



Pennsylvania Grade Crude Oil Coalition
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August 25, 2017

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Request for Rulemaking to Reconsider and Administratively Stay the Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category (81 Fed. Reg. 41,845)

Dear Mr. Pruitt:

Pennsylvania Grade Crude Oil Coalition (PGCC)¹ submits this petition asking the United States Environmental Protection Agency (EPA) to conduct a rulemaking to reconsider the final Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category (UOG rule), which imposed a “zero discharge” standard on wastewater from “unconventional oil and gas extraction” under the Clean Water Act (CWA). As discussed below, the final UOG rule was based on erroneous information, and reconsideration is necessary to address and correct the resulting errors in the rule. PGCC also requests that EPA administratively stay the UOG rule, or otherwise suspend its enforcement, for certain operators until the rulemaking requested in this petition is complete.

¹ Pennsylvania Grade Crude Oil Coalition (PGCC) is a coalition of producers, refiners, suppliers and community members whose common interest is the development of Pennsylvania’s conventional oil and gas resources. “Conventional” formations are the traditional reservoir rock (generally sandstone) from which Pennsylvanians have drawn their oil and gas for over 150 years. The first oil well, drilled in Titusville in 1859 by Colonel Drake, is, of course, a conventional well. Unconventional well development began in Pennsylvania in the mid 2000’s; the unconventional industry draws its oil and gas from source rocks (generally shales). The unconventional rocks are typically deeper than Pennsylvania’s conventional formations and, unlike Pennsylvania’s conventional industry, the unconventional industry employs horizontal drilling and large scale hydrofractures, to free the oil and gas molecules from the very tight shales. The mission of PGCC is to advance local economies and energy independence by promoting conventional oil and gas production in a safe and environmentally sound manner.

A. Background

On June 28, 2016, EPA promulgated a rule titled Effluent Limitation Guidelines and Standards for the Oil and Gas Extraction Point Source Category. 81 FR 41845 (June 28, 2016); 40 C.F.R. Part 435, Subpart C. The UOG rule prohibits the discharge of wastewater from unconventional oil and gas extraction to publicly owned treatment plants (POTWs). The term “unconventional oil and gas” is newly defined in the UOG rule as “crude oil and natural gas produced by a well drilled into a shale and/or tight formation (including, but not limited to, shale gas, shale oil, tight gas, tight oil).” 40 C.F.R. § 435.33(2)(i). EPA indicated that a parallel rulemaking for conventional oil and gas would be conducted in the future, if appropriate.²

In the UOG rule, EPA selected a “zero discharge” Effluent Limitation Guideline (ELG). EPA found that this ELG was both technologically available and economically achievable because “unconventional” oil and gas operators were not discharging wastewater to POTWs at the time the UOG rule was issued. Both the preamble to the UOG rule and the associated Technical Development Document (TDD) indicated that no operators subject to the rule were currently discharging to POTWs. This statement is factually incorrect. According to Pennsylvania Department of Environmental Protection records, over one million barrels of waste were sent from Pennsylvania-defined conventional operators to public treatment plants in both 2015 and 2016.³ To the extent that such operators are covered by the rule, EPA’s record was incomplete.

Oil and gas operators classified as “conventional” under Pennsylvania law produce oil and gas from tight (but not shale) formations. As defined in the UOG rule, “unconventional oil and gas” includes all oil and gas extraction from tight formations and, therefore, includes Pennsylvania-defined conventional activity. As a result, Pennsylvania-defined conventional oil and gas operators are subject to the UOG rule’s “zero discharge” restriction in spite of EPA’s statements that the final rule was not intended to include conventional oil and gas operations. Because Pennsylvania-defined conventional operators have historically discharged to POTWs, such operators rely on the availability of this option for wastewater disposal.

After promulgation of the final rule, EPA was notified that Pennsylvania-defined conventional operators, who were unaware that they would be subject to the final rule based on the agency’s characterization of the rulemaking as applicable to “unconventional oil and gas,” were discharging to POTWs. In response to this information, EPA issued a final rule that extended the compliance date to August 29, 2019 for *existing* sources discharging into POTWs

² In the UOG rule, 40 C.F.R. § 435.33(b) and § 435.34(b) were reserved for PSES and PSNS, respectively, for wastewater from conventional oil and gas extraction. 81 FR 41857; *see also* 81 FR 41848 (June 28, 2016) (“The final rule does not include pretreatment standards for wastewater pollutants associated with conventional oil and gas extraction facilities or coalbed methane extraction facilities. EPA is reserving consideration of any such standards for a future rulemaking, if appropriate”).

³ See PADEP’s Office of Oil and Gas Management Oil and Gas Waste Report at: http://www.depreportingservices.state.pa.us/ReportServer/Pages/ReportViewer.aspx?%2fOil_Gas%2fOil_Gas_We%2fWaste.

between April 7, 2015 and June 28, 2016. 81 FR 88126 (Dec. 7, 2016); 40 C.F.R. § 435.33. There was no change in the compliance date for new sources. Accordingly, Pennsylvania-defined conventional operators with *new* wells producing from tight sand formations are currently subject to the rule banning discharges to POTWs.

PGCC filed a petition for review of the UOG rule with the U.S. Court of Appeals for the Third Circuit on November 7, 2016. That proceeding is pending, but the relief requested in this petition is necessary to address the ongoing impact of the UOG rule on PGCC's members.

B. Petition for Rulemaking to Reconsider UOG Rule

PGCC petitions EPA pursuant to 5 U.S.C. § 553(e) for a rulemaking to reconsider the Effluent Limitations and Guidelines and Standards for the Oil and Gas Extraction Point Source Category. The UOG rule is flawed, in part because it is based on incorrect and incomplete facts and because EPA failed to adequately consider the burden it imposes on small businesses.

1. REASONS TO RECONSIDER THE UOG RULE

a. The Errors in the UOG Rule Preamble Undermine EPA's Rationale for Selecting the "Zero Discharge" Option

Throughout the preamble for the UOG rule, EPA stated or assumed that POTWs do not receive wastewater from "unconventional oil and gas" operations, as defined in the UOG rule. For example, EPA stated that "[b]ased on the information reviewed as part of this final rulemaking, EPA concludes that current industry practice is to not discharge pollutants from onshore UOG extraction to POTWs." 81 FR 41851. PGCC understands that Pennsylvania-defined unconventional operators voluntarily stopped sending wastewater to POTWs in 2011 upon a request by the Pennsylvania Department of Environmental Protection. Notably, the TDD shows that EPA considered data only from operations in the Marcellus/Utica shale formations in Pennsylvania. *See* TDD, Table D-1. The administrative record does not consider or confirm whether extraction activity in "tight" non-shale formations classified as conventional under Pennsylvania law was associated with ongoing wastewater disposal at POTWs.

When establishing the Pretreatment Standards for Existing Sources (PSES), EPA's reasoning for rejecting a non-zero pretreatment standard and selecting the "zero discharge" option was based entirely on its evaluation of "current industry practice[s] . . . none of which involve sending wastewater to POTWs." 81 FR 41851. Likewise, in establishing the Pretreatment Standards for New Sources (PSNS), EPA stated that "EPA has no data in the record indicating that new sources would manage their wastewater any differently than existing sources or that the management options that are available for existing sources would not be available for new sources." *Id.* at 41853. Without any record regarding Pennsylvania-defined conventional operations, the explicit basis for EPA's selection of the "zero discharge" option is not valid.

To address these errors, EPA must reconsider both the definition of “unconventional oil and gas” set out in the UOG rule and the basis for selecting the “zero discharge” option.

b. EPA’s Failure to Consider Costs and Non-Water Quality Environmental Impacts Imposed by the UOG Rule Is Contrary to the Clean Water Act

Under the CWA, EPA typically considers a number of factors when promulgating PSES and PSNS. 81 FR 41849-50 (citing *Natural Resources Defense Council v. EPA*, 790 F.2d 289, 292 (3d Cir. 1986)). For both PSES and PSNS, those factors include the costs of achieving effluent reductions and any non-water quality environmental impacts associated with the selected alternative. *Id.*

Based on the erroneous assumption that no operators subject to the UOG rule were currently discharging to POTWs, EPA’s cost analysis in the final UOG rule preamble was straightforward: “Accordingly, because industry is already meeting this requirement, no facilities will incur incremental costs for compliance with the promulgated PSES and, therefore, the promulgated PSES is economically achievable.” 81 FR 41852. Likewise, EPA “found that there are no overall incremental impacts from the final standards on new sources . . . since the incremental costs faced by new sources generally will be the same as those faced by existing sources.” *Id.* at 41854. If Pennsylvania-defined conventional operators remain in the scope of the UOG rule, the incremental costs of compliance for operators with ongoing discharges to POTWs must be reconsidered.

Similarly, EPA’s analysis of potential non-water quality environmental impacts in the UOG rule preamble stated simply that no such impacts were expected, based on the fact that industry was already meeting the requirement of the selected option. *Id.* at 41852, 41854. However, if Pennsylvania-defined conventional operators currently discharging to POTWs are required to find a new disposal method, the non-water quality environmental impacts of the alternative disposal methods must be reconsidered by EPA.

c. EPA’s Failure to Consider the Effect of the UOG Rule on Small Businesses Is Contrary to the Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 et seq., sets out procedural requirements for rulemaking intended “to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses . . . subject to regulation.” Congressional Findings and Declaration of Purpose, Regulatory Flexibility Act of 1980. Specific requirements for final regulatory flexibility analysis include “a description of an estimate of the number of small entities to which the rule will apply” and “a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual policy and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.” 5 U.S.C. § 604(4), (6).

EPA's statements in the preamble to the UOG rule demonstrate that the agency's analysis under the RFA was premised on incomplete facts. When certifying that the rulemaking would not have a significant economic impact on small entities, the agency stated that "[n]o small business will experience a significant economic impact because the final rulemaking codifies current industry practice and does not impose any new requirement that is not already being met by the industry." 81 FR 41856. Because most, if not all, Pennsylvania-defined conventional operators qualify as small entities, and these small entities are subject to compliance costs under the UOG rule, the RFA analysis must be reconsidered if these operators remain within the scope of the UOG rule.

2. PROPOSED REMEDIES FOR ERRORS IN UOG RULE

PGCC believes that several relatively narrow and straightforward options exist for remedying the errors related to Pennsylvania-defined conventional operators in the UOG rule. First, EPA could explicitly exempt Pennsylvania-defined conventional oil and gas operations from the definition of "unconventional oil and gas." Alternatively, EPA could remove the references to "tight" formations from the definition of "unconventional oil and gas," such that the UOG rule would be defined to mean "crude oil and natural gas produced by a well drilled into a shale formation (including, but not limited to, shale gas, shale oil)." The latter approach is consistent with not only Pennsylvania law, but definitions in other states that EPA considered in its Technical Development Document. *See* TDD, Table B-1 (Summary of State Regulatory Definitions) (defining unconventional formations with references to shale but not tight formations). Either of these approaches would provide regulatory relief to Pennsylvania-defined conventional operators and address the errors underlying the UOG rule. If EPA determines that such rulemaking is non-controversial, it could efficiently provide relief to PGCC members through a promptly issued direct final rulemaking.

3. REQUEST FOR ADMINISTRATIVE STAY OR OTHER RELIEF FROM ENFORCEMENT

In the interest of justice, PGCC seeks an administrative stay of the UOG rule or a commitment from EPA to stay enforcement against Pennsylvania-defined conventional operators. For the reasons stated above, a stay or enforcement relief is appropriate here to allow EPA to reconsider the rule without the unanticipated effect on Pennsylvania-defined conventional oil and gas operators.

PGCC requests that the administrative stay or relief from enforcement remain in effect until EPA has appropriately addressed any ELG applicable to Pennsylvania-defined conventional operators in a final rulemaking.

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In conclusion, we respectfully request EPA grant this petition for rulemaking, stay the UOG rule or suspend enforcement of the UOG rule with respect to Pennsylvania-defined conventional operators, and promptly initiate a new rulemaking. Please let me know if we can provide additional information or assistance.

Respectfully submitted,

Pennsylvania Grade Crude Oil Coalition

A handwritten signature in black ink, appearing to read "David Clark", with a horizontal line extending from the end of the signature.

David Clark, President

cc: Sarah A. Greenwalt, Senior Advisor to the Administrator, USEPA
Lee D. Forsgren, Deputy Assistant Administrator, USEPA
Hon. Glenn Thompson, U.S. House of Representatives
Hon. Mike Kelly, U.S. House of Representatives