



May 11, 2022

Patrick McDonnell, Secretary
Department of Environmental Protection
16th Floor Rachel Carson Building
400 Market Street
P.O. Box 2063
Harrisburg, PA 17105-2063

Re: Draft Environmental Justice Policy (012-0501-002) submitted electronically via <https://www.ahs.dep.pa.gov/eComment/> and RegComments@pa.gov

Dear Secretary McDonnell:

The Marcellus Shale Coalition (MSC), a regional trade association with a national membership, appreciates the opportunity to submit comments regarding the above-referenced draft Environmental Justice Policy (EJ Policy or Policy). The MSC was formed in 2008 and is currently comprised of approximately 115 producing, midstream, transmission and supply chain members who are fully committed to working with local, county, state and federal government officials and regulators to facilitate the development of the natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in natural gas production, gathering, processing and transmission, in the country, as well as the suppliers, contractors and professional service firms who work with the industry.

Introduction

The MSC and its members support policies that enable disadvantaged communities to participate fully in the public comment and public information sharing that accompanies the review of permits. Since the inception of the Environmental Justice (EJ) movement, however, some have attempted to use EJ to advance a separate agenda, and often these persons are not in or have any connection to disadvantaged communities. Using EJ in this manner or for other ulterior motives detracts from its laudable purposes, often to the detriment of the people it was designed to help. Unfortunately, as discussed below, the Policy seems to have fallen victim again to being used to advance a separate agenda.

Members of the MSC take seriously their responsibility to engage proactively and constructively with the communities in which they operate, including local elected officials, property owners, concerned citizen organizations and the general public.

By the very nature of the industry, operators rely upon this engagement to secure the legal right to develop natural gas and transport it safely to market. Operations are centered upon areas of the Commonwealth where the resource is located, and operators can only develop resources which they have leased through the consent of property owners. This up-front engagement – long

before physical development occurs on the ground – allows community members and local elected officials to familiarize themselves with the development process. In addition, local approvals and authorizations are often necessary for development to occur, separate from the permitting requirements of the state. These local actions provide an additional opportunity for public awareness and engagement.

Unconventional natural gas development is well into its second decade throughout Pennsylvania. The industry is rightfully proud of both its economic and environmental enhancement contributions to the Commonwealth and the communities in which it operates. From an economic perspective, countless citizens have benefited financially from lease agreements, including ongoing royalty payments attributable from the nearly 11,000 producing wells across Pennsylvania. There is no question that many of these residents reside in largely rural, oftentimes economically disadvantaged communities.

From a broader perspective, despite a recent rise in natural gas prices all citizens of Pennsylvania are benefitting from lower energy costs when compared to 15 years ago. More than 50% of homeowners rely upon natural gas to heat their homes, and the vast majority of Pennsylvanians use electricity, of which over 50% now comes from natural gas generation. Wholesale electric price reductions of over 40%, and natural gas commodity price reductions of nearly 75%¹, have translated into savings of several thousands of dollars annually for many residents.

In short, the shale gas revolution has no doubt helped to move many citizens who may otherwise reside in an environmental justice community (from a poverty rate index) out of such a designation. That is an eminently positive outcome that should reinforce the need for the Department of Environmental Protection (PA DEP or Department) to work cooperatively with permit applicants to encourage domestic energy production in Pennsylvania.

From an environmental perspective, increased utilization of natural gas in the electric power generation sector² has provided significant benefits to all Pennsylvanians. Due to the conversion to natural gas as the primary fuel choice for electric generation, since 2005 Pennsylvania has seen a reduction of volatile organic compounds (40%), nitrogen oxides (81%) and sulfur oxides (93%)³. These historic reductions translate into cleaner and healthier air for all, particularly those citizens most vulnerable to respiratory ailments such as children and senior citizens.

In fact, when utilizing the exact same methodology used by the Department in its recent analysis of the Regional Greenhouse Gas Initiative, the aforementioned reduction of key pollutants, due in large part to the increased use of natural gas for electric generation, translates to approximately \$31 Billion to \$71.5 Billion in annual public health benefits for the citizens of Pennsylvania.

¹ Source: PA PUC Average natural gas price reduction for six largest PA natural gas utilities 2008 – 2020.

² Natural gas as a share of Pennsylvania's electric power generation has increased from approximately 1.5% in 2001 to 53% in 2021. Source: U.S. Energy Information Administration – Electricity Data Browser

³ Source: PA Department of Environmental Protection – Air Emission Report (Power BI)



The MSC offers the following specific comments regarding the proposed EJ Policy for consideration by the Department.

Comment and Response Document

The MSC strongly encourages the Department to include a key, code, or other method in its development of the Comment and Response Document which allows public commentators to identify their comments in the document and how the Department has responded. The Department previously has prepared the Comment and Response Documents in this manner, which is extremely helpful and efficient. Such a method also underscores that the Department has identified and fairly considered all unique comments which it received during the public comment period.

Additional Public Comment Period Requested

In addition to substantive policy concerns and questions, the draft Policy contains several substantive drafting errors and omits a critical supplemental document that is to accompany the Policy. Each of these concerns are discussed in greater detail below.

The MSC anticipates that significant modifications to this Policy are necessary to be responsive to public comments and to address drafting inconsistencies. It is always better to do something right than expeditiously, and to this end, the MSC believes that a better product will ultimately emerge if the public is able to evaluate and provide feedback on a revised version of the Policy before its final publication.

The MSC is concerned about the stated intention of the Department to finalize the EJ Policy this summer. In addition to the need to provide for input on the supplemental document to be released by the Department that will define the methods for determining EJ Areas (discussed later in these comments), the sheer number of comments already received by the Department raises legitimate concerns about the ability to sufficiently review and meaningfully consider them.

Further, there are serious reservations as to the capability of the Department to absorb the anticipated new workload that the EJ policy will impose upon its staff. For example, the Department took 20 months – nearly 600 days – to consider comments submitted on its volatile organic compounds rulemaking⁴ for oil and gas facilities, while routinely taking in excess of 200 days to issue basic earthmoving permits. These, and other exceedingly lengthy processes, are core responsibilities of the Department. It is concerning that the Department is seeking to voluntarily add additional responsibilities to its staff without demonstrating an ability to manage current workload.

⁴ Regulation #7-544: Control of VOC Emissions from Oil & Natural Gas Sources:
<http://www.irrc.state.pa.us/regulations/RegSrchRsIts.cfm?ID=3267>

Authority

The MSC recognizes that many policies issued by the Department include a section on “Authority”. With respect to the draft Policy, nearly every environmental statute administered by the Commonwealth is listed. The Department certainly has the authority to administer these statutes. However, the Department fails to cite any specific provision within each statute that authorizes it to impose EJ obligations on permit applicants or to treat applications differently in specific areas. Merely citing a bevy of statutes in their entirety does not constitute an explicit citation of statutory authority.

To the extent that the Department believes it has the statutory authority specifically to impose conditions or permit requirements on applicants which are related to environmental justice, any effort to do so must be done via the promulgation of a rulemaking by the Environmental Quality Board.

Purpose

The third line of this section contains an extraneous “had”.

Disclaimer

This section reads as follows:

“The policies and procedures outlined in this guidance are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.”

The policies and procedures herein are not an adjudication or a regulation. DEP does not intend to give this guidance that weight or deference. This document establishes the framework, within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy if circumstances warrant.”

The MSC recognizes that this is standard language which the Department includes in nearly all of its policies or Technical Guidance Documents. Nonetheless, it is reasonable to interpret the statement “...are intended to supplement existing requirements” as imposing *additional* requirements beyond those which exist in current statute or regulation. In fact, the Policy does create binding criteria and impose obligations on permit applicants, notwithstanding the careful use of the word “should.”⁵ There can be no doubt that an applicant will need to follow this Policy if it hopes to obtain a permit. For example, Section II (B), entitled “Process for Permit Applicants and DEP” clearly indicates that the process is to be followed, not only by DEP but also by applicants. Section II.B1 states: “*When completing the General Information Form (GIF) of a permit application, the applicant should determine whether the project is in an EJ Area and the project’s Area of Concern*” and further “*The methods used to identify EJ Areas should be*

⁵ According to dictionary definitions the term ‘should’ is “an auxiliary verb to indicate that an action is considered by the speaker to be obligatory” and synonyms include “must” and “shall.” (cite)

identified in a separate document and shared with DEP.” Can anyone reasonably interpret such language as anything other than a requirement if one wishes to have the application acted upon favorably?

Given the time that the Department has been working on an EJ Policy, it has had ample time to follow the proper procedures to propose and finalize a rulemaking. Failure to use that time appropriately does not warrant an end run on the regulatory review process.

Section I General Information

A. Definitions

Climate Justice. The definition of “climate justice” reads as follows: “*A concept that addresses the ethical dimensions of climate change.*” This definition is, at best, overly ambiguous and appears to have been drawn from a definition of “climate ethics” found on Wikipedia⁶.

More to the point, however, the term “climate justice” is not used anywhere within the Policy. Since the term serves no purpose for the document, it should be removed.

Environmental Justice Area. The definition of “Environmental Justice Area” provides no actual guidance or direction on how such areas are defined or determined. Rather, the definition states, in part, “*The methods to identify EJ Areas are specified in a separate document supplementing this policy.*” (Emphasis added).

However, the MSC was unable to identify what separate document this definition refers to. No additional reference to this document is included in the *Pennsylvania Bulletin* notice of public comment, or on the Department’s eComment website⁷. Moreover, the MSC’s request to the Department for information on this document was referred to the Environmental Justice Office but received no response.

The MSC recognizes that the proposed Policy references the Department’s Environmental Justice Viewer⁸ website, and that the website references an EJ area as either a census tract or census block group with 20% or more individuals living in poverty, and/or where 30% or more of the population identifies as minority. However, those wishing to comment are unable to consider how this definition of an EJ area differs from current practice, whether these thresholds are reasonable, and what other information may be contained within the document referenced in the EJ Area definition. Moreover, from comments made by Department representatives at various advisory committee meetings, it appears that the Department may be proposing to significantly alter the definition of “Environmental Justice Area” later this year – again via a policy document. Any such change to what constitutes an EJ area could have drastic implications

⁶

https://en.wikipedia.org/wiki/Climate_ethics#:~:text=Climate%20ethics%20is%20an%20area,concepts%20such%20as%20climate%20justice.

⁷ <https://www.ahs.dep.pa.gov/eComment/>

⁸ www.dep.pa.gov/eviewer



for how the EJ policy is effectuated. The lack of awareness of what these potential changes to the definition of an EJ area may encompass makes it nearly impossible to fully appreciate the ramifications of the EJ policy. At a minimum, the Department should not solicit public comment on a Policy which references *another* document that is integral to the Policy, and not make that document publicly available.

The MSC requests that the Department post this document online and conduct a separate public comment period on it and withhold advancement of the EJ Policy until the public has had an opportunity to weigh in on this document.

Minority. The definition for the term minority is missing a period at the end of the sentence.

Additionally, the term “buffer” is used in the document but may benefit from being included within the definitions to clearly outline what is and is not included within its meaning.

Illogical Outcomes from Definition of ‘Environmental Justice Area’

In addition to the above comments, the MSC takes note that the Department’s reliance on census tracts and census block groups can result in some absurd outcomes. For example, the largest census tract on the EJ Area viewer is Census Tract 301 in Clinton County. This designation is triggered because of a poverty rate of 22%. Yet, this tract is enormous in size, encompassing 375 square miles⁹. With a population density of only 8.3 people per square mile, it is also one of the most rural areas of the Commonwealth. Yet under this revised Policy, any project proposed within this area that requires a permit on the Department’s trigger permit list will fall under the enhanced review and associated obligations of this Policy.

A similar scenario is presented with Census Tract 323 in Susquehanna County and demonstrates how a relatively compact population base within a census tract can have far reaching geographic implications merely because of how the U.S. Census Bureau has chosen to designate the tracts.

Census Tract 323 encompasses 51.6 square miles in the far northeast corner of Susquehanna County. The tract is extremely rural, largely forested, and includes portions of several state game lands¹⁰ managed by the Pennsylvania Game Commission. Census Tract 323 has a total population of approximately 3,765.¹¹ Of this population, approximately 2,800 people in total live within the boroughs of Lanesboro, Oakland and Susquehanna Depot. These three municipalities are in close proximity to each other, all situated on the main branch of the Susquehanna River.

The Department should consider having a minimum population density within the definition of what constitutes an Environmental Justice Area. Additionally, the Department states that the EJ Policy applies to both the identified Area of Concern as well as the Census Tract Group. It is possible that the EJ Policy, therefore, could become applicable even if there are no residents within the identified Area of Concern. The MSC suggests the EJ Policy be applicable only to the

⁹ <https://censusreporter.org/profiles/14000US42035030100-census-tract-301-clinton-pa/>

¹⁰ State Game Lands No. 035 & 070

¹¹ <https://censusreporter.org/profiles/14000US42115032300-census-tract-323-susquehanna-pa/>

Area of Concern, as simple reliance upon a Census Tract Group may encompass communities far removed and not impacted by a proposed project or permit.

State Prisons

A different scenario is presented by designating certain areas as Environmental Justice Areas because of the presence of a state correctional institution within the census tract. For example, Census Tract 5301 in Forest County spans over 206 square miles¹². According to PA DEP, its designation is triggered because of a minority population of 50%. However, this designation is only reached through inclusion of the prison population of SCI-Forest, located in Marienville, PA within the Census Tract. According to the Pennsylvania Department of Corrections, SCI-Forest encompasses 64 acres¹³, which is exactly 1/10th of one square mile.

Respectfully, no serious undertaking that seeks to acknowledge the inability of community members to participate fully in the environmental permit review process would consider prison inmates as having been disadvantaged in said review processes. By the nature of their confinement, prison inmates are not de facto members of the local community. They do not own or rent property locally, pay taxes, or otherwise engage in community activities as other citizens of other EJ communities do. Yet, through the rigid application of a designated census tract, a confined population of 1/10th of one square mile (64 acres) will impact the review of projects covering 206 square miles (approximately 132,000 acres). This designation is contrary to the stated intent of this policy, results in an absurd outcome, and siphons off limited and critical staff resources of the Department in potentially undertaking reviews.

A similar scenario is presented as well with Census Tract 9705.01 in Greene County, which is home to SCI-Greene, another correctional facility of the Commonwealth.

This EJ Policy is of the Department's own choosing. Therefore, it is wholly free to apply common sense to what constitutes an EJ Area and avoid outcomes such as those described above. The MSC encourages the Department to take note of these, and similar anomalies which may exist, and adjust any final definition of EJ Area accordingly.

Designation of Environmental Justice Areas

The Department has, in a separate document, established criteria for designating areas as EJ Areas. It has then used those criteria to delineate areas of the Commonwealth where the Policy will apply and those where it will not. The criteria and the boundaries of the delineated areas are binding on permit applicants, and should, therefore, be promulgated as regulations. When the Department wishes to designate an area for special treatment, it does so through a regulation or an adjudication as was done, for example, for wetlands or Special Protection waterways. The Department cannot designate an area for special treatment in a policy. Although the Policy

¹² <https://censusreporter.org/profiles/14000US42053530100-census-tract-5301-forest-pa/>

¹³ PA Department of Corrections:

<https://www.cor.pa.gov/Facilities/StatePrisons/Pages/Forest.aspx#:~:text=SCI%20Forest%20is%20comprised%20of,utility%20plant%20and%20administration%20building.>



suggests that the criteria and designations may change in the future, that exacerbates the concerns suggesting more *ad hoc* creations of binding criteria.

Section II Permit Review Process

The MSC offers the following comments in conjunction with the attached Appendix A.

Inasmuch as the Policy is intended to provide guidance to Department staff, permit applicants, and interested community members, the Department is encouraged to increase its level of specificity as to which permits are included within each category (trigger and opt-in), including the formal name, permit number, or other unique identification method so that there is clarity for all parties as to which permits the Department intends to be included. This is particularly important given the significant deviations the regulated community encounters with regional department permitting staff. Lack of specificity will result in one regional office concluding that a certain permit is a trigger permit, while in another region personnel reach a different conclusion.

The need for clarity is significant. Permit applicants need to know up front whether a permit proposed for a project within an EJ area will be subject to the Policy. The Policy envisions significant efforts to be undertaken by Department staff and the permit applicant – including pre-conference meetings and community engagement meetings – if a permit subject to the Policy is submitted. This can only occur with a clear understanding of which permits are included and which permits the Department may opt-in to the process.

The Department is also encouraged to provide guidance on how it will coordinate its EJ Policy with applicable EJ policies at the federal government level. In addition, it is important for the Department to determine if it has the requisite staff to take on additional internal workload while ensuring this process does not further exacerbate current permit review timeframes.

A.1 Trigger Permits

Appendix A should be modified to reflect the language within this section that clarifies that Trigger Permits are only individual permits and do not include General Permits.

Additionally, specificity should be added as to which permits are Trigger Permits. For example, the unconventional oil and gas industry utilizes a variety of waste treatment or processing permits that it regards as General Permits. However, lack of clarity may result in different PA DEP regional office applications as to what constitutes a trigger permit. In fact, confusion may lead to a single well site being subjected to EJ review for some of its permits but not others. This will create a significant bureaucratic burden on both the applicant and the Department staff, with no appreciable benefit to the local community.

A.2. Opt-in Permits

The MSC notes for the Department's consideration the inconsistency that landfill and transfer station permits are included both on the Trigger Permit list (in Appendix A) and in the Opt-in



Permit list. This inconsistency seems to apply as well to permits for sewage treatment plants, which are included on both the Trigger Permit list (in Appendix A) and the Opt-in Permit list. There also appears to be a discrepancy between 50 million gallons of capacity per day, and 50,000 gallons of discharge capacity per day. While these particular permits do not directly impact the unconventional oil and gas industry since, as the Department knows, the industry voluntarily discontinued lawful discharging into Pennsylvania waterways more than 11 years ago, the MSC nonetheless urges the Department to review these lists for other potential inconsistencies.

We reiterate again that a comprehensive, specific list of permits included as trigger permits would remedy this scenario.

Ironically, nowhere in this Policy (outside of a passing reference in the definitions section) does the Department state that Trigger Permits and Opt-in Permits are limited to those for which a permit is sought *within an EJ Area*. While it may be assumed, the Department fails to state this unequivocally, either within the Applicability section (Page ii); Section II (Permit Review Process) or the list of permits included (Appendix A).

On a more substantive note, the draft Policy contains the following:

“In addition, any permits not specified in this Policy as Trigger Permits or determined to be an Opt-in Permit including but not limited to General Permits, renewals, or revisions, may serve as Opt-in Permits if DEP believes they warrant special consideration.”

This provision entirely guts any clarity that the Department may have sought in preparing an EJ Policy and crafting a list of both Trigger Permits and Opt-in Permits. In short, where the Department does provide some level of specificity about what permits are in or out and asserts clearly that Trigger Permits do not include General Permits, this provision undermines it entirely. It essentially says that for any entity seeking to undertake a lawful activity, regardless of what is included within the EJ Policy, the Department reserves the right simply to classify any permit application as an Opt-in Permit, at any time and in any region of the Commonwealth, .

This is the very definition of arbitrary and capricious. The MSC strongly recommends that this entire provision be deleted.

B.1.c. and B.1.e.

The draft policy states in B.1.c.:

“For Trigger Permits and potential Opt-in Permits, applicants are encouraged to have a pre-application conference.”

This section underscores the lack of clarity and resulting uncertainty that this policy is perpetuating. How is an applicant to know if their permit is a “potential Opt-in Permit” and thereby know that they are “encouraged” to have a pre-application conference?



Similarly, in section B.1.e., it likewise begs the question about how the Department's staff is to know what is a "*potential* Opt-in Permit" in order to notify the OEJ upon receipt of an application?

In short, the lack of clarity as to what constitutes a "*potential* Opt-In Permit" for either the permittee and the Department leads to uncertainty for all parties. As the policy is currently drafted, every permit the Department administers is a "potential Opt-In Permit."

B.1.h.

This section of the policy states the applicant is "encouraged" to undertake a series of steps, yet the same section indicates that DEP may implement those steps unilaterally "*if an applicant is unable or unwilling to do so.*" This underscores the mixed messages perpetuated by this policy by suggesting an applicant should consider something yet reserving for the Department the de facto power to undertake the same actions.

B.2.a)ii. and B.2.a)v.

These sections markedly have different requirements for notifications depending on whether the policy is directing a regulated entity or the regulator. If this section is to exist, they should, at the very least, be consistent.

B.2.D Public Meetings

Subsection (i) states that the Department should begin scheduling a public meeting within 30 days of accepting an application as administratively complete and technically adequate.

It seems excessive to take up to 30 days to "begin scheduling" a public meeting. The Department's own Permit Decision Guarantee policy¹⁴ states that it is the policy of the Department to conduct a completeness review "as quickly as possible" and should not take more than ten business days unless indicated by regulatory or statutory requirements. Moreover, this provision infers that a public meeting will be required for every permit reviewed under the EJ Policy, even if one is not necessary or appropriate. The MSC recommends that this section be modified to read as follows:

"i. If a public meeting is determined to be necessary and appropriate, DEP, in coordination with local government officials and the applicant, should begin scheduling a public meeting within five business days of determining that an application is administratively complete and technically adequate. The Department should be mindful

¹⁴ Policy for Implementing the Department of Environmental Protection Permit Review Process and Permit Decision Guarantee 021-2100-001:

<http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=8063&DocName=POLICY%20FOR%20IMPLEMENTING%20THE%20DEPARTMENT%20OF%20ENVIRONMENTAL%20PROTECTION%20PERMIT%20REVIEW%20PROCESS%20AND%20PERMIT%20DECISION%20GUARANTEE.PDF%20%20%3Cspan%20style%3D%22color%3Agreen%3B%22%3E%3C%2Fspan%3E%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E>

that determining to hold a public meeting cannot extend a permit decision timeline that is specified within a statute or regulation.”

Section III Community Input

Role of Community Liaisons

The recommendation that PA DEP should work with community liaisons to provide information to community residents is concerning. The definition of ‘community liaison’ is very broad and can reasonably be inferred to include an activist who is opposed to a proposed project or permit application and therefore may seek to influence the flow of information. Many non-governmental organizations purport to be simply no more than unbiased, community-minded advocates when the reality is that they have a pre-disposed preference on how a particular permit decision turns out. Just as the Department would not recognize an employee of a permit applicant (who may also happen to be a resident of the local community) as a ‘community liaison’, nor should it recognize another resident who may have a stake in the matter as a ‘community liaison’.

Without question, the flow and availability of information to local residents is critically important. The MSC recommends that, instead of designating ‘community liaisons’ as currently envisioned, the Department work directly with a representative of the local municipal government where the project or permit application is situated. Alternatively, the Department should designate a professional employee from within its own ranks to serve in this capacity. Such approaches can remove questions – from all sides of a particular matter – as to the unbiased function of a designated individual and therefore enhance the legitimacy of the permit engagement process.

Community Education

It is important that the Department reasonably manage the expectations of local community residents as to the Department’s role and function in reviewing a permit application and rendering a decision. To this end, the MSC encourages the Department to include within this section a commitment to educating and informing EJ community residents – and residents across the Commonwealth, for that matter – the considerations it must weigh in rendering a permit decision.

All too often, some residents are under the belief that a permit review and community engagement process are a referendum on whether a project or permit application is popular among local residents. A review of comments already submitted to the Department via eComment for this very policy reinforce this notion. There are numerous examples of comments where the commentator observes that an “overwhelming” number of residents voiced opposition to a past permit or proposed project, but the Department issued the permit or authorization anyway. These commentators then assert that the Department has failed in its mission because it did not accede to popular demand.



As the Department knows well, lawful activities which adhere to the statutory and regulatory requirements of the Commonwealth and meet the applicable permit requirements are entitled to receive a permit. Certainly, the Department can deny a permit application if so warranted, but such denial must be based upon legally defensible justification that will withstand scrutiny should the decision be appealed to the courts.

This reality is not to suggest that any party, including a permit applicant, should be insensitive to legitimate concerns and questions that local residents have. To the contrary, it is understandable that most residents are not experts on permitting statutes and regulations or the established legal process that guides state and local government agency decision-making. This reality, again, underscores the importance of providing a foundation of knowledge and information to local residents to help inform constructive engagement and reasonable management of expectations for all concerned.

B.2.

The policy states “*DEP should ensure access to information for members of an EJ Area...*”. It is uncertain what is meant by “members of an EJ Area.” The word “members” should be changed to “residents” in order to provide necessary clarity.

Section IV Oil and Gas Public Engagement

The MSC recommends that this section be eliminated in its entirety.

Efforts by the Department to incorporate public engagement with communities it has designated as environmental justice communities should not be specific to any one industry, let alone specific to only one sector (unconventional) of one industry. The Department provides no rationale for creating this new section specific to the unconventional oil and gas industry, beyond a press release¹⁵ asserting that this “*was a major need identified by community members.*” Similar, vague claims are made in PowerPoint presentations the Department provided to several of its advisory committees.

No evidence of this need is provided; rather, it appears that the Department largely relies upon passing comments gleaned from its environmental justice “listening” sessions held more than five years ago. A comprehensive review of the Comment Document¹⁶ generated by the Department from these listening sessions includes a variety of statements regarding natural gas development. Some of them appear rooted in not fully understanding the rigorous permitting requirements in place; some are from residents who simply don’t support development; and some are from anti-energy activists who knowingly spread false and defamatory information about natural gas development.

¹⁵ DEP Underscores Commitment to Environmental Justice with Policy, Newly Appointed Director of the Office of Environmental Justice: https://www.media.pa.gov/Pages/DEP_details.aspx?newsid=1559 March 11, 2022

¹⁶ April 12 – May 25, 2017 Comment Document: <https://files.dep.state.pa.us/PublicParticipation/Office%20of%20Environmental%20Advocacy/EnvAdvocacyPortalFiles/2017/OEJ%20Listening%20Session%20Comment%20Document%20Categorization%20Order%20Final.pdf>



These comments, many of which would have benefited from some sort of response to better inform the commentators and the broader public audience, do not justify creating new obligations upon one particular industry. The MSC respectfully suggests that, rather than concede that “more must be done” simply because a handful of individuals voiced displeasure with and disdain for the industry (and fossil fuels, in general), a far better and more impactful approach would be for the Department to embark on an educational initiative as part of the EJ Policy to help inform residents of what is currently required, both for the unconventional natural gas industry and other industries of interest. The MSC recognizes the legitimate interest of communities to be informed and engaged, but strongly encourages the Department – as it did in its response to Attorney General Josh Shapiro’s misleading report¹⁷ on the natural gas industry – to engage in a robust educational initiative about its existing roles, responsibilities and requirements related to natural gas development so that community members may make informed comments.

The MSC believes that educating about these requirements is a shared responsibility between both regulator and the regulated community. Our members regularly provide information and participate in forums which seek to educate citizens on the regulatory, permitting and compliance process. The MSC, through the initiative of its member companies, has developed a host of resources¹⁸, including presentations and fact sheets, about the natural gas development process.

Fundamentally, it is important for any final policy developed by the Department, which is premised upon the equitable treatment of communities across the Commonwealth, to also treat the industries and associated citizen-employees the Department regulates in an equitable manner as well.

Specific Comments on Section IV Oil and Gas Public Engagement

Beyond the overarching concern and the recommendation above to eliminate this section, the MSC identifies several specific concerns with the draft policy within this section.

Policies of the Department ostensibly are to guide the internal actions and workings of the Department and its staff in the performance of their duties. However, this policy essentially seeks to impose obligations upon the unconventional oil and gas industry which are not appropriate for a policy and are reserved for either a statute or a properly promulgated rulemaking.

For example, Section IV (A)(2) states that “*Each operator identified by DEP should develop an overview of projects that explains the scope and operations of the projects in terms understandable to a considerable majority of readers within an EJ Area.*” While this language

¹⁷ Response of the Pennsylvania Department of Environmental Protection to Report 1 of the Forty-Third Statewide Investigating Grand Jury: “*The fact that the Grand Jury was not provided with clear or accurate information about the regulatory requirements for the unconventional natural gas industry is evident from the recommendations which DEP reviewed. Several...are based on a mischaracterization of existing law. Other recommendations urge policy positions that are unwise.*” (Pg. 36)

<https://files.dep.state.pa.us/Newsroom/NewsroomPortalFiles/2020/DEPResponseReport1to43dStatewideInvestigatingGrandJury-May72020.pdf>

¹⁸ <https://marcelluscoalition.org/resources/>



carefully uses the term “should”, any unconventional operator will be hard-pressed not to interpret this policy as a de facto requirement. The reality is that operators who wish to stay in the good graces of regulators to ensure that permits and other authorizations are timely considered have been conditioned by Department personnel effectively to consider suggestions such as this as regulatory obligations.

Moreover, the Department’s policy states that it will (unless the Department intends to violate its own policy) distribute the company’s project summary at a community meeting; post the company’s project summary online; and email it to local government authorities and meeting participants. This is wholly inappropriate and unnecessary. No other industry in Pennsylvania is treated in this manner.

Unconventional operators must apply for a multitude of permits to conduct their operations. These include, but are not limited to:

- Well drilling permit
- Erosion & sediment control permit
- Air quality permit (if applicable thresholds are met)
- Waterway crossing and encroachment permits, as necessary
- OG-71 or WMGR123 or other residual waste/beneficial reuse permits, as necessary

Many of these permits include either public notice, comment or other awareness opportunities which are unique to that permit. These state permits or authorizations do not include any local approvals which may be necessary for the municipal or county government where operations are proposed.

An unconventional well drilling permit, for example, requires the following notices by certified mail:

- The surface owner
- The lessor, if not the surface owner
- The municipality where the well is proposed
- Each municipality within 3,000 feet of the proposed well
- Each municipality adjacent to the municipality where the well is proposed
- All surface landowners and water purveyors within 3,000 feet of the proposed well
- The owner, lessee and operator of any coal seam required to be identified on the well permit application

Additionally, operators are required to submit an Act 14 notification¹⁹ to both municipal and county government officials in advance of submitting an erosion and sediment control permit application (ESCGP-3), which is necessary for the well pad and access road development.

¹⁹ Act 14 of 1984, P.L. 75:

<https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1929&sessInd=0&smthLwInd=0&act=175&chpt=19A&sctn=5&subscn=0>



Without question, these are among the most robust notification requirements that exists for any industry operating in Pennsylvania. To also task an operator to identify well drilling activity that it *might* undertake in the coming year – when a host of factors such as market conditions and operational uncertainties make it difficult to forecast such activity –is counterproductive. Furthermore, the draft policy states that PA DEP shall review the company’s summary of planned activities for “accuracy”, which is highly inappropriate. Not only does the Department not have access to a company’s proprietary and/or business and operational information regarding their potential development plans, but it is also not the arbiter to gauge accuracy. More importantly, it is not the Department’s place to do so.

The MSC fails to see why the Department has crafted a section specific to the unconventional natural gas industry. Well locations are not determined based upon the circumstances of a community, but rather where the resource is located and where an operator has secured legal right to develop the resource. As outlined above, the ability of interested parties to receive notice and engage in the permitting process for unconventional natural gas development is unrivaled among other industries. Moreover, there is no quantifiable data offered to support any need for this provision, which will be a significant drain upon both Department and operators’ resources. An analysis of existing unconventional natural gas wells shows that only 4% of the nearly 12,000 wells in the Commonwealth are located within current EJ Areas – a designation which the MSC has already opined as being arbitrary. In summary, there is no evidence whatsoever to suggest that EJ Areas are targeted in any manner for unconventional natural gas development.

Section V Inspections Compliance, and Enforcement

The Section title appears to be missing a comma after “Inspections”.

B. Prioritizing Compliance

This section begins as follows:

“DEP will prioritize compliance in EJ Areas or areas where environmental and public health conditions warrant increased attention.” (Emphasis added).

The use of the term “or areas” suggests that this section appears to be broader in its application than just EJ Areas. To be clear, the MSC agrees with the concept that the Department should indeed focus its compliance efforts wherever “*environmental and public health conditions warrant increased attention.*” However, it is unclear that this particular section is necessary to the Policy since this concept should be one of universal application throughout the Department’s work.

In addition, should the Department develop “*methods for prioritizing compliance and enforcement*” – regardless of whether such efforts are within or outside of EJ Areas – the MSC encourages the Department to solicit public comment and input on these methods. This will allow interested stakeholders to better understand the criteria the Department intends to apply with respect to prioritized compliance and enforcement and offer informed comments on those proposed criteria.



C. Civil Penalty Enhancements

The first sentence of this section has an extraneous comma after the word “health”.

While acknowledging the Department’s obligation to hold persons responsible for violations of the Commonwealth’s environmental statutes, it is unclear what this section means by “disproportionate” negative impacts to human health and the environment in EJ Areas. Is the Department inferring that *any* violation which happens to occur within an EJ Area is subject to an enhanced civil penalty, merely because it occurred within an EJ Area? If this is the inference, then this would appear to be a highly inappropriate exercise of the Department’s enforcement discretion and, ironically, discriminatory in nature because it would treat non-EJ Areas as less worthy of public health or environmental protection than EJ Areas.

Moreover, no guidance is offered as to how PA DEP will consider such ‘disproportionate negative impacts’ in calculating assessments for civil penalties. Many programs within the Department have an established matrix which lays out, with specificity, factors that influence such a calculation²⁰. To the extent that the Department has the authority to include these impacts in its calculation, it should provide clear direction to all parties – including PA DEP field staff – as to how these impacts are to be considered.

This section also states that “*DEP may add reasonable enhancements to civil penalties at its discretion.*” Respectfully, this statement is factually inaccurate, as the Department’s discretion is not unfettered. Penalties for violations of statutes are governed, generally, by the underlying statute. Many statutes lay out minimum and maximum civil penalties and provide direction and siderails as to the circumstances where these penalties may be enhanced. For example, the Clean Streams Law²¹ provides a tiered approach to civil penalties based on whether the conduct was negligent, was intentional or knowingly performed, or was committed within two years of a similar prior violation. It makes no such distinction as to *where* the conduct was committed. Other environmental statutes have similar provisions.

The MSC requests that this statement be deleted.

Section VII Policy Updates

This section appears to be numbered incorrectly and should instead be “VIII”.

²⁰ For example, see Bureau of Waste Management – Enforcement Actions Document # 250-4000-002: <http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=8050&DocName=ENFORCEMENT%20ACTION%20S.PDF%20%20%3Cspan%20style%3D%22color%3Agreen%3B%22%3E%3C%2Fspan%3E%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E>

²¹ Act 394 of 1937 §602: <https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1937&sessInd=0&smthLwInd=0&act=394&chpt=6&sctn=2&subsctn=0>



Conclusion

The MSC appreciates your review and consideration of these comments and welcomes the opportunity to discuss them in greater detail with the Office of Environmental Justice. As shared above, and put into practice each day, our member companies – representing the entire spectrum of natural gas development, transportation and utilization – value their engagement with the communities in which they operate. After all, they are more likely than not the same communities in which they live and raise their families.

Sincerely,



David E. Callahan
President

