Act ("Tank Act"), from which oil and gas operations are generally exempt. By imposing Tank Act remediation procedures on spills of brines and oil, the proposed § 78.66 effectively eliminates the legislature's distinction between tanks used for oil and gas operations and regulated tanks storing gasoline or hazardous substances.

The Draft Final Rule would significantly broaden reporting obligations and require greater documentation, increased sampling, and more stringent restoration standards than are necessary or appropriate for conventional operations. These additional requirements would substantially increase the time and costs of addressing small spills on well sites, with little meaningful environmental benefit. Existing law provides standards for cleanups and enforcement authority where needed to protect public health, safety and the environment. Brine

and oil accidental spills, which have occurred in the past and will occur in the future, can and should be addressed under existing law and policy.

All of the foregoing changes are proposed without the DEP having engaged in the proper procedural steps required under the RRA. As noted, the DEP failed to engage in any alternatives analysis. Similarly, the RRA requires a statement of needs, a consideration of the effectiveness of the current regulations, and what is, in effect, a cost-benefit analysis of the proposed regulation relative to the harm being guarded against. These procedural details are discussed earlier and not repeated here. However, it is instructive to discuss the type of data that a proper cost-benefit analysis might have yielded.

The brine water produced in Pennsylvania's conventional operations is trapped from ancient oceans. It is similar to brine manufactured by PennDOT for spreading on roads in winter. It weighs about 9 pounds per gallon. The proposed regulations require reporting for 5 gallons or more and would require Act 2 cleanup for 42 gallons or more.

Under EPA guidelines, there are over 700 hazardous materials that have a higher reportable quantity than Pennsylvania's produced brine. For example, Ammonia, Hydrogen Sulfide, and Phosophine are all toxic and may be fatal if inhaled. In fact, the latter two materials require self-contained breathing apparatus for cleanup. The reportable spill quantity for all three is 100 pounds.

A data-driven discussion would allow the relative dangers of these materials and brine to be quantified. A data-driven discussion would also account for the amount of sodium and calcium chloride contained in brine water. Some brine is nearly freshwater. For the majority of the conventional industry's existence, it was the practice to drain all brine water upon the ground, and since 1859 billions of gallons of brine were so deposited. Where that water contained high amounts of sodium and calcium chloride, there were observable impacts including vegetation kills. That was not the case where the water was virtually fresh and, in all circumstances, the danger of brine is qualitatively different than materials such as Ammonia, Hydrogen Sulfide and Phosophine.

But by preparing regulations in a process that is not data driven, the DEP has arrived at requirements that involve extraordinary new cost (Act 2 cleanup mandates), without any measurement of the benefit yielded by that extraordinary cost. Similarly, the DEP has arrived at the mandate for such extraordinary costs without the necessary analysis of alternatives for small business or the consideration of whether the extraordinary cost is in balance with the statutory mandate of "optimal" development of the Commonwealth's oil and gas resources. These are fatal oversights that require the current proposal to be abandoned in favor of compliance with the rigor expected of agencies adopting new burdensome and highly expensive regulations.

§ 78.67 Borrow Pits

The Department has added some language to comport with Section 3273.1 of Act 13, which provides an exemption from obligations under the Noncoal Surface Mining Conservation and Reclamation Act or regulations under that statute, where a borrow area is used solely for the

purpose of oil and gas well development. The Department has added, however, a requirement that areas subject to this exemption comply with standards in Chapter 77, adopted pursuant to the Noncoal SMCRA. This is contrary to the exemption provided in Act 13, which cannot be altered by the Department or the EQB. Without legislative amendment, this expansion is beyond the scope of legal authority.

In addition, in the Draft Final Rule, DEP has added the requirement that such areas be "included in any permit required under Chapter 102." The meaning and purpose of this statement is unclear. The exemption in Act 13 states that the obligations for borrow areas are satisfied when the well is permitted and the owner or operator of the well meets its bonding obligations. There is no reference to additional permits under Chapter 102 needed to satisfy the exemption. If the Department means that borrow pits are not exempt from the Pennsylvania Clean Streams Law or that permits under Chapter 102 may be needed for certain borrow areas, the language must be revised to state its intent more clearly.

§ 78.121 Annual reporting

The 2015 Proposal adds to the annual production report the information of where the waste was managed. PGCC members retain and can provide such information when necessary. However, the complication of adding that information to the report is proposed by the DEP in association with two dozen other new forms and electronic reporting. The cumulative impact of the new reporting requirements is in direct conflict with the intent expressed by the legislature in the RRA. The RRA requires the regulatory body to provide "an explanation of measures which have been taken to minimize...[the] recordkeeping or other paperwork, including copies of forms or reports which will be required for implementation." No such explanation or measures have been proffered by the DEP.

As to small businesses, the regulatory agency is directed to take the additional step of conducting a regulatory flexibility analysis wherein it specifically considers "the consolidation or simplification of compliance or reporting requirements for small businesses." Again, no such analysis was performed by the DEP as to the new requirement. Without such analyses, the requirement should be stricken.

Electronic Reporting and Forms

PGCC noted in its prior comments that electronic reporting can be burdensome and unnecessary for small businesses in this industry. The Department not only ignored the request for relief and alternatives, but expanded the number of new forms and electronic reporting obligations in the Draft Final Rule. Under the Regulatory Review Act, the Department was to provide ALL forms to the EQB and IRRC with submission of the proposed rulemaking in 2013. The Department has failed to comply with the express requirements of the statute to submit such forms, has failed to accommodate small businesses with reasonable alternatives, and has expanded the number of NEW forms to more than two dozen. This rule cannot be finalized until all forms are provided for review and comment.

And, as noted above, the legislature has expressed the intention that the regulatory process be "reformed" to enhance efficiency for all businesses, with special considerations for small businesses. In launching this plethora of new forms, the DEP has failed to follow the procedural steps required to test the necessity of the forms' new burdens. The sheer number of forms points to the DEP's failure to achieve the substantive reform desired by the legislature.

The new reporting requirements should be stricken from the proposed rules because they have not been properly explained by the DEP and because no alternatives have been examined for the small businesses that will be most adversely affected by the substantial new burdens.

Outstanding Issues

The Department's Draft Final Rule does not appear to address or incorporate PGCC's prior comments on the following topics and issues. Without a Comment/Response Document, PGCC cannot determine the Department's rationale for failing to address these issues. The following summary is provided to renew and restate PGCC's prior concerns that are equally applicable to the Draft Final Rule. PGCC also incorporates by reference its March 2014 comments to the 2013 Proposal.

§ 78.1. Definitions.

***Act 2*—The Land Recycling and Environmental Remediation Standards Act (35 P.S. §§ 6026.101□6026.908).**

PGCC Comment:

PGCC objects to the Department's efforts by policy and/or regulation to compel oil and gas operators to utilize what is a voluntary process for all other entities. Act 2 procedures should not be required for spills at oil and gas well sites, but should continue to be available for operators who choose to use them to obtain relief from liability.

***Approximate original conditions*—Reclamation of the land affected to preconstruction contours so that it closely resembles the general surface configuration of the land prior to construction activities and blends into and complements the drainage pattern of the surrounding terrain, and can support the land uses that existed prior to THE APPLICABLE oil and gas [~~activities~~] OPERATIONS to the extent practicable.**

PGCC Comment:

PGCC objects to any requirement to return land to "approximate original conditions" unless such a commitment has been made in the approved site restoration plans or private agreements with landowners. No such obligation is created under any relevant statute and is without environmental justification.

***Freshwater impoundment*—A facility that is:**

(i) Not regulated under § 105.3 (relating to scope).

(ii) A natural topographic depression, manmade excavation or diked area formed primarily of earthen materials although lined with synthetic materials.

(iii) Designed to hold fluids, including surface water, groundwater, and other Department approved sources.

(iv) Constructed for the purpose of servicing multiple well sites.

PGCC Comment:

New regulations targeting the use of freshwater impoundments by the oil and gas industry are neither necessary nor appropriate. The definition and the related subsections should be stricken.

***Oil and gas operations*—The term includes the following:**

(i) [~~Well location assessment, seismic~~] SEISMIC operations, well site preparation, construction, drilling, hydraulic fracturing, completion, production, operation, alteration, plugging and site restoration associated with an oil or gas well.

(ii) Water withdrawals, residual waste processing, water and other fluid management and storage INCLUDING CENTRALIZED TANK STORAGE, used exclusively for the development of oil and gas wells.

(iii) Construction, installation, use, maintenance and repair of:

(A) Oil and gas WELL DEVELOPMENT, GATHERING AND TRANSMISSION pipelines.

(B) Natural gas compressor stations.

(C) Natural gas processing plants or facilities performing equivalent functions.

(iv) Construction, installation, use, maintenance and repair of all equipment directly associated with activities in subparagraphs (i)□(iii) to the extent that the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant.

(v) Earth disturbance associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities.

PGCC Comment:

PGCC objects to the effort to expand the scope of Chapter 78 Subchapter C to activities and operations other than the operation and plugging of oil and gas wells. This definition should be stricken and the scope of Section 78.2 should be retained.

***PPC plan*—*Preparedness, Prevention and Contingency plan*□A written preparedness, prevention and contingency plan.**

PGCC Comment:

PGCC is concerned about the unnecessary burden created for small operators who conduct operations at multiple well sites in close proximity where the PPC plan would be the same for all such operations.

***Regulated substance*—Any substance defined as a regulated substance in section 103 of Act 2 (35 P.S. § 6026.103).**

PGCC Comment:

The term "regulated substances" as defined by Act 2 includes thousands of substances, some of which are naturally occurring and generally benign, and most of which have no threshold concentration for regulation. The use of this term in this regulation would create an unreasonable and unattainable standard in several sections of Chapter 78, including effectively prohibiting the disposal of drill cuttings under Section 78.61.

PGCC Comment:

PGCC recommends the addition of a defined term to allow for exemptions that would be appropriate for small businesses to comply with the 2012 amendments to the Regulatory Review Act and DEP's obligation to consider exemptions for small businesses.

***Small Business* – defined in accordance with the size standards described by the United States Small Business Administration's Small Business regulations under 13 C.F.R. Ch 1. Part 121 or its successor regulation.**

§78.15 (g) Permit Applications

DEP's proposed subsection (g) does not implement the requirement of Act 13, Section 3215(e) because it does not provide criteria to allow the DEP to balance the three interests stated in that section of the Act. Act 13 requires EQB to promulgate regulations to create criteria for the conditioning of well permits for the protection of public resources.

PGCC Suggested Regulatory Language and Revisions:

(g) The presence of well sites and the conduct of oil and gas operations on or in the vicinity of Public Resources, as listed in Section 3215(c), are not in and of themselves an impact or harm requiring or authorizing the imposition of any well permit conditions under Section 3215(e). Because Section 3215(e) expressly requires the Department to ensure optimal development of oil and gas resources and directs the Department to respect the property interests of oil and gas owners, mere inconvenience to users of Public Resources will not be the type of harm that may be mitigated by a condition placed on a well permit. When considering conditions to be imposed on well permits, necessary for the protection against probable harm to Public Resources, the Department will take the following steps.

1. Describe the Public Resource from the list in Section 3215(c) being considered for protection, as provided by the applicant in response to the question on the permit application and submission of the "Coordination of Well Location with Public Resources."

Standard of Harm:

2. Determine if there is clear and convincing evidence to demonstrate that:

a. there will be permanent or long term (10 or more years) physical harm to the Public Resource from operations authorized by the permit,

b. the harm is clearly in excess of the reasonable use standard and

c. the harm is more likely than not.

If the harmful impact meets the above criteria, proceed to steps 3 through 5.

Standard of protection:

3. Consider the minimum necessary measures to mitigate harm, in consultation with the applicant and after consideration of pre-existing agreements between the parties.

a. Propose the minimum necessary mitigation as a permit condition only if existing mitigations will not address the circumstances.

b. Ensure the optimal development of the resource and protection of oil and gas property rights by conducting a thorough analysis of the costs of compliance with any recommended permit condition and the necessity to avoid waste of oil and gas resources through inappropriate locational constraints.

4. The issuance of a permit containing conditions imposed by the Department pursuant to this subsection shall be an action that is appealable to the Environmental Hearing Board. The Department shall have the burden of proving that the conditions were necessary to protect against a probable harmful impact of the public resource and that without the permit condition, the activity would not be a reasonable use of the surface.

* * *

§ 78.58. [Existing pits used for the control, storage and disposal of production fluids.] Onsite Processing.

PGCC Comment:

PGCC objects to new requirements that are not justified by a compelling environmental need and impose unnecessary additional costs on oil and gas operations.

[(d)] (f) Processing residual waste generated by the development, drilling, stimulation,

alteration, operation or plugging of oil or gas wells other than as provided for in subsections (a) and (b) shall comply with the Solid Waste Management Act (35 P.S. §§ 6018.101□6018.1003).

PGCC Comment:

Subsection (f) above improperly alters a legislatively created exemption from Solid Waste Management requirements for activities conducted on bonded and permitted well sites. The subsection must be stricken.

§ 78.61. Disposal of drill cuttings.

PGCC Comment:

The notice required by this section is unnecessary. The proposed revisions to Chapter 78 create an excessive burden on operators by imposing extensive notification requirements.

For example, the following sections include notification requirements: §§ 78.15(f), (b); § 78.52a(b); §§ 78.56(a), (e); § 78.57a(c); § 78.58(d), (g); § 78.59b(b); § 78.61(f); § 78.62(a); § 78.63(a); §§ 78.66(b), (c); § 78.70(k); § 78.70a(q); and § 78.73(c).

The notice obligations must be simplified and consolidated for the conventional industry and small business owners.

(f) The owner or operator shall notify the Department at least 3 business days before disposing of drill cuttings under this section. This notice shall be submitted electronically to the Department through its web site and include the date the cuttings will be disposed. If the date of disposal is extended, the operator shall re-notify the Department of the date of disposal, which does not need to be 3 business days in advance. THE OWNER OR OPERATOR SHALL ALSO PROVIDE NOTICE OF DISPOSAL TO THE SURFACE LANDOWNER, INCLUDING THE LOCATION OF THE DISPOSED DRILL CUTTINGS, WITHIN TEN BUSINESS DAYS OF COMPLETION OF DISPOSAL.

§ 78.123. Logs and additional data.

PGCC Comment:

The proposed revision to subsection (d) below appears to eliminate a long-standing and necessary protection of logs submitted under subsection (a) without justification. The three-year protection should be restated as provided below.

(a) If requested by the Department within 90 calendar days after the completion **[of drilling]** or recompletion **[of a well]** **of drilling,** the well operator shall submit to the Department a copy of the electrical, radioactive or other standard industry logs run on the well. **All such logs will be kept confidential by the Department for a minimum of three years.**