



## Pennsylvania Office of Attorney General Fact Sheet

### Department of Environmental Protection Submission

#### DEP claims it only received the Report after court intervention

On December 23, 2019, the OAG sent a letter to the Governor's Office of General Counsel formally engaging the Wolf Administration, including DEP and DOH, in the Grand Jury's investigation of the fracking industry and describing the process envisioned by the OAG in welcoming the Administration to engage with the Grand Jury as they worked toward issuing a report. This letter explicitly provided that the Administration would have an opportunity to submit a response to the final version of the report, and that any response would be attached to it upon its public release, as per the cited section of the Investigating Grand Jury Act. As the letter stated: "In addition, the administration will have an opportunity to submit a written response to the report within 20 days of the Grand Jury's issuance of a report during the week of February 10-14, 2020. See 42 Pa.C.S. § 4552(e).

The only "court intervention" was the disclosure order that the OAG, on its own motion, secured from the supervising judge so that it could lawfully share the report with DEP before public release, just as OAG had consistently assured DEP it would do.

#### DEP claims it had no fair opportunity to present information to the grand jury

The OAG provided DEP the opportunity for unprecedented access to the Grand Jury and its record, and information received from DEP was carefully considered by the Grand Jury in preparing the final draft of the Report. The OAG allowed DEP to present any evidence it desired, in whatever form, to the Grand Jury. The OAG clearly explained the purpose of this offer in its December 23 letter: "The goal of this endeavor is to ensure the grand jurors hear the administration's view so it can acquire a complete and well-rounded understanding of the subject matter."

Both DEP and DOH accepted the offer. The grand jurors agreed to serve an additional week in January 2020 specifically so that DEP would have additional time to prepare its presentation. The Department was even offered a full additional day to present evidence, but declined this extra time. DEP's characterization of its opportunity to present evidence to the Grand Jury as "limited" to one employee and in its subject matter is spurious.

In addition to its presentation of live testimony, DEP also provided three written statements to the Grand Jury, with hundreds of pages of attached exhibits. All of this material was read to the Grand Jury. DEP's response appears to assume that, because the Report does not adopt the agency's counter-narrative, the grand jurors must have been ignorant. In reality, the Grand Jury heard a great deal of evidence that went beyond DEP's official submissions, including much that came from DEP's own employees, and simply chose to reject certain elements as inaccurate or contrary to other testimony.

## DEP claims that the Grand Jury must not know how fracking laws and regulations developed over time

DEP claims that “[m]uch of the inaccuracy in the Report stems from a failure to anchor events in time,” and provides a timeline that allegedly refutes the findings of the Report. DEP response, p. 14-21. But the Department provided this same timeline to the Grand Jury prior to its presentation. The Report specifically acknowledged this timeline. Report, p. 52 (“DEP helpfully prepared a timeline for us, showing that the Department began ‘developing concepts’ for a comprehensive fracking regulation package as early as 2009-10”). The Grand Jury simply did not share DEP’s self-serving assertions about the implications of the timeline. Based on all the evidence it heard, which included testimony from prior DEP secretaries, the Grand Jury concluded that DEP’s response to the fracking boom was too slow, that it did not act energetically enough to pursue a regulatory package capable of addressing the unprecedented realities of fracking operations, and that Pennsylvania’s citizens and environment were harmed as a result

## DEP claims the Grand Jury must be ignorant about the mechanics and oversight of the fracking industry

DEP assumes that the Grand Jury heard no testimony beyond the evidence specifically recounted in the Report. In reality, the Grand Jury reached its conclusions only after laying a detailed foundation of knowledge based on hundreds of hours of testimony and thousands of pages of exhibits. The Grand Jury took a period of almost two years to build this extensive record. The evidence came from three main sources, including DEP itself -- although its employees’ testimony did not always support the “party line” presented in DEP’s response.

**DEP:** Over 30 current and former DEP employees -- from the secretaries who ran the Department to the on-the-ground employees, and all levels in-between -- testified regarding every aspect of DEP’s oversight of the shale gas industry. Report, p. 50. In addition to the DEP witnesses who appeared in person, the Grand Jury also heard reports of interviews with an additional 25 DEP employees. Included among these DEP employees were the technical director and the bureau director of DEP’s Bureau of Labs; the former regional director of the southwest region office; an environmental program manager from the safe drinking water program; a biologist from the wetlands and waterways program; former and current environmental group managers from the oil and gas program; former and current water quality specialists from oil and gas; a geologist from the clean water program who also served as a water quality specialist; oil and gas inspectors; a former radiation protection bureau director; an environmental protection specialist from oil and gas; staff from the bureau of investigations; a surface mine conservation inspector; hydrogeologists; water quality specialist supervisors; a surface mine conservation inspector supervisor; former and current DEP geologists; a former compliance specialist from oil and gas; an environmental cleanups program manager; a retired environmental program manager from oil and gas; a soil scientist from the environmental cleanups program; and a retired oil and gas inspector supervisor.

DEP experts addressed topics including well failure; stray gas migration; air and water contamination from fracking operations, chemicals used in fracking, and many others. Also, DEP experts testified extensively about the laws and regulations governing fracking operations in the Commonwealth. They provided a detailed analysis of the interplay between regulations and their authority to oversee the industry.

**Homeowners:** The Grand Jury heard sworn testimony from twelve everyday Pennsylvanians who took time out of their lives to share their stories. Approximately 75 additional families were interviewed by OAG Agents, and all their reports were presented to the Grand Jury as well. The experiences they related

had in many cases previously been provided to DEP, but either went unanswered or were not believed. The grand jurors simply came to different conclusions than DEP did about the credibility and significance of these reports.

**Expert Testimony:** The Grand Jury heard detailed testimony from ten outside expert witnesses on a wide range of subjects, totaling approximately 1,500 pages of transcripts. These experts provided nuanced insight into the mechanics of fracking operations; chemicals used in drilling and fracturing wells; state and federal laws governing disclosure -- or nondisclosure -- of fracking and drilling chemicals; the ways water and air can be contaminated by industry activity; rates of well failure and prospects for breakdowns in well integrity over time; how waste generated by industry operations is transported, managed, and disposed of; how the governing laws and practices of the fracking industry limit first responders' ability to keep communities safe; and other topics.

### DEP claims that the report relies on hearsay and anecdotes

As described above, the grand jury record was extraordinarily robust, and included extensive live testimony, documentary evidence, and expert analysis. DEP dismisses accounts it finds inconvenient, however. For example, DEP rejected reports of worms forced out of the ground from the extreme vibrations caused by hydraulic fracturing, stating “[t]here is no testimony or other evidence verifying this statement - no photos, no dates, times, nor locations.” DEP Response, pp. 31-32. That is incorrect; there certainly was testimony and corroborating evidence. See Grand Jury Exhibit 80 attached hereto as Exhibit “A.” More importantly, DEP makes no effort to refute the evidence that hydraulic fracturing causes intense vibrations, but nevertheless has failed to address this problem or its effects on the lives of those living nearby.

### DEP claims that health effects described in the Report are not significant

While DEP pays lip service to the “undocumented health effects” described in the Report, it ultimately dismisses these accounts as “not contribut[ing] to a scientific or medical understanding of whether there was, is, or possibly could be an association between unconventional gas development and observed health problem.” DEP response, p. 32. The Grand Jury heard expert and individualized evidence substantiating connections between fracking activity and harms to public health, so this statement is incorrect. If DEP had evidence to the contrary, after more than a decade overseeing the industry, it was free to present it, but has not. The Grand Jury readily acknowledged that more study of links between fracking and human health is necessary. The problem, as the Report observes, is that the current state of knowledge is not where it should be in large part because DEP and DOH willfully avoided this issue for years.

### DEP claims the Report inaccurately describes DEP and DOH efforts – or lack of effort – to gather public health information

The Grand Jury heard testimony from numerous parties, at both DEP and DOH, who personally participated in agency discussions on this subject and were present at the meeting in which a final determination was made. DEP alleges the Report does not tell the “whole story,” yet once again fails to provide the public with any information to the contrary. Investigators discussed this subject with DEP extensively before and after the Department presented testimony to the Grand Jury, yet received no clarification. Finally, it is simply untrue that the Grand Jury would have better understood the collaborative arrangement between DEP and DOH “had the OAG asked.” The Grand Jury reviewed the information and policies DEP states it would have provided “had the OAG asked” and heard testimony from the same DOH employees identified in the exhibit DEP relies on regarding this very subject matter.

## DEP claims that, contrary to the Report, the Department does have a policy to notify neighbors when contaminating events occur in their community

As the Report observed, the primary problem is not whether a “policy” exists; the problem is that any such policy is unclear and unknown to DEP’s own employees -- as established by testimony from those very employees, including high-ranking supervisors responsible for implementing agency policies. A nominal policy that nobody follows is not a meaningful defense to the Grand Jury’s findings.

## DEP claims that, contrary to the Report, the Department has addressed impoundments

DEP again ignores the Grand Jury’s actual finding -- that it took years before the Department finally implemented a more appropriate and strenuous regulatory regime. Until then, impoundments at fracking sites were dangerously under-regulated and DEP bears part of the blame for the serious problems that resulted. Instead of acknowledging this history, DEP skips forward to the point when a better regulatory regime was finally put in place, ignoring the problem identified in the Report.

## DEP claims that photographs appearing in the report are unreliable or doctored

This is a bizarre allegation. The grand jurors heard testimony that authenticated each of these photographs -- none of which are particularly controversial. They depict various routine realities of fracking operations, such as the layout of a well pad, the lines of trucks necessary to transport material to and from a well, and the proximity of some wellbores to families’ front doors. Yet for some reason DEP insinuates that the pictures were “altered electronically.” Once again, if the Department believed the photographs do not accurately represent the fracking operations depicted, it was free to provide the public with additional information.

## DEP claims the safer setback recommendation is misdirected

DEP has little to say about the substance of the recommendation, but nonetheless disparages it: “To the extent that the Report blames DEP for these setbacks, the Report is erroneous and misleading.” DEP Response, p. 37. The recommendation does not “blame” DEP for the setback law; as the Report makes clear, the law is a statute passed by the General Assembly, and the recommendation is therefore directed to the Legislature. Given DEP’s presumed expertise in the field, however, its views on setbacks would be relevant. But the Department, while criticizing the recommendation for its supposed lack of “scientific rationale,” presents no scientific rationale to justify the current setback, which permits a well to be drilled just 500 feet from a home.

## DEP claims no action is needed to stop the chemical cover-up

DEP contends the recommendation is wrong because the identity of complex and potentially dangerous fracking chemicals is already “available to the agency.” But the Report acknowledges that. The whole point of the recommendation is that the information be made available to everyone, not just DEP, and prior to drilling, not just after the fact. If DEP objects to such transparency, it should have explained why

## DEP claims it cannot aggregate air pollution sources

DEP asserts that, under existing law, it cannot add up and control air pollution from adjacent smaller devices that, taken together, may have significant effect on local air quality. The Grand Jury, however, was aware of current law in this area. The clearly stated point of the recommendation is to change the laws.

Today, many of the air contamination sources in question are owned by or under the effective control of a common operating entity; yet even when they are not, there is no reason regulatory law could not take into account the cumulative effect of closely grouped equipment.

## DEP claims current wastewater transportation labeling requirements are completely adequate

DEP says it's fine to classify fracking wastewater as "residual waste," but does not address the Grand Jury's observation that the very same chemicals labeled as mere "residual waste" after fracking are often required to be classified as "hazardous waste" before fracking. Yet the standards for transportation of residual waste are more lenient than those for hazardous waste. The residual waste category generally includes materials that are far less dangerous than hazardous waste, thereby jeopardizing first responders and other members of the public who do not realize what they may be facing when dealing with fracking wastewater.

## DEP claims there is no "revolving door"

More precisely, DEP claims there is no "evidence" of a revolving door. But the Grand Jury heard exactly such evidence: that experienced DEP employees are often hired away, at substantial salaries, by the industry they previously oversaw. It is remarkable that DEP would claim such a thing never happens; it happens in many areas of government. To acknowledge the fact is not to "denigrate" DEP employees; it is simply a recognition of basic economic reality. DEP says it "responsibly enforces" the Ethics Act, but fails to note that the Act merely addresses lobbying, which is not the problem addressed by the Grand Jury's recommendation.

## DEP claims there is no need for concurrent OAG jurisdiction

DEP says that the Department should maintain complete control over the decision to bring criminal charges for environmental violations, because only the Department has sufficient knowledge of the field to make the right decisions. But that position ignores the evidence gathered by the Grand Jury from DEP's own employees. The testimony showed that some DEP employees believe criminal prosecution is never necessary, while others said they wanted more prosecutions, but were overruled by superiors. The inconsistent answers indicate the absence of any departmental culture strong enough to guarantee that DEP, and only DEP, is capable of making the right call. Meanwhile, contrary to the Department's claims, statistics show that referrals to OAG involving criminal prosecution of oil and gas cases have not been consistent over time, but have instead fallen in recent years.

Concurrent OAG jurisdiction is not, as pictured by DEP, some kind of personal affront against the agency's autonomy. Dozens of similar statutes already exist in other areas of the law. The reason is simple: more resources means more effective enforcement of the law.



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