

WVDEP'S Emergency Rules On Horizontal Gas Wells

Comprehensive and Detailed New Requirements Now Apply to all Marcellus Wells

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On August 22, 2011, the West Virginia Department of Environmental Protection (WVDEP) filed an Emergency Rule with the Secretary of State, entitled "Rules Governing Horizontal Well Development" (W.Va. CSR 35-8-1.1, et seq.). In approving it (and thus making it effective) on August 29, 2011, Secretary of State Natalie Tennant agreed that it was properly classified as an emergency rule because it was "necessary to prevent substantial harm to the public interest." (ERD 12-11, 8/29/11).

Whether it qualifies as a true "emergency" or not, the rule closely tracks Acting Governor Earl Ray Tomblin's Executive Order 4-11 issued on July 12, 2011, which in turn was intended (in part) to address the "considerable concern in areas of our State regarding the proper regulation of this burgeoning industry..." In light of the comprehensive and detailed nature of this regulation, it should certainly accomplish that purpose (at least until such time as a formal Legislative Rule (and/or a broader statutory program) may be acted upon by the West Virginia Legislature).

The WVDEP emergency rule addresses most of what are considered to be the critical areas, including water use, as well as groundwater and surface water quality protection. It requires that any permit application for a well that is planned to be horizontally deviated include: detailed erosion and sediment control plan, a site construction plan, a water management plan, and a well site safety plan. The sediment control and site construction plans must be certified by a registered professional engineer, and (as with the other plans) will be considered a part of the well work permit, enforceable in the same way as any other permit condition. Various subparts of the rule require detailed identification (including mapping) of all significant features on a proposed well site (so that all parties have a clear understanding of pre-drilling conditions), surface water diversion ditches, construction standards to be followed in creating fills, and specific steps to stabilize disturbed areas. (As with the other substantive requirements, these provisions generally do not apply to well sites of less than three acres, or when the planned water usage is less than 210,000 gallons per month.)

The water management plan must describe the source of any water to be used in drilling or fracturing the well; how much water the operator expects to withdraw and in which months; a demonstration that the amount of water withdrawn from any surface waters will not adversely affect designated and existing uses; and a listing of all additives that may be used in fracturing the well. (After fracturing, the operator must submit a statement regarding what additives were

actually used.) In addition to these and other permitting elements, the emergency rule establishes a number of environmental protection performance standards, such as specific procedures for stream water withdrawal, including advance notice to the WVDEP, casing and cementing standards; and extensive recordkeeping requirements as to the disposal of produced water, flow back water from fracturing, and drilling mud.

There are legitimate questions regarding duplication of existing programs and the scope of certain aspects of the WVDEP emergency rule. However, it touches on most of the key aspects of the “Hydraulic Fracturing” chapter of the Guidelines for the Review of State Oil and Natural Gas Environmental Regulatory Programs, as developed by STRONGER, an independent stakeholder group formed to administer the Interstate Oil and Gas Compact Commission’s state program review process (www.strongerinc.org.) Perhaps most significantly, it is also now pending as a proposed Legislative rule, with the WVDEP taking comments on it until September 30, 2011.

In general, the DEP’s efforts in this regard compare favorably to what has been done in our neighboring states, particularly when viewed as a prelude to legislative efforts. In Ohio, which faces similar issues with regard to predicted development of the deep Utica Shale formation, the General Assembly recently completed a significant rewrite of its oil and gas laws, resulting in what has been described by the American Bar Association as “one of the nation’s most detailed statutory provisions governing well construction and well stimulation, including hydraulic fracturing.” That legislation included within its scope several issues that are not suitable for emergency rulemaking, but likely will continue to be a subject of legislative discussion in West Virginia, including enhanced enforcement and funding capabilities.

In Pennsylvania, which has experienced substantially greater Marcellus well drilling activity, a driller of a horizontal well must comply with regulations implemented pursuant to Pennsylvania's Oil and Gas Act, 58 P.S. § 601.101, et seq. Those regulations impose requirements which are similar to those set forth in the recently released WVDEP emergency rule. An operator is required to post a bond and submit a detailed application for a permit prior to drilling (if the driller plans to drill a group of wells disturbing five or more acres, a separate permit for storm water management is also required). Well sites are inspected from construction to reclamation to ensure that the site has proper erosion controls in place and that any waste generated in drilling and completing the well was properly handled and disposed. As in West Virginia, well operators are also required to submit a variety of reports regarding well drilling, completion, production, waste disposal and well plugging.

In short, the effort to provide both more definite protection to the public and the environment, and greater certainty to the industry, has begun in earnest in West Virginia. Let’s hope that all stakeholders devote themselves to the timely completion of this process using a rational, risk-based approach.