

Energy Bulletin - Pennsylvania's New Oil and Gas Regulations for Unconventional Wells

Part II: Recent developments; waste management, impoundments, and secondary containment; site restoration

Part 1 of this Client Alert provided background on Pennsylvania's new regulations for unconventional oil and gas wells – published on October 8, 2016 as Chapter 78a (the “Chapter 78a Regulations”)¹ – and highlighted sections involving planning and permitting.

Part 2 highlights a recent Commonwealth Court decision, which preliminarily enjoined the implementation of certain provisions of the regulations, and covers other topics, including waste management, impoundments, secondary containment, and site restoration.

The recent Commonwealth Court decision

After the Chapter 78a Regulations were released, the Marcellus Shale Coalition (“MSC”) sought a preliminary injunction that would enjoin the Department of Environmental Protection (“DEP”) from enforcing certain sections of them. On November 8, 2016, the Commonwealth Court granted some of the MSC’s requests for preliminary relief, but not others. *The Marcellus Shale Coalition v. DEP*, No. 573 M.D. 2016 (Pa. Commonw. Ct. Oct. 25, 2016) (“MSC v. DEP”).

The Court temporarily enjoined enforcement of a subset of the provisions establishing a process for identifying potentially impacted public resources, then notifying any appropriate public resource agencies about them. § 78a.15(f).² (Part 1 of this Client Alert series addressed this topic.) While the structure as a whole remains in place, the DEP may not enforce the rules regarding “common areas on a school’s property or a playground” and “species of special concern” as “public resources.” Further, “playground owners” are not to be included in the definition of “public resource agency.” *MSC v. DEP* at 18.

The Court addressed the “Area of Review” provisions, which were designed to address potential problems with existing wells. (See Part 1 of this Client Alert series.) The overall area of review survey requirement remains, and owners and operators still must monitor – and, if necessary, remediate – any of their own wells identified in the survey. However, under the preliminary injunction, they do not have to monitor and remediate the wells of others. *MSC v. DEP* at 25-27.

The Court also temporarily enjoined provisions regarding centralized wastewater impoundments, well development impoundments, and site restoration. Those topics are covered below.

Waste management, impoundments, and secondary containment

With the new regulations, certain practices that previously could have been followed – even if they may not have been common in the industry – are now banned. Some practices that may already be familiar are subject to enhanced requirements, while others now require permits.

Temporary storage: Pits and tanks

The regulations now distinguish between temporary storage requirements (see § 78a.56) and long-term containment requirements (see §§ 78a.57, 78a.64, 78a.64a).³

Section 78a.56 regulates temporary storage of “regulated substances” at the well site.⁴ “Pits may not be used for temporary storage.” § 78a.56(d). Any existing such pits must be closed by April 8, 2017. § 78a.56(d).

The temporary storage rule now states that, with two exceptions, the operator “shall contain regulated substances and wastes used or generated at a well site in a tank, series of tanks or other storage structures” approved by the DEP. § 78a.56(a). Those two exceptions concern discharge requirements and disposal of drill cuttings:

- The discharge of “tophole water or water in a pit as a result of precipitation by land application” is permitted under certain conditions. § 78a.60(b).
- Drill cuttings from above the surface casing seat may be disposed of in a pit at the well site under certain conditions. § 78a.61.

The regulations establish rules for tanks and other approved storage structures. § 78a.56(a). The continued use of underground storage tanks (“USTs”) is permitted. § 78a.57(e). The draft version of the rules had proposed banning the use of USTs and removing existing tanks, but those provisions were revised.⁵ Under the final rules, operators using underground or partially buried storage tanks as of October 8, 2016 need to provide a list of the well sites where they are located by April 8, 2017 and register additional USTs prior to installation. § 78a.57(e).

Disposal, including pits and land application

Pits at the well site may be used for the disposal of drill cuttings from above the surface casing seat, under certain conditions. See above (referencing § 78a.61). However, onsite disposal of “residual waste” (defined in § 78a.1) now requires a permit, thus removing the “permit by rule” structure for waste disposal on unconventional well sites.⁶ Thus, a permit is required for the disposal of residual waste in a pit (§ 78a.62) or via land application (§ 78a.63).

Open top structures and pits to store brine and other production fluids are not allowed. § 78a.57(a). They must be reported by April 8, 2017 and closed by October 10, 2017. § 78a.57(a).

Centralized wastewater storage impoundments

The Chapter 78a Regulations had called for existing centralized wastewater storage impoundments, which store waste water from drilling operations, to be treated like other waste transfer facilities.⁷ Operators would have had to obtain permits for them or close them. Those rules, however, were stricken by the Commonwealth Court. See *MSC v. DEP* at 31-35 (striking § 78a.59c).

Well development impoundments

As issued, the Chapter 78a Regulations imposed new standards on well development impoundments, which store fresh water for use in drilling operations,⁸ and required existing impoundments to be upgraded to meet the new requirements, or closed within a year. The Commonwealth Court struck the portion of the rules as they applied to existing impoundments. *MSC v. DEP* at 31-33. The construction standards regarding new well development impoundments still stand. Those rules include mandates for the liner, which must be a synthetic impervious liner, and the placement of a surrounding fence, unless someone is there around the clock. § 78a.59b(d)-(e).⁹

Secondary containment

Secondary containment was already required around tanks containing oil. Those requirements have now been extended to tanks containing condensate (light liquid hydrocarbons) produced from a well.¹⁰ Secondary

containment must be constructed and maintained around tanks that have a combined capacity of at least 1,320 gallons, where those tanks contain oil or condensate. That secondary containment must meet the requirements under 40 CFR Part 112, relating to oil pollution prevention. § 78a.64(a). Tanks installed before the adoption of the new rules must be brought up to the standards of the new requirements within two years, or when the tank is replaced, refurbished, or repaired—whichever is sooner. § 78a.64(e).

Secondary containment rules apply to equipment brought onto the site and to regulated substances brought onto or generated at the well site. § 78a.64a(c)(1). Operators must conduct weekly inspections of all secondary containment. § 78a.64a(e).

Site restoration

The well site operator needs to develop and implement a “restoration plan.” § 78a.65. That plan must address “the restoration of areas not needed to safely operate the well to approximate original conditions.” § 78a.65(b). The term “approximate original conditions” is defined as:

Reclamation of the land affected to preconstruction contours so that it closely resembles the general surface configuration of the land prior to construction activities and blends into and complements the drainage pattern of the surrounding terrain, and can support the land uses that existed prior to the applicable oil and gas operations to the extent practicable.

§ 78a(1). DEP’s position is that the phrase “to the extent practicable” was added “in recognition of the fact that restoration to original contours may not always be feasible.”¹¹

Post-drilling restoration of the well site, done in accordance with a restoration plan, must be undertaken within 9 months of completion of drilling a well. § 78a.65(a)(1). “Within 9 months after plugging the final well on the well site, the owner or operator shall remove all production or storage facilities, supplies and equipment and restore the well site” in accordance with restoration requirements. § 78a.65(a)(2).

While extensions are possible, all restoration must be completed within two years. § 78a.65(c)¹² The final-form rulemaking changed requirements for restoration after the expiration of a drilling permit if the site was constructed but the well was not drilled. Previously, restoration in those cases had to be completed within 30 days, but that time frame was changed to nine months. § 78a.65(a)(3).¹³

Under the preliminary injunction issued by the Commonwealth Court, the DEP may not enforce Section 78a.65(d), which addressed erosion and sediment control measures. *MSC v. DEP* at 38.

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 References are to 25 Pa. Code Chapter 78a.

³ 46 Pa. Bull. 6431, at 6437-38.

⁴ 46 Pa. Bull. 6431, at 6451.

⁵ 46 Pa. Bull. 6431, at 6452.

⁶ See 46 Pa. Bull. 6431, at 6469-70 (the revisions “removed the permit-by-rule structure for waste disposal on unconventional well sites.”).

⁷ 46 Pa. Bull. 6431, at 6455.

⁸ Other fluids may include mine influenced water (“MIW”) or treated waste water meeting permit requirements. See DEP, Oil and Gas Operations Well Development Impoundment Registration Instructions, via link at DEP’s elibrary at <http://www.elibrary.dep.state.pa.us/dsweb/HomePage> (the impoundments may contain “treated waste water meeting the requirements in General Permit WMGR123”).

⁹ See also 46 Pa. Bull. 6431, at 6453-54.

¹⁰ 46 Pa. Bull. 6431, at 6456.

¹¹ 46 Pa. Bull. 6431, at 6457.

¹² The DEP has released a Well Site Restoration Extension Request form. Go to <http://www.elibrary.dep.state.pa.us/dsweb/HomePage>, select Forms, then Office of Oil and Gas Management, and then select Well Site Restoration Extension Request – UC Only.

¹³ See also 46 Pa. Bull. 6431 at 6458.