

July 22, 2013

Robert Altenburg
Department of Environmental Protection Policy Office
400 Market Street, 16th Floor
Harrisburg, PA 17105

**Re: Comments on Policy on Public Participation in the Permit Review Process
Document ID: 012-0900-003**

Dear Mr. Altenburg,

The undersigned organizations appreciate the opportunity to submit comments regarding the Department of Environmental Protection's proposed policy on public participation. As representatives of organizations actively engaged with communities, we support broad and active public participation. We also encourage the Department to further expand the opportunities for the public to take part in and contribute to the agency's decisionmaking process.

The lives and health of residents across the Commonwealth are affected by the Department's permitting decisions in a variety of areas, from new infrastructure to water use to toxic clean-up. The public participation process is essential to transparent and fair decisions, because it allows those who are most affected by projects to influence the outcome of permit applications. In addition, the Department can derive great value from the information and perspectives that residents can provide related to projects proposed for their communities.

In order to realize these benefits, a public participation process must be accessible, structured, and allow for meaningful participation by diverse members of the public. With this in mind, we offer the following comments on specific sections of the proposed policy.

Purpose

We welcome the development of a robust "framework within the applicable regulatory and statutory requirements," as outlined in the policy. However, we request that the DEP consider codification of the public participation policy itself, to ensure its use and strengthen its role in all aspects of the permitting process. We also recommend that the Department expand its disclaimer that "the Department reserves the discretion to deviate from this policy" in order to spell out and clarify which circumstances would warrant deviation. Public participation must be consistent, required, and enforceable, not voluntary or potentially limited by arbitrary circumstances.

Applicability

The proposed policy is limited to permits published in the *Pennsylvania Bulletin*. This aspect of the proposed policy is too narrow. By excluding permits that are not subject to notice in the *Pennsylvania Bulletin*, general permits, and permits by rule, the Department is in effect excluding public participation in decisions on some of the most important and far-reaching permits that the Commonwealth issues. For example, natural gas well drilling permits are not published in the *Pennsylvania Bulletin* and not subject to a general public comment period. Nor are General Permits for both air emissions and erosion and sedimentation, which are increasingly used by the Department for large-scale projects such as compressor stations, multi-well gas pads, and waste impoundment pits—projects that in turn can have far-reaching environmental and health impacts.

In addition, some permits are part of a broader development process, but current regulations do not require plan approval for the build out of the initial project—even though its environmental impacts increase significantly over time. A key example is the drilling permit for a natural gas well. As stated above, public input on these individual permits are not part of the proposed policy—even though such permits include not only a well, but also an impervious well pad that can be several acres in size, open pits for storage of water and liquid and solid waste, chemical storage, processing equipment, roads, and even quarries. Sometimes a single well pad can hold several or a dozen wells and the wells must be connected to gathering and transmission lines. Unconventional well development requires millions of gallons of water and thousands of truck trips per site. Under the proposed policy, industrial development on this large scale evades any public participation process.

Given these realities, the build out of natural gas projects—which start with the issuance of a single individual drilling approved by the Department—can have a transformative impact on a community and environment, often changing a rural area into an industrial zone. To help ensure that this type of development would be subject to a public participation process, we strongly recommend that the Department change the policy to include permits that are related to and spur broader development, such as a natural gas well drilling permit.

Relation to Other Public Participation Requirements: Environmental Justice

The broad exception of many permit types discussed above also does not make sense if the Department is to seriously integrate its own environmental justice areas and Environmental Justice Public Participation policy. That policy is based on the Environmental Justice Work Group Report of June 2001. The policy defines environmental justice (EJ) as “...the fair treatment and meaningful involvement of all people with respect

to the identification of environmental issues, and the development, implementation, and enforcement of environmental policies, regulations, and laws.”¹

In light of the expansion of natural gas activities in Pennsylvania, we strongly recommend that the Environmental Justice policy be more robustly applied to communities with regard to public participation in permitting. The EJ policy adopts a ten-step review process for “trigger permits” that “...regulate activities that may lead to significant public concern due to potential impacts on human health and the environment.”² Appendix A lists the trigger permits, including with regard to industrial wastewater, new major sources of hazardous air or criteria pollutants, major modification to air permits, landfill and other waste permits, and the land application of biosolids. Natural gas development clearly involves a very large number of drilling, air, and other permits that fall into these trigger categories. It also generates large amounts of liquid and solid waste, for which permits are issued for industrial wastewater treatment, on-site burial, disposal in landfills, and land application.

In addition, use of the EJ policy should be required in relation to the public participation policy because of an opt-in process that includes (but is not limited to) General Permits and permit renewals or revisions. Regarding opt-in permits, it is stated that the Department should consider “1) identified community concerns; 2) present or anticipated environmental impacts; and 3) reasonably anticipated significant adverse cumulative impacts.”³

Importantly, the opt-in process described in the EJ policy expands public participation to General Permits and permits not listed in the *Pennsylvania Bulletin*—including individual gas drilling permits, other permits, and authorizations to which (as discussed above) the Department believes the proposed public participation policy is not applicable.

Also outlined is how an area of concern and status of an Environmental Justice community is to be identified. To be effective, the proposed public participation policy must require inclusion of EJ areas in all permitting considerations. We request that the Department begin the process of identifying communities where gas development is occurring and that meet the criteria of EJ areas, using the guidelines in the Department’s Environmental Justice Public Participation Policy. We also recommend that the Department refer this critical issue to the Environmental Justice Advisory Board for action at its next scheduled meeting.

¹ PADEP Environmental Justice Public Participation Policy, Doc. ID # 012-0501-002 dated 4.24.2004, p. 3

² Ibid.

³ Ibid., p. 4

General Policy

We support the concept that project applicants should seek public input from affected communities prior to submitting a permit or other authorization to the Department and that local governments be included in the proposed policy. It is critical that basic facts and information about a planned project are presented to the public before plans are set in motion, allowing for a more iterative process that might, in fact, substantially change a permit application or project scope in order to ensure that it is more protective of the environment.

We support the requirement that the Department responds to each relevant comment, including hearing comments, and that these responses are published in a Comment and Response Document or a Record of Decision. A public document that fully reports the public input and the agency's response requires justification by the agency of its decisions and shows how the public input influenced the final outcome, lending validity to the process. The documentation of comments ensures much-needed agency transparency. Without it, the public is left in the dark regarding the basis for final permit decisions, the undue influence of project applicants on permit decisions may be reasonably suspected, and the very legitimacy of the agency's work may be called into question.

Such a situation occurred when the Department proposed an aquatic life standard for chlorides in 2010 and 2013, based on a standard Iowa developed in coordination with the U.S. Environmental Protection Agency (EPA). In both instances, the Department failed to include this contaminant in its final version of the Triennial Review and did not adopt a chloride standard when revising Chapter 93 discharge standards. The Department itself did not provide any scientific justification or data to rationalize the removal of the proposed standard. Nor did the Department refute or respond to several scientific studies that were referenced by public commenters in testimony submitted to the agency during the public comment period. Essentially, the public comments were ignored and the bulk of technical evidence inexplicably disregarded. The Department narrowly explained the reason for withdrawing the proposal as follows:

“The Department is recommending the Board withdraw the chloride criteria, not because the Iowa criterion is flawed but rather it is not completely applicable statewide to the ionic composition found in the waters of the Commonwealth” (DEP Comment Response document, p. 19).

In other words, the Department thinks that it is possible that there are streams in Pennsylvania for which the Iowa standard may not be appropriate for, but never defined in any quantifiable or specific way what specific stream composition would result in the standard being “not completely applicable”—let alone propose another, protective standard it considered more appropriate to the Commonwealth. Given the deep interest

shown by the public in this issue—including several substantive comments submitted and supported widely by organizations, large public turnout to hearings, and many letters filed regarding the chloride standard when the Department was revising its effluent standards—the Department left the public in the dark about why this very important pollution issue was being left completely unaddressed, despite clear negative impacts to so many of the State's rivers and streams.

The Alpine Rose case illustrates the importance of broad public input, which the Environmental Hearing Board (EHB) determined to be beneficial to sound permit decisions by the Department. In a decision issued by the EHB in 2006, Blue Mountain Preservation Association v. DEP and Alpine Rose Resorts, the Board held that a person proposing a new, additional, or increased discharge to High Quality or Exceptional Value Waters must demonstrate that no environmentally sound and cost-effective non-discharge alternative exists to better protect the quality of receiving surface waters.

The Board explained the comment process as follows: "At the permitting stage, the Department receives input from the public, including concerned citizens. Those citizens are provided with an opportunity to come forward with their concerns, which are then investigated by the professional staff at the Department. Many times concerns are raised by citizens that must be addressed by the technical staff and other professionals hired by the permit applicant. In some cases, issues raised by concerned citizens are such that, after more investigation by the Department and further response by the professionals employed by the permit applicant, the Department decides not to issue the permit or imposes substantial conditions in the permit." This example illustrates that public input is critical to permit decisions but unless the public has full access to the information in the Department's files, citizens cannot provide the input to help shape a sound agency decision.

In the current Policy on Public Participation dated July 16, 2005, the Department's Center for Collaboration and Environmental Dispute Resolution is required to provide consultation. Projects that may be controversial or of great public interest are specifically flagged in the current policy to include the Center to ensure effective public participation. The proposed policy removes this resource, and thereby the expertise and advocacy of the Center—in turn reducing the benefits of review for the public. We recommend that, at a minimum, the regional representative of the Department's Environmental Advocate be required to provide expertise and support for public participation.

Public Participation Options

Written/Electronic Comments in response to notice in the *Pennsylvania Bulletin*

We support the use of the *Pennsylvania Bulletin* and additional forums or venues; the greater the opportunity for public participation in decisionmaking, the better and more

protective will be the decisions made by the Department. We support the continued use of both electronic and written comments so that more people can take part.

Public Hearings

We support Public Hearings on permit applications during the formal comment period on all permits that have the potential, individually or cumulatively, to impact communities and the environment. We support the Department's proposal to extend the public comment period if a hearing is granted at the end of a formal comment period. We support the proposal that oral comments be given equal weight to written ones, since many individuals choose only to participate in this way. However, we recommend that the policy specify that public hearings will be recorded and that oral testimony will become part of the Comment and Response Document.

We recommend that the proposed policy be revised to specify what is meant by "written request of the community where significant local interest in the pending application is demonstrated to the Department." This regards whether the request can come from an individual resident speaking on behalf of his/her community; to which Division of the Department the request should be submitted and how (email or surface mail); and the factors or numerical threshold used by the Department to determine "local interest."

We support the Department's proposal that public hearings should be held in the location most affected by a project that is convenient to the impacted community. However, we recommend that these guidelines be inclusive in defining "local interest" by allowing requests to come from a community that will be directly impacted by a proposed project, even if it is not the exact geographic location for it. This is a critical consideration when several small but adjacent communities in rural areas (where much gas development, for example, occurs) inevitably share water and air quality impacts from large-scale projects.

We do not agree with the Department that two weeks is enough time for notice of a hearing. Input from potentially impacted communities is highly valuable to the Department and should be encouraged through reasonable timelines and notification requirements that take into account the workings of local government. In order to include these entities as participants, the Department needs to consider local regulatory and statutory requirements; for example, many rural municipalities only meet monthly, making 30 days' notice for a hearing or comment period the minimum necessary, and 45 days much more equitable.

A timeframe of 30-45 days is also more reasonable in light of the realities of residents' work schedules, vacations, family considerations, and possible illness or other personal issues that could interfere with the ability to attend a hearing. Longer notice periods will

greatly improve the chances of turnout and preparation, and therefore the substantive comments and information provided to the Department.

The proposed policy should also include a Department requirement for timely dissemination to the municipality of the notice of a Department permit or authorization so that local governments can achieve broad public participation that is unique to their circumstances. For instance, municipalities will often turn an issue over to their Environmental Advisory Commissions, which will assume responsibility for analysis and developing a community response. Additionally, a local government may want to schedule a public information session of its own.

A longer public comment period will also help to address the difficulty that members of the public may have in accessing Department files in a timely manner when preparing comment. The current situation is that Department offices regularly do not make files available for public review within two weeks and that gaining access through a file review or Right to Know request can take a large portion of the typical 30 day comment period on a permit. This leaves commenters at a disadvantage in preparing substantive comments by the deadline. If the Department expects informed public comment, then the Department must improve its public information program to allow citizens to review file information in a more timely manner and to routinely provide more information on the Department's website.

In addition, we recommend that this policy reflect a change in how the Department counts the days in a comment period. One of the most constraining factors for the public is when a comment period includes legal or religious holidays. The Department should extend the comment period for these days. The Department should also not count weekends as calendar days in the comment period.

Regarding the postponement of a public hearing, it is very important that attention be paid to conditions in the area where a hearing is to be held. For instance, if local weather is inclement or if there is another local event that could interfere with public participation, a hearing should be postponed and rescheduled. The proposed policy should reflect that the Department's goal is to maximize the opportunity for input at public hearings.

We agree that official records of Public Hearings should be prepared, but recommend that they also be posted online on the Department website, along with all Comment and Response Documents. Easy access by the public to this information is essential; online posting allows residents to stay informed at home, in libraries, or via local or regional government Web platforms. As noted above, access and transparency are essential to ensuring trustworthy government process and legitimate project outcomes.

We support the proposal of Web-based platforms for public hearings. But we caution that the Department should see this step as an additional opportunity to broaden public participation, not a substitute for in-person hearings. The significant segment of the population that still lacks access to Web-based media must be afforded other ways to participate.

In the current Policy on Public Participation dated July 16, 2005, it is affirmatively stated that the transcript of a Public Hearing “should be provided to the Department within 21 days of the hearing.” This is not stated in the proposed policy and should be inserted. Timeliness of the availability of the transcript is important so that the public can obtain a copy to review before a Comment and Response document is issued by the Department.

Public Information Meetings

We support Public Information meetings as an additional way for people to learn about a permit application or project and agree that such meetings should never be substituted for a public hearing. We strongly recommend that the proposed policy specifies that these information sessions will always include a question-and-answer component. The optimum outcome for meetings is to elucidate issues and concerns that can only be addressed through an exchange of information between participants and Department representatives. We therefore also support the proposal that the public should have the opportunity to engage professionals to present information and materials at public information sessions.

In the current Policy on Public Participation dated July 16, 2005, public information meetings are to include the state’s in-house consulting services, such as community relations coordinators and environmental advocates, in designing public meetings. Notably, the Environmental Dispute Coordinator of the Department’s Center for Collaboration and Environmental Dispute Resolution is supposed to be involved. It is not clear which state resources and departments would be involved in designing and executing a public information meeting under the proposed policy. The Department should avail itself of all resources available to design and hold a productive public information meeting, including the Department’s Environmental Advocate for the region involved (as stated earlier in this comment letter).

Informal Conference

We support the concept of these conferences as a way for all types of stakeholders to voice their concerns and ask questions of Department staff. However, we recommend that the policy specify that the Department will respond to and consider all requests for informal conferences equally. This is necessary to avoid the perception or reality of undue influence over permit decisions by applicants and “back-room deals” being worked out directly with the Department, without negotiations “seeing the light of day” and without the

consideration of public input. This change is also necessary to be consistent with the statement in Section V of the proposed policy, which we fully support, that the Department's role is "communicating to the public the factual information related to the project" and not to "act as an advocate for or against issuance of a permit."

Republication to Afford Additional Public Participation

We recommend that, should the Department find technical deficiencies in an application and it is then substantively changed, an additional opportunity for public comment is always afforded—rather than, as stated in the draft policy, the Department "considering" if it should be afforded. It is necessary to have public scrutiny of and input on a project as it will be actually be carried out and the actual impacts it could have, not only as it was initially put forth by the applicant or considered by the Department.

Relation of Comment and Response Document to Other Department Policies

Land Use

We support the Department's consideration of the land use implications of proposed projects. However, we recommend that the Department revise this language, as well as the relevant sections of the *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure*, to consider comments by the general public. Residents often have direct knowledge of local conditions (such as the health of streams and forests) and how zoning laws are actually applied in particular communities that would be useful to the Department, and are likely to complement or go beyond comments from local government officials.

In addition, many municipalities do not even have zoning laws and comprehensive plans or only ones that are too out-of-date to address some projects (such as natural gas wells and facilities) that have significant environmental and community impacts. This makes public comments on land use even more useful for the Department's decisionmaking process.

In closing, we suggest that the Department consider using social media to enhance its public outreach for participation in permitting and should plan to update its policy in a shorter timeframe than the eight years the proposed update took. Changes in technology and Web-based platforms are occurring at a rapid pace and the agency needs to keep up to date with these advances in communication to maximize the public's participation in the agency's permits.

Thank you for your time, consideration, and commitment to public participation.

Sincerely,

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