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1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212

(614) 487-7506
www.theOEC.org

Interested Party Testimony
Ohio Senate Bill 165 (As Introduced), 128th General Assembly
Presented to: Ohio Senate Environment and Natural Resources Committee
On behalf of: Ohio Environmental Council
Presented by: Trent Dougherty, Director of Legal Affairs
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Chairman Shaffer, Vice-Chair Stewart, Ranking Member Morano and Members of the Committee, I am Trent Dougherty, Director of Legal Affairs for the Ohio Environmental Council (OEC). Thank you for the opportunity to testify as an Interested Party on Senate Bill 165, As Introduced (SB 165).

BACKGROUND & PERSPECTIVE

This debate, as state officials have testified, represents a rare opportunity to reform and update Ohio's oil and gas development and oversight laws. To become better informed about this complex issue and detailed chapter of law, the OEC has had initial discussions with officials at the Ohio Department of Natural Resources (ODNR) and its Division of Mineral Resources Management (DMRM), the oil and gas industry, and citizen organizations. We plan to continue this dialogue with all affected parties and to consult with third-party experts.

By way of full disclosure, the OEC opposed House Bill 278 (125 G.A.) when it was before the General Assembly in 2003-2004. We believed then and we believe now that involving more public officials in the oversight of industrial and extractive activities that may impact air, land, and water resources is a good thing. By way of further disclosure, even though House Bill 278 passed into law, the OEC accepted the invitation of the ODNR to participate in an advisory panel that helped craft administrative rules to implement the new law.

We are pleased that the General Assembly is revisiting Ohio's oil and gas laws. We share the goal of helping modernize Ohio's oil and gas laws to better ensure more adequate protection of air, land, and water resources while respecting private property rights and the safe and responsible production of oil and gas resources.

NOTE: The following observations represent our best information and knowledge of this issue at this time. Please know that we likely will have further comments and suggestions as we become better informed about this issue, industry practices, and state oversight.

WORTHY PROVISIONS OF SB 165

The OEC is supportive of several important provisions in SB 165 that will better protect air, land, and water resources and public health and safety:

1. Proper Funding of the State Oil and Gas Regulatory Program

We strongly support the increase of regulatory funding for ODNR's Oil and Gas program. We commend the oil and gas industry for stepping up and agreeing to a funding proposal that effectively will double the budget for the regulatory program, and do so without burdening the taxpayers and depleting the General Revenue Fund. We believe it is appropriate for any industry that makes a profit from extracting natural resources to fund the regulatory oversight of that activity. The oil and gas industry has done that with SB 165.

We could only hope that other resource extractive industries follow the same lead. The coal industry—an extractive industry that disrupts thousands times more landscape, surface- and ground-water resources, and property and an industry whose permits anticipate literally anticipate and plan for geologic subsidence, collapsed houses and structures, depleted groundwater resources, and stream degradation—continues to resist relieving the taxpayers of Ohio for full oversight of the state's coal regulatory program.

2. Brine Disposal

Brine is a byproduct of oil and gas development that is more than just salty water; it also includes heavy metals which are toxic. ODNR, under a primacy agreement with U.S. EPA in accordance with the standards of the federal Safe Drinking Water Act, requires produced waters, and all drilling and hydraulic fracturing flow-back fluids to be disposed of through licensed Class II injection wells that are permitted and inspected by ODNR. Ohio's Underground Injection Control (UIC) program protects Ohio's ground water resources and aquatic life in our waterways. Ohio has emphasized deep well injection as the most environmentally sound method of disposing drilling fluids, flow-back fluids from hydraulic fracturing operations and produced water, rather than treatment and discharging of the brine into receiving streams, or other waste management practices found in other states.

This favorable regulatory regime, however, has a downside: It is making Ohio a dumping ground for brine disposal from nearby states, especially Pennsylvania and West Virginia. We strongly support SB 165's proposed fee increase on out-of-district brine disposers to cover the increasing portion of the cost for inspection and monitoring of these disposal wells by ODNR officials.

Further, we support the addition of language limiting the application of brine onto roads as a deicer, to produced brine waters only. Precipitation and other conditions can cause brine water applied to roads to runoff and potentially pollute nearby watercourses. Such occurrences are problematic when the brine water has been contaminated with fluids from the drilling of an oil and gas well. Prohibiting the application of fluids from a well, flow back from the stimulation of a well, and other fluids used to treat a well, is an important safeguard to water resources in oil and gas bearing parts of Ohio.

As exploration of the Marcellus Shale formations in Pennsylvania and West Virginia rapidly increase in the near future, so will the need to dispose of the vast amount of produced water such drilling requires.

3. Orphan and Idle Wells

An increasing threat to Ohio's human and environmental health is the legacy of abandoned or orphan wells throughout the state. We support the provisions in SB 165 that require drillers to "plug or produce" as well as the dedicated \$1 million in funding to pay for plugging of these wells.

These are all very important improvements that should be approved.

AREAS THAT NEED IMPROVEMENT IN SB 165

We respectfully suggest that there remain several other important provisions of existing law that either are inadequately strengthened or are not at all proposed for strengthening by SB 165—but that absolutely should be adequately strengthened, including:

1. Local control and local consultation

A great deal of testimony over the past few weeks has centered on the loss of local control over oil and gas drilling under HB 278, or the gain of consistent state regulation under the same bill, depending on one's point of view.

Proponents of SB 165 have stated that local input is satisfied through the addition of a proposed "site review" to identify and evaluate any site-specific terms and conditions. This is a procedure, currently done under division procedural directive. However, the language of SB 165 does not specifically address the issue of local official involvement. Over the years, we have seen local control stripped from local boards of health and county commissioners and engineers. Just as all politics are local, all environmental and human health risks begin as local risks. Those local officials who are charged with the responsibility to preserve and protect the health and safety of their communities should retain the right to be properly notified, be consulted, and be present, and to offer any question, suggestion, recommendation, observation, protestation, etc., during any and all phases of oil and gas production.

A way to help effect this would be to place responsibility with the drilling applicant to notify and consult with local health and safety officials to encourage their appearance at the siting conference. The driller would verify that this has occurred before the scheduling of the site conference commences. The responsibility would then shift to the local officials to be active in the process. The local officials would be given the opportunity to clearly state any concerns dealing with important local matters, including but limited to sight and noise abatement, air emissions, water impacts, infrastructure impacts, and fire and emergency protections and contingencies. Further, local officials would need to be present at the siting conference, and be invited to present at and to raise any question or concern at and about the drilling site during any phase of the site preparation, active drilling, and site decommissioning.

2. Enforcement

We appreciate the addition of language defining a material and substantial violation. However, while ORC Sec. 1509.04 states that the Chief SHALL enforce this chapter, the new language in SB 165 only provides the Chief the DISCRETION to immediately suspend a material violation that presents an imminent danger the health and safety of the public. The law must require the immediate and direct enforcement of the law when the safety of Ohioans is in jeopardy.

The enforcement section of SB 165 must be reviewed with internal ODNR legal staff and external legal consultants to make certain that ODNR has the tools to quickly and effectively enforce the human health and safety regulations of ORC Chapter 1509, and can provide the necessary specific and general deterrent for future and recalcitrant violators. We further recommend significant strengthening of penalty provisions for any repeat offenders.

3. Public notice

There is also extensive amended language providing notice and hearing to those suspended permittees, which is important for securing due process. However, notification of potentially effected parties has been reduced. Notification currently, is for owners of occupied dwellings within 500 feet, which is in itself arguably inadequate. However, that notification is changed in SB 165 to require a permittee to merely notify the owners of parcels of land. In urban and suburban areas, many occupants of dwellings are not necessarily the owners of the parcels of land. Rental properties, multi-family dwellings, and apartment complexes routinely are located on parcels owned by corporations or individuals who do not live on the parcel and even live/reside in the local jurisdiction, the state, or even the nation. Therefore, to guarantee that the people affected by the drilling operation are notified of the activity, the language of the bill should state “all occupants living or residing on” and not “owners of” parcels of land. Further, the justification on how 500 feet was determined seems arbitrary.

4. Distance Setbacks

OEC questions the adequacy of the minimum statutory distance setback of 100 feet from a dwelling and 300 feet from a property line as provided in the existing ORC. While we appreciate the addition, in SB 165, of specific statutory language permitting rulemaking authority setting minimum setbacks for human health and safety concerns, we believe that a stronger minimum setback should immediately be statutorily codified. The justification offered by proponents of SB 165’s setback language is that, the oil and gas industry is “not aware of any reported incident involving the drilling of a well that occurred beyond Ohio’s existing 100 foot setback.”¹ However, the 100 foot minimum lacks any legal or technical justification. The minimum setback should be based on human health and safety considerations that are validated by sound science and engineering. A “nothing has happened yet” approach to safety is dangerous policy making. Health and safety experts should be consulted to determine the best **minimum** setback, and that distance should be codified in ORC 1509. Further, the Chief should have the ability to require increased distances for localized, permit specific conditions.

¹ Proponent Testimony, SB 165, Testimony of Tom Stewart, Ohio Oil and Gas Association, October 21, 2009.

Merely increasing the setbacks near private property and structures provided in existing statute is not enough. The current ORC provides no setbacks from waters of the state, state protected lands, or other non-dwelling places of public gathering, or sensitive populations. Lessons can be learned in Construction Demolition and Debris Landfill law requiring setbacks of XX from homes, resources, and public places.

5. Mandatory Pooling

Mandatory pooling and spacing requirements have been a hotly debated topic. At its core, mandatory pooling and spacing requirements are property rights issues, and only tangentially connected with human and environmental health protection. For such an issue that has garnered the attention that mandatory pooling has, the “solution” in SB 165, to increase applications for mandatory pooling applications to \$5000, and limit applications to 5 per year, seems a bit arbitrary. If there is a problem with mandatory pooling being used improperly by a minority of drillers as a lease negotiation tool, then the problem is not with the number of applications or the cost, but with an abuse of the system. If these rogue drillers are abusing the mandatory pooling system, then their applications should be denied as illegitimate, by the governing commissions.

Therefore, one important deficiency with the current mandatory pooling system in Ohio, which is not addressed by SB 165, is the procedural due process deficiencies. The “adjudicatory” bodies that rule on whether a affected parcel is determined to be part of the pool are heavily weighted on the side of the industry. While there are public representatives on both the Technical Advisory Committee and the Oil and Gas Commission, they represent a single vote compared to the industry’s six votes and four votes in the TAC and OGC, respectively. We do not wish to pass judgment on the current public representative appointees for these Commissions, but past experience with other Commissions have shown that their representation may be questionable and have the appearance of conflict of interest. For example, a previous appointee for public representative for the ODNR-DMRM’s Reclamation Commission was a close relative to a coal industry lobbyist; and on ODNR’s Great Lakes Compact Advisory Committee, the public representative is a lawyer for the Ohio Chamber of Commerce.

OEC is very interested in the questions of Constitutional law that have arisen today and in previous testimony, and as the debate moves on, OEC would like to continue this discussion with members of the Committee and other stakeholders. The property right in oil and gas is much different than that of other subsurface rights. Coal and other minerals are not as migratory as oil and gas, and the use of one’s rights does not necessarily deplete the amount of an adjoining property owner. The migratory nature of oil and natural gas is like that of groundwater, however, as this Committee knows, the property right in water is that of reasonable use. It is the burden of a user of water to use only up to the point that it infringes on the property rights of neighbors. Oil and gas rights, however, are governed by the rule of capture. Rule of capture necessitates, according to some witnesses, spacing laws that limit drilling by 20 acre parcels. In order to secure the property rights of those parcel owners, mandatory pooling is thus required so that a minority parcel owner cannot “holdout” and

therefore stop the drilling in that area (and thus stop the driller from capturing and possessing his property).

Some opponents of this legislation have suggested that the spacing laws and mandatory pooling are patently an unconstitutional taking. On cursory review, we tend to agree that the constitutionality of these requirements is questionable. Further, the arguments in favor of spacing are specious since the 20 acre parcel need not be based on the geology, but just that 20 surface acres (of any shape) are contiguous. Such a requirement, like setback requirements in this context, is wholly arbitrary and must be revisited. Nevertheless, if the spacing law is abolished, we need to be considerate of the environmental and human health ramifications. If there are no minimum spacing acreage requirements, theoretically, every landowner who wished to exercise his/her right to oil and gas would erect a rig.

6. Other environmental and public safety concerns

As this is a “once in a career” opportunity to update Ohio’s oil and gas drilling regulation, all areas should be examined for reform. SB 165 must, therefore, address issues of public safety and environmental protection based on air emissions and further protections of drinking and groundwater. Therefore, SB 165 should prohibit the burial of hazardous waste and use of known toxic chemicals at drilling sites; require monitoring of hydrogen sulfide gas and other air emissions; and require monitoring and first alert warning technology to detect spills, leaks, or explosions that jeopardize human health.

These are important shortcomings in SB 165 that should be strengthened.

CONCLUSION

We look forward to working with the Committee, with ODNR, the industry, and with impacted citizens to strengthen Ohio’s oil and gas laws. Thank you for considering our perspective.