



**Interested Party Testimony of Trent Dougherty, Managing Director of Legal Affairs, Ohio Environmental Council
Governor's Operating Budget - House Bill 64 (As Introduced)
Presented to the Ohio House Subcommittee on Agriculture, Development, and Natural Resources
March 12, 2015 - Ohio Statehouse**

Chairman Thompson, Ranking Member O'Brien, and Members of the Ohio House Subcommittee on Agriculture, Development, and Natural Resources, thank you for this opportunity to present Interested Party testimony on the Governor's Operating Budget, House Bill 64 (As Introduced).

My name is Trent Dougherty, Legal Affairs Director of the Ohio Environmental Council. The OEC is a not-for profit network of more than 100 group-members and several thousand citizen-members. Our mission is to secure clean air, land, and water for all who call Ohio home.

On Tuesday, OEC Deputy Director, Jack Shaner, testified on the land and water management divisions of the Ohio Department of Natural Resources and the Ohio Department of Agriculture of the Governor's proposal. My testimony this morning will concentrate on the regulatory operations of the ODNR, especially with respect to oversight of oil and gas and coal extraction, the Ohio EPA's water quality certification provisions, and the budget proposals for the Public Utilities Commission and the Ohio Consumers' Counsel.

Division of Oil and Gas Resources Management

FY 2016: \$20.05M (+36.9%)

FY 2017: \$20.50M (+ 2.0%)

OEC SUPPORT If the estimates foretold by ODNR and the industry are correct, even with current low commodity prices impacting production levels, Oil and Gas Resources Management will need all and perhaps more than the increase of its current budget for proper inspection and oversight. With a reliance on individual terms and conditions on permits to ensure protections of air, land, and water protections we are optimistic that some of the increase will provide resources for more PhD's and P.E.'s to provide the scientific and engineering basis for these permits. We therefore support the increase in funding for the oil and gas regulatory program.

Beyond the increase in funding for the regulatory program, the Governor has proposed a number of substantive amendments to Ohio oil and gas law. OEC continues to commend Governor Kasich and Director Zehringer for their continuing efforts to improve Ohio's oversight of the state's booming horizontal drilling operations. The OEC generally supports the statutory changes related to Oil & Gas regulation proposed in the Governor's Budget, and feel that most of the provisions improve upon current law. We wish to specifically discuss the following:

Registration containing background information under R.C.§1509.051

The bill requires a person that intends to engage in an activity regulated under the Law or rules adopted under it to register with the Division of Oil and Gas Resources Management on a form prescribed by the Chief prior to engaging in the activity. The person must disclose on the form all felony convictions or felony guilty pleas of or by the person and of or by the officers of the person, including any statutory agent, to any of the following that have occurred within the 25 years previous to the date of registration.

OEC SUPPORT -- OEC supports background checks for applicants and key employees of oil and gas permits. Flagrant violators of federal and state environmental laws should not be permitted to set up shop in Ohio and put local communities at risk. While the Governor's proposed background checks fall short of the breadth of background checks of other industries seeking state permits, it is a major step forward in identifying bad environmental actors.

Notification of emergencies under R.C.§1509.232

A major problem with current law is that there is no requirement for a well owner to let anyone know if there is some emergency on the site. This provision fixes that big omission in the law, and makes it a strict liability offense if you as an owner do not report (by that I mean that it does not matter whether you meant to not report or not). There are a couple of odd qualifications that could be clarified, however.

Specifically the language raises the following questions with us:

- **Why apply this notification to “other than the production operation”?** If there is an incident where medical attention is required, it may need to be reported. Although, we do understand the argument that certain situations (i.e. if a worker falls off a ladder and needs stitches) may not seem necessary to report to ODNR. OEC would be amenable to working with the Committee, industry and the department to make sure that all *necessary* incidents are reported, including those on the production operation.
- **Why not apply this provision to “any uncontrolled release”, instead of only those “that may jeopardize worker safety or public safety”?** This qualification seems like a judgment call that could either allow uncontrolled releases from being reported because someone thinks it is not going to jeopardize safety, or risk strict liability offense for not reporting something that ODNR thinks is jeopardizing, but the owner did not think so. It's best just to require any uncontrolled release to be reported. Why should there be an exemption for “production operations” when it comes to reporting emergency medical treatment of a person exposed to a chemical or injured? We believe the phrase “that may jeopardize worker safety or public safety” is unnecessary language.
- **Why shouldn't the ODNR chief be notified, in place of the well owner, by the person performing services on behalf of the owner of a well?** We believe this language adds an additional and unnecessary 30 minute delay of notification to the ODNR chief? We recommend revision.

Compulsory unitization under R.C.§1509.28

As Director Zehringer testified, the unitization law was rarely if ever used over the first four-plus decades of the law. Since the permitting of horizontal shale wells has increased dramatically over the last couple of years, so have unitization orders. We agree with the underlying spirit to modernize the oil and gas unitization law. We believe that the modernization of this law must have the goal of protecting the rights of all landowners including those landowners who choose not to lease, those who have yet to come to an agreement with the driller, and the 11 million landowners of publicly-owned property.

OEC SUPPORT – Therefore, we support the Governors proposed revisions to §1509.28 as a positive step, and specifically the provisions that:

- Eliminates unilateral ODNR unitization by eliminating Chief's own motion for holding a unitization hearing;
- Requires the Applicant to notify all unleased mineral rights owners of the hearing by certified mail at least thirty days prior to the hearing date. Applicant also required to provide newspaper notification; Verification of both forms of notification required at least 14 days prior to hearing.
- Requires monthly cash payment of 1/8th royalty calculated on gross proceed;
- Prohibits surface operations or surface disturbance on unleased mineral rights owner property unless written consent obtained;
- Specifies that unleased mineral rights owners shall not incur any liability for personal or property damage associated with the operations; and
- Makes violation of divisions (C)(2); (F)(5); (H)(2); and (L) strict liability offenses.

Penalties for violations under R.C. §§1509.33 and 1509.99

Increases civil penalties for certain violations of the Law; and increases criminal penalties for certain violations of the Law, and specifies that a knowing violation of the statutes governing the management, transportation, and disposal of brine is a felony and that a negligent violation is a misdemeanor for a first offense and a felony for each subsequent offense.

OEC SUPPORT – OEC supports the much needed increases in penalties and enhancements in ODNR enforcement tools under this bill. OEC continues to advocate for a number of substantive improvements to Ohio law concerning oil & gas drilling's impact on Ohio's air, land, water, and property owners. However, even those improvements would fail if the regulator does not have the complete authority to enforce the law and the regulated do not fear the repercussions for such activities. We further support the provision to person is convicted of or pleads guilty to a violation of any provision of the Law, the sentencing court may order the person to reimburse the state agency or a political subdivision for any actual costs incurred in responding to the violation, including the cost of rectifying the violation and conditions caused by it.

Idle and Orphaned Well Program

While the severance tax provisions of the Governor's budget bill are being heard concurrently and separately in the Ways and Means Committee, we feel it necessary, before this Subcommittee however, to discuss one issue previously discussed during numerous deliberations concerning the Severance Tax – an improvement to Ohio oil and gas law that are missing from the Governor's proposal, but important to safety of citizens in districts throughout the state.

In HB375 in the 130th General Assembly, OEC worked with House leadership and the industry on a proposal to increase the efficiency, accountability, and transparency of the ODNR Idle and Orphan Well Program. These abandoned and unused wells -- especially the legacy wells that were abandoned before the existence of modern regulations -- can pose risks to safety, the environment, and development. These wells are scattered around the state and can be found in rural as well as urban areas. Experts believe that thousands of these wells likely exist in Ohio.

Our proposal, as passed by the House, would have required the ODNR Division of Oil and Gas Resources to:

- Provide sufficient staff to identify, locate, and plug idle and orphaned wells located in Ohio;
- Develop and maintain an inventory of all known and suspected idle and orphaned wells located in this state;
- Prioritize the plugging of idle and orphaned wells identified in that inventory based on the relative risk of those wells to public health and safety;
- Report annually to the General Assembly on actual and projected expenditures and related well plugging activity for the immediate preceding and immediate upcoming fiscal years, respectively.

While that bill was not adopted by the Senate, the need for identifying and plugging idle and orphan wells is still an environmental and human safety priority. We believe that codifying the program along with the other statutory directives will result in increased productivity, efficiency, and accountability by the ODNR.

OEC thus recommends the Committee amend HB64 to include the reforms passed by the previous House in HB375.

However, with all of these improvements to Ohio law, we must express our opposition to the Governor's proposed amendments to chemical inventory reporting + EPCRA compliance.

Chemical inventory reporting + EPCRA compliance under 1509.23 and 1509.231

Together, proposed sections 1509.23 and 1509.231 of the Governor's budget bill revises the state's compliance with the Federal Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 by requiring specified chemical inventory information be filed with the ODNR Oil + Gas chief in place of reporting to the State Emergency Response Commission, local emergency planning committees, and the local fire departments which have jurisdiction over a facility, as is required by all other industries using chemicals over a certain threshold in Ohio.

OEC OPPOSES – These provisions pose several concerns from the OEC's perspective:

- This proposal stops direct reporting from drillers to state and local emergency planners and fire departments nearest each well. Direct reporting was just reinstated a year ago, after a 12 year lapse.
- The onus will be placed on local emergency responders and firefighters to seek out chemical inventory information from the ODNR, instead of having the information immediately and automatically provided to them by the industry.
- The ODNR Oil + Gas chief would have the discretion to decide whether and to what extent to share the chemical information with the public, despite the fact that federal EPCRA law requires that information about chemical inventories at facilities be made available to the public.
- ODNR's proposed primary means of providing chemical information to first responders, through an internet-based database, will not always be accessible, especially in rural areas with unreliable internet access.
- Federal emergency planning law and Ohio emergency planning law both make hazardous chemical information available to the public for every other industry in the state. Why an exception for oil and gas drillers?
- Federal emergency planning law states that facilities must report information directly to state and local emergency planners and the fire departments nearest each facility, and says that states enacting their own emergency planning laws must make them consistent in "scope, content and coverage" with the federal law. No provision is made for a third party agency to receive this information.

The OEC proposes removing sections 1509.23 and 1509.231.

Other reforms to Ohio Oil & Gas Law

While, again, we commend the Administration for proposing *some* improvements to Ohio's oil and gas law, OEC still feels that there is work to be done to make sure our laws and regulations meet or exceed those in other shale producing states. For example, OEC has drafted amendments for:

- Increased setbacks or buffer zones between horizontal wells and homes, horizontal wells and drinking water supplies, and horizontal wells and ecologically sensitive areas;
- Emergency rules mandating that all horizontal wells adopt approved spill prevention measures and approved secondary containment systems;
- Prohibition on water withdrawals for horizontal wells from headwater streams, streams with low flow, and streams with federally or state endangered species.

We hope to work with members of the Subcommittee and other stakeholders to continue the efforts over the past few years to improve Ohio law.

Ohio EPA

FY 2016: \$183.2M (-8.2%)

FY 2017: \$185.9M (+1.5%)

Ohio EPA Environmental Response and Revitalization

FY 2016: \$20.84M (-2.9%)

FY 2017: \$21.29M (+2.2%)

OEC SUPPORT – While the overall budget for Ohio EPA's DERR Division is taking a loss in FY16 compared to FY15, budget line items that fund environmental cleanup are seeing significant increases.

OEC is heartened by Director Butler's acknowledgement in his written testimony of the efforts of the Ohio EPA's emergency response program – the 24-7 environmental cops on the beat. Their responses to derailed trains carrying petroleum, evacuations of neighborhoods due to chemical spills, and explosions, and even well pad fires, play a huge role in protecting the health and safety of Ohioans. OEC has advocated for a number of years that the General Assembly provide necessary tools to State Emergency Personnel through developing sustained financial and human resources for the OEPA DERR program; codifying the authority of OEPA DERR on-scene coordinators, and enabling safer and more efficient access to incident sites by defining as "public safety vehicles" the vehicles used by PUCO hazardous materials transportation enforcement and OEPA DERR.

The Governor's proposed budget makes strides in the direction OEC has been advocating, and we thank the Governor and Director for their leadership on this issue. Specifically, the bill amends R.C. §6109.34 Right of Entry & §6111.05 Investigation of alleged act of pollution or failure to comply, and as expressed below, OEC offers our support for these provisions and proposed revisions to further strengthen the law.

Emergency actions and confidentiality under water laws

OEC SUPPORT -- This section allows for the Ohio EPA to ask for, and to receive, during an emergency or investigation, the identity of all chemicals on site– no matter the source (oil and gas, chemical plants, train derailments etc). Language allows the OEPA Director (or authorized Representative) to share trade secret chemical information when responding to protect public health, safety or environment during an emergency or during an investigation of an emergency.

Generally the proposed provisions, here, represent a stark improvement to current Ohio law. Specifically, the language will increase the effectiveness of emergency responses to environmental incidents by allowing:

- OEPA to obtain and share trade secret chemical information in accordance with section 6111.05
- Requires operator responsible for a spill or person having knowledge of trade secret chemical info to disclose records without "undue delay".
- Also, during an emergency for Director or Director's representative to share trade secret chemical info with public or private water system owner/operator
- Director or Director Representative may disclose to the person seeking the trade secret info the identity of the person who designated the trade secret info.

Although we support the Governors proposal, we do have some questions that should be addressed and recommend some changes to the proposed language which we feel will improve current law even more. For example:

- Right of entry onto land by Ohio EPA responders should also be allowed for emergency action. It is not clear if the proposed new paragraph or current law provides this. OEC suggests amending current law to include language that "the director or the director's duly authorized representative may enter at reasonable times, or if an emergency action is required to protect the public health or safety or the environment . . .";
- How would Director's authorized representative be verified in the field? It is our understanding that OEPA Division of Emergency Response On-Scene Coordinator is the "authorized rep" on the scene 99% of the time, and should be clarified. OEC drafted language codifying the role of the Division of Emergency Response On-Scene Coordinator and the duties and responsibilities of both the OSC and the regulated entity when it comes to spills/releases/etc. We have attached that language to the email. This language was shared with Ohio EPA in the Spring of 2014.
- While we support these provisions, however, we question why the provision is limited to impacts to only aquatic organisms." We recommend the consideration of other wildlife; livestock; crops; etc. Also, while we would definitely support the disclosure to private & public water systems, it is too narrowly focused when dealing with impacts near the Ohio River (thus ORSANCO jurisdiction) -- we suggest adding ORSANCO and other state governments;
- We would recommend replacing or qualifying the phrase "without undue delay" with a clear timeframe (i.e. 30 minutes or 1 hour for example);
- We also recommend removing lines 71663-71671 (sections a, b, and c). This would thereby allow the OEPA Director (or the Director's authorized representative) to share trade secret chemical information with the owner or operator of public or private water systems when it is needed to "protect public health or safety of the environment," which should be sufficient without the conditions listed in these lines. Lines 71663-71671 would add extra burden of proof onto the OEPA Director which could impede or slow his/her ability to request and receive trade secret chemical information needed to protect public health.

Ohio EPA Surface Water Protection

FY 2016: \$33.59M (-2.6%)

FY 2017: \$33.68M (+0.3%)

OEC SUPPORT – Similar to the Ohio EPA DERR Division budget, looks may be deceiving. While the budget for the Division of Surface Water take a 2.6% loss in FY16 proposal, much of the loss is from reductions in federal funding. Movement of state funds, and increases in certain surface water protection line items should provide this Division with the amount of funding needed.

While OEC supports the budget line items, unfortunately we do have concerns with certain changes to the Surface Water protection statute proposed by the Administration.

Certified Water Quality Professional under R.C. §6111.30

In Director Butler's testimony, he has committed to work with fewer staff in the next biennium and exploring creative ways to protect the environment. In theory, OEC supports the basis of this commitment – efficiency and environmental protection. However, in practice, the amendments proposed to R.C. 6111.30, are an unfortunate culmination of the overarching commitment to creativity and cost-cutting, with which we have a number of concerns.

These provisions create a certified water quality professional (CWQP) program, along with striking the requirement for a “use attainability analysis” to be conducted on streams and wetlands, and replace it with “data sufficient to determine the existing aquatic life use”. Again, these provisions pose a number of concerns for OEC, including:

- **How will conflicts of interest be handled?** According to Director Butler's testimony, the “certified water quality professional program “will allow a prequalified 3rd party private-sector evaluation and assessment of wetlands and streams for water quality certification and Isolated Wetland Permit applications.” However, the CWQP is not necessarily a third party, but hired by the permittee. The true third-party intermediary between what is right for the water body and what the permittee wants to accomplish, is the staff experts at the Ohio EPA. This has been the role of Ohio EPA for four decades, and should continue.
- **Given Ohio EPA's 35-plus years of conducting use attainability analyses as a routine part of their overall support for the water programs we are at a loss as to why the current law must be replaced.** If the concern of the agency is that there is a need for third parties to relieve the burden on the agency staff, a new program is not needed. We need only utilize a program put in place by the 125th General Assembly in 2003 – the Ohio Credible Data Program. Under this program, watershed groups, community associations, educators, local governmental organizations, **and** private sector businesses can collect water quality data and provide that data to Ohio EPA.

That law, and the administrative regulations promulgated under it, establishes three broad categories or levels of data that will be deemed “credible” for distinctly different purposes, with an increasing level of scientific rigor behind the sampling and analytical work as those credible data collectors progress from Level 1 to Level 2 to Level 3.

Data collected by those who have been through the training and testing requirements to be credited as a Level 3 Credible Data Collector can fill the role of the proposed CWQP, and most importantly, not necessarily be hired by a particular permittee. Level 3 provides the highest level of scientific rigor and methods are equivalent to those used by Ohio EPA personnel. The law limits the Director's use of data collected under the credible data program for certain regulatory applications (for example, setting water quality standards and evaluating attainment of those standards) to only verified Level 3 data. In other words, data submitted under this program as Level 1 and Level 2 data cannot be used for those regulatory purposes. The level 3 collector requirements provide the environmental safeguards, while ensuring administrative efficiency, and doing so without creating a new program.

- **Will this proposal violate the Clean Water Act or jeopardize Ohio's primacy?** Finally, while USEPA does not have jurisdiction over the 401 state water quality certification process, if this new provision affects anything with how Ohio EPA operates their water quality program or if it has implications for the program being inconsistent with the Clean Water Act, then it could trigger, at the least, increased involvement from the federal EPA. We therefore feel it prudent that the Committee inquire from USEPA Region V, whether this new program raises any concerns with them before moving forward on any further discussion or deliberation of this proposal.

OEC recommends that the Committee remove these provisions from the bill.

Public Utilities Commission of Ohio

FY 2016: \$53.25M (- 0.3%)

FY 2017: \$53.25M (+/- 0.0%)

OEC SUPPORT + REQUEST FOR ADDITIONAL FUNDING -- Ohio is facing a great transformation in energy production, generation, transmission, and distribution. From the massive amounts of pipeline infrastructure needed in the coming years to transport the increasing amounts of natural gas to market, to the increase in demand for decentralized electricity by consumers, and utility attempts to re-regulate electricity generation, increased demand for customer choice, and the role of all electricity resources contributing to a reduction in greenhouse gas emissions. This transformation will require an ever increasing amount of analysis from Commission Staff to play a leadership role at the state and national level to do what's right for Ohio's economy, environment, and consumer rights.

OEC supports the work of PUCO Commission Staff and strongly urges the Subcommittee to increase its funding.

Ohio Consumers' Counsel

FY 2016: \$5.64M (+/- 0.0%)

FY 2017: \$5.64M (+/- 0.0%)

OEC SUPPORT + REQUEST FOR ADDITIONAL FUNDING -- The Ohio Consumers' Counsel is a major asset to . While the Public Utilities Commission and the Commission Staff, play a vital role in analyzing and adjudicating, the Commission in the end is merely the judge. The utilities have an armada of attorneys to defend their interests before the Commission. It is the small cadre of attorneys and analysts at OCC who every day have to battle to keep those utilities honest and make sure that the millions of residential consumers pay reasonable rates, and only pay for services that benefit them. As the above referenced transformations in Ohio's energy future increase, the stresses on this invaluable resource to each and every Ohio citizen will equally increase.

OEC supports OCC and vigorously urges the Subcommittee to increase its funding.

Chairman Thompson and Members of the Committee, thank you for considering our recommendations and perspective.



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