

To: Edward Hanlon/DC/USEPA/US@EPA
Date: 04/06/2010 03:16 PM
Subject: Ohio Oil & Gas Information

Hello

Thank you for conducting this study on hydraulic fracturing.

Although we missed the deadline, please be informed that the Ohio oil and gas grassroots project of over 1000 citizens and industry representatives concur with comments and suggestions provided by Mr. William Wegner and strongly disagree with those of Mr. Russell.

It is also important for you to be aware of the following:

With regard to the Bainbridge Twp, OH incident (2007) often referenced: the components used in this well stimulation which occurred just before the house explosion and water contamination have not yet been disclosed according to the attorney representing those affected. Therefore statements can not be made that hydraulic fracturing chemicals were not found in the drinking water supply since one can not perform applicable testing without knowing the fingerprint of what we are looking for.

Ohio allows for fracturing operations to occur within 150 feet of residences and schools and has zero setback requirements to sources of water.

With regard to states allegedly adequately regulating fracturing today according to the GWPC testimony made by then President Scott Kell (Ohio Acting Chief DMRM) 2008 please be aware of attached testimony offered by Kell and other regulators also in 2008 revealing that this may not be the case.

We look forward to other meetings and opportunities for input and appreciate your goal of collecting information from independent groups and experts. Our hope is that the majority of those involved will not have the typical conflict of interest wherein their paycheck is directly or indirectly dependent on special interest initiatives.

Thank you

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**BEFORE THE OIL & GAS COMMISSION
OF THE
STATE OF OHIO
2045 Morse Road
Columbus, Ohio 43229**

CITY OF MUNROE FALLS, OHIO

Appellant

v.

**CHIEF OF THE DIVISION OF MINERAL
RESOURCES MANAGEMENT OF THE
OHIO DEPARTMENT OF NATURAL
RESOURCES**

Appellee

**RE: Oil and Gas Well Drilling Permit
granted to D & L Energy, Inc., bearing
the API Well Number of 34-153-2-3024-
00-0**

Appeal No. 812

POST-TRIAL BRIEF

I. Introduction

Munroe Falls has always acknowledged that there is a very low likelihood of any sort of spillage or groundwater contamination as a result of the drilling that D & L Energy wants to do on the banks of the Cuyahoga River. However, all of the witnesses are in agreement that the ODNR cannot completely eliminate the risk of groundwater contamination, no matter what sort of conditions it places on drilling permits. Even this small risk is too great a risk to take when the potential consequence of the drilling is the contamination of the Cuyahoga Falls aquifer. This water well system provides the drinking water for 60,000 residents of Cuyahoga Falls, Munroe Falls, and Silver Lake. There is no other groundwater source in the area that can provide that much water. Accordingly, Munroe Falls believes that any risk to such a unique and valuable resource is too much risk.

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II. Factual Background

A. Prior to 2004 HB 278

Since the time that Ohio became a state, until 2004, local municipalities have controlled oil and gas well drilling. In addition to the permits required by the Ohio Department of Natural Resources, drillers could be compelled by municipalities to obtain a municipal permit. This gave municipalities the power to serve their citizens by regulating and permitting drilling within their boundaries. Local officials, who had knowledge of the environment surrounding a proposed well, the character of a community, its zoning regulations, its needs and its risk tolerance, made the decision to allow or deny permits for drilling. If the local officials did not do a good job at regulating oil and gas drilling, the officials were answerable to the voters.

B. Changes made by 2004 HB 278

In 2004, the Ohio General Assembly made a radical change to the law by passing HB 278. This bill purported¹ to strip away the power of local municipalities to regulate oil and gas drilling, and make the ODNR the sole permitting authority. Specifically, under the new law, the Chief of the Division of Mineral Resources Management of the Ohio Department of Natural Resources, an un-elected official in Columbus, had the sole discretion to decide whether oil and gas wells were appropriate

¹ Munroe Falls does not concede that the General Assembly has the power to pre-empt its ability to regulate oil and gas drilling. Under the Section 3, Article XVIII of the Ohio Constitution, "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." However, the question of whether the General Assembly's passage of 2004 HB 278 runs afoul of this state constitutional provision is not before this Commission, and for purposes of this appeal, Munroe Falls will accept the assertion that its permitting ordinances are pre-empted by 2004 HB 278

within the boundaries of each of the cities in Ohio. The ordinances and wishes of individual cities were now superseded.

Under 2004 HB 278, the ODNR is the sole permitting authority, and it is not required to:

- Give notice of the filing of a drilling application to the city where the drilling is to take place;
- Give a copy of the drilling application to the city;
- Discuss the permit application with anyone from the city;
- Notify the city that the ODNR is performing a site inspection;
- Do any sort of environmental assessment;
- Do any sort of specific groundwater risk assessment;
- Review and give consideration to the surrounding property uses;
- Discuss the permit application with the Ohio or Federal EPA;
- Consult the city's zoning map or ordinances; or
- Factor in the local character of the city in any way.

The ODNR is not even required to give notice of the approval of a permit to the city, notwithstanding the fact that the city has a strict 30 day deadline for appeal that runs from the date of issue of the permit.²

Despite the fact that the Chief is not required to collect any of the above information, the Chief is then exclusively charged with the duty to protect the citizens of Ohio by denying a permit when there is "an imminent danger to public health or safety or damage to the environment" and those dangers have not been eliminated by the

² Munroe Falls learned of this as a result of its involvement in the appeal of the first permit granted to D & L Energy and appealed to this Commission.

placement of conditions upon the Permit. R.C. §1509.06(F). The Chief is now responsible: Ohio cities have been cut out of the oil and gas well permitting equation entirely.

C. Changes made by the ODNR

As of the effective date of 2004 HB 278, the ODNR was granted the exclusive responsibility to assess the safety and risk of drilling oil and gas wells. So what did the ODNR do to address its new responsibility? According to the testimony at the hearing of this matter; very little. John Husted, Chief of the Mineral Management Division, initially could not identify any changes enacted in the permitting process before and after 2004 HB 278. He later testified that the ODNR adopted "Urban Drilling Regulations" following the passage of 2004 HB 278. Scott Kell, Deputy Chief, testified that the permitting process was changed to allow the ODNR to do a review of a potential site and adopt permit conditions in response to the site review. But Kell was forced to admit that nothing in 2004 HB 278 directs the ODNR to avoid drilling in environmentally sensitive areas.

The "Urban Drilling Regulations" referenced by John Husted do very little to protect groundwater. There is a regulation titled "prevention of contamination and pollution." O.A.C. 1501:9-1-07. Subsection (A) of this regulation requires anyone with an urban drilling permit to conduct the operation "in a manner which will not contaminate or pollute the surface of the land, or water on the surface or in the subsurface." No further guidance on that point is given. Subsection (B) of the regulation refers drillers to the "best management practices (BMPs) for oil and gas well site construction manual,"

but this manual is primarily directed at controlling erosion and run-off, not groundwater contamination.

Accordingly, despite being tasked with assuring the environmental and public health dangers of oil and gas drilling in urban areas, the ODNR has not set forth extensive regulations limiting threats to groundwater. It has not set forth any specific environmental guidelines. It does not regularly involve the EPA or the cities in its decisionmaking. As a result, the ODNR lacks the information to effectively manage those risks. It is clear that the ODNR is not in the business of denying permits. John Husted testified that of 1400 oil and gas drilling permits granted in 2008, he could not recall even one being denied for environmental reasons. Scott Kell could only identify two permits that were denied due to environmental sensitivity during his entire career at the ODNR. Accordingly, the ODNR, under its current procedure, is not the watchdog that the state deserves.

D. Drillers approach Munroe Falls

In 2006, oil and gas drillers approached Munroe Falls for permission to drill on land owned by Munroe Falls. Munroe Falls learned that Kathy Metropolus, a geologist in the drinking water division of the Ohio EPA had spoken to Cuyahoga Falls about the environmental safety of oil and gas well drilling. Her background was serving as the the Source Water Protection Program Coordinator for Northeast Ohio. In that role she studied the Cuyahoga Falls aquifer and was involved in the 2002 SWAP assessment of the aquifer. Munroe Falls invited her to speak, and Ms. Metropolous told the city that the aquifer was very susceptible to pollution due to its geology and that the soil provides little or no protection for the underlying aquifer due to the composition of the soil.

Ms. Metropolis put on a powerpoint presentation that explained the potential risks of drilling near the Cuyahoga River and the Cuyahoga Falls aquifer. (Exhibit "I"). Her testimony was that the area of the proposed well was a highly susceptible area and there was little or no protection for the aquifer. If the Cuyahoga River flooded, and oil was in the floodwaters, the oil would remain behind near the wellhead and make its way into the aquifer. At the time of the hearing, Ms. Metropolis testified that Munroe Falls drew a fair conclusion that they should seek to protect the area along the river from the dangers of oil and gas well drilling.

During this period, Larry Valentine was working as the Service Director of Munroe Falls. Larry is an engineer who formerly ran the water plant at Cuyahoga Falls for 25 years, and holds a class 4 water treatment operator's license. Prior to that, he was employed by the Ohio EPA in the Division of Drinking Water. Larry described the Cuyahoga Falls water wellfield and water plant, which consisted of 18 high-capacity wells in close proximity to the Cuyahoga River. Larry explained that the waters of the Cuyahoga River recharged the aquifer, and that the river often flooded the wellfield. If oil made it into the river, and the river flooded, the oil residue would be left behind in the wellfield. In Larry's experience, oil and gas hydrocarbons can make drinking water unsafe for human consumption, and efforts to get hydrocarbons out of an aquifer would cost many millions of dollars.

Based upon this information, the City of Munroe Falls decided that it was unwilling to accept the risk of an oil and gas well being drilled near the Cuyahoga River, and declined lease city-owned land for that purpose.

E. D & L Energy's application

Thereafter, D & L Energy applied to drill on the Sonoco site, which is around a half-mile upstream from the Cuyahoga Falls water wellhead, and around 300 feet from the banks of the Cuyahoga River, within a 100 year flood plain. No notice of the filing of the application was given to Munroe Falls. The Mayor of Munroe Falls, Frank Larson, was invited to the ODNR's site review, and was told that the application would be granted. He was not asked for input, and was told that the application would be granted. As word spread in the community, Munroe Falls residents reacted by circulating petitions opposing the drilling, and the City Council passed a resolution requesting the Governor to place a moratorium on drilling. (Exhibit O, Q). The City Council of Cuyahoga Falls did the same. (Exhibit R).

No notice of the approval of the application was given to Munroe Falls. No ODNR representative offered any explanation for why it was safe to drill near the river when the EPA said it was unsafe to drill near the river a year prior. Steve Opritza from the ODNR learned from Kathy Metropolis that "the area of the well field and the area of the proposed oil and gas well ... have one of the highest susceptibility ratings in Summit County. This means that there is little to no protective layer of clay overlying the aquifer, and anything getting on the ground has a very good potetnial (sic) to be washed into the aquifer." (Exhibit C). The ODNR did not impose any permit conditions directly related to that information. The permit was approved on October 28, 2007.

When Munroe Falls attempted to appeal the grant of the permit to this Commission, the appeal was dismissed as being filed too late, despite the fact that the 30 day appeal deadline was not supposed to begin running until notice of the approval

of the permit was sent. While the first appeal was pending, the first permit expired, and D & L Energy obtained a second permit. Munroe Falls filed this appeal from the issuance of the second permit.³

III. Law and Argument

The ODNR, through the testimony of Scott Kell and John Husted, admitted that the department has the obligation to deny a drilling permit when there is “an imminent danger to public health or safety or damage to the environment.” R.C. §1509.06(F). The ODNR admitted that no set of conditions could eliminate the risk of groundwater contamination. Kell admitted that the ODNR has investigated 900 complaints of groundwater contamination from oil and gas drilling during his time at the ODNR. Kell further admitted that there are times when it is appropriate to deny a permit based solely upon environmental concerns, and cited two occasions when permits were denied.

This is one of those occasions. The testimony of Kathy Metropulos and Larry Valentine demonstrated that the Cuyahoga Falls water well aquifer is a unique, irreplaceable resource. There is no other aquifer that can produce as much groundwater as this aquifer, anywhere in the region. And it is particularly susceptible to harm, being covered by only 4 feet of silty loam soils which offer essentially no protection from contamination. It is also susceptible to any pollution of the Cuyahoga

³ It has been suggested by counsel for ODNR that this appeal is improper, because the decision of the Chief to grant a permit does not constitute an “order” that is appealable under R.C. §1509.36. But in State ex rel. Fisher v. Nacelle Land and Mgt. Corp. (1993), 90 Ohio App.3d 93, the court found that the Chief’s decision to grant a drilling permit to be an “adjudicative order” subject to appeal under R.C. §1509.36. Further, R.C. §1509.03 specifically states that “[e]very order **issuing**, denying, or modifying a permit under this chapter and described as such shall be considered an adjudication order....”

River, in that the aquifer is recharged through lagoons and troughs connected to the river, and the area frequently floods with water from the river.

The testimony also revealed that chemicals from oil and drilling wastes can make groundwater unfit for human consumption. Interceptor wells could be built to try to clean the aquifer, but plenty examples exist where such wells have been ineffective and pollutants remain more than 50 years after contamination (City of Wooster; Weaver Woodlands, etc.). From a drinking water perspective, the only way to try to treat affected water would be to build a multi-million dollar "stripping tower" to evaporate the hydrocarbons. If the Cuyahoga Falls aquifer were to become tainted, the result would be catastrophic – if the pollution could be remediated at all, it would be at a multi-million dollar cost.

If the worst-case scenario occurred, what then? Kell made it very clear that the ODNR would not bear any of the cost of remediation. Remediation costs are solely the obligation of the driller. But D & L Energy is only required to maintain insurance limits of \$500,000 for property damage and \$1,000,000 for personal injury. R.C. §1329.15. In case of a catastrophe, those limits would be exhausted quickly. If the driller then sought bankruptcy protection, the communities of Munroe Falls, Cuyahoga Falls, and Silver Lake would be left holding the bag, trying to provide water for their citizens. The ODNR certainly wouldn't pick up the tab.

And that lack of accountability is the basic problem here. All of the ODNR witnesses were clear that while risk could be mitigated, it can't be eliminated – a risk of harm to Munroe Falls and the Cuyahoga Falls aquifer will exist if drilling in this location is allowed. Formerly, cities were permitted to enact ordinances to balance such risk

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against the potential benefits of oil exploration in order to best serve their citizens. But since 2004 HB 278, these delicate issues of risk tolerance are now exclusively reserved to unelected ODNR staff in Columbus. While every ODNR witness who testified was obviously learned and earnest, they do not have to live with the consequences of a mistake. They are not answerable to voters, they do not have to pay for a clean-up, and they do not have to drink the water in Munroe Falls.

As a result, this appeal is an effort to get the ODNR to take the task of balancing these risks more seriously. At the hearing, the testimony revealed that in 2008 alone, the ODNR granted 1400 permits. Scott Kell was only able to identify two occasions in more than 20 years at the ODNR where the ODNR denied a drilling permit solely on environmental concerns. Apparently, the ODNR rejects a vanishingly small percentage of drilling applications. Since the ODNR has now been vested with the exclusive power to grant or deny drilling applications, with that power comes responsibility. Specifically, to protect the public, the ODNR now must perform the risk-balancing which was once the role of local government.

It is clear that the risk to the water supply of Munroe Falls was never seriously considered here, as there was never any real consideration given to denying the permit. Steve Opritza's inquiry to Kathy Metropolis on September 28, 2007 demonstrates that the ODNR had decided to issue the permit a full month before it eventually did. (Exhibit C). In that e-mail, Opritza doesn't say "we are considering whether to issue a permit..."; instead, he says "it is our intention to impose special permit conditions...."

More must be demanded of the ODNR. As the sole agency assuring the safety of oil and gas drilling in Ohio, fair consideration must be given to the denial of a permit

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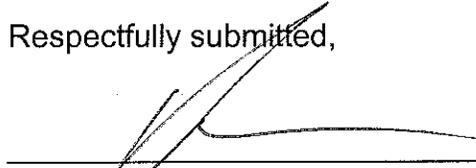
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where, as here, the proposed drilling will occur in a location where there is a risk of catastrophic damage to a unique natural resource. It is the ODNR's duty to deny a permit where permit conditions cannot eliminate the risk of such a large environmental harm. Even here, where the risk is admittedly small, the potential harm is very, very large, and that mandates a denial of the permit.

IV. Conclusion

Based upon the foregoing law and argument, Munroe Falls requests that this Commission enter an order REVERSING the Chief of the Mineral Resources Management Division's decision to grant an oil and gas drilling permit to D & L Energy.

Respectfully submitted,



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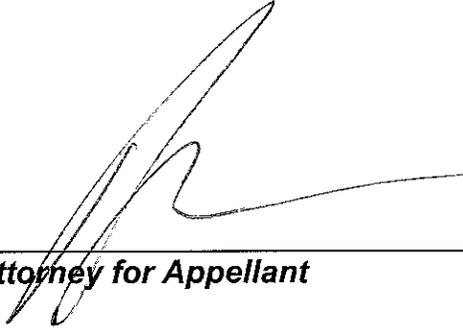
CERTIFICATE OF SERVICE

THIS CERTIFIES THAT a copy of the foregoing was mailed to the parties below
by **Electronic and Regular Mail** this 28 day of May, 2009.

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