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**HOUSE ENVIRONMENTAL RESOURCES AND ENERGY COMMITTEE
PUBLIC HEARING ON H.B. 2213, PROPOSED AMENDMENTS TO THE OIL
AND GAS ACT**

CLEARFIELD, PENNSYLVANIA, FEBRUARY 18, 2010

Chairman George, Chairman Hutchinson, Members of the Committee, and distinguished guests, I would like to thank you for this opportunity to comment on the proposed amendments to the Oil and Gas Act that are included in House Bill 2213. My name is John Baillie, and I am a Senior Attorney for Citizens for Pennsylvania's Future ("PennFuture"), working out of our Pittsburgh office. PennFuture is a statewide, public interest, membership organization with offices in Harrisburg, Pittsburgh, Philadelphia, West Chester, and Wilkes-Barre. PennFuture's purposes include advocating and litigating on behalf of the environment and public health (including water quality issues and issues arising out of gas drilling activities) on a state-wide basis. PennFuture's membership includes residents of Pennsylvania who use the Commonwealth's rivers and streams for fishing, boating, and other forms of recreation, as well as Pennsylvanians who rely on the Commonwealth's rivers, streams, and underground aquifers as sources of drinking and household water. Since early 2008, almost one third of my time has been devoted to responding to the legal issues and environmental challenges posed by the rapid development of the Marcellus Shale.

Oil and gas drilling activity in Pennsylvania is largely governed by the Oil and Gas Act¹ and the implementing regulations of the Department of Environmental Protection in 25 Pa. Code Chapter 78. However, the Oil and Gas Act has not been amended in any significant way since it

¹ 58 P.S. § 601.101, *et seq.*

was first enacted in 1984. PennFuture agrees with the sponsors of HB 2213 that there is a need to revisit many of the Act's provisions in light of the development of the Marcellus Shale, which presents a set of challenges that could not have been anticipated by the General Assembly in 1984, and we commend Chairman George and the other sponsors of HB 2213 for taking the first steps needed to respond to those challenges.

With that in mind, I offer these comments to HB 2213:

1. HB 2213 would impose a number of new requirements on wells drilled into the "Marcellus Shale," and with good reason: wells are being drilled into the Marcellus Shale at an increasing rate and those wells use drilling techniques – including high-volume hydraulic fracturing and horizontal drilling – that increase the potential for pollution. However, the Marcellus Shale is not the only gas-bearing geologic formation in Pennsylvania, and those same drilling techniques are likely to be used to extract gas from other formations. Using those techniques to drill in those other formations is likely to raise similar water pollution concerns to those that have arisen in connection with the extraction of gas from the Marcellus Shale.

Accordingly, HB 2213 should be revised throughout so that its protections extend not only to "Marcellus Shale" gas wells, but also to any gas extraction activities that use high-volume hydraulic fracturing and horizontal drilling techniques, regardless of the geologic formations they tap into.

2. HB 2213 would add a Section 207(e) to the Oil and Gas Act that would require the Department of Environmental Protection to inspect every well drilled into the Marcellus Shale when the well is sited, drilled, cased, cemented, completed, altered, and stimulated, and would also give DEP the power to increase permit fees to meet the increased inspection costs that Section 207(e) would impose.

DEP already has an inspection policy which, if adhered to, would result in inspection at each of these, and at several additional, phases of drilling.² However, that policy is not binding. As long as DEP is given sufficient funding or other means to raise money to pay its increased inspection costs, PennFuture supports the inspection requirements that HB 2213 will establish. Requiring DEP inspections at key phases of drilling will encourage well operators to adhere to the law and should promote public confidence that the law and regulations are being followed at drilling sites.

3. Sections 208(c) and (d) of the Oil and Gas Act make well operators responsible for restoring or replacing water sources that are polluted as a result of gas drilling. HB 2213 would amend Section 208 to make explicit well operators' responsibility to replace or restore water sources that are diminished as a result of gas drilling.

Water "pollution" already includes diminution as a result of decisions of the United States Supreme Court³ that construe the federal Clean Water Act, and by the regulations promulgated by DEP to implement the Oil and Gas Act.⁴ HB 2213's amended Sections 208(c) and (d) will help prevent confusion by conforming the Oil and Gas Act to this case law and to DEP's regulations.

4. Section 208 of the Oil and Gas Act creates a presumption that any pollution of a source of water that occurs within 1,000 feet of a gas well, and within six months of drilling, results from the drilling, and an obligation that the well operator replace or restore the polluted water source. HB 2213 would amend Section 208 to extend its protections to sources of water within 2,500 feet of a gas well.

It is important to bear in mind that although the presumption created by Section 208 carries with it a benefit for those who live close to gas wells, it also creates a burden: to take

² See 25 Pa. Code § 78.903.

³ See *P.U.D. No. 1 v. Department of Ecology*, 511 U.S. 700, 719-20 (1994).

⁴ See, e.g., 25 Pa. Code § 78.51(a) (providing that "[a] well operator who affects a public or private water supply by pollution or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply") (emphasis added).

advantage of the presumption, a person who owns or uses a water source within a zone protected under Section 208 must incur the expense of having both the water quality and flow rate of the water source tested by a certified laboratory after receiving notice that drilling is set to occur.⁵ Otherwise, there may be no hard proof that pollution has occurred in the first instance, unless the well operator itself has tested the water source. In setting the size of the zone, the General Assembly must balance the likelihood of pollution with the cost of the tests that owners of water sources must have performed in order to take advantage of Section 208's protections.

Experience has already shown that there is justification to extend the zone protected by Section 208 from the current 1,000 feet. In early 2009, in Dimock Township, Susquehanna County, drilling activities at a Marcellus Shale gas well contaminated at least one water source that was at least 1,300 feet away. In light of that occurrence, the zone protected by Section 208 should be extended, so that all water sources that could be adversely affected by nearby drilling activities receive the protections of Section 208.

5. Currently, the Oil and Gas Act does not purport to require gas well operators to disclose any information about the chemicals that they use during the drilling process. Nevertheless, DEP already requires companies drilling in the Marcellus Shale to disclose the ingredients of the fracturing fluids that they use and makes a list of those ingredients available to the public on its website.⁶ HB 2213 would add a Section 208.1 to the Oil and Gas Act which also would require well operators to disclose to DEP a list of the chemicals they use in the hydraulic fracturing process, and would further expand well operators' disclosure obligations to include the formulas for those chemicals and the concentrations of drilling fluids' chemical constituents.

Many of the known chemical constituents of drilling fluids are hazardous and toxic. Requiring well operators to disclose which hazardous and toxic chemicals are present at a well

⁵ See 25 Pa. Code 78.52(b).

⁶ <http://www.dep.state.pa.us/dep/deputate/minres/oilgas/FractListing.pdf>.

site is critical so that the well operators' employees, DEP, and local emergency personnel can respond appropriately if there is a spill or release at the site. Indeed, drilling companies themselves acknowledge that there is little justification for keeping the ingredients of fracturing fluids from state regulators, local emergency response personnel, and the public.⁷ However, it also appears that the manufacturers of fracturing fluids can legitimately claim that the concentrations of the fluids' various ingredients are confidential trade secrets. Well operators purchase fracturing fluids but may not be privy to the concentrations of the ingredients the fluids contain. Consequently, it may be impossible for well operators to disclose the concentrations of fracturing fluids' ingredients.

The purpose of allowing well operators' employees, DEP, and local emergency personnel to respond appropriately to any spills or releases of fracturing fluid should be adequately served if lists of fracturing fluid ingredients used at each gas well are disclosed to DEP and made available to the public and emergency responders. Accordingly, the sponsors of HB 2213 should consider removing the requirement that well operators disclose the concentration of ingredients in the fracturing fluids they use, in order to avoid imposing an obligation on drillers that they must fight, but that will produce little, if any, benefit to the public.

6. Section 215 of the Oil and Gas Act imposes a bonding requirement on well operators to ensure that Pennsylvania's taxpayers are not forced to bear the expense of plugging old and abandoned wells if the operators of those wells fail to comply with their obligations to do so. HB 2213 would also amend Section 215(a) of the Oil and Gas Act to: (i) increase the bonding amounts for gas wells from the current amount of \$2,500 per well to \$12,000 per well generally and \$150,000 per Marcellus Shale well; (ii) increase the amount of blanket bonds from \$25,000 to \$240,000; and (iii) make Marcellus Shale wells ineligible for blanket bonds.

⁷ See Katie Howell, *Spills, Looming Regulation Spur Natural Gas Industry Toward Disclosure*, NEW YORK TIMES (Oct. 1, 2009), available at <http://www.nytimes.com/gwire/2009/10/01/01greenwire-spills-looming-regulations-spur-natural-gas-ind-5759.html>.

The bonding amounts currently in the Oil and Gas Act were set in 1984 and have not been changed since. They are inadequate, badly out of date, and, as the sponsors of HB 2213 have recognized, need to be increased significantly to account for inflation that has occurred since 1984 and for the increased potential for pollution that can result from new drilling techniques now in use across Pennsylvania.

A bonding requirement of \$125,000 per well is not unprecedented in Pennsylvania. In 2002, DCNR offered at auction the drilling rights to large tracts of state forest, subject to a bonding requirement as high as \$125,000 per well: a \$25,000 lease bond (which was intended to guarantee the well operator's compliance with the terms of the gas lease) and a plugging bond (which was intended to ensure that the well operator would comply with its obligation to plug the well) in an amount as high as \$100,000, depending on the depth of the well.⁸ Of the over 218,000 acres that were ultimately offered for auction, 51,203 acres were successfully bid upon, by Cabot Oil and Gas and Pioneer Natural Resources;⁹ Cabot has also been active in the Marcellus Shale play. PennFuture supports increasing the bonding amounts for gas wells so that they accurately reflect the costs of plugging wells and restoring well sites and protect Pennsylvania taxpayers from the burden of well operators' failures to comply with their obligations under the Oil and Gas Act.

7. Section 602 of the Oil and Gas Act currently states that local ordinances that are enacted pursuant to the Municipalities Planning Code or the Flood Plain Management Act which purport to regulate oil and gas well operations are preempted by the Act. HB 2213 would amend Section 602 to clarify that such local ordinances are preempted only to the extent they purport to regulate oil and gas well operations, and that to the extent local ordinances would regulate certain other aspects of oil or gas well operations – including the time and place of operations – the ordinances are not preempted.

⁸ Dan Simon, *Drilling the Trenton Black River*, GREENWORKSRADIO ENVIRONMENTAL REPORTER

⁹ Pennsylvania Department of Natural Resources, THE RESOURCE (Aug. 2002), available at <http://www.dcnr.state.pa.us/polycomm/res2002/gasauction0802.htm>.

PennFuture believes that the proposed amendments to Section 602 are consistent with the recent decisions of the Pennsylvania Supreme Court in *Range Resources – Appalachia, LLC v. Salem Township*¹⁰ and *Huntley & Huntley v Borough Council*;¹¹ together, those decisions confirmed the traditional power of municipalities to regulate the time and place of gas drilling operations within their boundaries, and also recognized that by the Oil and Gas Act, the Commonwealth reserved for itself the power to regulate the manner of operating gas wells within Pennsylvania.

Further, PennFuture notes that the Marcellus Shale underlies all of the City of Pittsburgh and that gas drilling has been proposed for sites within the City. However, because the Pittsburgh City Code was not adopted pursuant to either the Municipalities Planning Code or the Flood Plain Management Act,¹² the power of the City even to assert its traditional zoning powers over gas drilling operations pursuant to Section 602 in either its current or amended form is questionable. Accordingly, we urge that HB 2213 be amended to include the ordinances that are validly enacted under the Second Class City Code so that the City of Pittsburgh can assert its traditional zoning powers over gas drilling in the same manner as other municipalities across Pennsylvania.

Thank you for giving PennFuture this opportunity to comment on the changes proposed by HB 2213.

(July 31, 2009), available at <http://www.greenworks.tv/radio/todaystory/20020731.htm>.

¹⁰ 964 A.2d 869 (Pa. 2009).

¹¹ 964 A.2d 855 (Pa. 2009).

¹² See *Broussard v. Zoning Board of Adjustment*, 907 A.2d 494, 499 n.7 (Pa. 2006) (stating that “ zoning authority for Pittsburgh is not governed by the Pennsylvania Municipalities Planning Code, as that statute does not apply to second class cities. Rather zoning by the City of Pittsburgh is governed by provisions of the second class city planning statute, located at Article VI, Chapter 61 of the General Municipal Code, and by the home rule powers contained in the Pittsburgh Home Rule Charter”) (citations omitted).