PROPOSED RULEMAKING
ENVIRONMENTAL QUALITY BOARD
[25 PA CODE CH. 78]

The Environmental Quality Board (Board) proposes to amend §§ 78.1 and 78.19 (relating to definitions; and permit application fee schedule) to read as set forth in Annex A. This proposal satisfies the obligation of the Department of Environmental Protection (Department), as specified at 25 Pa. Code § 78.19(f), to provide the Board with an evaluation of the Chapter 78 fees and recommend regulatory changes to address any disparity between the program income generated by the fees and the Department's cost of administering the program. The proposal includes several changes to the structure of oil and gas well permit fees, including establishing increased flat fees for unconventional well permits.

This proposed rulemaking was adopted by the Board at its meeting of ___________, 2013.

A. *Effective Date*

This proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information, contact Kurt Klapkowski, Director, Bureau of Oil and Gas Planning and Program Management, Rachel Carson State Office Building, 15th Floor, 400 Market Street, P. O. Box 8765, Harrisburg, PA 17105-8765, (717) 772-2199; or Trisha Salvia, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding submitting comments on this proposed rulemaking appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposed rulemaking is available electronically on the Department of Environmental Protection's (Department) web site at www.dep.state.pa.us (DEP Search/Keyword: Public Participation).

C. *Statutory Authority*

This proposed rulemaking is authorized under 58 Pa.C.S. § 3274 (relating to regulations) which directs the Board to adopt regulations necessary to implement 58 Pa.C.S. Chapter 32 (relating to development), 58 Pa.C.S. § 3211(d) (relating to well permits), which authorizes the Board to establish permit fees that bear a reasonable relationship to the cost of administering 58 Pa.C.S. Chapter 32, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which authorizes the Board to promulgate regulations of the Department.

D. *Background and Purpose*

Applicants for permits to drill oil and gas wells in this Commonwealth must pay the permit fee established by the Board. These permits fees fund the entire operation of the Department's Office of Oil and Gas Management (Oil and Gas Program), which is responsible for statewide oil and gas conservation and environmental programs to facilitate the safe exploration, development, and recovery of Pennsylvania's oil and gas reservoirs in a manner that will protect the

Commonwealth's natural resources, the environment, and public health, safety and welfare. The permit fees are placed in the Well Plugging Fund.

The Department prepared and presented to the Board a "3-Year Regulatory Fee and Program Cost Analysis Report" as part of this proposed rulemaking. A copy of that Report is available from the persons listed in Section B, above. The conclusions of that Report are outlined in this section of the Preamble.

The Well Plugging Fund balance is declining as the Department's expenses to operate the Oil and Gas Program have exceeded permit fee revenues for the past several fiscal years. Fiscal Year (FY) 2011-12 revenues totaled $13.5 million and expenditures exceeded $16.6 million. The Oil and Gas Program is projected to have increasing expenditures with declining revenues in future fiscal years, which will continue to deplete the existing fund reserves. At current permit fee and expenditure levels, with projected permitting levels the Department expects a $1.8 million deficit of the Well Plugging Fund by the end of FY 2013-14.

In addition to declining Well Plugging Fund balances, the Oil and Gas Program is facing increasing operational expenditures due to increased activity in the area of oil and gas exploration associated with previously unexplored unconventional gas formations, as well as the development of natural gas infrastructure throughout the Commonwealth. These expenditures are only expected to increase as exploration of other unconventional formations and infrastructure development expands.

The proposed rulemaking increases the well permit fee to provide adequate revenue to support the ongoing operations of the program as well as to meet future program needs, including permitting, inspection, enforcement and information technology needs. Compounding the problem of declining funds due to increasing expenditures is the decrease of well permit applications. Since 2010, the Department has experienced a 22% decrease in the number of unconventional well permit applications received. The decline in permit applications is met with declining revenues but with the passage of Acts 9 and 13 of 2012, the overall responsibility of the Oil and Gas Program has increased. It is imperative that the Department have the resources and technology necessary to ensure industry compliance and environmental protection as Office of Oil and Gas Management responsibilities in this area continue to expand.

This increase in workload coupled with declining permit revenues creates a situation where the incoming permit revenue is insufficient to cover the current operational costs of the program, not allowing any room for flexibility in terms of future staff and resource needs. As the oil and gas industry continues to expand in Pennsylvania, additional Department staff and technology will be critical to ensure the Department's proper oversight of the industry.

Two areas where this increased workload and expenditures make the proposed permit fee increase critical are streamlined electronic review and staffing.

Streamlined Electronic Review. The Department will allocate a substantial portion of the increased fee revenue to Information Technology projects for the Oil and Gas Program, such as electronic permitting, mobile digital inspections, upgrades to existing reporting systems and modernization of forms and databases. This investment in technology will yield efficiencies for both the Department and the regulated community in terms of more predictable and timely permit issuance, more effective site inspections, increased availability of staff for compliance assistance, and more streamlined reporting to and communication with Department. It will also make the Department's work more transparent to the public as electronic documents can be easily made available on the internet. The two key initiatives on the forefront of Information Technology priorities for the Department are the ePermitting initiative and enabling staff with devices and the capability to conduct mobile digital inspections.

The ePermitting system will provide the ability to process applications for Oil and Gas permits online. The new system will replace the manual process that requires applicants to complete paper forms and deliver multiple copies of documentation to a Department District office. This change should reduce data transcription errors from entering data on paper forms into the Department's databases. The new ePermitting system is designed to increase review efficiency through electronic workflow and to significantly decrease the time from initial application submission to permit issuance. It will enable applicants to submit online payment, and will provide for permit review transparency as an applicant will be able to closely follow their permit through the approval process and receive automatic notifications as it completes the outlined benchmarks. Upon approval, the system will deliver the permit electronically to the applicant, thereby eliminating the lag time from permit issuance to receipt by the applicant.

Electronic receipt and storage of the permitting documents will also result in significant savings in terms of storage and of staff time and costs associated with related Right-to-Know requests. The Department is second in the Commonwealth in terms of such requests, much of which is attributed to the Oil and Gas Program. The public will enjoy greater access to timely data as the Department receives it.

Creation and deployment of a mobile digital inspection platform and mobile devices will create marked improvement and efficiencies in terms of how the organization conducts site inspections. Current paper based inspection forms necessitate staff spending at least one day a week in the office to manually enter data from paper inspection reports and mail the resulting inspection report and findings to operators. Mobile digital inspections will allow entry of data into the system while on-site, eliminate the need to return to the office for data entry, and will enable employees to spend their time where they are needed, on location for inspections and compliance assistance.

Staffing Needs. Currently, there are 202 Full Time Equivalents (FTE's) assigned to the Office of Oil and Gas Management. The program has grown considerably; in 2004 the program had 64 FTE's. Approximately 80% of the current staff is assigned to engineering, scientific or permit/inspection-related work, as Oil and Gas Inspectors or Oil and Gas Inspector Supervisors. Another 20%, are assigned to clerical, administrative, or legal work to support the Oil and Gas Program.

The Department is proposing that additional positions are needed within the Office of Oil and Gas Management to implement the additional responsibilities required by 58 Pa.C.S. Chapter 32, to review well pad and pipeline development permit applications in an efficient and timely manner, and to support the Bureau of Oil and Gas Planning and Program Management.

58 Pa.C.S. Chapter 32 comprehensively amended the 1984 Oil and Gas Act and established a number of new responsibilities on the oil and gas industry as well as the Department. Pursuant

to 58 Pa.C.S. Chapter 32, the Department must inspect well sites before drilling can commence and well drillers must now notify the Department prior to cementing all strings of casing and before hydraulic fracturing operations commence. These new requirements have stretched thin the current staff and therefore necessitate additional inspectors to fulfill the increased inspection requirements and expectations of the law. Absent additional inspection staff, well sites will not be inspected at the frequency envisioned by the law.

In addition to responding to new legislative requirements, additional staff is needed to timely review the increase in permits received by the Department due to substantial natural gas infrastructure development throughout the Commonwealth. Failure to review permit applications within a reasonable time period can result in substantial cost increases for these projects and ultimately prevents natural gas from reaching consumers, thus increasing commodity costs.

Finally, as a result of the Department's 2011 reorganization, the Office of Oil and Gas Management was created to unify the planning and program management staff with the permitting, inspection and enforcement staff under a common Deputate. As a result of this reorganization, additional staff are necessary to support the Office's Bureau of Oil and Gas Planning and Program Management. These additional staff will enable the Office to better develop new regulations, policies and technical guidance documents pertaining to well construction and surface activities on a timely basis. Failure to promptly develop these rules and policies can lead to uncertainty and inconsistent application of the law. Additional staff will better serve the public as well as the industry by making more transparent how DEP interprets and implements the law.

Without additional revenue provided by a regulatory fee package, additional staff complement will not be possible, which will jeopardize the Department's ability to provide high quality compliance assistance, assure timely permitting, ensure adequate inspection and enforcement operations, and leverage existing technology to streamline inspection and permitting activities.

The Department consulted with the Oil and Gas Technical Advisory Board (TAB) in the development of this proposed rulemaking. The Department presented the draft proposed rulemaking to TAB at its April 23, 2013 meeting. Because the rulemaking does not address technical issues relating to oil and gas, TAB did not take a formal action relative to the proposed rule.

E. *Summary of Regulatory Requirements*

Current Fee Structure

The current permit fee structure is outlined in § 78.19 and establishes three classes of wells. Two are based on the type of wellbore that will be used to produce oil or natural gas – vertical or nonvertical (deviated or horizontal) and the third is based on the Marcellus Shale being the target formation. Permit fees for an individual well are determined by use of a sliding scale based on the total well bore length in feet. The sliding scales for the nonvertical and Marcellus wells are identical and are roughly two to three times the fee paid for a vertical well of the same total well bore length. As an example, an applicant requesting a permit for a 5,000-foot vertical well pays a fee of $550, while an applicant for a nonvertical or Marcellus Shale well of the same well bore length would pay $1,600. The current average nonvertical unconventional well permit fee is approximately $3,200 and the current average vertical unconventional well permit fee is $2,000.

Proposed Fee Structure

The proposed rulemaking amends § 78.19 to create two classes of wells for permit fee purposes. These classes are "conventional wells" and "unconventional wells." This part of the proposal follows the general structure of 58 Pa.C.S. Chapter 32, which established the "conventional vs. unconventional well" distinction in a number of different areas. For example, 58 Pa.C.S. § 3215 (relating to well location restrictions) establishes differing setback requirements for the two classes of wells, and 58 Pa.C.S. § 3218 (relating to protection of water supplies) establishes differing presumptions of liability for the two classes of wells.

It is important to be clear that the proposed rulemaking does not include any changes to the current permit fee structure for applicants for permits to drill "conventional" oil and gas wells. Although "conventional" wells and formations are not defined in 58 Pa.C.S. § 3203 (relating to definitions), proposed changes to § 78.1 would define those terms with reference to section 3203's definitions of "unconventional well" and "unconventional formation."

By reviewing the "unconventional" definitions, "conventional wells" include (1) any wells drilled to produce oil, (2) wells drilled to produce natural gas from formations other than shale formations, (3) wells drilled to produce natural gas from shale formations located above the base of the Elk Group or its stratigraphic equivalent, and (4) wells drilled to produce natural gas from shale formations located below the base of the Elk Group where natural gas can be produced at economic flow rates or in economic volumes without the use of vertical or nonvertical well bores stimulated by hydraulic fracture treatments or by using multilateral well bores or other techniques to expose more of the formation to the well bore. For permit applicants to drill such wells, this proposed rulemaking will have no impact.

Permit applicants for conventional wells will see no impact from this proposed rulemaking because the rulemaking retains the current "vertical well" fee structure as the new "conventional well" fee structure. Typically, "conventional wells" as defined in the proposed rulemaking would currently pay the "vertical well" fee.

For "unconventional nonvertical wells" and "unconventional vertical wells, the proposed rulemaking establishes flat permit fees of $5,000 and $4,200, respectively, regardless of the total well bore length of the well. The Department has determined that this increase will enable the Department to operate the Oil and Gas Program in the manner contemplated by the current rules and regulations, as well as undertake the initiatives described above.

F. *Benefits, Costs and Compliance*

Benefits

The increased oil and gas permit fee revenue would be used to adequately fund the Department's Office of Oil and Gas Management. Revenue to the Department from the fee increase would be used solely to operate the regulatory program overseeing the responsible development of the Commonwealth's oil and natural gas resources. In addition, the Department will be able to pursue streamlined electronic review initiatives and increase the Office of Oil and Gas Management staffing levels to meet the challenges of increased responsibilities and timely oversight, responsiveness and transparency. Finally, the proposed regulation reduces the burden on the regulated community and the Department because it replaces the sliding scale permit fees, which require proper calculation and review, with flat fees that are easy to understand and implement.

Compliance Costs

Nonvertical Unconventional Wells:

The average permit fee paid for a nonvertical unconventional well or Marcellus Shale well during 2012 was approximately $3,200 per well. The proposed regulation establishes a fixed $5,000 fee for each nonvertical unconventional well which is an increase of $1,800 per well. The Department projects that approximately 2,600 well permit applications will be received annually following this adoption of these amendments. This would result in an additional annual incremental permit cost of $4,680,000 to the regulated community.

Vertical Unconventional Wells:

The proposed regulation establishes a fixed $4,200 fee for each vertical unconventional well. The Department projects that approximately 80 well permit applications for vertical unconventional wells will be received annually following this adoption of these amendments. This would result in an additional annual incremental permit cost of $176,000 to the regulated community.

No new legal, accounting or consulting procedures would be required.

Compliance Assistance Plan

The Department plans to educate and assist the public and regulated community in understanding the newly revised requirements and how to comply with them. This outreach initiative will be accomplished through the Department's ongoing compliance assistance program. Permit application forms and instructions would be amended to reflect the new permit fee structure.

Paperwork Requirements

There are no additional paperwork requirements associated with this proposed rulemaking with which the industry would need to comply.

G. *Pollution Prevention*

The Federal Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. The anticipated increased revenues would allow the Department to continue providing adequate oversight of the oil and gas industry in this Commonwealth, ensuring continued protection of the environment and the public health and welfare of the citizens of this Commonwealth.

H. *Sunset Review*

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended. In addition, in accordance with § 78.19(f), the Department will evaluate these fees and recommend regulatory changes to the Board to address any disparity between the program income generated by the fees and the Department's cost of administering the program with the objective of ensuring fees meet all program costs and programs are self-sustaining. This report and any proposed regulatory changes will be presented to the Board no later than three years after the promulgation of the final-form rulemaking.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on __________, 2013, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act (71 P.S. § 745.5(g)), the Commission may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

J. *Public Comments*

Written comments. Interested persons are invited to submit comments, suggestions or objections regarding the proposed rulemaking to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by ________ (within 30 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by _________ (within 30 days of publication in the *Pennsylvania Bulletin)*. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic comments. Comments may be submitted electronically to the Board at RegComments@pa.gov and must also be received by the Board by __________ (within 30 days of publication in the *Pennsylvania Bulletin).* A subject heading of the proposed rulemaking and a return name and address must be included in each transmission. If the sender does not receive an acknowledgement of electronic comments within two working days, the comments should be retransmitted to ensure receipt.

E. CHRISTOPHER ABRUZZO
Acting Chairman
Environmental Quality Board