

February 14, 2012

Practice Group(s):

*Energy, Infrastructure
and Resources*

Oil & Gas

New Pennsylvania Oil and Gas Law Targets Unconventional Gas Operations for Heightened Regulatory Oversight

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Introduction

On February 8, 2012, the Pennsylvania General Assembly passed a sweeping reform of the key environmental protection regime that governs natural gas operations. House Bill 1950 (“HB 1950” or “the bill”), awaiting the Governor’s signature, provides a wide-ranging update to and recodification of the Commonwealth’s Oil and Gas Act (the “Act”). In addition to extensive revisions to the Act’s environmental regulatory provisions, HB 1950 also addresses drilling fees and local regulation of the industry, each discussed in companion alerts.

The prior Oil and Gas Act (58 P.S. §§601.101-601.605) is recodified as a new Chapter 32 in title 58 of Pennsylvania Consolidated Statutes (Pa.C.S.). While the new law still applies to all oil and gas operations in the state, much of the new language in Chapter 32 targets unconventional (i.e., shale) natural gas drilling operations that utilize hydraulic fracturing. The industry should quickly become familiar with the updates to discern their effect on existing operations and enable meaningful participation in forthcoming regulatory revisions. Some of the most important amendments, detailed more fully below, include:

- Increased setbacks and well siting restrictions
- New chemical disclosure and reporting obligations
- Additional well permitting procedures, plans, and approvals
- New water supply protections
- Increased bonding requirements
- Stricter enforcement mechanisms

The Oil and Gas Act

First enacted in 1984, the Oil and Gas Act has long provided many of the key environmental safeguards that shape the operations of natural gas drillers in the Commonwealth. To implement the Act, the Environmental Quality Board (“EQB”) has adopted oil and gas well regulations at 25 Pa. Code Chapter 78, and those rules govern administration of the regulatory program by the Pennsylvania Department of Environmental Protection (“DEP”). The Chapter 78 regulations, which were overhauled in February 2011, fill-out the Act’s currently effective requirements. Thus, changes to the Act will necessarily mean changes to the regulations, at least where the regulations are inconsistent with the Act’s new features.

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Summary of Key Changes Implemented by HB 1950

The new 58 Pa.C.S. §§ 3201-3274 largely tracks the language of the old Oil and Gas Act. However, it introduces a number of important revisions and additions in an effort to manage the perceived risks associated with unconventional gas operations.¹ The remainder of this article describes the amendments that may have the greatest effect on operators.

Setbacks and Well Siting Restrictions

HB 1950 expands and clarifies existing setbacks:²

Protected Resource	Old Setback	New Setback for Unconventional Wells
Buildings & water wells	200 feet from the well	500 feet from the vertical well bore
Water well, surface water intake, reservoir, or other water supply extraction point used by a water purveyor	None (but 200 feet water well setback may apply)	1,000 feet from the vertical well bore
Streams, springs, wetlands, and other bodies of water	100 feet from the well site or well	300 feet from the well bore and 100 feet from the edge of the well site/disturbance area

In addition to the setbacks, (1) a wastewater *pit or impoundment* is prohibited within the 100 year *floodplain* and (2) a *tank* containing hazardous materials, chemicals, or waste is prohibited within the *floodway*.³

For each of these setbacks and siting restrictions, the opportunity to obtain a variance or waiver remains, and HB 1950 clarifies that variances will be granted if the operator demonstrates compliance with measures prescribed by DEP.⁴

Chemical Disclosure and Reporting Obligations

The recodified Act includes a new section on fracturing fluid chemical disclosure, requiring all operators to complete a chemical disclosure form and post the form on the chemical disclosure registry in accordance with yet to be promulgated regulations.⁵ In essence, this section makes mandatory chemical disclosure on the FracFocus website. The new provisions allow for trade secret and confidential proprietary information claims to be made by operators, vendors, and service providers, and describe how such claims will be handled by DEP. Also, a new “safe-harbor”

¹ Additionally, even sections that have not been substantively amended have been stylistically reworded, so that the potential exists for new interpretations in the courts and regulatory agencies.

² HB 1950, § 3215.

³ HB 1950, § 3215(f).

⁴ Compare the Oil and Gas Act, § 601.205(a) with HB 1950, § 3215(a).

⁵ HB 1950, § 3222.1.

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provision clarifies that operators will not be required to disclose chemicals that are not disclosed to it by the fluid manufacturer, vendor, or service provider.⁶

By January 1, 2013, DEP is required to determine whether the chemical disclosure registry (FracFocus) is searchable and sortable by geographic area, chemical ingredient, chemical abstract service number, time period and operator.⁷ If it is not, DEP is required to (1) investigate the feasibility of making the chemical disclosure information available on its own website in searchable and sortable form, and (2) report to the General Assembly on whether additional resources may be needed to implement such a project.

The bill also partially codifies the Chapter 78 regulations that govern the reporting of chemicals in completion reports, but the statutory language differs from the existing rule language.⁸ For instance, where the current rules require the completion report to include “[t]he percent by volume of each chemical additive in the stimulation fluid,” HB 1950 requires “[t]he maximum concentration, in percent by mass, of each chemical intentionally added to the stimulation fluid.”

Permitting Procedures, Plans, and Approvals

HB 1950 establishes several new permitting requirements, plans, and approvals:

- **Notice of Application:** Unconventional well permittees will be required to send notice of their application to all surface landowners and water purveyors whose water supplies are within 3000 feet of the vertical well bore (up from 1000 feet), and also to all “storage operators” within the same 3000 foot radius.⁹ A “storage operator” is a person who operates a “storage reservoir,” a subsurface area into which gas can be injected for storage purposes.¹⁰
- **Containment Plans:** Applicants will be required to develop and submit a containment plan, in accordance with practices set forth in the bill and further regulations to be promulgated by the EQB.¹¹
- **Water Management Plans:** Withdrawal or use of water for drilling or hydraulic fracturing an unconventional well will require a DEP-approved water management plan (“WMP”).¹² Plans approved by a regional water commission (such as the Delaware and Susquehanna River Basin Commissions) will be presumed to be satisfactory, but DEP will have the authority to establish additional requirements as necessary to comply with state law. Moreover, in the Ohio River Basin, there is no existing regional water withdrawal regulatory body, and thus DEP will have the lead in review and approval of WMPs.

⁶ HB 1950, § 3222.1(c)(1).

⁷ HB 1950, § 3222.1(b)(6).

⁸ Compare 25 Pa. Code § 78.122(b)(6) with HB 1950, § 3222(b.1)(1).

⁹ HB 1950, § 3211(b)(2).

¹⁰ HB 1950, § 3203.

¹¹ HB 1950, § 3218.2.

¹² HB 1950, § 3211(m).

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The bill also grants DEP new authority when considering a permit application:

- **Written Comments by Municipalities and Storage Operators:** DEP *may* consider written comments by (1) the municipality in which an unconventional well is located and (2) storage operators within 3000 feet of the proposed well bore.¹³
- **Permit Conditions Based on Impact to Public Resources and Ensuring Optimal Development:** EQB will promulgate regulations for DEP to utilize for conditioning a well permit based on its impact to certain public resources (such as parks, forests, rare and endangered species habitats and archeologic and historic resources, and sources of drinking water), and for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners.¹⁴ Notably, there may be some tension between these factors to be used in conditioning well permits (for example, promoting optimum development of oil and gas resources, while addressing impacts on public resources). While unstated, this provision necessitates a balancing of these concerns by the agency.
- **Protective Measures for Storage of Hazardous Chemicals:** DEP *may* establish protective measures for storage of hazardous chemicals and materials within 750 feet of any stream, spring, or other body of water.¹⁵

Water Supply Protections

HB 1950 includes a variety of new and revised provisions aimed at protecting water supplies, including the following:¹⁶

- **Rebuttable Presumption of Responsibility:** The rebuttable presumption of responsibility for pollution of a water supply will be extended to 2,500 feet from the vertical well bore (increased from the former 1,000 feet) and 12 months (compared to the former 6 months) from the later of completion, drilling, stimulation, or alteration.¹⁷ When the presumption applies, operators shall provide a temporary water supply if the user is without a readily available alternative source of water.
- **Water Contamination Telephone Hotline:** DEP will establish a new toll-free telephone number that persons may use to report cases of water contamination.¹⁸
- **Notification of Contamination to Public Drinking Water Facilities:** DEP will notify any public drinking water facility that could be affected by a spill, upon receiving notification and after investigation of the spill.¹⁹
- **Treatment and Discharge of Wastewater:** DEP will ensure that any facility which seeks an NPDES permit for treating and discharging wastewater from and oil and gas activities is operated by a competent and qualified individual.²⁰

¹³ HB 1950, § 3212.1, 3215(d).

¹⁴ HB 1950, § 3215(e).

¹⁵ HB 1950, § 3215(d.1).

¹⁶ HB 1950, § 3218.

¹⁷ HB 1950, § 3218(c).

¹⁸ HB 1950, § 3218(b.2) & (b.3).

¹⁹ HB 1950, § 3218.1.

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- **Publication of Contamination:** DEP will now be required to publish on its website any “confirmed cases of subterranean water supply contamination that result from hydraulic fracturing.”²¹
- **Wastewater Fluid Recordkeeping:** Unconventional well operators that transport wastewater fluid will be required to maintain five years of wastewater fluid records detailing:
 - the volume of wastewater fluids;
 - the person or company that transported the wastewater fluids;
 - each location where wastewater fluids were disposed of or transported, broken down by volume; and
 - The method of disposal.²²

Bonding

Bonding requirements will be increased, with bond amounts based on well bore length and number of wells operated, as follows:²³

Well Bore Length	Number of Wells	Bond Amount	Maximum Bond
less than 6,000 feet	50 or less	\$4,000/well	\$35,000
	51 - 150	\$35,000 + \$4,000/well in excess of 50 wells	\$60,000
	151 - 250	\$60,000 + \$4,000/well in excess of 150 wells	\$100,000
	more than 250	\$100,000 + \$4,000/well in excess of 250 wells	\$250,000
6,000 feet or greater	25 or less	\$10,000/well	\$140,000
	26 - 50	\$140,000 + \$10,000/well in excess of 25 wells	\$290,000
	51 - 150	\$290,000 + \$10,000/well in excess of 50 wells	\$430,000
	more than 150	\$430,000 + \$10,000/well in excess of 150 wells	\$600,000

EQB will adjust the amount of the bonds required every two years to reflect the projected costs to the Commonwealth of plugging the well.

Stricter Enforcement Mechanisms

HB 1950 increases the amount of both civil and criminal penalties for violations.²⁴

²⁰ HB 1950, § 3218(b.5).

²¹ HB 1950, § 3218(b.4).

²² HB 1950, § 3218.3.

²³ HB 1950, § 3225.

²⁴ HB 1950, § 3255-56.

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Violation Type	Old Maximum	New Maximum
Criminal penalty for a general violation (summary offense)	\$300	\$1,000
Civil Penalty at an unconventional well site	\$25,000 plus \$1,000/day	\$75,000 plus \$5,000/day

Additionally, a new enforcement mechanism will require that DEP post inspection reports on its website, detailing the nature of any alleged violations, the operator's response, the status of the violation, and the remedial steps taken by the operator and DEP.²⁵

Other Amendments

In addition to the revisions discussed above, the bill includes amendments involving the following topics: (1) pre-drilling erosion and sediment control inspections;²⁶ (2) a two year extension for well site restoration;²⁷ (3) air emissions reporting;²⁸ (4) corrosion control requirements;²⁹ (5) gathering lines;³⁰ (6) well control emergency cost recovery;³¹ and (7) well control emergency response specialists.³²

Interaction with Local Regulations

The above-mentioned revisions may have a significant effect on the ability of local governments to regulate the natural gas industry, in light of HB 1950's preemption provisions. As discussed in our companion [alert](#), HB 1950 preserves the Oil and Gas Act's preemptive effect over all local ordinances "that contain provisions which impose conditions, requirements or limitations on the *same features* of oil and gas operations regulated by Chapter 32 or that accomplish the *same purposes* as set forth in Chapter 32."³³ Thus, to the extent that these new provisions expand the realm of state regulation, that expansion should result in a decrease in the matters that are open to local regulation.

HB 1950 also introduces a new provision that establishes broad preemptive effect of all "environmental acts," which may include the recodified Oil and Gas Act. "Notwithstanding any other law to the contrary, environmental acts are of statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter."³⁴ "Environmental acts" are defined as "[a]ll statutes enacted by the Commonwealth relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced

²⁵ HB 1950, § 3262.

²⁶ HB 1950, § 3258.

²⁷ HB 1950, § 3216.

²⁸ HB 1950, § 3227.

²⁹ HB 1950, § 3218.4.

³⁰ HB 1950, § 3218.5.

³¹ HB 1950, § 3254.1.

³² HB 1950, § 3219.1.

³³ HB 1950, § 3302.

³⁴ HB 1950, § 3303.

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by [DEP] or by another Commonwealth agency, including an independent agency, and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations.”³⁵ The recodified Oil and Gas Act seems to fit within this broad definition; it (1) was enacted by the Commonwealth, (2) is administered by DEP, (3) relates to the protection of the environment and public health, and (4) regulates oil and gas operations. Thus, it may “occupy the entire field of regulation, to the exclusion of local ordinances,” whether or not those ordinances regulate the same features or accomplish the same purposes as set forth in Chapter 32.

Finally, a new section on uniformity requires that “all local ordinances regulating oil and gas operations shall allow for the *reasonable development* of oil and gas resources.”³⁶ Specific requirements are set forth defining what a local ordinance may and may not do in order to ensure that reasonable development is allowed.³⁷ For instance, there is a prohibition on any local ordinance that increases the setbacks set forth in Chapter 32 and discussed above.³⁸ However, this same provision allows that “[a] local ordinance may impose setback distances that are not regulated by or set forth in Chapter 32 . . . if the setbacks are no more stringent than those for other industrial uses . . .” The list of permissible and impermissible types of local regulation contained in the uniformity section should be consulted to help determine the scope of allowable local regulation.

Conclusion

The recodified Oil and Gas Act reflected in HB 1950 significantly revamps the environmental protection regime governing the Commonwealth’s expanding natural gas industry. Well siting, design, development, and operations will be impacted in a myriad of ways. Although many of the features of HB 1950 were endorsed by industry, the details of how these provisions are interpreted and implemented will require close attention and active involvement by operator stakeholders throughout the process.

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³⁵ HB 1950, § 3301.

³⁶ HB 1950, § 3304(a) (emphasis added).

³⁷ HB 1950, § 3304(b).

³⁸ HB 1950, § 3304(b)(11).

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