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MEMBER

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA



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HARRISBURG, PA 17120-2040

CHAIRMAN  
ENVIRONMENTAL RESOURCES AND ENERGY

April 15, 2016

Independent Regulatory Review Commission  
333 Market St, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

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IRRC

re: DISAPPROVAL of Final Rulemaking (DEP 7-484 and IRRC #3042)

Dear Commission:

The House Environmental Resources and Energy Committee directed me to advise that, in accordance with Regulatory Review Act section 5.1 (j.2), the Committee has disapproved the final rulemaking, "Environmental Protection Standards at Oil and Gas Well Sites."

Disapproval was adopted by the Committee on April 12, 2016, by a bi-partisan super-majority vote of 19-7.

Among reasons considered in reaching this decision:

1. **Premeditated Violation of Regulatory Review Act transparency law.**

Regulatory Review Act section 5(a)(5) requires "forms or reports, which will be required for the implementation of the regulation and an explanation of measures which have been taken to minimize these legal requirements," **MUST** be included in the Regulatory Analysis Form ("RAF") presented to IRRC (and the public). In this case, dozens of new forms are central to the regulations.

a. These critical forms were altogether absent when RAF presented in 2013 – depriving ability for public comment

b. These critical forms remained altogether absent when ANFR (Advanced Notice of Final Rulemaking ) was published in 2015 by DEP – again depriving public comment.

c. These critical forms were still altogether absent when regulations were considered by EQB on February 3, 2016 – with very disturbing comments whereby **OGC Counsel verified that this statutory requirement was known and the decision to ignore this law was premeditated.** (This premeditated violation of the Regulatory Review Act certainly deprived EQB members of any pretense that EQB met its statutory duty to formulate the regulations.)

d. While some forms emerged (without any approval by EQB) for the RAF and were deposited with IRRC in March 2016, roughly a dozen forms have yet to be revealed to the public to this very day -- although the RAF pretends otherwise by itemizing the absent forms as present.

**2. Regulatory Review Act Small Business Statutory Requirements Violation.**

Regulatory Review Act section 5(a) (10.1 through 12.1) established regulatory requirements specific to “small businesses” including an “economic impact statement” and “description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.”

The small business provisions of the Act were ignored in the original RAF (as noted by IRRC) and are again absent from the RAF submitted in March 2016. Instead, the RAF attempts to substitute chatter contrasting conventional and unconventional differences which has absolutely nothing to do with the impact on small business or less intrusive or costly alternative methods. The proposed rule contains not a single provision specific to small businesses.

**3. RAF submitted to IRRC is not actually as approved by EQB.**

The Notice of Final Rulemaking submitted to IRRC differs in material respects from the Order adopted by the Environmental Quality Board (“EQB”) on February 3, 2016 with the addition of two dozen forms that have never been considered by EQB.

IRRC should reject the substitution and require EQB to submit only rulemaking packages that have actually been adopted by the EQB.

**4. Rulemaking is premeditated violation of Act 126 of 2014**

Act 126 of 2014 required regulations for conventional and unconventional wells, under all state laws, to be promulgated separately after the July 2014 effective date and that all regulations under Title 58 differentiate between the two. While DEP accepted differentiation, it has steadfastly refused to comply with the law’s requirement of separate promulgation.

When the House was considering the adoption of Act 126 of 2014, Rep. Greg Vitali is quoted in the House Journal stating, several times, that adoption would mean that the regulations would go, “back to square one.” This prima facie legislative intent was immediately obvious even to opponents of the measure, but DEP and EQB have chosen to proceed in violation of the law.

The law remains unchanged. Nonetheless, on February 3, 2016, in its only vote on such rulemaking since adoption of Act 126, EQB promulgated the regulations together, not separately. This simultaneous promulgation defies the law (which is presented for convenience below to see that differentiation and separate promulgation are required). By acting in violation of this law, EQB lacks statutory authority for the regulations. Statutory Authority is a threshold issue for

consideration of regulations by the Committee (and, statutorily so, for IRRC as well).

Section 1741.1-E. Environmental Quality Board.

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

**5. Administrative Code duty of EQB to formulate regulations has not been met**

Act 275 of 1970 created the EQB to “Formulate, adopt and promulgate rules and regulations as necessary to accomplish the Department of Environmental Protection's work.” EQB did not “formulate” the proposed regulations in any meaningful sense. The first time that the EQB even considered the bifurcated regulations was the date that the regulations were promulgated.

Worse, EQB members who sought to participate were foreclosed by the DEP Secretary who serves as EQB Chair. Even simple requests for information by EQB members, whether in writing or expressed in public meetings, were refused.

ANFR was published by DEP without any pretense that EQB was involved in any way.

Even an EQB member who voted in favor of the regulations illustrates that EQB did not formulate the regulations. That EQB member signed a (publicly available) December 30, 2015 letter addressed to “Environmental Quality Board Members of the Independent Regulatory Review Commission.” The letter asserts, “It is the job of PA DEP to...promulgate regulations...” This EQB member's designation of EQB as merely some regulatory review subset of IRRC further evidences that EQB has not been involved in formulation of the regulations.

To this very date, EQB has never even seen any of the dozens of critical forms inherent in the regulations. Certainly, EQB has had no role in formulating or promulgating them. The Committee rejects this entire circumvention of EQB from both formulation and promulgation of the regulations (and hopes IRRC will reject a package that has never been before the entity that has the duty to formulate and promulgate).

At the EQB February 3, 2016, DEP Deputy Secretary Perry evidenced that DEP had divorced EQB from formulating the regulations when he spoke of the work of DEP, “to bring this rulemaking to the body today” and “to bring this excellent work product to the board's attention.” EQB was conspicuously absent from the list of those credited with being involved in the formulation of the regulations.

Since EQB's duty under the Administrative Code has not been met, the regulations lack statutory authority.

## **6. COGAC**

The Conventional Oil and Gas Advisory Committee was created by this administration. All of its appointees were selected by the current Governor. That Committee voted unanimously against adoption of the proposed regulations specific to the conventional drilling.

## **7. TAB**

Act 13 of 2012 created the Oil and Gas Technical Advisory Board ("TAB") and provided a role for TAB in the development of regulations concerning unconventional drilling. It has been misrepresented to IRRC that the draft regulations have TAB's approval. The most recent action of TAB on the question of approval was a vote to disapprove the draft regulations. Other unanimous and specific recommendations from TAB were rejected by DEP in its formulation of the proposed regulations.

The TAB members expressing technical concerns were, incidentally, all appointed by the current governor.

## **8. Violates Supreme Court Order enjoining parts of Act 13**

In its 2013 Robinson Township decision, the Pennsylvania Supreme Court enjoined Act 13 of 2012, sections 3215 (c) through (e). When the original RAF was presented, these sections were cited as the statutory basis for regulations for certain well permit application requirements. Although those statutory sections of Act 13 were enjoined, the regulations were not revised to remove the out-of-bounds requirements. Rather, the reference to the enjoined sections was replaced with a claim of an unspecified "other authority."

## **9. DEP Acknowledges absence of statutory authority for regulations**

While the question of statutory authority is raised many times by the Committee, there are sections of the regulations where DEP acknowledges it has no statutory authority whatsoever. At the February, 3, 2016 EQB meeting Deputy Secretary Perry confessed, "We ourselves created rules that were on our own motion so to speak." He offered examples of proposed rules that lack any statutory authority including, "area of review" rules and the mandate of voluntary Act 2 standards for cleaning spills. Instead of drafting such rules to conform with statutory authority, the Deputy Secretary explained that he and his staff used a "why shouldn't we have?" standard for the rulemaking. This is the wrong standard for formulating or promulgating regulations and, when openly confessed, must not be countenanced.

#### **10. Known drafting errors are enshrined in the regulations**

Known typographical errors, internal contradictions, cross reference issues and other obvious technical deficiencies remain in the regulations. Those who aim to abide by regulations should be able to read a coherent version. DEP's request that such errors be enshrined in final regulations is very odd.

DEP's comforting explanations of some examples that DEP does not intend to apply the regulations as written is unacceptable and quite unfair to those who lack insider information.

Although imposing enormous and costly burdens on the public, the proposed regulations do very little that can conceivably improve the environment. Unacceptable environmental impacts that are already illegal will remain illegal.

The regulations include many confounding directives detailed by TAB, COGAC and others. For instance, brine will still be spread on roads by the truckfull, while a five gallon spill of the same brine at a well site will be treated as an environmental hazard (though DEP calls the five gallon spill "innocuous"). Such illogical proposals were merely noted by the Committee, the overarching reason for disapproval is:

**Government should not break laws to make laws.**

Sincerely,



John A. Maher  
Chairman  
Environmental Resources and Energy Committee

c: Hon. John Quigley  
Chairman  
Environmental Quality Board