

The Times Tribune

Open records case produced untracked drilling documents

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Scattered records kept by the state Department of Environmental Protection offer one answer to a key question in a new age of fossil fuel extraction in Pennsylvania: How many water supplies have been damaged by drilling?

The Sunday Times requested the letters and enforcement orders that might best account for the number of drilling-disrupted water supplies in 2011.

The letters are known as "Section 208 determination letters" or "208 letters" after the former portion of the now-revised state oil and gas law that describes DEP's obligation to investigate and respond to complaints of water impacts by drilling. Regulators send the letters to public and private water supply owners to announce the results of their investigations.

Taken together, the founded and unfounded complaints mark sites where people lost confidence in their drinking water and, in some cases, where the state also trained the blame on nearby oil and gas operations.

Prior to the newspaper's request, the state had not kept track of the records. At first, DEP responded by releasing those letters and orders to the newspaper that it could locate based on its databases and "institutional memory" and rejected the rest of the request as insufficiently specific to allow it to find the rest of the documents.

During a series of appeals, the department defended its filing system as suiting DEP's regulatory purposes even as it described the files' unwieldy organization.

"There are tens of thousands of oil and gas files in each region," the agency wrote, "and without specific identifying information such as a specific county with permit numbers or well numbers, site names or facility names, it is impossible to determine in which files 208 letters would be found. The department does not

maintain an index of 208 letters and there is no accurate way to isolate all of the records requested. The department does not electronically track letters via a database."

The DEP acknowledged at one point that it "does not know how many letters have actually been issued."

In affidavits, the head or file review coordinator of each regional DEP oil and gas office described the limits of the filing system and their efforts to navigate it to find responsive records. Both the Northcentral and Northwest Regional offices located orders to drillers to replace water supplies then tried to trace them to individual letters sent to water well owners. The Southwest Regional Office maintains a complaint database by county and date, but it "has no database indexing in any fashion which complaint files pertain to allegations of contamination or diminution of water supplies and therefore might contain Section 208 determination letters," the agency wrote.

It would be impossible to find all of the requested records without doing a file-by-file search of each of the thousands of files, the department argued.

In July 2012, a three-judge panel of the Commonwealth Court ruled that DEP had to turn over all of the records because "there is simply nothing in the [Right to Know Law] that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so."

"It cannot be inferred" from the Right to Know Law, the court said, "that the General Assembly intended to permit an agency to avoid disclosing existing public records by claiming, in the absence of a detailed search, that it does not know where the documents are."

The state released the records last fall after the full Commonwealth Court denied its request to reconsider the ruling. DEP spokesman Kevin Sunday said the department was able to locate all of the records when "each district office reviewed the appropriate files in their possession."

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