

## Revised DEP policy would expand the scope of projects requiring PHMC review

On December 28, the Pennsylvania Department of Environmental Protection published notice of a substantive revision to the *Policy for Pennsylvania Historical and Museum Commission (PHMC) and DEP Coordination During Permit Application Review and Evaluation of Historic Resources* (012-0700-001). The draft policy, if finalized, would replace *Implementation of the Pennsylvania State History Code: Policy and Procedures for Applicants for DEP Permits and Plan Approvals*, finalized in 2002 and amended in 2006, and establishes the framework DEP would implement for its plan approvals and permit application reviews to comply with Pennsylvania's History Code, 37 Pa. C.S. §§ 101 et seq.

### The History Code and its application to oil and gas operations

Under Section 507 of the History Code, Commonwealth agencies must notify PHMC before undertaking any Commonwealth or Commonwealth-assisted permitted or contracted project that affects or may affect archaeological sites and provide PHMC with information concerning the project or activity. DEP requires applicants to submit the State Historic Preservation Office (SHPO) Project Review Form to PHMC if their project potentially affects an archaeological site. After receiving the form from the applicant, PHMC must then determine whether the project may adversely affect an archaeological site.

Oil and gas operations potentially fall within the History Code's consultation and survey requirements as "Commonwealth-assisted permitted projects." Activities that require state permits, such as construction of well pads, pipelines, compressor stations and underground injection control wells, could have the potential to affect historic resources that come within the purview of the PHMC coordination requirements in the History Code.

Neither the History Code nor the draft policy mandates outcomes for known or discovered historic resources identified during the review process or during a survey or field investigation. If PHMC identifies potential adverse effects to archaeological resources that may result from

the permitted activity, it will notify DEP and work to mitigate or minimize adverse effects.

### Changes from the current policy

Under the History Code, Commonwealth agencies, including DEP, are required to institute procedures and policies to ensure their actions contribute to the preservation of historic resources. The History Code is procedural in nature and has a limited scope with respect to private properties and entities. Several of these limitations, provided in the current policy, have been removed from the draft policy.

For example, if PHMC deter mines a project may adversely affect a significant archaeological site—defined as "an area of land which contains extensive evidence of previous prehistoric or historic human habitation or stratified deposits of animal or plant remains or manmade artifacts or human burials"—PHMC may conduct or cause to be conducted an archaeological survey of the site. However, PHMC cannot require archaeological surveys or investigations on private property without the consent of the property owner and must pay for any surveys or investigations conducted on private property, unless the survey is required under federal law. For oil and gas operations, consent to conduct a survey or investigation may depend on the surface landowner because the operator's property interests are often in the subsurface by lease or fee rather than the surface. Permittees, however, may not interfere with a survey or investigation that is conducted within the time limits set by the History Code.

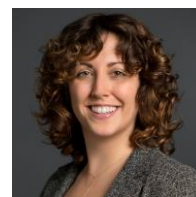
### Increasing scope of and uncertainty in PHMC review

Both the draft policy and the current policy include a list of projects and activities exempt from completing the SHPO Project Review Form and, therefore, PHMC review. However, the two exemption lists are constructed very differently and new defined (and undefined) terms introduced in the draft policy make it unclear when and to whom the exemptions apply, likely resulting in more

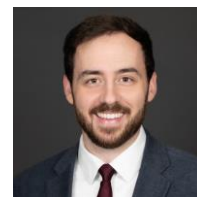
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applicants submitting SHPO Project Review Forms and being subject to PHMC review for their projects.

The current policy exempts specific activities and permits by bureau, listing most by permit name (i.e. “individual well permit,” “Chapter 105 General Permit”). Many of the exemptions are conditioned on a 10-acre exemption; the permits are exempt from PHMC coordination if they involve no more than 10 acres of earth disturbance. Many permits or approvals required for oil and gas related activities, including well permits and waste management permits, are either categorically exempt or exempt under the current policy’s 10-acre exemption. However, any permitted activities that may affect an historic resource on the National Register of Historic Places are not exempt from coordination, regardless of size.

In contrast, the draft policy exemptions are listed by descriptions of the activity rather than by bureau and specific permit types, creating potential confusion regarding which activities require review. For example, activity exempt from PHMC coordination under the draft policy includes permits or approvals for ground disturbance within areas where documented prior ground disturbance occurred and permits or approvals where proposed activity will not affect above ground historic resources or archaeological resources 50 years of age or older. This exemption may be difficult to apply in practice.

The draft policy clearly expands reviews by removing the 10-acre exemptions and including all activities that may affect “significant above ground resources or significant archaeological resources listed on or *eligible to be listed* on the National Register of Historic Places” rather than those that might affect resources already listed on the National Register of Historic Places.

### **Early coordination and PHMC response categories**

The draft policy adds a new section that encourages early coordination between PHMC and project applicants. The draft policy recommends that before completing the SHPO Project Review Form and submitting a DEP permit application, project applicants should review four sources of information on historic and archaeological resources: Pennsylvania’s Cultural Resources Geographic Information System, county historical societies, historic mapping, and county planning commissions and offices. While these resources are not necessarily new to project applicants, the emphasis on urging applicants to consult these resources during the planning stages of a permitted project is new. It is not clear if the use of early coordination will be an effective way to receive timely permitting decisions.

The draft policy also provides a new list of PHMC’s potential responses to a permittee’s SHPO Project Review Form. The list contains seven different responses, ranging from “no historic properties in the area of potential effect” to “the project may affect significant archaeological resources and it is the opinion of the SHPO that an

archaeological survey should be conducted.” The draft policy provides a brief explanation of the circumstances under which a permittee would receive each type of response. Including these potential response types and the guidance on when each one will be issued further informs the review procedure for permittees but also increases the complexity of the response outcomes.

### **Looking forward**

Public comments were accepted on DEP’s eComment website through January 27. Following public comment, DEP could move forward with finalizing the draft policy, issue a new draft or do nothing, leaving the current policy in place.