

**BEFORE THE ZONING HEARING BOARD OF PENN TOWNSHIP,
WESTMORELAND COUNTY, PENNSYLVANIA**

IN RE:

**APEX ENERGY, LLC
(Draftina Central Pad-31)**

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SPECIAL EXCEPTION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

The above matter comes before the Zoning Hearing Board of Penn Township (hereinafter referred to as “Board”) upon the application of Apex Energy LLC, (hereinafter referred to as “Applicant”) for a Special Exception for unconventional gas drilling pursuant to Article VI, Section 190-641 of the Zoning Ordinance of Penn Township (Ordinance) on parcels owned by the Bridget Draftina Estate located at 1051 Dutch Hollow Road with Tax 51-10-00-36. Public hearings were held on February 29, 2016 and March 10, 2016 at which time testimony was presented by all individuals desiring to be heard. After full consideration of all testimony and evidence presented the Zoning Hearing Board of Penn Township makes the following Findings of Fact, Conclusions of Law and Decision for the property located along Dutch Hollow Road, Penn Township:

FINDINGS OF FACT

1. Notice of the February 29, 2016 hearing before the Board was published in the Penn Trafford News on February 15, 2016 and February 22, 2016. The property was posted with a copy of the Notice of the February 29, 2016 hearing by the Zoning Officer on February 15, 2016 with notices to adjacent property owners by first class mail on February 16, 2016.
2. The hearing on the matter was continued until the Board’s regular meeting on March 10,

2016 with notice of the continuance provided on record at the January proceeding, via publication in the Penn Trafford News and addition notice mailed to the Applicants and Owner.

3. The record was closed at the time of the Board's April regular meeting on April 14, 2016 after no additional citizen comment or other evidence was offered by any interested party.
4. The parcel subject to the request covers an area of approximately 49.4 acres.
5. The parcels are zoned Rural Resource (RR) as is defined in §190-402 of the Ordinance and are also part of the Township's Mineral Extraction Overlay (MEO) district as is more particularly defined in § 190-407.
6. The Applicant, Apex Energy LLC ("Apex"), is in the business of drilling Marcellus Shale gas wells and has been existence for approximately three years maintaining operating wells in Westmoreland and Armstrong counties, including the Quest Pad in the Township that was the subject of a prior special exception grant by the Board in 2015.
7. Apex has entered into a Farmout Agreement dated November 5, 2014 with Dominion Transmission, Inc., that is recorded in the Officer of the Recorder of Deeds for Westmoreland County, Pennsylvania as Instrument No. 201506110018699, wherein Apex became the successor-in-interest to certain Marcellus shale gas leasing interests held by Dominion on the property. See Applicant's Exhibit 2.
8. Under the aforementioned Agreement Apex has the right, title and privileges to develop, explore and produce for natural gas and other hydrocarbons within the Marcellus shale pursuant to a lease dated December 27, 1957 between Matt Draftina & Bridgett Draftina, his wife, and New York State Natural Gas Corporation, a predecessor in title to Dominion Transmission, and recorded in the Recorder of Deeds Office of Westmoreland

County, Pennsylvania in Deed Book Volume 1686, Page 432.

9. This lease covers all the oil, gas and other minerals that underlie the areas subject to this Application.
10. The Applicant's request is for a Special Exception for the drilling of unconventional natural gas wells and subsequent operation of the wells as is permitted by Article VI, Section 190-641, as amended, of the pending Zoning Ordinance of Penn Township.
11. The proposed well bores for the site, referred to as the Draftina Pad, will be located at property controlled by Apex through the terms and conditions of the Dominion Farmout Agreement and the Draftina Lease.
12. The pad area for drilling will cover approximately 3.6 acres of the parcel with the total development area being 12 acres.
13. The development site includes proximately 4.9 acres within the 16-24 % slope range being 40.83% of the steep slope acreage of the site.
14. The Draftina Pad will be used to open up to five unconventional gas wells at the site.
15. Appropriate and required permit applications, including ESCGP-2, have been submitted to the Pennsylvania Department of Environmental Protection (DEP).
16. Public roads used to access the site are all maintained by the Pennsylvania Department of Transportation (PennDOT) and required applications for Highway Occupancy Permits have been submitted to the Department.
17. The site is to be reached by construction of an access road from Dutch Hollow Road having an 11% slope.
18. Dutch Hollow Road is a narrow, two lane road in a rural area that provides access to an area that is primarily residential in character.
19. Dutch Hollow Road is also the primary access route to the Applicants proposed Beattie

Central Pad site that is nearby.

20. Testimony during the hearings on Apex's Beattie site application established that the road surface underwent extensive repairs within the last several years as a result of the collapse of the roadbed and supporting foundations requiring large quantities of fill and stone to restore.
21. On its approach to the access road for the site Dutch Hollow Road has a steep drop on one side.
22. The entire process from site preparation until clean up with active wells operating will take approximately four months.
23. Initial site prep, including road and pad construction, will take approximately thirty days at the proposed site.
24. The road and pad construction will require over a dozen people at the site using typical surface preparation heavy equipment.
25. At least 350 truckloads of rock will be brought to site for road and pad construction.
26. Plans submitted indicate the location and composition of erosion, storm water and sediment controls to be used during this phase. Sediment and erosion will be controlled, both during construction and post-construction, by rain gardens, ditches, dry ponds, retention basins and sediment traps to be installed on site. See Applicant's Exhibits 5 & 6.
27. The post-construction and permanent stormwater control plan is designed to handle a 100 year storm event.
28. There are no protected structures within the 600 foot well site set back required by the Ordinance. See Applicant's Exhibit 3.
29. There is one structure that is 603 feet to the east of the proposed well site and a second

structure located across Dutch Hollow Road that is 640 feet from the proposed site.

30. No drilling will occur within 200 feet of property lines of parcels adjacent to the subject parcel. See Applicant's Exhibit 3.
31. The project is designed to meet the dimensional setbacks of the Ordinance as would apply to oil and gas development.
32. The 3.6 acre pad area will be protected by three barriers consisting of alternating layers of liners and wooden board mats with polyurethane sealant coating surrounded by an eight inch high containment barrier to handle potential spills of liquids during the operations.
33. The site of the well pad operations is primarily agricultural in nature with tree lines shielding a portion of the site from residential structures.
34. There will be cut slopes created through the construction phase to assist in noise reduction.
35. Drilling will involve the transport to and erection of drilling equipment at the site requiring a short-term, several day increase in heavy truck traffic.
36. Freshwater requirements for the operations are to be met by piping of municipal water that is to be stored in two twelve-foot high, above-ground rubber lined steel storage tanks at the Applicant's proposed Beattie site.
37. Those tanks will be monitored by Apex on a twenty-four hour basis.
38. The drilling process will require the presence of several dozen people onsite.
39. The drilling rig, pad and other equipment will be lit at night with both surface illumination and safety lighting as the operation will be run on a 24 hour basis.
40. This will include six to eight portable lighting towers that will be faced downward and shielded except for required FAA recognition lights and a lighting system for an

automatic threading device requiring 24 hour video monitoring.

41. Approximately one-half of the lights will be low glare globe lights similar to one introduced at the Quest Site after resident complaints regarding glare from production lighting.
42. There will be no permanent lighting at the site when the wells have moved to production.
43. Temporary trailer residences for two to three supervisory personnel will be placed at the site at the time of drilling and remain through the subsequent fracking process.
44. The site will be secured by perimeter fencing and will have a guard shack manned on a 24 hour basis at the entrance to the site during all phases prior to production phase.
45. The Applicant intends to maintain separate containment vessels and barriers for chemicals stored on site for drilling and completion operations.
46. These chemicals, including friction reducers, biocide, scale inhibitors and others, are listed in Section 3-3 of the Preparedness, Prevention and Contingency Plan (PPCP) submitted with this Application which Apex will maintain on site and provide to the Township.
47. The quantity of chemicals stored on site would be an amount required for 24 to 48 hours of operations and none of these chemicals will remain on site after the completion phase of the Draftina project.
48. Apex will maintain an emergency response truck onsite with spill response equipment and first aid equipment.
49. In addition to submission of the PPCP and internal emergency response preparation, Apex, as was done on the Quest Pad site, intends to meet with first responders at the time the operations commence to review the site and coordinate procedures for

emergency response.

50. The Applicant has no history of reportable spills at any of its sites and during the Quest Site project previously approved by the Board and the DEP conducted ten site inspections that resulted in no violations or requests for corrective action.
51. The fracking segment of the procedure will be conducted upon opening of the wells causing a second temporary increase in heavy vehicle traffic as the relevant equipment is brought to the site.
52. This will include water tank trucks and sand delivery trucks.
53. There will be one sand truck reaching the site every 15-20 minutes during the fracking stage.
54. There will be minimal staging of vehicles servicing the well pad area during the fracking process as the access to the site has been designed to permit a circular traffic plan with continuous flow into and exiting the site.
55. The traffic will also be monitored by Apex employees or subcontractors to avoid any additional issues.
56. The sand delivery system is designed to be a "closed-loop" system which is intended to minimize release of sand and dust.
57. The system at the Quest site released sand in various quantities to the surrounding area as noted by the residents' testimony at the time of hearings in this matter.
58. The fracking operation will take at least 45-60 days and operate on a 24 hour basis using a procedure known as "zipper-fracking" to allow completion of the process on multiple wells at the same time.
59. The fracking process will require the introduction of at least 7 million gallons of water and limited chemical drilling compounds per well.

60. Wastewater recovered from the fracking operation will be temporarily stored as recovered in mobile tanks on site and removed from the site on a regular basis.
61. Wastewater recovered from the fracking operation will be approximately 15-20% of the freshwater amounts injected into wells at the site.
62. Adequate containment is to be provided to protect from accidental waste fluid release.
63. No waste fluid treatment will occur on site.
64. Apex intends to ship natural gas produced via pipeline and no long term storage will occur at the site.
65. It is anticipated that immediate transfer of produced gas will be into a pipeline to be completed prior to the production phase and there will be no flaring or combusting of produced gas.
66. Clean up will take approximately thirty days requiring the removal of fracking equipment, temporary wastewater and freshwater storage tanks, residential trailers and other related equipment.
67. Final site clean-up and securing will require the presence of four to five individuals once the aforementioned equipment has been removed from the site.
68. Post-completion visits to producing site will involve two pickup trucks per day and water removal trucks one to two times per month.
69. The Applicant intends no secondary or tertiary stimulation when the wells' primary production begins to drop.
70. Compression to enhance the flow of gas produced will be handled by "gathering" equipment originally installed at the well sites and required future changes and adjustments will be handled by this equipment.

71. The Applicant submitted Air and Hydrogeologic Assessment Reports prepared by Environmental Resources Management (ERM) regarding inadvertent or accidental releases of fluids and accompanying emissions as required by the language of §190-641(D) (9) regarding the requirements that applicants demonstrate oil and gas drilling operations will not violate citizens' right to clean air and water as guaranteed by Article I, Section 27 of the Pennsylvania Constitution.
72. The ERM report reviewed and analyzed the risks presented by "accidental" release of materials at the Draftina Site and set forth categorization of the nature and context of those risks.
73. ERM used formulas and procedures designed to include industry risk assessment standards that identified chemicals and other stored materials, site operations, industry standards for those operations, topography, hydrology, geology and barriers and controls proposed for the site in terms of the redundancy of those barriers and their mitigation effects.
74. The preparation of the evaluation also took into consideration the location of receptors, such as residences or waterways, incorporating that information into formulas that looked to the frequency and severity of potential events.
75. The ERM air risk calculation study established that the potential risk for hazardous emissions from an accidental or inadvertent spill at the Draftina Site would be low.
76. The report concluded further that there was a low chance of off-site migration of such emissions.
77. The ERM hydrogeologic study demonstrated that the risk for exposure to water sources as a result of a spill at the Draftina Site to be low to moderate.
78. The moderate risk assessment resulted from the acknowledged, though rare, possible

- catastrophic failure of the freshwater storage tanks or the wastewater storage vessels onsite.
79. No review of subsurface contamination potential was conducted by ERM as part of its studies.
 80. The ERM report did not obtain its own site specific groundwater information, including well location, in preparation of its report, using information provided by another consultant regarding percolation and infiltration testing.
 81. No other form of environmental impact or similar studies or reports of any nature or evidence, other than the testimony regarding DEP inspections at the Quest Well Site, was submitted by the Applicant to further establish that the operations at the Draftina Central Pad would not violate §190-641(D)(9) and Article I, Section 27.
 82. There exist other primary sources of potential release of regulated compounds in addition to onsite accidental or incidental spills.
 83. These sources include things such as site-stationary items as uncaptured venting, piping seals, pumps and other related hardware along with mechanical and other equipment. Additionally, mobile sources accessing the site on a periodic or regular basis may need to be included in any assessment.
 84. Air modeling of these stationary, mobile emission sources and potential air and liquid releases is required to properly assess the site-wide environmental impact of all the operations at the Draftina Central Pad, not just the final production phase of the project.
 85. Testimony at the time of hearing from residents and members of Protect PT indicated that the operations at the Quest Pad created excessive noise during all phases, vibration, odors and emissions detectable by smell and taste, glare from lighting and

generated dust found on automobiles over a mile from the site.

86. Some of the noise issues were the result of flaring and combustion operations required as pipeline required for the site had not been completed when the production commenced.
87. Apex agreed that third party monitoring of compliance with noise limits outlined in the Ordinance would take place on site and would be coordinated with Township officials.

CONCLUSIONS OF LAW

88. As this matter is proceeding in anticipation of the Township enacting a new Zoning Ordinance the matter is being handled under “pending ordinance” provisions. See Kaufman and Broad, Inc. v. Board Of Supervisors, West Whiteland Township, 442 A.2d 1220 (Pa.Cmwlth. 1982)
89. The Applicant has standing to bring this application by virtue of its rights under the Dominion Farmout Agreement and the Clayton, Kepple, Klingensmith and Kozain Leases. 53 Pa.C.S. §10908.
90. Protect PT has standing in this matter as an objector as it is community organization with over sixty members including several Township residents in the immediate area of the proposed Draftina Pad and residents who resided in the area of the completed Apex Quest Pad site. See 53 Pa.C.S. §10908.
91. A special exception is a conditionally permitted use allowed if the standards of the ordinance are met. Shadyside Action Coalition v. Zoning Bd. Of Adjustment of City of Pittsburgh, 537 A.2d 926, 113 Pa.Cmwlth. 437 (1988).

92. An applicant for a special exception has the burden of proving that his proposal complies with the objective requirements of the zoning ordinance. Nicholls v. Zoning Board of Adjustment of Borough of Jermyn, 471 A.2d 584, 80 Pa.Cmwlth. 247 (1984).
93. If this burden is satisfied the Board must grant the request unless it can be shown that the proposed use will have an adverse or abnormal impact on the public interest. Utility Contractors, Inc. v. Zoning Hearing Bd. of Sadsbury Twp., 471 A.2d 944, 80 Pa.Cmwlth. 477 (1984);
94. Objections by residents of the neighborhood alone do not provide a sufficient basis to find that the proposed use will be injurious to the public welfare. See Sanko v. Rapho Township, 293 A.2d 141, 6 Pa.Cmwlth. 73 (1972); Rexrode v. Zoning Hearing Board of North Coventry Twp., 502 A.2d 325, 94 Pa.Cmwlth. 154 (1986).
95. Testimony by residents as to actual facts and circumstances regarding prior operations of the same applicant is admissible and the Board can give such evidence whatever weight deemed appropriate.
96. The Board may establish such reasonable conditions as may be found necessary to protect the public interest. See MPC Section 912.1, 53 Pa.C.S. Section 10912.1; Lockey v. Lower Southampton Twp. ZHB, 864 A.2d 593 (Pa.Cmwlth. 2004).
97. A special exception is defined in Article II, §190-202 of the Ordinance as follows:
A use which is subject to approval by the Zoning Hearing Board when there is a specific provision for such special exception made in this Chapter.
98. Article II, Section 190-202 of the Ordinance, as amended, includes hydraulic fracturing to produce oil or natural gas in the definition of Oil and Gas Operations.
99. Oil and natural gas drilling using an unconventional well is a use permitted in the MEO

district by special exception pursuant to Article VI, Section 190-407 of the Ordinance, as amended, and in Section 190-641(D)(7) which states:

(a) Oil and gas operations, including but not limited to oil and natural gas wells, gas and water pipelines above the surface and vertical and horizontal well bores which extend into the DIO Development Infill Overlay District below the surface.

100. Article II, Section 190-202 defines "Wastewater" as ". . . the post-drilling liquids or fluids used in the fracking or extraction process."

101. An Occupied Structure is defined in Article II, Section 190-202, as amended, of the Ordinance as follows:

... a structure with walls and a roof within which individuals live, customarily work, and such other "vulnerable structures" which would include schools, hospitals, clinics, daycare centers and intermediate care centers.

102. A Protected Structure is defined in Article II, Section 190-202, as amended, of the ordinance as follows:

Any occupied structure, measured horizontally on the ground, within six-hundred (600') feet of the vertical wellbore of an unconventional oil or natural gas well or, in the case of a natural gas processing facility, within twelve-hundred (1200') feet thereof, measured horizontally on the ground. The term shall not include any structure that is not occupied by individuals; and such as facilities of the storage for construction materials or equipment. The term shall not include any structure whose owner has signed a waiver relieving the operator from the implementation of the measures established herein or other applicable provisions of any current Penn Township Ordinance. In addition, a waiver shall not be required from the owners of any protected structure which may situate within the setback area in those situations where such owner has a valid and subsisting oil and gas lease with the party proposing the oil and/or gas lease.

103. Section 190-407(F) Development Standards, requires that all Special Exception grants in for MEO parcels must comply with the provisions of Section 190-641 of the

Ordinance, as amended.

104. The Applicant has demonstrated that the requirements of Article VI, § 190-641 (A) –(C) have been satisfied.
105. The Applicant has provided an adequate description of the property location, proposed use of the site and other requirements as set forth in Article VI, § 190-641 (D)(1.1).
106. Article VI, § 190-641(D)(2)(g) provides that the application must include an emergency response plan that addresses methods to handle the following:
 - (a) Well leakage
 - (b) Spill containment
 - (c) Vandalism creating unknown conditions
 - (d) Defective casing or cementing
 - (e) Potential contamination between the well and the public and/or private water supply
107. The Applicant supplemented its application with the submission of Emergency Response Plans for Township and State purposes conforming to the above requirements.
108. While the Applicant indicates that it will abide by all necessary regulations of local, state and federal agencies with regard to environmental issues, no study or report was commissioned and there was insufficient testimonial evidence to demonstrate the lack of environmental impact on the surrounding residents during the preparation, drilling and completion phases regarding noise, light, emissions and other issues that involve the environmental rights of the citizens.
109. The ERM Air & Hydrogeologic study, while providing information regarding the potential risks from onsite accidental spills, does not provide sufficient satisfactory information regarding the specific hydrogeologic conditions on site or air modeling of potential hazardous emissions from the preparation, drilling, fracturing and production

operations and other issues, such as releases, to demonstrate that requirements of §190-641(D)(9) regarding clean air and water rights of Township citizens.

110. The proposal fails adequately to consider the impact of the heavy truck traffic on Dutch Hollow Road and its effect on the residents and individuals who use the road for daily access.
111. The proposal fails to take into consideration the topographical issues of the site as several of the residences are unprotected from excessive noise and glare by the graded and sloped areas and, in fact, are located at elevations lower than the proposed Draftina Pad.
112. The Applicant has failed to adequately demonstrate that the proposed unconventional well operation at the Draftina Pad site will not violate the rights of Township citizens to clean air and water as required by requirements of Article VI, § 190-641(D)(9) of the Ordinance and Article I, Section 27 of the Pennsylvania Constitution as the Board received limited evidence of the environmental impacts of the normal operations of the project from initiation through completion and operation of the producing well sites.

DECISION

WHEREFORE, this ____ day of _____, 2016 the Board hereby denies the application of Apex Energy LLC, for a Special Exception pursuant to Article VI, Section 190-641 of the Zoning Ordinance of Penn Township, for the unconventional gas well operation designated Draftina Central Pad-31, as the Applicant has failed to adequately demonstrate that the drill site operations will not violate the environmental rights of the citizens as required by Section 190-641(D)(9).

PENN TOWNSHIP ZONING HEARING BOARD

Eric Rinker, Chair

Michael DeMark, Vice-Chair

Mark Hensler

William Mihalco

Ronald Veyo

The Decision of the Zoning Hearing Board of Penn Township may be appealed to the Court of Common Pleas of Westmoreland County, Pennsylvania. Any appeal must be taken within thirty (30) days following the date of the Decision of the Board. The proceedings of the Public Hearings held in this matter were recorded stenographically and a transcript of the proceedings, as well as any materials or exhibits received in evidence, are available to any interested parties at cost.