September 9, 2014

Joint Committee on Administrative Rules
700 Stratton Building
Springfield, Illinois 62708

Re: 2nd Notice of Proposed Hydraulic Fracturing Regulatory Act Rulemaking
Title 62, Chapter 1, Part 245 et seq.

To: Members of the Joint Committee on Administrative Rules

On behalf of the GROW Coalition and its respective organizations and individuals, we respectfully submit the following comments and concerns with regard to the 2nd Notice of Proposed Rulemaking to implement the Hydraulic Fracturing Regulatory Act. In addition to our formal comments regarding the second rulemaking, we have also attached a copy of our comments regarding the first rulemaking for an historical view and previously suggested changes so that the rules implement the law as negotiated.

We recognize the fact that the Department of Natural Resources (DNR) took 438 days to promulgate the second set of rules after culling through tens of thousands of comments many of which were general in nature and did not address specific sections of the regulations – a fact specifically noted by the National Resource Defense Council.

Despite the fact that thousands of comments were received and must be considered as part of the regulatory process, DNR has a legal obligation to implement the Hydraulic Fracturing Act passed by the General Assembly on overwhelming votes in the House of Representatives (108-9-0) and Senate (52-3-4). Administrative rules are for the purpose of interpreting or implementing provisions of a statute - not for actually expanding or limiting the scope of the statute or supplanting the will of the legislature. The Joint Committee on Administrative Rules is a bipartisan committee that has long worked carefully to implement Illinois laws as drafted and we appreciate your work in making sure that these rules simply follow the law.

Unfortunately, the second set of rules promulgated by the Department of Natural Resources far exceeds both the statutory provisions of the legislation and the intent of lawmakers who carefully negotiated the legislation for well more than a year. In many cases, the 2nd rulemaking contains rules that run directly counter to the law and legislative intent. Many of the items in the rulemaking were introduced as concepts by interest groups during the legislative process, contemplated and were specifically not included in the legislation as part of the negotiation. Given that DNR staff participated in every meeting and was aware of each carefully crafted provision, it's disappointing to find the inclusion of provisions that were explicitly rejected by legislative negotiators.

The attached document outlines our strong concerns with the second set of rulemaking but we would like to highlight some very specific examples.

1. The Department unilaterally added eight new criteria that must be met in order for a permit to be issued including a new requirement that the cumulative impact of past and future well development must be factored into the Director's decision. The added permit requirements are not consistent with the negotiated statute and essentially make all permit decisions subject to individual opinion about uncertain future development. The statute clearly based permit approvals on detailed factual information required in the application. More specifically, the "cumulative impact" issue was raised multiple times during the negotiation and ultimately rejected by the negotiators in favor of the specific language created in statute.

2. The Department arbitrarily deleted the "economic unreasonableness" standard for approving the use of flares and completion combustion devices in well completion and production operations. They replaced this carefully negotiated standard with an alternative threshold in which the applicant must prove that they have been subject to a "property taking", "loss of investment" or "practical closing" of their business to be granted flaring approval. The standard for meeting these tests has been set so high that the applicant will likely be met by legal challenges each and every time. The rulemaking is in direct conflict with this provision of the statute that was discussed as a stand-alone topic on multiple occasions.

3. Illinois law states "sampling of private water wells or ponds wholly contained within private property shall not be required where the owner of the private property declines, expressly and in writing, to provide access or permission for sampling. If the owner of the private property declines to provide proof of his or her refusal to allow access in writing, the operator shall provide the Department evidence as to the good faith efforts that were made to secure the required documentation. **Permits issued under this Act cannot be denied** if the owner of the private property declines to provide proof of his or her refusal to allow access in writing and the permittee provides evidence that good faith efforts were made to gain access for the purposes of conducting tests." The second rulemaking and DNR's response to comments on this topic establishes a definition of "wholly contained" that restricts the private property

rights of landowners in conflict with the intended goals of the legislature. DNR's response document (p. 186) directly conflicts with statute by stating that "access is a condition of the permit." Lawmakers specifically addressed this because of concerns that one neighboring landowner could block private property rights by refusing to allow water quality testing to be conducted on their property. DNR's second rulemaking and interpretation directly changes the statute.

Other changes that raise significant concern and deviate from the legislation include an expansion of the public hearing section and the addition of three pages of new testing requirements for radioactive material. Radioactive testing requirements were very specifically discussed at length during the legislative process and were rejected. The legislative agreement included a requirement for testing only.

These are only a few highlighted examples of the egregious overreach contained in the second set of proposed rules in the view of the GROW Coalition that participated in each and every meeting for years. While we had hoped that the second set of rules would be acceptable, the second draft has so many new items that exceed both the statute and negotiated intent, we are unable to limit our comments to only one or two items. After three years of negotiation that resulted in the carefully crafted law, it is extremely disappointing to see the proposed rulemaking that changes the law and thoroughly circumvents the intent that was agreed upon by all parties including the business community, Farm Bureau, and mainstream environmental organizations. If these rules are codified, it risks the loss of tens of thousands of jobs and hundreds of millions of dollars in tax revenue that will be generated by safe and proven hydraulic fracturing technology.

We appreciate your careful consideration of these comments and suggested changes that we have proposed. It is our hope that you will direct the Department of Natural Resources to make applicable changes to the rules so that they simply implement the law. **DNR's suggested changes that seek to expand the scope of the law should be addressed by the General Assembly – not through rulemaking.**

We look forward to discussing each of these issues with members of JCAR and staff to answer any questions that you may have.

Thank you.