

**NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD**

[25 Pa. Code Ch. 78]

Oil and Gas Wells

Order

The Environmental Quality Board (Board) by this order amends 25 Pa. Code Chapter 78 (relating to Oil and Gas Wells) by adding new definitions and amending section 78.19 relating to permit fees as set forth in Annex A. The Board has the authority to establish fees by regulation under Section 201 of the Oil and Gas Act, 58 P.S. § 601.201. Under this provision, the Board has the authority to set fees at an amount that bears a reasonable relationship to the cost of administering the Act.

This order was adopted by the Board at its meeting of _____, 2009.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact Ronald Gilius, Director, Bureau of Oil and Gas Management, Rachel Carson State Office Building, 5th floor, 400 Market Street, P.O. Box 8765 Harrisburg, PA 17105-8461, 717-772-2199; or Scott Perry, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) Web site: www.depweb.state.pa.us.

C. Statutory Authority

The final-form rulemaking is adopted under the authority of Section 201(d) of the Oil and Gas Act (58 P.S. § 601.201(d)) which authorizes the Department to establish, by regulation, well permit fees that bear a reasonable relationship to the cost of administering the Act, section 604 of the Oil and Gas Act (58 P.S. § 601.604) which directs the Board to adopt regulations necessary to implement the Act, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), authorizing and directing the Board to adopt regulations necessary for the performance of the work of the Department.

D. Background and Purpose

The Oil and Gas Act was passed on December 19, 1984, and established a \$100 fee for Oil and Gas well permits. Section 201(d) of the Act allows the Department to increase the fee by regulation. Under this provision, fees, must be set at a level that “bears a reasonable relationship to the cost of administering” the act. Fees for traditional oil and gas wells have never been increased. However, fees for Marcellus Shale wells were recently increased on April 18, 2009.

At the same meeting that the Board approved the proposed rulemaking that is made final by this order, the Board also approved a final-omit rulemaking that increased permit fees for wells that produce natural gas from the Marcellus Shale formation. The proposed rulemaking also included the new Marcellus Shale permit application fees that were included in the final-omitted rulemaking to allow interested persons to comments on the new Marcellus Shale permit application fees as part of the proposed rulemaking. The Board committed to making appropriate changes to the Marcellus Shale permit application fees as part of the proposed rulemaking in response to public comments. On April 18, 2009 the final-omitted regulations increasing permit fees for Marcellus Shale wells were published in the Pennsylvania Bulletin and became final.

There are three considerations that support a regulation that increases the permit application fees authorized by the Oil and Gas Act. First, the costs of administering the Act have increased significantly since 1984 when the General Assembly establish the \$100 fee that the Department currently charges. This \$100 per permit application fee does not currently bear a reasonable relationship to the cost of administering the Oil and Gas Act. Indeed, in 2008 permit fees only provided 15% of the revenue needed by the Department to administer the Act. The remaining 85% was provided through the General Fund.

Second, the number of permit applications that the Department reviews annually has grown dramatically over the past several years. In 2000, 1,354 wells were drilled in Pennsylvania. In 2008 the Department issued 7,927 well permits, of which 7,451 were for traditional oil and gas wells. The Department’s current staffing levels for the Oil and Gas program were established at a time when the Department reviewed considerably fewer permit applications than it reviews today. To properly review the number of applications that the Department currently receives and to inspect the operations at sites that currently possess a permit, the Department needs additional staff that the current \$100 fee cannot support.

Finally, there continues to be significant interest in the development and recovery of natural gas resources from the Marcellus Shale formation that underlies much of Pennsylvania. Despite the recent economic downturn and the decline of natural gas prices, Marcellus Shale well permitting and drilling is increasing. In 2008, the Department permitted 476 Marcellus Shale wells. In the first 5 months of 2009, the Department permitted 569 Marcellus Shale wells.

The drilling and completion techniques that allow recovery of natural gas from the Marcellus Shale present new and expanded environmental considerations that the Department must evaluate to ensure the gas is recovered in an environmentally protective manner. Many of the environmental considerations are directly related to the use of water to recover natural gas from the Marcellus Shale formation. Extracting natural gas from the Marcellus Shale requires a

process known as “hydraulic fracturing”. Hydraulically fracturing the Marcellus Shale uses far greater amounts of water than traditional natural gas exploration. Large volumes of water are pumped into the formation, along with sand and other materials under high pressure, to fracture the rock surrounding the well bore. A single well can use millions of gallons of water to hydraulically fracture the rock. After the hydraulic fracturing process is completed, the wastewater must be properly managed.

The significantly greater use of water at Marcellus Shale wells creates a series of environmental issues during the drilling and development of a Marcellus Shale well. First, there are a number of considerations associated with withdrawal of water, including the need to monitor and restrict the amount of withdrawal to avoid dewatering streams and causing pollution. Under state water law, a person who withdraws water in the amounts generally associated with Marcellus Shale well development must register the withdrawal with the Department. Second, there are a number of considerations associated with the use and storage of the water used for hydraulic fracturing at the well site or at other locations. Third, there are a number of considerations associated with the proper management, treatment, and disposal of the wastewater.

The Department expends considerable staff resources to review the additional information associated with a Marcellus Shale well permit. The fees provided by the final-omitted regulation provide the revenue needed to recover the Department’s costs to properly evaluate a Marcellus Shale well permit application and to inspect the activities associated with Marcellus Shale well drilling. Therefore, the fees provided by the final-omitted regulation will remain unchanged.

E. Summary of Changes Made in the Final-form Rulemaking

§ 78.1 (definitions)

In response to comments by the Independent Regulatory Review Commission, the Department added definitions for Marcellus Shale well, Non-vertical well and Vertical well.

§ 78.19 (d) (underpayment of fee)

In response to several comments, the Department removed the 10% penalty for wells that are drilled longer than the length applied for. As amended, applicants only need to submit difference between the correct fee and the previously submitted fee.

§ 78.19 (e) (money-back guarantee)

This subsection stated that fees were non-refundable. It was not the Department’s intention to withhold fee refunds where the Department fails to take action on well permits within the time period required by the Department’s money-back guarantee policy. This subsection has been deleted.

F. Summary of Comments and Responses on the Proposed Rulemaking

Fees for traditional wells

Several commentators questioned the size of the fee increase for non-Marcellus Shale wells. They contend that for conventional shallow oil and gas well permitting, either no fee increase is needed or at most, a fee increase that tracks inflation since 1983 would be more appropriate. Using the Consumer Price Index published by the US Department of Labor's Bureau of Labor Statistics, the fee for such wells would increase from the current \$100 as enacted in the Oil and Gas Act to \$216.

The initial \$100 permit fee did not cover the program costs in 1984. Program staff and most equipment has primarily been funded by the General Fund. Very few positions, equipment, or emergency well plugging has been funded by permit fees. Indeed, revenue provided by permit fees only covered 15% of the Department's administrative costs in 2008 with the remaining 85% funded through the General Fund. Also, permitting has increased by 398% in just the last ten years with only recent increases in permitting staff and minimal increases in inspection staff. It is also important to note that the well permit fee is not an annual fee. Therefore, the entire program must be funded through new well permits. In order to provide the funding needed to employ sufficient staff and provide equipment necessary to carry out the Department's statutory duties through the well permit application fee, as envisioned by section 201(d) of the Oil and Gas Act, the permit fees must be increased in the amounts provided in the regulation to "bear a reasonable relationship to the cost of administering this act."

Fees based on well bore length

Several commentators questioned the relationship between well bore length and the administrative costs incurred by the Department in reviewing and processing the application.

Section 201(d) of the Oil and Gas Act states that well permit fees must "bear a reasonable relationship to the cost of administering this act." The Department believes the fee structure satisfies this requirement. While there is not a direct relationship between well bore length and review time, deeper wells do tend to have a greater potential for environmental impacts and this in turn requires greater Department evaluation of the potential impacts. Any set permit fee will necessarily require one group of well drillers to pay more than others if the Department's total costs to administer the program are to be covered by the permit fee as envisioned by the law. The Department believes the ability to bear the cost of increased fees is better able to be borne by operators drilling deeper wells and to do otherwise would place an undue burden on smaller operators.

Penalty for underpayment of fee

Commentators requested deletion of the provision in § 78.19(d) that penalize the operator if the drilled well bore length exceeds the length specified in the permit application.

This provision has been removed.

Fee refund

Commentators questioned whether the Department would continue to refund permit fees

according to its money-back guarantee policy in light of § 78 (e) which states that fees are non-refundable.

This subsection has been deleted. It was not the Department's intention to withhold fee refunds where the Department fails to take action on well permits within the time period required by the Department's money-back guarantee policy. However, the Department will not refund permit fees for wells that are permitted but not drilled or for wells that are drilled that have a shorter well bore length than the length permitted.

G. Benefits, Costs and Compliance

Benefits

The residents of this Commonwealth and the regulated community will benefit from this regulation because the Department will be able to continue to uphold the purposes of the Oil and Gas Act. The purposes of the act are:

- (1) Permit the optimal development of the oil and gas resources of Pennsylvania consistent with the protection of the health, safety, environment and property of the citizens of the Commonwealth.
- (2) Protect the safety of personnel and facilities employed in the exploration, development, storage and production of natural gas or oil or the mining of coal.
- (3) Protect the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs.
- (4) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution. (58 P.S. §601.102)

The public will benefit in two general ways. First, the public will benefit from a fiscal perspective when the costs of the regulatory program are imposed on the regulated community, as the Oil and Gas Act provides. For Marcellus Shale gas well development, the need for timely and special reviews has significantly increased the Department's cost of implementation of the program and it is in the public interest to impose these costs on the regulated community. The public also benefits from an environmental perspective because the Department will be able to hire additional staff to properly inspect new and existing traditional wells and to properly review Marcellus Shale well permit applications.

The regulated community will also benefit because the regulated community wants timely reviews of permit applications, which state law also requires. Having the staff to evaluate well permit applications in a timely and environmentally protective manner will benefit the regulated community and the public.

Costs

This rulemaking will not impose any additional costs on the Department. This proposal will help

the Department offset the greater implementation costs to support new and extensive reviews of oil and gas permit applications.

The base fee for vertical wells \$250 with an additional \$50 per 500 feet of well bore drilled from 2,000 feet to 5,000 feet and an additional \$100 per 500 feet for the well bore drilled past 5,001 feet. Non-vertical wells and Marcellus Shale wells have a base fee of \$900 with an additional \$100 per 500 feet of well bore drilled past 1,500 feet. An applicant for a vertical well with a well bore length of 1,500 feet or less for home use shall pay a permit application fee of \$200.

Compliance Assistance Plan

A compliance assistance plan is not necessary because the new fee structure does not create a situation where a well operator will be out of compliance with the regulation. Well permits that do not contain the appropriate fee are not complete. The Department will return the application to the applicant and tell the applicant what the appropriate fee is. In order to minimize this circumstance from occurring, the Department will publicize the new permit fee requirements on its website and inform potential applicants of the new fee structure at upcoming industry trainings.

Paperwork requirements

No additional paperwork will be required as a result of this rulemaking. However, the Department will need amend its well permit application form and instructions to incorporate and explain the new permit fee structure.

H. Sunset Review

These regulations 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.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 4, 2009, the Department submitted a copy of the notice of proposed rulemaking, published at 39 *Pa.B.* 838 to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees, and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on (blank), these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on (blank) and approved the final-form regulations.

J. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated there under at *1 Pennsylvania Code* §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 39 *Pa.B.* 838 on February 14, 2009.
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, *25 Pennsylvania Code*, Chapter 78, are amended to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately.

BY:

JOHN HANGER
Chairperson
Environmental Quality Board