

## MEMORANDUM

**FROM:** Paul Kugelman, Jr.  
Senior Assistant Attorney General

**DATE:** September 13, 2016

**RE:** Proposed Regulations - 4 Va. Admin. Code § 25-150-10 *et seq.*

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*Please note that this memorandum does not constitute an opinion, formal or informal, of the Attorney General. Rather, this email contains the legal analysis of the individual staff member providing it.*

As is explained herein, it is my view that the Department of Mines, Minerals and Energy (DMME) has the authority to promulgate these proposed regulations, which revise 4 Va. Admin. Code § 25-150-10 *et seq.* It is also my view that the Virginia Administrative Process Act, §§ 2.2-4000 to -4032, applies here.

Under § 45.1-161.3 of the *Code of Virginia*, DMME's Director has the authority to "promulgate regulations necessary or incidental to the performance of duties or execution of powers conferred under this title and other relevant chapters . . . in accordance with the provisions of Article 2 (§ 2.2-4006 *et seq.*) of the Administrative Process Act," § 45.1-161.3(4), and to "do all acts necessary or convenient to carry out the purposes of this title." § 45.1-161.3(5). Additionally, DMME's Director has been granted "the power and duty to regulate gas, oil, or geophysical operations . . ." § 45.1-361.4.

In summary, the proposed revisions to 4 Va. Admin. Code § 25-150-10 *et seq.* under

Va. Admin. Code § 25-150-10 supplements the definitions for this chapter of DMME's regulations. DMME has this authority under § 45.1-161.3;

-150-80 mandates a pre-application hearing for gas or oil wells to be drilled in the Tidewater region to ensure that permit applicants are aware of state and federal water quality standards and provides that applications include a certificate of compliance with local land use ordinances, a list of ingredients the applicant anticipates using in his fracking fluid, a groundwater sampling plan, and an emergency response plan. Subparagraph (7) sets July 1, 2017 as the effective date for subparagraph (7). DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-95 details the groundwater baseline sampling, analysis and monitoring plan. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-100 requires well operators to include specifications for use of centralizers to ensure that bore casings are centered in the well. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-110 requires permit supplements and modifications to also include changes in the use of ingredients in fracking fluid or changes in the ingredients contained in fracking fluid. Additionally, when a supplement involves a well in the Tidewater area, DMME must forward any additional documentation to the Department of Environmental Quality (DEQ). Subparagraph (2) sets July 1, 2017 as the effective date for subparagraph (2). DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-160 requires DMME to coordinate the review of a permit application and a permit modification with DEQ. Under certain circumstances, DMME cannot approve either until it and DEQ have conducted a coordinated review of the environmental impact assessment. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-280 requires permittees who complete a well to prepare and submit a cement bond log for water protection. *See* proposed regulation -150-360, which requires this log to be submitted as a part of a well completion report. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-300 requires pits used in drilling operations to be fenced and the fencing maintained. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-340 increases the radius from the drilling location for groundwater testing from 500 feet to  $\frac{1}{4}$  of a mile (1,320 feet). DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-360 requires the cement log mandated by -150-280 to be submitted as part of the well completion report. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-365 prescribes what each completion report shall contain. Its effective date is July 1, 2017. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4;

-150-535 provides the well casing pressure testing requirements for conventional wells. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4; and

-150-615 provides the well casing pressure testing requirements for coalbed methane gas wells. DMME has this authority under §§ 45.1-161.3 and 45.1-361.4.

Finally, the Virginia Administrative Process Act, §§ 2.2-4000 to -4032, applies here as the Director is promulgating these regulations under § 45.1-161.3(4), which expressly applies the Act to the promulgation of these proposed regulations.

For these reasons, it is my view that the Department of Mines, Minerals and Energy has the authority to promulgate these proposed regulations. It is also my view that the Virginia Administrative Process Act, §§ 2.2-4000 to -4032, applies here.

The foregoing conclusion is my own. It does not constitute an opinion, formal or informal, of the Attorney General.