

Pennsylvania's New Oil and Gas Regulations for Unconventional Wells – *Part I: Planning and Permitting*

The new rules for unconventional oil and gas wells in Pennsylvania are finally here. The regulations in Chapter 78a, relating to unconventional wells, were published in the Pennsylvania Bulletin on October 8, 2016.¹

Recent headlines may have focused on legal challenges to new regulations for unconventional oil and gas wells in Pennsylvania, but it is important to recognize that the regulations are effective *immediately*, despite ongoing efforts to block them. This Client Alert, which will be the first in a series, provides a brief background on the rules and then highlights a few of the sections involving planning and permitting. Future Client Alerts will describe other aspects of the rules.

Background

These rules are the culmination of a long process that began in 2011, when Pennsylvania's Department of Environmental Protection ("DEP") began developing rules to amend existing oil and gas regulations. That process also included codifying environmental provisions required by the 2012 Oil and Gas Act.² After years of work, the regulations neared final form. Late in the process, amendments to the rules for conventional oil and gas wells were removed. For unconventional wells, Chapter 78a supersedes the previous Chapter 78.³

Some of the rules simply codify existing guidance or describe practices that have already been adopted.⁴ The DEP provided some training and resources on the new rules before their release.⁵

While the industry must comply with the new rules, as written, the controversy over them – which played out over the years that they were in development – continues. The Pennsylvania Independent Oil and Gas Association ("PIOGA") filed a challenge to the regulations before they were published, but lost at the Commonwealth Court.⁶ That lawsuit is on appeal to the Pennsylvania Supreme Court.⁷ The Marcellus Shale Coalition filed a separate challenge one week after they were issued.⁸

The 2012 Oil and Gas Act, known as Act 13, has been subject to legal challenges since it was passed. The latest in the *Robinson Township* series of cases, dealing with these challenges, was published on September 28, 2016. That decision enjoined certain sections of Act 13.⁹ The industry challenges to the regulations rest in part on the *Robinson Township* decisions and their impact on the enabling legislation behind the new rules.

Planning and Permitting

There is nothing new to the concept that drilling an unconventional well requires significant planning – but there are some new, or at least expanded, planning requirements interspersed throughout the regulations. Some of the significant changes include:

i. Assessing impacts on watercourses and public resources

The application requirements impose various obligations for determining the potential impacts of the well. One concern is whether the proposed limit of disturbance of the well site is within 100 feet of "any watercourse or any

high quality or exceptional value body of water or any wetland 1 acre or greater in size.” If so, the applicant needs to demonstrate that those water resources will be protected. § 78a.15(b.1).¹⁰ To make that demonstration, the applicant may rely on plans developed under other sections of these regulations, such as the site containment plan, or plans approved by the DEP pursuant to other regulations. § 78a.15(b.1)(i) – (5).

Another area of concern is whether the proposed well will have an impact on endangered species. § 78a.15(d). The well permit application must include a “detailed analysis of the impact of the well, well site and access road on threatened and endangered species.” *Id.* An applicant that identifies a potential impact on a threatened or endangered species must submit a written document demonstrating how the impact “will be avoided or minimized and mitigated” in accordance with relevant state and federal laws. § 78a.15(d)(2).¹¹

The regulations establish a process for identifying potentially impacted public resources, then notifying any appropriate public resource agencies about them. § 78a.15(f). The list of “public resources” that fall within this process has been expanded.¹² The subsection applies if the proposed limit of disturbance of the well site is located:

- “(i) In or within 200 feet of a publicly owned park, forest, game land or wildlife area.
- (ii) In or within the corridor of a State or National scenic river.
- (iii) Within 200 feet of a National natural landmark.
- (iv) In a location that will impact other critical communities.
- (v) Within 200 feet of a historical or archeological site listed on the Federal or State list of historic places.
- (vi) Within 200 feet of common areas on a school’s property or a playground.
- (vii) Within zones 1 or 2 of a wellhead protection area as part of a wellhead protection program approved under § 109.713 (relating to wellhead protection program).
- (viii) Within 1,000 feet of a water well, surface water intake, reservoir or other water supply extraction point used by a water purveyor.”

§ 78a.15(f)(i). Understanding this section requires referring back to the “definitions” section of the regulations. See § 78a.1. In particular, “other critical communities” are “[s]pecies of special concern identified on PNDI [Pennsylvania Natural Diversity Inventory] receipt.” § 78a.1 (“Other critical communities”). These species include plant or animal species “[i]n a proposed status categorized as proposed endangered, proposed threatened, proposed rare or candidate,” and species “[t]hat are classified as rare or tentatively undetermined.” *Id.*¹³ The definitions section also addresses “Wellhead protection area.” § 78a.1.¹⁴

This section of the regulations has been particularly controversial. Both PIOGA and the Marcellus Shale Coalition objected to this section in their lawsuits challenging the regulations.¹⁵

2. Identifying Orphan or Abandoned Wells (“Area of Review”)

Operators are all-too-familiar with concerns raised by the prospect of drilling a new well near existing wells. New drilling around an old well can cause problems such as methane migration. DEP estimates that there are approximately 300,000 abandoned wells across the state.¹⁶ The new “Area of Review” regulations are targeted at addressing potential problems with existing wells. See §§ 78a.52a. and 78a.73. Before drilling, operators must identify active, inactive, orphan, and abandoned wells within 1,000 feet of the vertical and horizontal wellbore. § 78a.52a(a)-(b). The report summarizing that effort must include a monitoring plan for certain types of wells.

§ 78a.52a(c)-(d). Notifications to adjacent operators are required. § 78a.73(c). Previously, the DEP discussed the implementation schedule for these regulations and provided charts showing when they apply to wells at different stages in the drilling process.¹⁷ DEP has issued an interim final technical guidance document on the Area of Review requirements; written comments are due by December 7, 2016.¹⁸

3. Drafting Water Management Plans

Unconventional operators need to develop water management plans before withdrawing water for fracking, § 78a.69. The rulemaking is designed to ensure that requirements “are consistent Statewide, regardless of which river basin an operator withdraws water from.”¹⁹

4. Conducting Pre-Drilling Water Surveys

Operators are already familiar with issues surrounding the protection of water supplies. The concept of the “rebuttable presumption,” under which the operator is responsible for the pollution of a water supply under certain circumstances, is not new. See 58 Pa. C.S. § 3218(d)(2).²⁰ There are some new provisions, however, that must be followed to avoid impairing the assertion of defenses to the rebuttable presumption. See § 78a.52. For example, the operator must provide an electronic report containing a copy of all of the sample results to the DEP 10 business days before drilling, and to the landowner or water purveyor within 10 business days of receipt of the sample results. § 78a.52(d).²¹

Looking Ahead

This client alert provided an overview of a few of the new rules related to planning and permitting. Watch for future client alerts on other aspects of the regulations. Cohen & Grigsby’s Energy and Environmental Practice Groups will monitor the implementation of these new regulations, which will significantly impact operators in Pennsylvania. For more information, please contact Julie Vanneman at (412) 297-4715 or jvanneman@cohenlaw.com. To receive future bulletins and news alerts, please send an e-mail to bulletins@cohenlaw.com.

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¹ 46 Pa. Bull. 6431 (Oct. 8, 2016), <http://www.pabulletin.com/secure/data/vol46/46-41/1757.html>.

² DEP, 2015 Oil and Gas Annual Report, at 23, <http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/Pages/Annual-Report.aspx>.

³ 46 Pa. Bull. 6431 (explaining that the “revised final-form rulemaking” includes a new section, § 78a.2, “to clarify that Chapter 78a supersedes Chapter 78 for unconventional wells to avoid any potential conflict between the requirements in Chapter 78 and Chapter 78a regarding unconventional wells.”); *id.* § D (“The amendments in Chapter 78 are limited to deletions of the provisions regarding unconventional wells.”).

⁴ See, e.g., 46 Pa. Bull. 6431, at § D.

⁵ See DEP, <http://www.dep.pa.gov/DataandTools/Webinars/Pages/Oil-and-Gas.aspx>.

⁶ See *Pennsylvania Independent Oil & Gas Ass’n v. Commonwealth of Pennsylvania*, No. 321 M.D. 2015 (Pa. Commonw. Ct. Sept. 1, 2016). The opinion is available at <http://www.pacourts.us/courts/commonwealth-court/court-opinions/>.

⁷ See, e.g., Marie Cusick, *Trade Group Seeks to Block New Drilling Rules*, StateImpact Pennsylvania, Oct. 3, 2016, at <https://stateimpact.npr.org/pennsylvania/2016/10/03/trade-group-seeks-to-block-new-drilling-rules/>.

⁸ See, e.g., Laura Legere, *Shale Gas Industry Challenges Pennsylvania Drilling Rules in Court*, Pittsburgh Post-Gazette, Oct. 15, 2016, at <http://powersource.post-gazette.com/powersource/policy-powersource/2016/10/14/Gas-industry-files-suit-challenging-new-drilling-rules-in-Pennsylvania/stories/201610140177>.

⁹ See *Robinson Township, et al. v. Commonwealth of Pennsylvania*, No. 104 MAP 2014 (Pa. Sept. 28, 2016), available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-34A-2016mo%20-%2010282684312019871.pdf?cb=1>.

¹⁰ References are to 25 Pa. Code Chapter 78a, available as printed in the Pennsylvania Bulletin, 46 Pa. Bull. 6431 (Oct. 8, 2016), at <http://www.pabulletin.com/secure/data/vol46/46-41/1757.html>.

¹¹ See also DEP, Chapter 78a Training: Application Requirements and Public Resources Webinar (pdf), at p. 10, via link at <http://www.dep.pa.gov/DataandTools/Webinars/Pages/Oil-and-Gas.aspx>.

¹² See 46 Pa. Bull. 6431, at § F (“Public resources to be considered in § 78a.15(f)”) (“Based on comments received, ‘common areas of a school’s property,’ ‘playgrounds’ and ‘wellhead protection areas’ were added because these resources are similar in nature to the other listed public resources.”).

¹³ See also DEP, Chapter 78a Training: Application Requirements and Public Resources FAQ, § 4, via link at <http://www.dep.pa.gov/DataandTools/Webinars/Pages/Oil-and-Gas.aspx> (“The Pennsylvania Natural Heritage Program maintains a list of species and communities used as the basis for Environmental Review within the PNDI Tool at http://www.naturalheritage.state.pa.us/docs/PNDI_SpeciesList_Jan2014.pdf. This list covers plant and animal species included in the definition of ‘other critical communities’ in Section 78a.1. (posted 10/11/16)”).

¹⁴ See also *id.* § 5 (noting that the definition of the phrase is cross-referenced to drinking water regulations, and providing further information on Zone 2).

¹⁵ See *supra* notes 6-8.

¹⁶ See Regulatory Review Commission, Final Regulation #3042, Environmental Quality Board #7-484, Regulatory Analysis Form (March 3, 2016), at 19, <http://www.irrc.state.pa.us/docs/3042/AGENCY/3042FF.pdf>.

¹⁷ See DEP, Chapter 78a Training, Area of Review Webinar (pdf), pp. 8-11, via link at <http://www.dep.pa.gov/DataandTools/Webinars/Pages/Oil-and-Gas.aspx>.

¹⁸ See 46 Pa. Bull. 6392 (Oct. 8, 2016), at <http://www.pabulletin.com/secure/data/vol46/46-41/1725.html> (describing technical guidance documents related to the regulations and providing directions for accessing those documents).

¹⁹ 46 Pa. Bull. 6431, § E (“§ 78a.69. Water management plans”).

²⁰ This reference is to Act 13, which was codified at 58 Pa. C.S. §§ 2301-3504. See also DEP, Chapter 78a Training: Protection of Water Supplies FAQ, via link at <http://www.dep.pa.gov/DataandTools/Webinars/Pages/Oil-and-Gas.aspx>.

²¹ See also 46 Pa. Bull. 6431, at § E (“§ 78a.52. Pre-drilling or prealteration survey”) (the previous practice was to require submission within 10 days of receipt of each sample result, which led to “piecemeal submissions”); Chapter 78a Training: Protection of Water Supplies FAQ, at § 3; *id.* § 4 (the operator should submit testing results within 10 days of drilling, not within 10 days of receiving the results from the laboratory).