



Senate Environmental Resources and Energy Committee

Senator Mary Jo White Chairman

Patrick Henderson, Executive Director

Room 169 • State Capitol Building
Mailing address: Senate Box 203021 • Harrisburg, PA 17120-3021
Phone: 717-787-9684 • FAX: 717-787-6088 • energy@pasen.gov

November 4, 2010

The Honorable Edward G. Rendell
Governor of Pennsylvania
225 Main Capitol Building
Harrisburg, PA 17120

Re: DEP & DCNR Policy # 550-2116-001 (Policy for the
Evaluation of Impacts of Oil and Gas Development on State Parks
and State Forests)

Dear Governor Rendell:

I am writing to share with you my concerns regarding the above-referenced policy, which was announced through a press release issued on October 28, 2010. For the reasons outlined below, I believe the policy is ill-conceived, most likely illegal, and could potentially cost Pennsylvania taxpayers tens of millions of dollars.

Lack of Public and Legal Review

No one disputes both the desire and the statutory mandate of ensuring that oil and gas wells are designed, constructed and operated in a responsible manner that protects the environment. This is true regardless of whether the proposed development is located on publicly owned property. However, doing so must occur in concert with laws which have been enacted, and regulations which have been promulgated within the scope of the enabling legislation and according to the Regulatory Review Act. The regulatory review process allows for both public input and legal review to ensure that the proposed policy goals are appropriate and permitted. Both of these critical elements are circumvented by unilaterally imposing a policy that seeks to significantly alter the criteria for the Department of Environmental Protection (DEP) to approve or deny a drilling permit.

In fact, Section 201 (e) of the Oil and Gas Act is clear in its delineation of five reasons why DEP may deny a drilling permit. This policy seeks to add a new rationale for denying a permit, one which is not authorized by the Act.

Differentiation between Public Lands

The policy's stated purpose is to implement Section 205 (c) of the Oil and Gas Act (Act 213 of 1984). Presumably, the policy is more accurately intended to implement Section 205 (c) (1), which states that DEP

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“shall, on making a determination on a well permit, consider the impact of the proposed well on public resources to include, but not be limited to, the following: (1) Publicly owned parks, forests, gamelands and wildlife areas”

However, in seeking to implement this section in a manner never intended under the Act – namely by providing the Department of Conservation and Natural Resources (DCNR) with a “veto” over a well permit application should DCNR determine that proposed permit conditions are unsatisfactory – DCNR and DEP are inexplicably excluding other publicly owned lands, such as county and municipally owned parks, national forestland, state game lands, submerged lands of the Commonwealth and other properties from this policy. Even if one accepted the argument that Section 205 (c)(1) of the Act authorized additional coordination and permitting conditions to protect publicly owned property, there is no rationale for DCNR and DEP to limit the policy’s application to only state park and state forest land.

Potential Impairment of Existing Contracts

While the October 28th press release seems to rely upon the fact that the Commonwealth does not own the mineral rights underlying significant portions of state forest and state park land as justification for the new policy, the actual policy makes no such distinction. It is clear that the policy is intended to apply to all permits submitted to DEP which propose an oil or gas well be located on state park or state forest land, even in instances where DCNR willingly leased land for natural gas development.

As you know, the Commonwealth has received approximately \$413 million in bonus lease payments from two public lease offerings (September 2008 and January 2010) and one agreement entered into unilaterally with Anadarko Petroleum Corporation (May 2010). Much of this money has already been expended as part of the two most recently enacted state budgets, as well as to support the operations of DCNR. In each of these instances, the Commonwealth owns the subsurface mineral rights. The leases were mutually negotiated and agreed to, and both parties are aware of the terms and conditions of these contracts. The winning bids submitted were also presumably predicated on the bidder’s knowledge of the terms and conditions of the lease.

This new policy may very well impair these contracts, by authorizing DCNR to impose new conditions on permits that the lessee never envisioned and which may have discouraged the lessee from bidding on or signing the lease offering. Simply put, this new policy has resulted in the imposition of new conditions on the lessee which are not mandated by law and which have not been negotiated. Doing so very well may result in a lessee suing the Commonwealth for breach of contract, resulting in the return of the lease bonus payments and, potentially, associated costs and damages.

Ignoring prior Supreme Court legal precedence

This new policy is especially troubling because it blatantly disregards the Pennsylvania Supreme Court’s ruling of April 2009. In that case, *Belden & Blake Corporation v. DCNR*, the Commonwealth was prohibited from its efforts to impose surface use agreements and drilling conditions on permit applicants who owned the subsurface mineral rights underlying state park land. The Supreme Court held that DCNR “*may seek conditions like any other surface owner, even additional conditions consistent with its statutorily imposed duties*” [emphasis added].

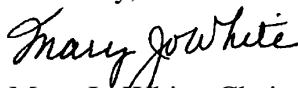
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However, while DCNR can request special conditions, the agency cannot simply impose them unilaterally and without consequence. Indeed, the Supreme Court ruled that *“If DCNR wishes further conditions pursuant to its statutory duties, the Commonwealth must compensate the subsurface owner for the diminution of its rights; indeed it may condemn the subsurface interests altogether pursuant to the Eminent Domain Code. However, a property owner’s interests and rights cannot be lessened, nor their reasonable exercise impaired without just compensation, simply because a governmental agency with a statutory mandate comes to own the surface.”*

By making DCNR approval of special conditions associated with a permit to drill on state park or forest land a prerequisite to DEP determining that a permit application is “complete”, this policy is vesting a de-facto veto within DCNR over oil and gas development on select public lands. Further, the policy seeks to vest rights in one class of surface owners (governmental agencies) that are not recognized by law nor enjoyed by other surface owners, in violation of both the *Belden & Blake* decision and other settled case law which holds that the subsurface estate is dominant to the surface estate, and that inherent in the ownership of mineral rights is the right to access said minerals.

DEP has done a good job of working to ensure that natural gas is developed responsibly, and DCNR has negotiated and executed lease agreements which contain meaningful added protections for publicly-owned lands. However, if there is justification for additional conditions on natural gas production, these conditions must be adopted by statute or regulation, and must adhere to settled case law. For these reasons, I encourage you to rescind this policy immediately so as to minimize the legal and financial ramifications the Commonwealth and its citizens now face.

Sincerely,



Mary Jo White, Chairman
Senate Environmental Resources
& Energy Committee

cc: Governor-Elect Tom Corbett
DEP Secretary John Hanger
DCNR Secretary John Quigley
Senator Joe Scarnati, President Pro Tempore
Senator Dominic Pileggi, Senate Majority Leader