



PEC Response on SB 1100 (P.N. 1723) to Members of the Pennsylvania Senate

October 27, 2011

The Pennsylvania Environmental Council (PEC) is pleased the Senate has committed to updating and improving the Oil & Gas Act, a decades-old law written before unconventional shale gas development was a reality in our state. Amendments are sorely needed to ensure that Pennsylvania has appropriate and adaptive standards in place to meet the myriad environmental issues associated with this already pervasive range of activities and infrastructure.

We understand that yesterday's amendment of S.B. 1100 (P.N. 1723) was an initial step in an ongoing, albeit concisely timed, process to refine comprehensive changes to environmental and community protection standards and the imposition of an impact fee or severance tax.

PEC has been deeply involved in these precise issues – as a member of the Governor's Marcellus Shale Advisory Commission; through our own specific policy and legislative proposals for amending state law and regulation; and through testimony and other discussions at both the state and federal level. We offer the following detailed comments on S.B. 1100 to advocate for additional necessary changes that are critical to "getting it right" for what will be a multi-generational activity in Pennsylvania. Our perspective is based upon established, open dialog with decision makers and public and private interests involved in shale gas development.

Additional Necessary Environmental Protections

- S.B. 1100 needs to further amend Section 103 (definitions) of the Oil & Gas Act by including the following additional definitions:
 - Best Management Practices. Best Management Practices should be defined as standards established or recognized by the Department of Environmental Protection (DEP) through technical guidance. These standards should identify industry practices that can be utilized to better protect natural resources, communities, and human health. The technical guidance should be reviewed and updated at least every three years. The Marcellus Shale Advisory Commission (MSAC) Report contained numerous recommendations pertaining to Best Management Practices and their utilization in management and oversight of industry activities. See, for example, MSAC Report Recommendation 9.2.23.

- Stream, Spring, or Body of Water. Currently the Oil & Gas Act relies on United States Geological Survey (USGS) topographic maps for the identification of streams, springs, or bodies of water in establishing measurement for setback standards. It is known that these maps are not fully accurate and occasionally fail to identify important surface water resources of the Commonwealth. S.B. 1100 should, adapting existing regulatory definitions from management programs relating to water protection, establish a set definition that will ensure that proper identification of these resources become a mandated part of pre-permit site analysis and characterization, and serve as the basis for setbacks and other protection standards. This is consistent with MSAC Report Recommendation 9.2.24.
 - Water Management Plan. Because the Ohio River Basin is not covered by an Interstate River Basin Commission, DEP has been requiring water management plans as part of the well permitting process to ensure that associated water use and withdrawals do not result in adverse environmental harm. The Oil & Gas Act should grant DEP express authority, consistent with the Clean Streams Law, to require this critical function (see proposed additional changes to Section 201, below, for language to this effect). The Legislative Proposal submitted by the Governor to the General Assembly provides a language-ready definition for Water Management Plan: *A plan associated with drilling or completing a well in an unconventional formation that demonstrates that the withdrawal and use of water sources protects those sources as required by law and protects public health, safety and welfare.*¹
 - Well Site. This definition is critical because the term “well site” is used (although not defined) throughout the Oil & Gas Act, including as a basis for establishment of setback standards. The definition should include the entire area occupied by equipment or facilities necessary for, or incidental to, the drilling, production, servicing, or plugging of a well – including any impoundments or other storage for chemicals, hydraulic fracturing or produced fluids, and flowback or waste water. Any setback standard should be at a minimum measured from the physical edge of a well site.
- S.B. 1100 needs to further amend Section 201 (Well Permits) of the Oil & Gas Act as follows:
 - Authorize expansion of the well permitting application and approval process to allow for more complete and informed decision making prior to final determination. This language, at a minimum, should include the following elements:
 - Allow DEP to establish a more robust site assessment and review process to identify key surface features and potential hazards, including pre-

¹ Page 6, Lines 1 – 5 of the Governor’s Legislative Proposal (dated October 20, 2011) (hereafter referred to as the “Governor’s Legislative Proposal”).

existing site conditions, consistent with MSAC Report Recommendation 9.2.29.

- Allow DEP, in partnership with other Commonwealth resource management agencies, to proactively identify areas of high ecological value where additional protection measures or performance standards may be required as a condition of permit approval. This is consistent with MSAC Report Recommendation 9.2.26.
 - Expand the minimum time allotted to DEP to perform permit application reviews. Given the highly industrial nature of this activity, occurring across an array of site conditions often in close proximity to sensitive natural and public resources, DEP should have the time it needs to ensure that all required information is gathered and properly assessed before making a permit determination. With the understanding that consistency and predictability of permitting is important to the industry, the Senate should consider allowing approved permits to have longer shelf lives, and to be marketable to other operators in good standing, in exchange for greater up-front information collection and analysis. See PEC's May 2011 Oil & Gas Act Amendment Proposal² for a suggested process on how this could be accomplished in a way that can benefit both the state and industry.
- Include enhanced inspection and monitoring requirements consistent with MSAC Report Recommendation 9.2.15:
 - Requiring a site inspection to verify properly implemented erosion and sedimentation controls before drilling and production operations commence. The Governor's Legislative Proposal includes such language: *The operator may not commence drilling activities until the department has conducted an inspection of the unconventional well site after the installation of erosion and sediment control measures. The department may conduct follow-up inspections of well sites and related activities to determine compliance with the act.*³
 - Requiring operators to give DEP advance notice of the start of key drilling and production activities to allow for additional monitoring of site activities. The Governor's Legislative Proposal includes such language: *The unconventional well operator shall provide the department 24 hours' notice prior to cementing all casing strings, conducting pressure tests of the production casing, stimulation and abandoning or plugging an unconventional well.*⁴

² Available online at <http://marcellus.pecpa.org/wp-content/uploads/2011/06/The-Marcellus-Shale-Amendments.pdf>

³ Page 37, Lines 18 – 23 of the Governor's Legislative Proposal.

⁴ Page 14, Lines 9 – 12 of the Governor's Legislative Proposal.

- Expressly authorize DEP to require Water Management Plans, based on the same reasoning for including Water Management Plan as a definition. The Governor’s Legislative Proposal includes such language: *(X) The following shall apply to water management: (X.1) No person may withdraw or use water from water sources within this Commonwealth for the drilling or hydraulic fracture stimulation of any natural gas well completed in an unconventional gas formation, whether on or off of the land where the gas well is located, except in accordance with a water management plan approved by the department. (X.2) The department shall review and approve water management plans based upon a determination that the proposed withdrawal, when operated in accordance with the proposed withdrawal operating conditions set forth in the plan, including conditions relating to quantity, withdrawal rate and timing and any passby flow conditions, will: (X.2.i) not adversely affect the quantity or quality of water available to other users of the same water sources; (X.2.ii) protect and maintain the designated and existing uses of water sources; and (X.3. iii) not cause adverse impact to water quality in the watershed considered as a whole. (X.3) The criteria under paragraph (X.2) shall be presumed to be achieved if the proposed water withdrawal has been approved by and is operated in accordance with conditions established by the Susquehanna River Basin Commission, the Delaware River Basin Commission or the Great Lakes Commission, as applicable. Notwithstanding this paragraph, the department may establish additional requirements as necessary to comply with the laws of this Commonwealth. (X.4) In addition to the requirements under paragraphs (X.1), (X.2) and (X.3), compliance with a department-approved water management plan shall be a condition of any permit issued under this act for the drilling or hydraulic fracture stimulation of any natural gas well completed in an unconventional formation.*⁵
- S.B. 1100 needs to further amend Section 205 (Well Location Restrictions) of the Oil & Gas Act as follows:
 - Ensure that setback standards in Section 205(a) and (b) are predicated on the physical edge of the well site, as this document proposes formalizing the term in the definitions section of the Act.
 - In addition, consistent with MSAC Report Recommendation 9.2.24, Section 205(b) should be further amended:
 - To remove reliance on USGS topographic maps for surface water identification; instead basing identification pursuant to an established definition (as suggested earlier in this document) for “Stream, Spring or Body of Water” to ensure that all surface water resources are properly identified and protected.

⁵ Page 17 Lines 1 – 30 and Page 18 Lines 1 – 5 of the Governor’s Legislative Proposal.

- S.B. 1100 should include additional flexibility in Section 206(g) (Well Site Restoration) of the Act when there is opportunity for net reduction of surface or environmental impacts. This is consistent with MSAC Report Recommendation 9.2.20. The Governor’s Legislative Proposal provides such language through a rewrite of Section 206(g): *(g) The following shall apply to restoration periods: (1) The restoration period may be extended by the department for an additional period of time not to exceed two years upon demonstration by the well owner or operator that: (i) the extension will result in less earth disturbance, increased water reuse or more efficient development of the resources; or (ii) site restoration cannot be achieved due to adverse weather conditions or a lack of essential fuel, equipment or labor. (2) The demonstration under paragraph (1) shall do all of the following: (i) Include a site restoration plan that shall provide for: (A) the timely removal or fill of all pits used to contain produced fluids or industrial wastes; (B) the removal of all drilling supplies and equipment not needed for production; (C) the stabilization of the well site that shall include interim post-construction storm water management best management practices; or (D) other measures to be employed to minimize accelerated erosion and sedimentation in accordance with the act of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams Law. (ii) Provide for returning the portions of the site not occupied by production facilities or equipment to approximate original contours and making them capable of supporting the uses that existed prior to drilling the well. (3) The department shall have the authority to condition an extension under this subsection as is necessary in accordance with The Clean Streams Law.*⁷
- PEC does not support blanket bonds for unconventional wells in Section 215 (Bonding), as is currently authorized in S.B. 1100. Instead we believe the Environmental Quality Board should be authorized, by regulation, to establish a voluntary Trust Fund Program as an alternative financial assurance mechanism.⁸ This alternative mechanism has been used with success in the state’s coal mining program, and should be adapted and available for unconventional well operations.

Adoption of an Impact Fee or Severance Tax

As is likely already intended by the Senate, S.B. 1100 should be further amended to include the adoption a reasonable impact fee or severance tax on unconventional well operations. It is imperative that a significant portion of revenues derived from this fee or tax be used to fund the capacity of DEP and other the resource protection agencies charged with managing unconventional shale gas activities. While permit fees have been raised and additional inspection staff have been hired by DEP, recent annual agency budget cuts have left DEP unable to fill existing vacant positions, or hire additional staff in bureaus (such as water or air) that are also key in overseeing unconventional shale gas activity.

⁷ Page 23 Lines 15 – 30 and Page 24 Lines 1 – 20 of the Governor’s Legislative Proposal.

⁸ For more information, see pages 34-35 from PEC’s 2010 Marcellus Shale Policy Report (available at <http://marcellus.pecpa.org/wp-content/uploads/2011/06/Developing-the-Marcellus-Shale.pdf>)

This is not meant as a slight to the intentions or performance on the part of DEP – we believe the agency has performed admirably to date with the resources and authority available to the oil and gas program. However, DEP must be given additional resources and capacity in other areas of the department to perform their charge under state law. Requiring DEP to administer additional duties and new requirements while at the same time continuing to cut their overall operating budget is entirely inappropriate. An impact fee or severance tax provides direct revenues to help agencies meet their mission and objectives.

In addition, a significant portion of the impact fee or severance tax should be dedicated toward addressing cumulative impacts that are not restrained to individual local government boundaries. The Environmental Stewardship Fund is an already-established, restricted fund that has a demonstrated track record of successfully addressing restoration, mitigation and protection needs throughout Pennsylvania. The Environmental Stewardship Fund also allows for leveraging of federal monies for these very purposes.

Adoption of a Model Ordinance and Preemption of Local Land Use Controls

While PEC recognizes that the diversity of local land use planning can cause significant challenges to the industry, we are opposed to a solution that would completely preempt the ability of local governments to enact appropriate public protection controls for issues not directly addressed by the Oil & Gas Act. We are particularly concerned with S.B. 1100's requirement that oil and gas operations be permitted as a use-by-right in all but residential districts -- this requirement disregards site-specific and regional considerations, including the fact that areas may have been already identified and protected against other similar extraction or industrial scale activities. Special exceptions should not be granted where uniform and legally appropriate controls are established.

In our view the state's efforts are better spent in providing planning assistance and other informational resources to local governments, and to more proactively involve them in the decision making process. A significant issue that remains to be addressed by S.B. 1100 or other legislative proposal is how the Commonwealth can more effectively perform comprehensive planning, and identify opportunities for reduction of surface and environmental impacts related to the vast amounts of pipeline and other related infrastructure that will be built and interconnected between individual well sites on an almost operator-by-operator basis. MSAC Report Recommendations 9.1.17 and 9.2.35 speak directly toward these concerns.

The environmental protection provisions identified above relating to individual well sites, in addition to those already spelled out in S.B. 1100, can and should be enacted in short order. But the next step in improving the state's approach to unconventional gas development should directly address comprehensive planning and associated infrastructure management.

Conclusion

We are again encouraged by the actions of the Senate to enact greater environmental and public protections. If S.B. 1100 is the vehicle and will receive further amendment in the days and weeks to follow, the additional measures outlined in this response document must be included in the final package. They represent informed and reasonable protections that have been already endorsed by environmental, industry and agency interests through the Marcellus Shale Advisory Commission or other forums.

Pennsylvania must get this right, and it must enact the proper laws to do so now. Thank you for your consideration.