

**TESTIMONY OF THE NATURAL RESOURCES DEFENSE COUNCIL**

**Substitute Senate Bill 315 (Jones)**

**Mid-Term Budget Review – Energy & Natural Resources**

**HOUSE PUBLIC UTILITIES COMMITTEE**

**May 21, 2012**

Chairman Stautberg and Committee Members:

My name is Richard Sahli. I have practiced environmental law in Ohio for thirty years, including four years as chief counsel for the Ohio EPA. I am testifying on the behalf of the Natural Resources Defense Council, a national non-profit environmental organization with 1.3 million members and online supporters nationwide, including 13,000 here in Ohio. My testimony addresses the provisions of SB 315 on gas well regulation and I am here to testify regarding NRDC's concerns with five serious flaws in the bill. Dylan Sullivan of NRDC will testify briefly on the bill's energy provisions.

Natural gas development has exploded at break-neck speed in recent years, fueled by advancements in an extraction technique known as hydraulic fracturing that has allowed the oil and gas industry to access previously out-of-reach reserves. We share a strong interest with Governor Kasich in seeing that Ohio become a leader in developing a strong and effective program to protect the public health and safety and the environment from the demanding new challenges presented by deep shale wells that utilize hydraulic fracturing. Because of the speed with which shale wells are being drilled in Ohio and the enormous amount of our state's ground water resources at risk, Ohio will only have one chance to get its regulatory oversight right.

- 1. Require companies to disclose detailed health and safety information and provide pre-drilling public notice about the chemical components of their hydraulic fracturing fluids**

There is growing evidence and concern about the risks that hydraulic fracturing poses risks to the environment and public health. Many of the substances used in the fracturing process or released into the environment by hydraulic fracturing are toxic. Some, like benzene, are known carcinogens. Drinking water wells have been contaminated by explosive levels of methane and other hazardous substances. As a result, requiring disclosure of the chemical composition of fluids used in the hydraulic fracturing process is a critical safeguard that allows for better public understanding of and preparedness for the risks involved.

SB 315 as amended and passed by the Senate was improved over the initial draft in the information that it requires companies to disclose about the chemical components of their hydraulic fracturing fluid. However, SB 315 requires that disclosure only within 60 days after the well has been drilled, rather than disclosed in advance and made available to the public at the time of the permit application. By that time, any damage that might have occurred from the fracking chemicals will have already been set in motion, and neither Ohio DNR nor local property owners and concerned citizens will have had any

chance to prepare for it. Chemical disclosure should be required at the time that the company applies for a drilling permit, so as to allow for testing of nearby drinking water sources (to establish a baseline against which to measure any future contamination) and a real discussion, in advance of any drilling and fracking, of whether there are less-dangerous alternatives available. Although the Senate bill requires baseline water testing, if the drilling company is not required to report the chemicals it is going to use before the well is fracked, it is virtually impossible for local property owners and concerned citizens to know what to test for. There are far too many chemicals used in drilling and fracking to test for all of them in advance.

Second, the Senate bill's process for allowing companies to claim that some of the information about chemicals that they disclose to Ohio DNR are "proprietary trade secrets" that should be kept confidential is too weak. The Senate bill gives companies the primary say over what is and isn't a trade secret, rather than requiring DNR to make that determination based on evidence that the company submits. Without a stronger process in place requiring companies to justify any trade secret claims, there is a significant risk that in practice, the public will be denied access to sufficient information to identify what the real health risks are of the chemicals being used in drilling and fracking fluid. Quite simply, because of the broad and unverified trade secrecy given to industry in this bill, trade secrecy is the loophole that could swallow up the entire principle of meaningful chemical disclosure to Ohioans.

Third, the Senate bill contains an unseemly provision that places a "gag order" on doctors who treat patients who might have been injured by exposure to fracking chemicals. The doctors are allowed to have access to information that the drilling company has designated as trade secrets, but only if the doctors agree not to disclose the information. Other states such as Pennsylvania that have adopted these kinds of provisions have seen an outcry from the medical community; laws like these potentially create situations where doctors have to choose between following their ethical code to do what's best for their patients and breaking the law. Doctors should not be put in a position where they have to put the drillers' need for secrecy over their patients' need for sound medical advice. And the State of Ohio should not be in the business of potentially infringing on doctors' First Amendment rights to freedom of speech.

## **2. Require ODNR to incorporate industry best practices in rules governing well construction**

SB 315 should also be amended to require ODNR to incorporate industry best practices into its well construction rules. ODNR's new well construction rules that passed JCARR on May 7 are less stringent than the American Petroleum Institute's recommended minimum standards in several key areas.

For example, the American Petroleum Institute's standards for hydraulic fracturing (HF1) adopted in 2009 include a minimum required safety zone between the base of a well's surface casing and the lowest drinking water aquifer of 100 feet. The new ODNR rules provide for only a 50 foot safety zone setback and are thus significantly weaker than the industry's own best practices for what is one of the most critical protections in the entire program.

Equally troubling, the American Petroleum Institute's hydraulic fracturing standards state that Formation Integrity Tests can reveal problems that are "critical to maintaining well integrity" and are thus mandatory at every well. These tests detect possible pathways for gas migration at the most critical and failure-prone point of the well at the bottom of a casing string, and help confirm that the casing and cement, which are critical to preventing the migration of gas and harmful contaminants, were properly designed and installed. However, ODNR's rules do not make the test mandatory and do not even provide any criteria for when it must be conducted. Instead, the new rules make this critical test entirely optional and subject only to the unlimited discretion of the program chief.

Ohio needs contemporary standards, based at a minimum on industry best practices, to protect our ground water from the new and inherently more risky horizontal drilling using high-volume hydraulic fracturing. We do not believe that Ohioans should receive any less protection than what the industry itself recommends as the minimum safe standard. NRDC recommends that ODNR be required to incorporate safeguards into its rules that are at least as stringent as the most current version of American Petroleum Institute (API) or American Society for Testing & Materials (ASTM) standards governing well construction and materials.

### **3. Restore the right of any aggrieved citizen to appeal permits to the Oil & Gas Commission**

Finally, you should know that SB 315 as currently written would clearly and categorically prevent any Ohio citizen, local government or business from appealing any permit approving any gas well, including any hydraulically fractured well, anywhere in the state. At the same time, the bill would continue to allow companies to appeal if their applications for permits are denied. This is completely unprecedented in Ohio law and we consider it to be dangerous and emphatically at odds with basic American values.

Under current law, any permit issued by ODNR is appealable by any Ohioan who can demonstrate that the permit could injure them or their property to the Ohio Oil and Gas Commission. That body now determines whether ODNR acted lawfully in issuing the permit and thus safeguards the integrity of the Department's permitting process. However, language in this bill amending R.C. 1509.03(B)(1) would end this basic right to redress by declaring that the issuance of a well permit is not an "order" of the Chief and can therefore no longer be appealed to the Commission pursuant to R.C. 1509.36. The new language would also exempt gas well permit approvals from the catch-all provision for appeals under the state's Administrative Procedures Act leaving no recourse at all.

This change would immunize ODNR's gas well program from public accountability for its actions. It would become a law unto itself. Not even the gas industry applicant itself could appeal a permit that imposes terms and conditions that it considers hazardous or unreasonable. As we all know instinctively, the lack of public accountability in a bureaucracy leads to nothing good by fostering isolation, apathy, laziness, favoritism and arrogance. Ohio has never given such immunity to one of its bureaucracies before and the oversight of this new, fast moving, and potentially hazardous technology is the last place where such a rash experiment should begin. If you want the public to have any reasonable basis to have confidence in fracking in Ohio, this provision must be removed from SB 315.

Some industry commenters seek to denigrate this loss of Ohioans' due process rights by claiming that even something as complex as permitting modern shale wells is just a simple matter of yes or no, black or white, merely a dry analysis of law. This is false. For example, ODNR's new rules require a permit application to include a detailed "casing and cementing plan" in which a well's safeguards must be disclosed for review by Department staff. This is demanding engineering work where errors, oversights, or bad bureaucratic procedures can lead to serious harm. It is also the core material that gives rise to most permit appeals when outside experts detect dangerous flaws in a document like this that the permit fails to correct.

Public accountability through the appeals process promotes better agency decision-making as the public's ability to challenge the choices of sometimes insular bureaucracies leads to results most likely to reflect relevant facts and consider engineering alternatives. Local prosecutors or citizens also now push bureaucracies to give due deference to this General Assembly's legislative commands by uncovering legal errors that can undermine the integrity of entire programs. Today these problems can be sensibly addressed through the public's appeal rights but if you consent to ODNR's unprecedented attempt in this bill to acquire immunity from appeals, these benefits will be lost.

This is not just an issue of basic fairness; it is an issue of fundamental constitutional rights. The right of citizens to appeal government decisions that might harm them, and to hold government accountable for its decisions, is a fundamental American freedom that is recognized and protected by the 14th Amendment to the U.S. Constitution. Why would this legislature ever take a position like this opposing due process of law?

We propose deleting language added to R.C. 1509.06(F) in 2010 and deleting SB 315's proposed amendment to R.C. 1509.03(B)(1) that both seek to redefine ODNR's issuance of a permit as unappealable to the Oil and Gas Commission and place it outside Ohio's Administrative Procedures Act. Without this change, a decision by ODNR to issue a drilling permit could never be appealed to any court or administrative body, exempting those decisions from any outside review or scrutiny. Such an outcome would be a clear threat to Ohioans' basic constitutional rights to due process and equal protection under the law.