



GROUP AGAINST SMOG & POLLUTION

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March 14, 2014

Via Email and U.S. Mail

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

RegComments@pa.gov

Re: Proposed Revisions to 25 Pa. Code Chapters 78

Dear Sir or Madam:

Group Against Smog and Pollution (“GASP”) offers these comments to a proposed rulemaking (the “Proposed Rulemaking”) that would substantially revise 25 Pa. Code Chapter 78. Notice of the Proposed Rulemaking was published in the Pennsylvania Bulletin on December 14, 2013,¹ and the Environmental Quality Board (the “EQB”) is accepting comments on them until March 14, 2014.

GASP is a nonprofit organization that works to promote a healthy, sustainable environment with a particular focus on improving air quality in southwestern Pennsylvania and surrounding regions.

Revisions to 25 Pa. Code § 78.15(c)

The Proposed Rulemaking would add 25 Pa. Code § 78.15(c), which requires applicants for drilling permits to identify parent and subsidiary entities in their initial permit applications following the effective date of the rulemaking, and also identify changes to their “business relationships” in subsequent permit applications. The EQB should clarify exactly which “business relationships” must be disclosed. Further, applicants should be required to identify joint ventures and sister entities (meaning, those having the same parent entity as the applicant) in their initial permit applications. The Department of Environmental Protection (the “Department”) must consider joint ventures and sister entities when determining whether nearby facilities are under common control and thus potentially subject to aggregation under the Title V,

¹ See 43 PA. BULL. 7377 (Dec. 14, 2013).

New Source Review and/or Prevention of Significant Deterioration rules established under the federal Clean Air Act and Pennsylvania's Air Pollution Control Act.²

Revisions to 25 Pa. Code § 78.15(f)

The Proposed Rulemaking would add 25 Pa. Code § 78.15(f) in an attempt to implement 58 Pa. C.S. § 3215(c)'s broad mandate that the Department "shall consider the impact of [a] proposed well on public resources" during its review of an application for a permit to drill an oil or gas well. Notably, by its own terms, Section 3215(c)'s mandate regarding public resources is not limited to public resources within a set distance from the proposed well. In contrast, the revised Section 78.15(f) would impose a duty to identify public resources on only those applicants who seek permits to drill wells within 200 feet of such resources;⁴ such applicants would be required to notify the agencies responsible for managing nearby public resources of their permit applications, so that the agencies could comment on, and seek permit conditions which would minimize or eliminate, any anticipated negative impacts the wells might have on nearby public resources.⁵ Section 78.15(f) does not, however, require any disclosure to the Department regarding public resources that are more than 200 feet from a proposed well.

Section 78.15(f) is thus inconsistent with 58 Pa. C.S. § 3215(c). The EQB is not empowered to write environmental protections that the General Assembly included in the Oil and Gas Act out of that Act.⁶ Section 78.15(f) should be revised so that the Department is explicitly authorized to consider any impact a proposed well might have on any public resource as Section 3215(c) plainly requires, and, in cases where the Department finds that the proposed well might impact a public resource in a significant and adverse manner, require that it give the agency responsible for managing the public resource an opportunity to propose permit conditions that would avoid or minimize the impact.

Further, even if the EQB could unilaterally limit the mandate imposed on the Department by 58 Pa. C.S. § 3215(c) to only those permit applications concerning proposed wells that were within a specified distance of public resources, Section 78.15(f) fails as a means to protect such resources. The 200-foot distance incorporated into 78.15(f) is obviously insufficient to protect public resources against negative impacts that might result from unconventional gas wells. By way of comparison, the Oil and Gas Act prohibits an unconventional gas well that is within 500 feet of an existing building unless the well operator has obtained a waiver from the building's

² See PENNSYLVANIA DEPT. OF ENVTL. PROT., BUREAU OF AIR QUALITY, GUIDANCE FOR PERFORMING SINGLE STATIONARY SOURCE DETERMINATIONS FOR OIL AND GAS INDUSTRIES, Doc. No. 270-0810-006 (Oct. 6, 2012), at 7-8, available at http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-90745/Final%20Guidance%20for%20Performing%20Single%20Stationary%20Source%20Determinations%20for%20OG%20Industries_Technical%20Guidance10-6-12.pdf.

⁴ See 78.15(f)(i) – (v).

⁵ See 78.15(f)(2).

⁶ See *Consulting Eng'rs Council v. State Architects Licensure Bd.*, 560 A.2d 204, 206 (Pa. 1989) (stating "[a] regulation cannot be upheld if it is contrary to the statute under which it was promulgated").

owner,⁷ presumably to ensure that the building's owner has been given an opportunity to evaluate (and protect the building against) the potential negative impacts from the proposed well. Public resources deserve at least as much protection from potential adverse impacts caused by unconventional wells as do buildings. If the EQB can validly limit the mandate that Section 3215(c) imposes on the Department according to the distance between a proposed well and a public resource, that distance should be at least 500 feet.

It is also worth noting that neither Act 13 of 2012 nor Chapter 78 define what a "public resource" is. Leaving this key term undefined creates significant uncertainty as well as an obvious invitation to litigation. The Proposed Rulemaking should include a definition of "public resources" so that the Department, the public, and operators know which resources may be protected under Sections 3215(c) and 78.15(f). Further, GASP suggests that the Department, in connection with stakeholders, develop guidance regarding how it will consider impacts to public resources in connection with permit applications, and what type of mitigation it will require when it finds that drilling is likely to impact public resources negatively.

Revisions to 25 Pa. Code § 78.51(d)

The Proposed Rulemaking would revise Section 78.51(d) to provide that a restored or replaced water supply that "exceeded" Pennsylvania Safe Drinking Water Act standards even before the supply was impacted by gas drilling would be adequate if it is "comparable" in quality to the pre-drilling water supply. In this context, the term "exceeded" is unclear: it could mean either that the water was better in quality (presumably, meaning that it contained fewer mineral salts and/or other contaminants) than water meeting the minimums established by the Safe Drinking Water Act, or it could mean that the levels of contaminants in that water are greater than those specified by that Act.⁸ An earlier proposal to revise Section 78.51(d), which used the term "did not meet" in place of "exceeded," was significantly less ambiguous.

Addition of 25 Pa. Code § 78.52a

The Proposed Rulemaking would add a new Section 78.52a, pertaining to the identification of abandoned and orphaned wells. Section 78.52a(b)(3) would require a well operator to identify abandoned and orphaned wells within 1000 feet of any vertical and horizontal well bores that the operator intends to drill, and requires an operator to send questionnaires (using forms approved by the Department) to nearby landowners seeking information about abandoned and orphaned wells in those 1000 foot zones.⁹ An operator would also be required to submit a plat showing the location of any abandoned or orphaned well that

⁷ See 58 Pa. C.S. § 3215(a).

⁸ THE NEW OXFORD AMERICAN DICTIONARY, at 591 (2001) (defining "exceed" to mean both "to go beyond what is allowed or stipulated" and "to be better than; surpass").

⁹ See 78.52a(a) and (b).

the operator's investigation reveals to the Department before the well in question is hydraulically fractured.¹⁰

Abandoned and orphaned wells can cause air, water, and soil contamination.¹¹ The requirements that Section 78.52a would impose are thus a good first step towards minimizing the pollution and contamination risks of drilling. But only a first step. Operators should also be required to take steps to prevent or minimize potential contamination resulting from the abandoned and orphaned wells that they identify (by plugging wells that penetrate the confining layer, for example). Such remediation work would help protect well operators, by making them less likely to incur liability for pollution or contamination caused by their drilling activities, and also benefit the public generally, by reducing sources of potential water pollution.

Revisions to 25 Pa. Code § 78.56

The Proposed Rulemaking includes a number of revisions to 25 Pa. Code § 78.56's requirements concerning the use of pits for temporary storage of contaminated fluids, including brine. When left in pits, brine and other drilling fluids can stagnate and become a source of malodors. The Proposed Rulemaking should require well operators to treat produced water (by removing volatile organic compounds, adding biocides, or aerating fluids stored in pits) to prevent malodors and the bacterial growth that can lead to the formation of malodors. For example, the Colorado Oil and Gas Conservation's Rule 902.i requires that "[o]perators shall utilize appropriate biocide treatments to control bacterial growth and related odors as needed"¹³ when pits are used to store produced water.

Further, produced water can contain pollutants that can harm domestic animals and wildlife. Neither the existing Chapter 78 regulations nor the Proposed Rulemaking include any protections designed to keep birds away from drilling fluids stored in pits, and section 78.56(a)(5) of the Proposed Rulemaking requires that a pit be fenced only when an individual is not continuously present at its well site. This is inadequate both to protect domestic animals and wildlife from the fluids in pits and to protect pits from damage that could be caused by domestic animals and wildlife. Accordingly, Section 78.56 should include a requirement that well operators install fencing around, and netting over, pits whenever necessary to protect domestic animals and wildlife. Again, the Colorado Oil and Gas Conservation Commission's rules concerning pits include just such a requirement:

Where necessary to protect public health, safety and welfare or to prevent significant adverse environmental impacts resulting from access to a pit by

¹⁰ See 78.52a(c).

¹¹ PENNSYLVANIA DEPT. OF ENVTL. PROT., ABANDONED AND ORPHAN OIL AND GAS WELLS AND THE WELL PLUGGING PROGRAM, Doc. No. 8000-FS-DEP1670 (Nov. 2012), available at <http://www.eibrary.dep.state.pa.us/dsweb/Get/Document-91715/8000-FS-DEP1670.pdf>.

¹³ 2 COLO. CODE REGS. 404-1 § 902.i.

wildlife, migratory birds, domestic animals, or members of the general public, operators shall install appropriate netting or fencing.¹⁴

Revisions to 25 Pa. Code § 78.58(e)

The Proposed Rulemaking would revise 25 Pa. Code § 78.58(a) to empower the Department to authorize a well operator to process fluids generated or used in a well at the well site. The Proposed Rulemaking would also add to a Section 78.58(e), pursuant to which the Department's authorization for a well operator to process fluids at one of its well sites would be deemed approval for that operator to process fluids at any of its subsequent well sites, provided only that the operator notify the Department of its intent to process fluids at such sites.

There are many reasons why it might be inappropriate for an operator to process drilling fluids at a given well site. Accordingly, Section 78.58(e) should be deleted from the Proposed Rulemaking. Instead, Section 78.58 should require an operator that wishes to process fluids at a particular well site to seek the Department's authorization to do so on a case-by-case basis.

Addition of 25 Pa. Code § 78.59c

The Proposed Rulemaking would add a new Section 78.59c, pertaining to centralized impoundments. Section 78.59c incorporates comprehensive requirements to limit the threat of an impoundment causing soil or water pollution or contamination, but does not include any requirement or limitation that would directly address the air pollution (including malodors) that centralized impoundments can produce. Section 78.59c should require the installation of air pollution control devices and/or other practices to avoid malodors and other air pollution at centralized impoundments.

Revisions to 25 Pa. Code § 78.69

Section 78.69 of the Regulations pertains to water management plans for unconventional wells. Although Section 78.69(b) refers to regulations of the Susquehanna River Basin Commission (the "SRBC") pertaining to water withdrawals and purports to apply the requirements of those regulations to the Ohio River Basin, it does not provide a citation to the SRBC's regulations. For clarity's sake, it should. Further, the requirements of the SRBC's regulations regarding water withdrawals should also be applied to the Lake Erie Basin,¹⁵ the Lake Ontario/Genesee River Basin,¹⁶ and the Potomac River Basin.¹⁷

¹⁴ 2 COLO. CODE REGS. 404-1 § 902.d.

¹⁵ See 25 Pa. Code § 93.9x.

¹⁶ See 25 Pa. Code § 93.9y.

¹⁷ See 25 Pa. Code § 93.9z.

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Thank you for your consideration of these comments.

Very truly yours,

/s

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/s

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