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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

## 2016 Environmental and Energy Law Forecast

### PENNSYLVANIA FORECAST

#### Is More Pre-Enforcement Review of PADEP Penalty Proposals Now Available?

**Diana A. Silva, Esq.**

Just days before the New Year, the Pennsylvania Supreme Court ruled that a private party could initiate a declaratory judgment action in the Pennsylvania Commonwealth Court to challenge a penalty assessment proposed by PADEP. EQT Production Co. filed a lawsuit to challenge PADEP's interpretation of the Clean Streams Law, which PADEP argued allowed it to recover \$10,000 for each day that residual contamination caused by a leaking fracking water impoundment remained in the ground – even though PADEP had not yet imposed the proposed penalty on EQT. In the normal course, a party is required to wait until PADEP actually levies a penalty or takes another enforcement action before that party can challenge the action before the Environmental Hearing Board, since administrative appellate rights are limited to appeals of “final agency actions.” The *EQT Production* case has added a wrinkle to the standard procedure for challenging administrative actions in Pennsylvania, and provides a potential new avenue for legal challenges to PADEP's proposed actions. The decision may also influence how the Department presents proposed settlements to members of the regulated community moving forward. A complete summary of the case can be found on [our litigation blog](#).

#### Revised Pennsylvania Oil and Gas Regulations Expected to be Finalized in 2016

**Todd D. Kantorczyk, Esq.**

On January 6, 2016, the Pennsylvania Department of Environmental Protection released its Final Regulations for Oil and Gas Surface Activities. The release of the final regulations is the latest step in a process that began in 2010 as an effort to revise these regulations to address more specifically the expansion of oil and gas exploration and production activities in Pennsylvania associated with the Marcellus Shale formation.

The final regulations incorporate changes required by Act 13 of 2012 as well as other rules that the Department believes are necessary to address “gaps” identified through reviews of the current Pennsylvania regulatory program. Highlights include:

- Separate regulations applicable to “conventional” oil and gas operations and “unconventional” oil and gas operations (i.e., shale drilling that requires the combination of horizontal drilling and high volume hydraulic fracturing);
- Allowing the Department to consider and protect “public resources” (such as schools, playgrounds, and critical habitat communities) as part of the well permitting process;

- Requiring operators to identify abandoned or orphaned wells within a certain radius before hydraulic fracturing begins;
- Mandating secondary containment for all regulated substances at unconventional well sites;
- Subjecting centralized storage impoundments to residual waste permitting requirements; and
- Prohibiting the use of temporary waste storage pits at unconventional well sites.

The Environmental Quality Board is scheduled to consider these regulations at its February 3, 2016 meeting, after which the regulatory package will move on to the Independent Regulatory Review Commission and then the Environmental Resources & Energy committees in the House and Senate. The Department believes that this process may conclude by summer 2016, but both the conventional and unconventional gas industry have raised significant objections to the new rule, in particular the additional costs for what the industry believes are questionable benefits. Between the industry objections and the ongoing budget disputes in Harrisburg, it is possible that this rulemaking will continue to drag on through 2016.

## **Pennsylvania EHB Upholds DEP Aggregation Determination – May Affect Source Aggregation in the Future**

### **Todd D. Kantorczyk, Esq.**

At the close of 2015 the Pennsylvania Environmental Hearing Board (EHB) upheld the Pennsylvania Department of Environmental Protection's decision to treat a natural gas well pad and nearby compressor station as a single emissions source for air permitting purposes (*National Fuel Gas Midstream, et al. v. Commonwealth of Pennsylvania*, EHB Docket No. 2013-206-B). While source aggregation issues have been a hot button issue for natural gas operations for some time, the principles the EHB applied in this matter have the potential to affect other industries where source aggregation may be in play in the coming year and beyond.

Under federal and state regulations, two activities qualify as a single emission source if the pollutant-emitting activities: (1) belong to the same industrial grouping; (2) are under common control; and (3) are located on contiguous or adjacent properties. In this instance, the EHB first held that the well pad and compressor station belonged to the same industrial grouping, with the compressor station falling under Oil and Gas Field Services because operation of the compressor engines constituted the primary polluting activities.

Next, the EHB found that the well pad and the compressor station were under common control because they shared a corporate parent that had approval over the operating and capital budgets of the two subsidiaries. Notably, the EHB declined to apply the general definition of "control" used by the Securities and Exchange Commission and referenced by the United States Environmental Protection Agency in the applicable regulatory preamble. At the same time, the EHB noted that it would have been very difficult to establish common control through a contractual or support/dependency standard that has been argued in other circumstances.

Finally, the EHB found that the two operations were "adjacent" because the boundaries of the two developed parcels were 0.24 miles apart. While this distance fell within the Department's quarter-mile "rule of thumb" set forth in official guidance, the EHB explicitly noted that it was not bound by Department guidance on this point. Indeed, in his concurring opinion Judge Labuskes went so far as to say that the

Environmental Rights Amendment in Article 1, Section 27 of the Pennsylvania Constitution (i.e., the Environmental Rights Amendment) provides sufficient authority for the Department to treat multiple sources as a single facility “[r]egardless of what the complex regulations governing air quality might otherwise require.”

At a minimum, going forward the EHB’s decision in this matter opens up new avenues of analysis for the Department and may require additional planning for entities evaluating issues related to single source aggregation for air permitting purposes.

### **Finalization of Governor Wolf’s Pipeline Infrastructure Task Force Report Expected Soon**

***Jonathan E. Rinde, Esq.***

Following six months of meetings, work groups and public involvement, Governor Wolf’s Pipeline Infrastructure Task Force is prepared to issue its final report in February 2016. The Report will contain a host of recommendations, for both industry and PADEP to consider in order to make the siting, permitting, construction and operation of natural gas pipelines in Pennsylvania environmentally sound and transparent to the public. PADEP may also use the recommendations to develop new policies or propose new regulations that could affect other industries statewide.

### **Army Corps Proposes Changes to Pennsylvania State Programmatic General Permit for Wetlands Loss of Less than 1.0 Acre**

***James M. McClammer, Esq.***

This past fall, the U.S. Army Corps of Engineers (the “Corps”) announced a draft Pennsylvania State Programmatic General Permit No. 5 (PASPGP-5) and provided a 30-day public comment period on the draft permit, which ended October 29, 2015. The PASPGP program is a general Section 404 permit under the federal Clean Water Act which is issued by the Corps on a Pennsylvania-wide basis for activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment, including wetlands. Generally, projects that result in the loss of less than 1.0 acre of wetlands are eligible for a PASPGP permit; otherwise, the project must obtain an individual or nationwide Section 404 permit. Under the PASPGP program, a Joint Permit Application is submitted to the Pennsylvania Department of Environmental Protection (PADEP), which determines – in accordance with the requirements of the PASPGP program – whether it must forward a copy of the application to the Corps for review, or whether it can issue the PASPGP permit itself without Corps review.

If adopted, the draft PASPGP-5 permit would replace the current PASPGP-4 permit, which is set to expire on June 30, 2016. The draft PASPGP-5 contains several significant changes from the PASPGP-4, including the following: (1) single and complete projects resulting in a permanent loss of more than 1,000 linear feet of stream would no longer be eligible for a PASPGP permit; (2) post-construction monitoring requirements would be required for temporary impacts to wetlands that exceed 0.10 acre, unless waived by the Corps; and (3) proposed changes to the activities that would be required – and not required – to be reported by DEP to the Corps for processing.

The majority of Section 404 authorizations issued in Pennsylvania are through the PASPGP program, so it is important for developers of residential, commercial, or industrial facilities in Pennsylvania to understand the parameters of the PASPGP program.

Additional information on this topic can be found [here](#).

## **Update to PA Act 2 Regulations Expected in First Half of 2016**

***Michael M. Meloy, Esq.***

Proposed changes to the regulations implementing the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2) were issued for public comment on May 17, 2014. The proposed regulations include numerous changes to the numeric cleanup standards for soils and groundwater under the statewide health standard. The proposed regulations also include important revisions regarding the public notice process associated with the submission of plans and reports to the Pennsylvania Department of Environmental Protection. The comment period regarding the proposed regulations has closed and the proposed regulations are expected to be finalized in the first half of 2016. The new regulations, particular the changes to cleanup standards, are likely to have important consequences for remediation and brownfields projects.

## **Fundamental Changes to PA Vapor Intrusion Guidance Likely to Go Final in 2016**

***Michael M. Meloy, Esq.***

The Pennsylvania Department of Environmental Protection (PADEP) is in the process of overhauling Pennsylvania's current vapor intrusion guidance document issued 2004. PADEP, in conjunction with the Cleanup Standards Scientific Advisory Board (CSSAB), has been evaluating changes in the manner in which vapor intrusion issues have been addressed over the past decade and the evolving science associated with vapor intrusion. PADEP issued a new vapor intrusion guidance document in proposed form on July 25, 2015. The public comment period regarding the proposed vapor intrusion guidance document closed on September 23, 2015. The proposed vapor intrusion guidance document makes fundamental changes in the way that vapor intrusion issues are currently being handled. In general terms, criteria associated with vapor intrusion are more stringent and the options for addressing vapor intrusion are more limited under the proposed vapor intrusion guidance. The proposed vapor intrusion guidance is expected to be finalized in 2016 and will have important ramifications for sites where volatile regulated substances are present.

## **Proposed Changes to PA Management of Fill Policy Could Adversely Impact Completed Projects and Future Availability of Clean Fill**

***Michael M. Meloy, Esq.***

On December 20, 2014, the Pennsylvania Department of Environmental Protection (PADEP) issued proposed changes to Pennsylvania's Management of Fill Policy (also known as the Clean Fill Policy). In particular, PADEP proposed to revise numeric standards used to evaluate whether fill materials qualify as "clean fill" and to alter the sampling protocols that are to be followed. In many instances, the proposed numeric standards are lower than the current numeric standards. Changing the numeric standards for "clean fill" has broad consequences for projects that have already been completed in reliance on the existing standard and projects that are in the planning phases. Certain of the proposed numeric standards are so low that it will be difficult to find materials in many portions of Pennsylvania that qualify as "clean fill." PADEP received extensive public comments on the proposed changes and has been considering how to proceed. It is likely that PADEP will finalize changes to the Management of Fill Policy in 2016. These changes will have significant importance for infrastructure projects, land development projects, brownfields projects, utility projects, and any other projects that involve earth disturbance activities.

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