

August 26, 2016

Rick Simmers, Chief
Division of Oil and Gas Resources
Ohio Department of Natural Resources
2045 Morse Road, Building F
Columbus, Ohio 43229-6693

via email
dogrm.rules@dnr.ohio.gov

Dear Chief Simmers,

Environmental Defense Fund (EDF) respectfully submits the following comments, in response to the Ohio Division of Oil and Gas Resource Management's (DOGRM) proposed rules 1501:9-8-01 and 1501:9-8-02, pertaining to Incident Notifications. EDF is a national environmental organization with over 1,000,000 members, many of which are deeply concerned about the impacts of oil, gas and brine releases to land, water, air and communities.

EDF concurs with Governor Kasich regarding the significant and dangerous environmental consequences of unmitigated and unreported spills from oil and gas operations and related activities.

[T]he release of natural gas, crude oil, brine, drill cuttings, hydrogen sulfide gas, hazardous substances, extremely hazardous substances, and other wastes can have a deleterious impact on the environment if the release is not quickly discovered and remediated.¹

As oil and gas production activity continues in Ohio², the importance of identifying and mitigating associated spills and leaks, and potential impacts to public health and the environment, cannot be understated. Comprehensive incident notification rules will facilitate more streamlined and effective incident response, and, if properly drafted and enforced, can provide both stakeholders and regulators with important information about oil and gas operations in the state. We recommend improving the proposed rules by adding more robust follow-up notification requirements- especially mandatory disclosure of root cause - lowering the spill reporting threshold to 42 gallons, and requiring reporting of contained and uncontained spills.

Specific Areas for Retention in Final Rule

In general, EDF supports the intent of the proposed rules. EDF understands that DOGRM intends to complement existing notification requirements established by the State Emergency Response Commission, coordinate

¹ Gov. John R. Kasich, Executive Order 2016-04K (Aug. 9, 2016).

² ODNR, Ohio's Oil and Natural Gas Production Totals Released for First Quarter of 2016 ("Quarterly production from the first quarter of 2016 shows a significant increase from quarterly productions from the first quarter of 2015."); accessed Aug. 16, 2016 at: <http://ohiodnr.gov/news/post/ohio-s-oil-and-natural-gas-production-totals-released-for-first-quarter-of-2016>.

information collection and incident response between and among several agencies, and speed response times.³ Certain provisions are especially commendable, and support these goals. Specific provisions include:

- Streamlined and simplified directions for reporting incidents, through a single telephone number or electronic means. 1501:9-8-02(A).
- 30 minute reporting time threshold for incidents. 1501:9-8-02(A). This time limit is consistent with other state reporting requirements established by the Ohio State Emergency Response Commission, and is consistent with other leading oil and gas state rules, which require “immediate” reporting of spills and leaks.⁴
- Definition of “environment” is comprehensive and includes all surface water, groundwater, land surface, subsurface strata or air.
- Low reporting thresholds for “oil, condensate, or materials saturated with oil or condensate,” and “refined oil products,” spills in sensitive areas, as proposed in 1501:9-8-02 (5) and (6), respectively.
- 42 gallon reporting threshold for “brine, or semi-solid wastes including but not limited to drilling mud, sludge, or tank bottom sediments,” and “brine” spilled from a vehicle, as proposed in 1501:9-8-02(8) and (9), respectively. A reporting threshold of 42 gallons (1 barrel) is consistent with reporting thresholds in other leading oil and gas production states such as North Dakota.
- Comprehensive coverage of materials subject to incident notification, including gas, hydrogen sulfide, oil, condensate and materials saturated with condensate, refined oil products, brine, semi-solid wastes and sludges, and extremely hazardous substances. 1501:9-8-02(A)(1)-(10).

EDF believes these proposed provisions demonstrate DOGRMs commitment to reducing the impacts of spills and leaks from oil and gas activities, and should be retained in the final rule.

Suggested Areas for Improvement

The proposed incident notification rules could be improved in several ways to ensure DOGRM and stakeholders are able to obtain critical information about the root cause of spills and leaks. Incident notification requirements – if managed correctly – create a valuable opportunity to improve management of oil and gas operations through the collection and analysis of information regarding spills and leaks. By understanding more about spills and leaks in Ohio, such as when, where, and why incidents occur, DOGRM and other stakeholders can respond with operational adjustments, targeted regulations, and precise monitoring.

The incident notification regulations proposed by DOGRM should be modified to better capitalize on this opportunity. Provisions such as lower reporting thresholds, reporting of contained releases, and mandatory follow-up notification with detailed information requirements and obvious enforcement provisions would greatly enhance the utility of this incident notification rule. Below, we propose specific adjustments to the proposed rule.

- **A “reporting person” is defined too narrowly.**

Under the proposed rules, reporting requirements apply only to narrowly defined subset of stakeholders and entities that may discover a release. Agents, employees, and contractors, for example, are not required to report the release immediately. 1501:9-8-01(J); 1502:9-8-02(A), (B). This narrow definition will cause confusion and delay incident reporting and response.

The proposed rule appears to extend the notification timeline for contractors, to allow for internal communications that would provide no benefit to incident response. 1502:9-8-02(B). Again, this provision is in contrast to DOGRM’s own emphasis on the importance of rapid notification. “Prompt notification of an incident

³ See, DOGRM, Incident Notification Rules, *Statement of Intent*; accessed Aug. 16, 2016 at: http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/rules/Statement%20of%20Intent%20Incident%20Notification%208.9.16_Final.pdf.

⁴ See, e.g., North Dakota, NDAC, 43-02-03-30 Notification of Fires, Leaks, Spills, or Blowouts (April 2014).

allows DOGRM to work with owners or authorized persons and emergency responders to swiftly respond to and document occurrences in order to mitigate further risks..."⁵

The obligation to rapidly report a release to appropriate authorities should apply equally to all potential stakeholders and entities involved in an oil and gas production activity, including contractors, employees and agents of owners and permittees. To clarify reporting requirements and ensure that DOGR receives incident notifications as soon as possible after discovery, the proposed definition of "reporting person" should be amended as follows:

(J) "Reporting person" means an owner, a person to whom an order or permit is issued under Chapter 1509. of the Revised Code or under division 1501:9 of the Administrative Code authorizing an activity, a person to whom a registration certificate is issued under section 1509.222 of the Revised Code, or a person engaged in an activity pursuant to section 1509.226 of the Revised Code, or any employees, agents, contractors or assigns of such persons.

- **Reporting thresholds should be lowered and simplified.**

The reporting thresholds proposed for spills should be simplified and more consistent to provide greater protection and to clarify incident reporting obligations. Draft Rule 1501:9-8-02 proposes ten categories of reporting thresholds. While some variation for gas and liquid is understandable, there is little to gain from different thresholds for liquids and semi-liquids such as oil, condensate, materials saturated with oil or condensate, brine, drilling mud and refined oil products. Other leading oil and gas state regulators use only one or two reporting thresholds for all liquids, including oil, produced water and other produced fluids.⁶

Under proposed rule 1501:9-8-02 releases of oil, condensate, or materials saturated with oil or condensate outside of containment need not be reported if the release is less than 210 gallons (5 barrels). Oil spills of this size can have extremely damaging impacts to soil, surface and groundwater, animals, plants and insects. For example, oil spills of under 5 barrels in rural areas may particularly impact farmland and associated crops, but under the proposed rule many would not be reported, which would unfairly put the onus on reporting and response on the farm owner.

We strongly urge DOGRM to adjust this reporting threshold downward, to be more comprehensive and consistent with the other reporting thresholds of 42 gallons (1 barrel) applicable to brine or 25 gallons (.5 barrels) applicable to other releases of oil, condensate, or material saturated with oil or condensate.

- **Incident notification should be required for contained releases.**

The proposed incident notification rules do not appear to require reporting of releases of any kind within containment. This omission would limit the utility of the incident notification information, and may allow unreported and unmitigated environmental damage to occur. Ohio's recent horizontal well site construction rule does not require new well sites to be lined, and it is unlikely that previously existing well sites were constructed with liners under tank batteries and other equipment in the absence of such a requirement.⁸ Therefore, even releases contained on the wellsite may absorb into the soil, and require additional monitoring and clean up during

⁶ See, e.g.; Wyoming WOGCC Environmental Rules, Chapter 4, Section 3; North Dakota, NDAC 43-02-03-30; Colorado COGCC Rule 906; Oklahoma OCC 165:10-1-2 and 165:10-7-5.

⁶ See, e.g.; Wyoming WOGCC Environmental Rules, Chapter 4, Section 3; North Dakota, NDAC 43-02-03-30; Colorado COGCC Rule 906; Oklahoma OCC 165:10-1-2 and 165:10-7-5.

⁸ OAC 1501:9-2-02(G)

site remediation. If unreported, spills inside of containment may not receive this necessary monitoring and clean-up, and wellsite remediation may be incomplete and inadequate for actual conditions.

Additionally, excluding contained releases may exempt a huge number of releases from important reporting and data collection requirements. For example, in 2015, approximately 70 percent of oil and gas related spills in North Dakota were contained, a containment rate slightly lower than the 80 percent reported in 2013.⁹ Under the rules proposed by DOGRM, a similar containment rate in Ohio would mean that three out of every four spills would go unreported.

Detailed spill reporting and notification data that includes information about contained and uncontained releases has been usefully employed by other state oil and gas regulators to target regulatory improvements on the operations and practices most ripe for improvement. For example, North Dakota uses “spill metrics as a way to determine if [North Dakota Industrial Commission’s] diking rules are adequate to prevent environmental damage.”¹⁰

Information on Ohio’s oil and gas operation related releases will be more comprehensive and useful for analytical purposes if both contained and uncontained releases are included in incident response requirements. EDF notes that DOGRM hotline dispatchers will be able to assign response resources as needed to mitigate releases, and may not always determine that immediate agency response to a contained spill is necessary.

- **DOGRM should require and make publically available follow up incident notifications that contain specific, important information.**

Response and remediation efficacy are important factors to consider when analyzing spill data. Guidelines promulgated by the State Review of Oil and Natural Gas Environmental Regulations (STRONGER) recommend that states “establish requirements for documenting environmental damage.”¹¹ Unfortunately, the proposed Incident Response regulations do not provide ODNR and other decision makers or the public with information necessary to evaluate the extent of environmental damage or efficacy of remediation efforts.

Often, initial incident notifications do not accurately estimate the extent of the release, or the full suite of impacts to the environmental and/or public health. This is due to the very reasonable expectation for rapid response, difficulty of visually estimating total volume of fluid or gas released, and the nature of environmental and public health impacts, which may take time to manifest. Initial notifications do not reflect the full response and the extent to which mitigation was used and effective. DOGRM should modify the proposed rules to require more thorough follow up reporting to capture these important considerations.

Specifically, EDF suggests the following modifications to 1501:9-8-02(D):

⁹ Pamela King and M. Soraghan, E&E News, Spills dropped 8% in 2015 as new drilling slowed (July 21, 2016); accessed Aug. 16, 2016 at: <http://www.eenews.net/stories/1060040567>; see also, Pamela King and M. Soraghan, E&E News, *U.S. Spill Count Rose 20% in 2014*, (Sept. 29, 2015); accessed Aug. 16, 2016 at: <http://www.eenews.net/stories/1060025432%20-%20says%20716,844>.

¹⁰ Pamela King and M. Soraghan, E&E News, Spills dropped 8% in 2015 as new drilling slowed (July 21, 2016); accessed Aug. 16, 2016 at: <http://www.eenews.net/stories/1060040567>. (“The containment numbers suggest some well sites aren’t catching spills, [Ritter] said. In response, the North Dakota Industrial Commission recently approved a requirement, set to go into effect in October, for 6-inch perimeter berms around new and existing well sites. Previously, the berms were required only around tankage. Had those rules been in place last year, containment would have been closer to 98 percent, Ritter said.”).

¹¹ ODNR, Incident Notification Executive Summary, p. 4.

~~(D) Follow-up reporting: If the incident involves a release of a substance specified in paragraphs (A)(4), (6), (7), or (10) of this rule, The reporting person also shall submit to the division of oil and gas resources management a follow-up report no later than thirty fifteen days after the release, and every thirty days thereafter until the mitigation is concluded. If necessary to document factors that contributed to an occurrence specified in paragraph (A) of this rule and its final resolution, the chief may request a follow-up report. Any follow-up report required under this paragraph shall be on a form prescribed by the chief that is available on the division's website. Follow-up reports should contain the following information:~~

- ~~(1) All information required under 1501:9-8-02(C)(9);~~
- ~~(2) A description of any variation from information provided in an initial incident notification and reason for the variation;~~
- ~~(3) The cause of the release;~~
- ~~(4) The actions taken in response to the release, a description of why the actions taken were appropriate, and extent to which actions were deemed successful;~~
- ~~(5) Estimate of released material recovered and unrecovered during mitigation;~~
- ~~(6) Any additional information required by the Chief.~~

(E) Root-cause analysis. The reporting person shall perform and submit a root cause analysis for all spills and releases over 5 barrels within 90 days of initial reporting. Time extensions beyond 90 days may be approved by the Chief for good cause.

EDF strongly recommends that follow-up reports, as well as initial incident reports, be made available to the public in electronic, machine readable format.

- **Establish enforcement expectations for failure to comply with any part of the rule**

According to the ODNR Incident Notification Rule Executive Summary, “an owner or person, including contractors, who fail to notify the DOGRM, is subject to the penalty provisions under Revised Code Chapter 1509.”¹² However, DOGRM’s intent to apply civil penalties to violations of the proposed rule is not reflected in the proposed rule. Moreover, there are several ways to fail to comply with the proposed incident notification rules in addition to failing to report a release, such as reporting a release outside of the required time frame, or providing incorrect information under 1501:9-8-02(C)(1)-(9).

EDF recommends that DOGRM clarify penalties associated with violating any part of the proposed incident notification rule as follows:

1501:9-8-02(F) Failure to comply with any provision of this rule is subject to the penalty provisions under Revised Code Chapter 1509.

¹² ODNR, Incident Notification Executive Summary, p. 6.

Conclusion

EDF generally supports DOGRMs efforts to improve incident notification regulation in Ohio. The proposed regulations are likely to speed and simplify state efforts to respond to potentially damaging spills and leaks from oil and gas operations and related activities. However, in order to provide DOGRM and other stakeholders with meaningful, actionable information about the types of releases and their root causes, the rules could be improved. If these areas for improvement are not addressed, the proposed rules, if enacted, represent a missed opportunity and will fail to provide ODNR and other stakeholders with information necessary to evaluate and track trends in oil and gas operation performance, identify common causes of spills and leaks, and inform future regulatory efforts.

Please do not hesitate to contact the undersigned with any questions regarding these comments. We look forward to working with DOGRM and other stakeholders on this important issue.

Respectfully Submitted,

Holly Pearen

Senior Attorney

U.S. Climate and Energy

Environmental Defense Fund

2060 Broadway Ave, Suite 300

Boulder, CO 80302

303-447-7227