November 17, 2014

John Ryder, Director of District Oil and Gas Operations
Department of Environmental Protection, Bureau of District and Oil and Gas Operations
Rachel Carson State Office Building, 15th Floor
P. O. Box 8765, Harrisburg, PA 17105-8467
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Re: Comments on Standards and Guidelines for Identifying, Tracking, and Resolving Violations

Dear Mr. Ryder:

On behalf of the undersigned organizations, thank you for the opportunity to comment on the substantive revisions to the Standards and Guidelines for Identifying, Tracking, and Resolving Violations recently issued by the Pennsylvania Department of Environmental Protection (hereafter the Department).

As you know, our organizations have been actively involved in research and ongoing discussions with Department staff about policies and procedures, in particular water testing protocols, contamination investigation processes, approaches to enforcement, and citizen communication and response. With this experience in mind, we offer the following comments on numerous aspects of the Standards and Guidelines (hereafter the Guidelines).

Section I. General

A. Basic Principles of Enforcement

We disagree with the Department's position that a Notice of Violation (NOV) may not be necessary if the violation is noted on an inspection report. A written NOV should be issued for every violation that occurs.

The necessity of a NOV should not be left to the discretion of individual inspectors, whose experience and approach can vary. By removing the discretionary element, the Department will improve consistency in its enforcement protocols and ensure that all violations are recorded in one place in a timely manner (i.e., recorded in the compliance database rather than on paper inspection reports, the logging of which is often delayed). Consistent, timely issuance of NOVs is also essential to ensure that the public is adequately informed about problems at sites that may affect their air, water, and health and how the Department has responded.

We also disagree that penalties "may be" assessed where the violation results in an actual threat to public health and safety, pollution, or environmental damage; for repeat occurrences; or where the violator acts negligently, recklessly, or willfully. The Standards and Guidelines should read that penalties "shall be assessed" in these instances.

B. Enforcement Process

The Department should include in this section a clarification of the "correct on site" enforcement process and when and why this would be used. In our reviews of well and facility files, it has become clear that inspectors often opt to work with operators to fix a problem, rather than issuing an NOV or taking the other enforcement actions specified in the Guidelines. Department staff have indicated this is done to reduce its administrative burden and to encourage operators to report

problems. However, this approach weakens the deterrent effect of having consequences for committing a violation and can risk that seemingly minor problems become worse over time.

C. Enforcement Priorities

The language in this section should read "[e]nforcement actions shall be taken on each violation until compliance is achieved." As discussed above, it should not be left to the Department's discretion to take enforcement actions for continuing violations.

The need to restore or replace an adversely affected water supply must be a top priority for the Department, as the degradation of a water supply is usually the result of an actual release of gas or pollutants that endanger the environment or public health and safety. Because of this, the Department's delineation of enforcement priorities 1 and 2 are inherently interconnected.

Impacts to water sources have significant deleterious effects on the well-being, quality of life, and property values of Pennsylvanians. It is imperative for the Department to take swift action to ensure that the responsible party mitigates impacts to water supplies as quickly as possible. In addition, the Department should revise priority 3 to encompass air pollution so that it reads, "Violations that result in the discharge of pollutants to surface or ground water, such as spills or releases, and to the air, such as releases of emissions due to faulty equipment or operator neglect."

Section II. Enforcement Actions

A. Notice of Violation (NOV)

As indicated above, we disagree with the Department's view that NOVs do not have to be issued every time a violation occurs. The problem with this approach is further highlighted in this section, which indicates that the Environment Facility Application Compliance Tracking System (eFACTS) system will be updated "within 10 business days of the issuance of the NOV."

If the Department does not issue NOVs for certain violations, it would be logical to assume that the Department would not update eFACTS to include those violations—depriving the public of a key source of information on violations and how the Department handles them. Currently, because the Department doesn't issue citations for all events that are violations of state oil and gas regulations, the number of problems that occur at well sites is likely much larger than implied by the official count of violations in eFACTS.

In addition, by excluding the requirement to enter and track material obligations related to a violation for which an NOV was not issued, the Department is compromising tracking, reporting, and transparency. This section should be changed to clarify that violation information and penalties will be included in eFACTS for *all* violations. The Determination of violation and completion of the inspection report should be done within 14 calendar days after receiving necessary further information, and alternate timeframes should not be allowed. The Department should also make clear in this section that staff will enter and track the corrective measures, if any, requested to be taken with a NOV, deadlines for them, and the operator's response.

A violation should not be administratively closed in eFACTS until the violation and its impacts to the environment are thoroughly resolved, i.e., when the pollution or other problem has been abated—not just when operators pay penalties. This information should be publicly accessible via eFACTS and the Department's Oil and Gas Compliance database.

The proposed time limit of 180 days to negotiate a resolution before the Department would take the applicable enforcement action would potentially allow a violation to remain unresolved too long before any significant action is taken—risking air or water quality and the health and well-being of nearby residents. While cooperation through settlement is an understandable goal, six months for negotiations encourages operators to delay resolution of the problem(s) related to violations. To encourage quick and complete resolution of the violation, the Department should have a negotiation period of no more than 60 days. This section should also specify that the negotiation period is not the same as the period operators have to respond to violations, which must be resolved *immediately* to prevent harm to the environment and residents.

C. Administrative Order

If a serious public health or environmental hazard exists, issuance of a field order should not be delayed by the requirement of concurrence by a supervisor. Requiring concurrence by a supervisor would delay the issuance of an Administrative Order, even in instances where there is an existing or imminent danger to public health or safety, or pollution or other environmental damage exists. Such a delay would result in continuation of a dangerous condition; the Department's Guidelines should not allow for such a condition to continue once an inspector has identified a violation.

D. Consent Assessment of Civil Penalty (CACP)

Allowing 60 days to negotiate with an operator after the Department has determined that the operator has committed a violation constitutes an unreasonable delay in violation resolution. This section should specify that the negotiation period is not the same as the period operators have to respond to violations, which must be resolved immediately. In addition, an extension of the timeframe for negotiations should not be allowed under any circumstances (including at the discretion of the Deputy Secretary or Bureau Director) as long as the violator is not in compliance with the terms of enforcement; doing so in effect rewards operators for non-compliance.

E. Suspension or Revocation of Permit or Registration

We strongly support the use of suspension or revocation of a permit as an enforcement tool. However, this section should specify the purpose, process, and timeframe of the "conference" that could occur, and clarify that only the full resolution of the problems at hand (e.g., polluting activities or non-compliance with the terms of an enforcement action) would be sufficient to prevent permit suspension or revocation.

We recommend eliminating the provision for instances of "last resort;" the Department is not required by statute to consider alternative enforcement under any circumstances and such a limitation places greater priority on continued production and operations than on ending detrimental impacts that may occur. Even if the Department keeps such exceptions, we disagree that the only instances of "last resort" are malfunctioning facilities, false/deficient information from an operator, or lack of intent/ability to comply with the law. The Department should specify that permit suspension or revocation may occur in instances in which continued operation of a well or facility poses a risk to the environment, health, safety, or property.

In addition, the Department should specify what it would consider to be evidence that an operator has a "lack of intent or ability to comply," in order to ensure that this enforcement action is implemented in such a way as to prevent prolonged and future instances of non-compliance. Finally, when an inspector or other agent of the Department finds a "lack of intent or ability to comply," suspension of a permit should be immediate and non-discretionary, at least until the time that the operator meets the conditions of full compliance. A lack of intent to comply should also

result in the operator's inability to receive new permits from DEP until full compliance is achieved on all outstanding violations; a repeated pattern of inability or unwillingness to comply should result in permanent non-issuance of permits by the Department.

F. Civil Penalties

This section and the Section II-D above regarding CACP continue to promote the Department's use of Technical Guidance Document, Civil Penalty Assessments in the Oil and Gas Management Program (Document ID No. 550-4180-00) to guide penalty calculation. We disagree that this document should serve as guidance, as the very penalty calculation formula is flawed and must be changed.

We strongly recommend removing the provision allowing for percentage deductions for operators who demonstrate "good faith" and cooperation in clean-up, abatement, and restoration should be removed from the penalty calculation formula. Companies that violate Pennsylvania's oil and gas and environmental laws by causing pollution should not under any circumstances be rewarded for their actions by receiving discounts on enforcement actions.

The Department should use monetary penalties as punishments and deterrents that provoke change in the way companies operate and help to prevent further polluting actions. With this in mind, the minimum expectation that the Department should have is for operators to thoroughly clean-up and abate the contamination they cause and restore the site or water supply to its previous condition or better.

G. Community Environmental Project (CEP) in Lieu of Paying Civil Penalty

We are greatly concerned that the Department's issuance of penalties for violations at both unconventional and conventional well sites has decreased over time. According to data in the DEP Oil & Gas Compliance database, in 2009, 34% of violations at unconventional well sites were linked to enforcement actions in which fines were issued, but only 13% in 2013; conventional wells show a similar trend, declining from 12% to 8% during the same period.[1] This trend deprives the Department of a much-needed source of revenue for its environmental protection and enforcement programs, while also signaling to operators that it is possible to violate the law at literally no cost.

As currently described in the Guidelines, the CEP mechanism could be easily exploited in settlement negotiations to avoid paying monetary fines for the actual, specific damage to water, air, or soil that has occurred—and which may continue to require attention from the Department for months or years to come. Restoration of water resources and habitats should be the sole criterion for approved CEPs. With this in mind, the Department should not allow entire penalty amounts to be offset by CEPs. This is particularly important because the Department does not have a set of requirements in place to define acceptable CEPS, e.g., to ensure that they remedy the actual damage caused by an operator or compensate affected residents. As a result, operators may use CEPs to offset violations without fully correcting the violations.

Allowing CEPs to take the place of civil penalties will only exacerbate the Department's problem of inadequate funding. For this reason, CEPs should rarely, if ever, be used. In addition, we disagree with the Department's proposal to allow operators facing violations for improper drilling and plugging activities to be eligible to offset the fines from their violations by plugging abandoned wells. It is environmentally risky to allow operators that have clearly demonstrated an inability to safely and completely plug wells to offset their fines by plugging other abandoned wells.

J. Equity Actions

We fully support the Department's use of a court injunction as an enforcement action. However, this section should be more specific so that the Guidelines can be used by the Department to ensure the effective, consistent use of injunctions. Specifically, the Department should provide examples of what is meant by "severe problems" that would result from delay (e.g., pollution or safety risks from operations) and specify what would constitute "immediate and irreparable harm" (e.g., filling in of a stream or eradication of wildlife habitat due to well site development).

It is also important for the Department to clarify which aspects and types of "past conduct by the violator" would lead to use of an injunction. Department staff have indicated that an operator's compliance history doesn't have bearing on future permitting unless there are outstanding violations. In order to assure the public that it is, in fact, willing to take action in response to operator misconduct, the Department needs to clarify what the "trigger" for an injunction would be.

Section K. Criminal Action

This section should be edited to state "DEP's Oil and Gas Management Program shall initiate a criminal investigation or prosecution if a party intentionally committed a violation of law and refuses to initiate or continue corrective activity." If an operator has intentionally committed a violation and is not correcting the violation, clearly the normal channels are not effective. In such instances, criminal investigations should be initiated.

III. Identifying a Violation

A. On-Site Inspections

1. Types of Inspections

With regard to **paragraph f, Follow-up,** the Department should correct the inconsistent use of terms for "follow-up inspection" in eFACTS and the Guidelines. Both Department staff and the public should have clarity which procedure for such inspections (i.e., on the same day or whenever an inspection is performed) represents the Department's intent. However, we believe that the Department should conduct follow-up inspections as quickly as possible, as time lags between inspections (a current problem with the oil and gas program, as discussed below) could allow violations to remain unresolved and cause damage for prolonged periods.

With regard to **paragraph i, Site Restoration**, we object to the proposal to conduct site restoration inspections only *after* operators file restoration reports. This in effect means that the Department is neglecting its responsibility to ensure that site restoration is done properly (as discussed further below with regard to frequency of inspections). In addition, the Department should not wait for well restoration reports to be filed before conducting site restoration inspections. Because site restoration requirements apply to well *sites*, operators may not undertake restoration or file restoration reports until after the last well on a site is completed, which can take years.

In addition, operators have 60 days after a well site has been restored to file reports and, under certain conditions, are allowed to request restoration extensions for up to two years. Such significant time lags mean that soil erosion, runoff, water contamination, and other problems could persist unchecked. In addition, it does not appear that operators submit restoration reports (form OOGM0075) to the Department in a timely manner; recent research shows that many are missing from paper files and that restoration reports are not logged in eFACTS, and therefore are not readily available to either Department staff or the public.[2]

With regard to **paragraph j, Complaint**, the Department indicates that staff should follow protocols established in Standard Operating Procedure for Complaint Response Management, Document No. OPI 2012-01. However, Department staff have confirmed that this document is an internal workflow policy, and not publicly available, on the Department's website—making it impossible for the public to assess those protocols and, in turn, whether they provide an adequate basis for the Guidelines and to ensure that the Department effectively uses complaints to identify violations. The Department should not finalize the proposed Guidelines until this document has been made available to the public.

Nor does the internal workflow policy (provided to us by Department staff) include guidance on specific, widespread problems related to oil and gas complaints. We can only assume that the Department's older complaints manual, which was recently provided through a Right to Know Law request, is still in effect. With regard to odors, the manual instructs Department employees that, "[t]he odors must be occurring at the time of the call…If the odors are not present at time of call, then instruct the caller to contact the Department the next time they detect the odors…DO NOT REGISTER THE COMPLAINT."[3]

In addition, depending on the priority level assigned to a complaint, the Department has from several days to more than a month to respond to most complaints. A time lag between complaints and inspections could decrease the opportunity to use complaints as a way to identify a violation and abate a pollution event, since odors, visible air emissions or substances in water, and noise may dissipate with time—yet they are often the result of equipment malfunction, safety problems, and serious pollution issues.

The Department should clarify whether the older complaints response manual is still in effect—and if not, whether the internal workflow document on which the Guidelines rest will be expanded to include response to common complaints and correct problems that prevent the comprehensive, consistent tracking of and response to resident complaints.

2. Frequency of Well Inspections

We understand the resource constraints facing the Department. Our organizations have advocated for increased budgets for the Department, in particular the Oil and Gas Bureau, in light of the Department's accelerated issuance of well and facility permits in recent years. The Department acknowledges this problem; in its response to the Pennsylvania Auditor General's recent Performance Audit, resource constraints and burdens on staff were frequently cited as key reasons why the Department is unable to fully implement its own policies.

However, a lack of inspectors and enforcement capacity should never trump the Department's mandate to ensure protection of the environment. Yet the Guidelines would do just that, by proposing an inspection schedule that would be *less* frequent than the Inspection Policy Regarding Oil and Gas Activities incorporated into the Pennsylvania Code in 1989.

It is illogical for the Department to propose a weaker inspection policy now than what was put in place long before shale gas development even existed. In addition, the Guidelines omit certain aspects of inspections currently specified in the Pennsylvania Code—raising the possibility that the proposed policy conflicts with established regulations.

Weakening rather than strengthening inspection protocols is particularly irresponsible because of current gaps in industry oversight. According to Department data, in 2013, 13,367 wells were inspected; while a notable increase over previous years, because of the growth in drilling and production, more than 66,000 active wells, or 83%, were still left uninspected.[4]

Regular inspections help ensure that problems such as spills, leaks, equipment failures, erosion, excessive emissions, and other problems that occur at well sites are detected, especially since some environmental impacts can take time to become evident and others can come and go. The Department states in its 2013 Oil and Gas Annual Report that it conducts "regular inspections to ensure that well sites are operated in a manner that is safe for Pennsylvania's citizens and protective of the environment." Unfortunately, the inspection schedule proposed in the Guidelines will undermine this goal and violate the public's right to have regular and unscheduled inspections performed for all aspects of oil and gas operations.

The Department should commit to an inspection policy based on all phases of development during the many years that wells are operational and until they are safely plugged and sites are fully restored. The Department should not limit the occurrence of inspections to "at least once," as currently proposed, which is an insufficient requirement that sets the bar of oversight far too low.

The Department should develop and implement a formal policy that requires inspections whenever needed, during all phases of well development, and make the following specific changes to the Guidelines:

- Inspections should occur during the Department's permit review to verify the information provided by applicants and during the siting of wells, particularly if an applicant has requested a permit exception (e.g., for setbacks) or proposed to construct a well in a Special Protection Watershed or other sensitive area.
- Inspections should occur to oversee onsite storage, treatment, and disposal of liquid and solid waste, particularly to ensure that equipment (e.g., tanks and production pit liners) are functioning properly, that waste management practices meet statutory requirements, and that any waste left onsite is properly solidified and will be permanently contained. Inspections are particularly necessary when the Department allows operators to use "alternative" waste management methods, in order to ensure that they meet the statutory requirement of providing "equivalent or superior protection" to established regulations.
- Inspections should be conducted regularly after a well is drilled or plugged/abandoned to ensure that operators are adhering to required site restoration deadlines and Best Management Practices (e.g., site stabilization, re-vegetation, and leak prevention). The Department should therefore replace the generic use in the Guidelines of "following" (inspection d) and "after" (inspection h) with specific inspection timeframes.
- The Department should replace the generic use in the Guidelines of "following" (inspection k) with specific timeframes within which inspections related to violations are conducted, since violations that are left uncorrected for any period of time can cause or exacerbate environmental damage.
- Clarify whether complaint inspections (inspection l) would occur following each single complaint. Inspections should be conducted in response to every complaint made about any potential problem that has either not already been inspected on-site by the Department or appears to be ongoing, or which has already been confirmatively resolved by an operator. The Department should respond quickly and consistently to complaints, which are a critical part of enforcement; for example, between 2007 and 2011, the Department found violations as a result of more than 700 complaint-driven inspections.[5]
- Clarify whether inspections will occur for wells serving a gas storage reservoir, which is specified in the 1989 Inspection Policy.

3. Preparing for On-Site Inspections

The Department should make review of all resources a requirement for inspectors preparing for fieldwork, rather than simply *recommending* them as options.

With regard to **paragraph b, Electronic Notices,** the Department should clarify which of the "several critical phases of the drilling process" are subject to electronic notification. If any phases are *not* subject to electronic notification, the Department should clarify how inspectors will otherwise be made aware that they are occurring.

With regard to **paragraph f, Enforcement/Compliance History**, and **paragraph g, Complaint Records**, the Department should specify which aspects inspectors are authorized to consider when assessing conditions at a well site, an operator's willingness to comply, and other issues encountered during fieldwork. Inspectors should be able to consistently integrate compliance history and patterns of resident complaints into inspection reports and issuance of violations, particularly because preventing "repeat offenders" and "bad neighbors" should be a key part of the Department's enforcement work.

4. Guidelines for Conducting On-Site Inspections

With regard to **paragraph b, Procedure and Notifications,** the Department should specify when inspectors are advised to conduct unannounced inspections. Inspections should be unannounced when they are intended to follow up on violations or in response to resident complaints, in order to prevent operators from shutting down certain operations or cleaning up sites solely because an inspection is pending.

With regard to paragraph c, Recording on-site Inspections, we believe (as discussed above) that NOVs should be issued for every violation. As written, this section allows significant discretion on the part of the inspector to craft the "mutually agreeable" time period to cure a violation. Such discretion can lead to inconsistency in enforcement and allow operators unacceptably long time periods for correction—during which impacts on the environment and health may persist. The Department should provide inspectors with more definitive guidance and maximum allowable timeframes to ensure that violations are resolved swiftly and consistently. In addition, the Department should ensure consistency in entries included in both eFACTS and the Oil and Gas Compliance database.

Section IV. Standards and Guidelines for Initiating, Documenting and Resolving Water Supply Investigation Requests

A. Background

We disagree with the Department's statement that a "hydrologic connection" is the basis for establishing a connection between oil and gas activities and water contamination. Water quality can be compromised by activities at the surface (e.g., spills and leaks), not only sub-surface (e.g., methane migration). The Department should clarify what is meant by this term or change it to encompass a broad array of possible pathways for contamination from oil and gas activities.

In addition, the Department should specify in this section that when presented with a citizen complaint that also involves potential health issues, the Department will directly share that information, with the resident's consent, with the Department of Health (DOH), instead of simply providing the resident with contact information of the DOH. Greater cooperation between the Department and DOH is needed to ensure that all aspects of a water supply complaint are properly

addressed and that adverse health effects do not persist or worsen while the Department is conducting an investigation.

The need for referral to DOH and/or another DEP water quality supply program is supported by statistics maintained by the Department. In a review of 349 complaints or Department actions that resulted in a Letter of Determination issued to water supply users/owners between the period of October 12, 2012 and May 9, 2014, obtained through a Right to Know Law request, it was found by the Department that 53 of these contaminated water supplies were caused by oil and gas operations, with an additional 18 still under investigation and 3 "temporary" positives (i.e., a total of 74 addressed or being addressed).

Of the 275 reported complaints determined to *not* have been affected by oil and gas operations, water supplies in 139 investigations were found to contain at least one pollutant (see Appendix I). The users of these contaminated water supplies should be immediately referred to resources for assistance to protect their health and the Department should further investigate the water quality issues manifested by these findings.

In addition, in cases in which the Department has determined that oil and gas activities were not the cause of water supply contamination, an ongoing review procedure should be established to monitor for changes in the quality and quantity of the water supply that prompted the complaint. Due to the variable amount of time that pollutants move through groundwater and the fact that chemical changes can occur over time, the Department should maintain a system that will track reported complaints to monitor for pollutants beyond the established investigative period.

For instance, it cannot be assumed that oil and gas operations have not released pollutant(s) because none have been found within the limited amount of time mandated by Section 3218(c) of the Oil and Gas Act. In order to provide protection to water supplies within the rebuttable presumption area, the Department should proactively follow up on dismissed complaints.

In the review of 349 complaints that resulted in a Letter of Determination (see Appendix I), water supplies were found to have been polluted or temporarily found to have been polluted on 56 occasions by oil and gas operations and 18 were still under investigation. The Departments should establish a process for following up on the 275 remaining water supplies that prompted water supply user/owner complaints, whether or not pollutants were found during the Department's investigation, to monitor for emerging contaminants and new evidence of causation to protect water users and the quality and quantity of regional groundwater.

The need for proactive monitoring and investigation of groundwater quality and quantity is also supported by the receipt by the Department of 2,976 water supply complaints up to May 1, 2014 (see Appendix II).

B. Procedures

Water Supply Investigation Requests

With regard to **paragraph 1,** the Department should add to the list of information requested by staff whether health issues are present and if so, what they are and when they began. As indicated above, staff should then ask whether that information can be shared with the DOH.

With regard to **paragraph 3,** if scheduling an inspection/water sampling is notdeemed to be appropriate by the Water Quality Specialist, the reasons for that conclusion should be properly

documented in such a manner as to be made available for public review in order to ensure transparency about the Department's decisionmaking and provide opportunity for follow up.

With regard to **paragraphs 3 and 4**, evidence of the need for an established prompt response time and protocol by the Water Quality Specialist to the requestor is contained in the statistics maintained by the Department. A review of 349 Letters of Determination (see Appendix I) indicates that the time between a complaint being filed and a response by the Department varied greatly and was rarely prompt. In the Letters of Determination in which the complaint date was provided, a response by the Department was two business days or less at the Southwest District, 1 time in response to 30 complaints; at the Northwest District, 6 times in response to 121 complaints; and in the Eastern District, 55 times in response to 198 complaints.

With regard to **paragraph 4,** if water samples are not warranted, then the reasons for that conclusion should be properly documented and made available for public review in order to ensure transparency about the Department's decisionmaking and provide opportunity for follow up.

With regard to **paragraph 5**, the Department should provide an established procedure for how to identify an operator that is required to provide temporary water when the water supply is not located within the rebuttable presumption area.

With regard to **paragraph 7,** if the Department cannot make a determination within 45 days, the water supply user/owner should be provided with a new timeframe for conclusion of the investigation. In addition, the Department should consider setting a deadline for requesting an operator to provide temporary water to the water supply user/owner while the Department's investigation is ongoing—otherwise, residents will be at risk of using contaminated water for indefinite periods of time due to Departmental factors.

With regard to **paragraph 9**, the Department should also inform residents that they can contact the Department if they notice any new changes in their water quality or supply.

In addition, potentially dangerous substances that are not regulated under the SDWA but are found in the water supply through the investigation, such as substances included in the U.S. Environmental Protection Agency's Emerging Contaminants Monitoring Rule, should be reported and guidance offered to the water supply user/owner. In these instances, the Department should take proactive steps to further monitor for changes in the levels and presence of the identified contaminants.

With regard to **paragraph 10,** if an adverse impact is determined, the Department should include in the written notification to the water supply owner/user an explanation of the obligations of the operator and the rights of the water supply owner/user under the law following a positive determination of contamination. The Department's timeframe of 24 hours for temporary water replacement by operators should also be stated in writing to the water supply owner/user. The Department should contact the owner/user by phone in order to confirm receipt of the letter or send the letters by certified mail, helping to ensure that exposure to contaminated water does not continue.

Because the operator is required to provide temporary water under the law in cases where a positive determination has been made, the operator should be *ordered* by the Department to provide temporary water within 24 hours (not simply requested, as currently written in the Guidelines). This order should be issued immediately after the positive determination is made. The procedure recommended below (paragraph 1 in the section on water supply investigations within the rebuttable presumption area) should also be applied in these instances of positive

determinations (i.e., the Water Quality Specialist Supervisor, Environmental Group Manager or District Program Manager shall order the operator by phone and in writing, via certified mail, to provide a temporary water supply adequate in quality and quantity for the needs of the user within 24 hours).

With regard to **paragraphs 11-12,** the timeline provided by these two paragraphs, taken together, provides for up to 70 calendar days until an operator will be issued an administrative order to permanently replace a water supply, which is too long for individuals to be forced to rely on temporary, limited sources of water (particularly because a permanent replacement supply is essential to maintaining health and property values). Once a positive determination has been made, the NOV should be issued *simultaneously* with the determination letter. The remaining timelines should be significantly compressed to ensure individuals are not without an adequate permanent source, while still allowing for voluntary resolution. The impacted individuals should be kept informed by phone calls or letters throughout this process. The Department should not allow operators to avoid an enforcement order by entering into an agreement with a water supply owner/user; agreement is not a replacement for regulatory enforcement, and there must be a public record of all water contamination cases and how the Department and operators responded.

With regard to **paragraph 12(4),** the Department should specify which staff or specialist will make the determination that a water supply is no longer contaminated, how that decision will be documented, and how that information will be communicated to the water supply owner/user.

With regard to **paragraph 14**, for instances where no responsible operator is identified, the Department should establish a procedure to assign responsibility to more than one operator. Alternatively, further investigation should be conducted to identify responsible operators so that a NOV can be issued and appropriate action taken by the Department (i.e., the investigation should not cease and the case should not be "closed" until the responsible party/parties has/have been identified). The Department should include the names of the responsible party(ies) in all positive Letters of Determination issued to residents following investigations.

With regard to **paragraph 15**, a neutral party should be engaged to evaluate the replaced water supply for adequacy and quality—not the operator. This neutral party could be someone with relevant qualifications from the Department, or a third party water quality professional. The fees incurred should be paid by the operator that affected the water quality or supply, not the affected resident or taxpayers.

With regard to **paragraph 16**, more information should be recorded in the water supply investigation tracking system and made available to the public. The current Complaint Tracking System that is available to the public only provides the County, Municipality, date received, complaint type, and date resolved (see Appendix II).

The information publicly provided should include: the disposition of the Department's investigation; the responsible operator; whether an NOV was issued and the dates and type of NOV; and a list and description, including concentrations, of the pollutants found. As indicated in the examples in Appendix I, the Department's Letters of Determination make some of this information available. In addition, the Department has ready access to other information (e.g., inspector notes and correspondence with operators). The public should have access to information on local/regional water supply issues in order to be prepared to protect themselves and their families from potential pollution—and in order to ensure that the Department is resolving cases fully and transparently.

Water Supply Investigation Requests Within the Rebuttable Presumption Area

With regard to paragraph 2, if an operator fails or refuses to provide a temporary water supply within 24 hours of receipt of written notification and also fails to rebut the presumption of liability, a civil penalty should be issued. This civil penalty should be greater than the cost of providing the temporary water supply.

In addition, paragraph 3 should be changed to state, "[i]n circumstances where an operator offers evidence to rebut the presumption of liability, an investigation **shall** still be conducted by the Department pursuant to the above-referenced guidelines." Even when the presumption of liability has been rebutted, it is possible that an operator is still liable, and/or a citizen's water supply has been negatively affected, and the Department therefore has a duty to investigate.

Thank you for your time and attention. If you have any questions or would like additional information, please contact Nick Kennedy, Mountain Watershed Association, 724-455-4200 X6, nick@mtwatershed.com; Nadia Steinzor, Earthworks, 202-887-1872, X109, nsteinzor@earthworksaction.org; or Tracy Carluccio, Delaware Riverkeeper Network, 215-369-1188 X104, tracy@delawareriverkeeper.org.

Sincerely,

Thomas Au, Sierra Club Pennsylvania Chapter
Tracy Carluccio, Deputy Director, Delaware Riverkeeper Network
Karen Feridun, Founder, Berks Gas Truth
Steve Hvozdovich, Marcellus Shale Campaign Coordinator, Clean Water Action
Nick Kennedy, Community Outreach Coordinator, Mountain Watershed Association
Nadia Steinzor, Eastern Program Coordinator, Earthworks Oil & Gas Accountability Project

Attachments:
Appendix I: Spread Sheet of PADEP Water Quality Data RTK 2014
Appendix II: Copy of PADEP Water Well Complaints 2014

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[1] Earthworks. *Blackout in the Gas Patch: How Pennsylvania Residents are Kept in the Dark on Health and Enforcement.* 2014. http://blackout.earthworksaction.org

[2] Ibid.

[3] PADEP, *Complaints Manual.* (Date unknown.) Received through a RTKL request filed by Clean Air Council, which provided the resulting documents to Earthworks.

[4] Earthworks. *Blackout in the Gas Patch: How Pennsylvania Residents are Kept in the Dark on Health and Enforcement.* 2014. http://blackout.earthworksaction.org.

[5] Earthworks, *PADEP: Inadequate Enforcement Guarantees Irresponsible Oil and Gas Development in Pennsylvania.* 2012. http://enforcement.earthworksaction.org.