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ENVIRONMENTAL LAW

Marcellus Shale Commission Provides Roadmap for Reform in Pa.

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Special to the Legal

On July 22, the long-anticipated final report of the Pennsylvania Marcellus Shale Advisory Commission was released. This groundbreaking 137-page report contains a vast array of non-binding policy recommendations pertaining to Pennsylvania's natural gas boom ranging from zoning reform to mineral rights. Included among these are a series of recommendations that could substantially transform Pennsylvania's existing environmental policy landscape in the coming months.

Pursuant to Executive Order 2011-01, Gov. Tom Corbett formed a 30-member advisory commission, led by Lt. Gov. Jim Cawley, in March. The commission was given 120 days to issue the final report and held five public full-commission hearings during this timeframe. The commission divided itself into four working groups: infrastructure; local impact and emergency response; economic and workforce development; and public health, safety and environmental protection. These working groups met separately during the 120-day term and ultimately produced the recommendations that were voted upon by the full commission at their last meeting on July 15. In addition, the commission traveled as a group to Clinton and Lycoming counties to observe natural gas drilling operations first-hand.



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THE 96 RECOMMENDATIONS

Of the 96 recommendations approved by the full commission, the largest number of recommendations, 43 in all, emerged from the public health, safety and environmental protection work group. Some of the more notable recommendations included:

- Doubling fines for environmental violations (e.g., increasing civil penalties under the Oil and Gas Act to \$50,000 including a \$2,000 daily penalty) and allowing the Pennsylvania Department of Environmental Protection, or PADEP, to assess these fines without environmental hearing board involvement.

- Urging the environmental quality board to develop regulations pursuant to existing authority under the Oil and Gas Act that require an evaluation of natural resource impacts as part of the well permitting process.

- Requiring tracking of all wastewater from generation through treatment and disposal.

- Requesting that PADEP evaluate its regulations to determine what, if any, obstacles exist or changes can be made to facilitate recycling of flowback and produced water.

- Asking PADEP, the Pennsylvania Department of Conservation and Natural Resources, or DCNR, and industry to continually review the best management practices used during well construction and operation and consider incorporating these practices into regulations.

- Encouraging the Pennsylvania Department of Health to conduct a number of health-based population studies.

- Increasing setbacks from public water sources.

- Enhancing and/or developing databases related to high value ecological areas and rare/threatened/endangered species.

- Creating an environmental checklist for use as part of the drilling permit issuance process.

IMPACT OF THE REPORT

Reaction to the issuance of the report has been swift from all sides of the environmental spectrum. The Pennsylvania Environmental Council, or PEC, while acknowledging that it did not agree with all aspects of the report, commended the work of the commission, especially its ability to achieve consensus on the environmental recommendations.

The PEC recommended that Corbett should immediately call for a special session of the General Assembly to address the

recommendations of the report and amend the Pennsylvania Oil and Gas Act. As part of that effort, PEC urged that PADEP be given the authority to deny permits based on the impact on public resources, such as sensitive ecological areas including high quality and exceptional value waters of the commonwealth.

The Marcellus Shale coalition, consisting primarily of natural gas industry representatives and service providers, also praised the work of the commission, noting that its chairman served on the commission, and advocated for the modernization of Pennsylvania's laws to further the responsible development of the Marcellus Shale.

Other groups, such as the Sierra Club condemned the report for not addressing collective air impacts from drilling operations, with former PADEP Secretary John Hanger similarly noting the absence of any proposal to address nitrous oxide emissions. Hanger's comments notwithstanding, it should be noted that a recommendation was also included to establish an air emission inventory in order to estimate NOX and VOC emissions for gas development activities.

Recognizing that the ability to transmit shale gas from wells to end users is a critical component of the long-term success of the Marcellus Shale, infrastructure and pipeline issues received critical focus through the commission's recommendations. In particular, the commission recommends that a lead state agency be designated to facilitate pipeline development and without unreasonable delay. Further, the commission called for Pennsylvania to create a "one-stop" permitting process to ensure a coordinated permitting process for pipeline development.

While these recommendations would seem to favor the natural gas industry by easing regulatory burdens on pipeline construction, certain recommendations were clearly designed to ensure that environmental protection is achieved in this context. For example,

one recommendation states that PADEP "should ensure that natural gas construction activities are required to meet the same standards as general construction activities." Further, recognizing the potential for erosion and sedimentation problems at natural gas well sites, the commission makes clear

that there is a role for local county conservation districts to play through the inspection of well sites. In examining the recommendations pertaining to construction, infrastructure and pipeline issues, one can see that the commission towed a careful line to balance the competing interests of ensuring expedited pipeline development while preserving an element of local control.

As anticipated, perhaps the most controversial element of the report and the part that drew the most reaction pertains to the impact fee recommendation. Proponents of impact fees, such as state Sen. John Yudichak, D-Luzerne, minority chairman of the Senate committee on environmental resources and energy, argue that the impact fees as envisioned by the commission won't properly address environmental concerns since the commission recommended fee revenue stay within communities hosting drillers, instead of going into any statewide funds aimed at

protecting the environment or cleaning up waterways. Corbett, who has made no secret of his position opposing impact fees, has been silent on the report thus far, other than indicating that he is continuing to review the report and finding disagreement with "one or two" recommendations thus far. It is expected that the General Assembly will take up the impact fee issue soon after it returns from the summer legislative recess in September. While the impact fee issues probably have limited direct impact on environmental policy towards natural gas operations, it is possible that environmental policy changes could become a key part of any larger negotiated package addressing the impact fee.

For the most part, the recommendations in the final report are high level concepts that leave implementation to the General Assembly and applicable state agencies. And as was reported by attendees of the commission's final meeting on July 15, a frequently uttered phrase was "the devil is in the details." To that end, it can be anticipated that legislators and regulators will take a number of the recommendations and run with them in the near future in an effort to revise, or in some cases overhaul, the commonwealth's environmental protection laws and regulations that apply to the natural gas industry in Pennsylvania. Accordingly, the next few months could result in a series of new, complex environmental compliance issues that the natural gas industry — and PADEP — will be addressing for the first time. Stay tuned. •

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