



# JONES DAY COMMENTARY

## MARCELLUS BOOM SPARKING REGULATORS TO ACTION

The Marcellus Shale, located under portions of New York, Pennsylvania, Ohio, and West Virginia, presents a tremendous opportunity for natural gas producers in the region. As producers consider the business potential of this significant natural gas resource, they must also consider the region's current regulatory environment. Various regulatory agencies, including state agencies and federal entities such as the Delaware River Basin Commission ("DRBC") and the Susquehanna River Basin Commission ("SRBC"), continue to assess potential impacts on the environment from increased oil and gas activities, particularly to the region's water resources. These various bodies will no doubt continue to enact further regulations aimed at oil and gas activities in the region. Even *The New York Times* has editorialized that New York State leaders should "take the safest course" and "ban drilling anywhere near water supplies."<sup>1</sup>

This *Commentary* addresses this enhanced regulation, specifically a recent effort by the Pennsylvania

Department of Environmental Protection ("DEP") to regulate oil and gas activity in the Marcellus Shale.

### ENHANCED REGULATION IN THE REGION

On June 13, DEP held a "summit" to educate invited industry representatives on the policy change requiring drillers and production entities to complete a new addendum to existing well permit requests. The addendum goes beyond the existing permit application requirements and mandates information about water withdrawal, "preparedness, prevention, and contingency ("PPC") plans," well types, earth disturbance information, and more.<sup>2</sup>

In a departure from past practice, applicants must now identify the amount of water they will use for drilling. Furthermore, each applicant must disclose the source of water by name and type, and must disclose the withdrawal point location. DEP also requires that the applicant disclose whether the SRBC or the DRBC

1. *The New York Times* Editorial, "Where Water Trumps Energy," Oct. 15, 2008.
2. Application Addendum for Marcellus Shale Gas Well Development ("Addendum"), pp. 1-4, sections A through O.

requires withdrawal permits and whether such permits have been obtained. Applicants must submit a water management plan and describe how the existing use and designated uses of surface water or hydrologically connected surface water will be maintained and protected.<sup>3</sup> Recent reports indicate that the Delaware River Basin Commission will further require producers to disclose the chemicals used in fracturing water.<sup>4</sup>

Several reports suggest that the new addendum might slow permitting activity in Pennsylvania. DEP acting secretary John Hanger recently suggested to a Pennsylvania House committee that “his department will need dozens more people to process drilling permit applications and inspect drilling sites . . . . In addition, the state’s capacity to treat contaminated drilling water is running out as more exploration companies begin drilling.”<sup>5</sup>

The Marcellus Shale application addendum also requires information related to streams, wetlands, and other bodies of water. If the construction, excavation, or operation of the project (including the well site, access road, water intake or outfall structures, storage impoundments, pipelines, or other support activities) will result in or require a water obstruction or encroachment on a watercourse, floodway, wetland, or other body of water, the operator must obtain a Water Obstruction and Encroachment Permit or other authorization.<sup>6</sup>

The Marcellus Shale application addendum requires each operator to develop and implement a preparedness, prevention, and contingency plan (“PPC Plan”), which has not been required at the application stage in the past.<sup>7</sup> The PPC Plan must incorporate any Control and Disposal Plan developed in accordance with the Pennsylvania Code. Guidelines for the plan are contained in the *Oil and Gas Operations*

*Manual* (550-0300-001) and *Guidelines for the Development and Implementation of Environmental Emergency Response Plans* (400-2200-001). The PPC Plan must include a description of the operation, pollution prevention measures, chemicals or additives used and waste generated, waste disposal methods, incident response plans, and corrective action plans, as well as an implementation schedule. If a centralized storage pit or impoundment is utilized, the PPC Plan must also address the construction and operation of the pit or impoundment.<sup>8</sup>

In addition to requiring information on water use and PPC Plans, the Marcellus Shale addendum requires that the applicant specify whether it will employ vertical wells with horizontal laterals—and, if so, the number and length of laterals from the vertical borehole. Applicants must attach a copy of a U.S.G.S. topographical map and cross-section showing the location of the well, laterals, and property lines.<sup>9</sup>

Furthermore, DEP will more rigorously enforce requirements that applicants provide extensive information about pits, impoundments, and dams. If operators will construct a pit with an embankment, earth barrier, or dam located on a watercourse, and 1) the maximum depth is greater than 15 feet, or 2) storage volume is greater than 50 acre-feet, or 3) the contributory drainage area is greater than 100 acres, a dam permit is required under the DEP Dam Safety Program. Otherwise, an Environmental Assessment approval is required. Even if a pit or impoundment is not located on a watercourse, a dam permit may be required, depending on depth and storage volume. Applicants must attach a copy of a U.S.G.S. topographical map showing the location of the centralized impoundment or dam, access roads, and well sites that will be serviced by the storage impoundment. Plans, profiles, and cross-section of centralized impoundment dams, as well as site restoration plans, must be attached.<sup>10</sup>

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3. Addendum, pp. 1-4, sections A through O.

4. Harold Brubaker, “Delaware Basin Gas Drilling Hits a Snag,” *The Philadelphia Inquirer*, Sept. 11, 2008.

5. Marc Levy, “Pa. Trying to Keep Up With Gas-Drilling Rush,” *Forbes*, Sept. 30, 2008, <http://www.forbes.com/feeds/ap/2008/09/30/ap5491695.html>.

6. Addendum, p. 2, section H.

7. Addendum, p. 1, section B.

8. *Id.*

9. Addendum, p. 1, section A.

10. Addendum, p. 3, section N.

## IMPACT ON BUSINESS

DEP's broadening regulation will initially require substantial information from operators seeking permission to engage in oil and gas activity in Pennsylvania. That regulation and the newfound attention on oil and gas activities will not be limited to Pennsylvania. Any business entity that intends to pursue the opportunities presented in Marcellus Shale must become familiar with the region's constantly evolving regulatory environment.

## LAWYER CONTACTS

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