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Legislature Proposes Amendments to Oil and Gas Act

The General Assembly seems poised to enact significant amendments to the statutes governing oil and gas development in Pennsylvania.

David Mandelbaum

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The General Assembly seems poised to enact significant amendments to the statutes governing oil and gas development in Pennsylvania. On Nov. 15, the Senate passed Senate Bill No. 1100 and on Nov. 17, the House passed House Bill No. 1950.

Most of the new language addresses development of natural gas from shale formations. The bills have real differences, so a compromise bill will have to be drafted and presented again to both chambers. Nevertheless, the bills have sufficient similarities that we can now begin to think about what all this means.

These bills implement many of the recommendations of Gov. Tom Corbett's Marcellus Shale Advisory Commission reported in July. These bills also join a series of changes in the regulatory law governing Marcellus Shale natural gas development in Pennsylvania. Development here has proceeded while regulation is adjusted to reflect experience. Other jurisdictions have adopted a "wait until we know we have it right" approach.

Most press about these bills focuses on their inclusion of an "impact fee" to be assessed on "unconventional" natural gas operations. The bills would assess fees (don't call it a severance tax) and would earmark the revenue from this fee-not-a-tax for distribution to specific municipalities and particular agencies of the Commonwealth, all to be used for enumerated purposes. The two bills differ in exactly how this would work, and one would expect that most of the effort to reconcile the two bills will focus on this impact fee.

This is an environmental practice column, so we should leave it to the tax practitioners to analyze the impact fee closely.

However, notice that the tax is only on "unconventional" natural gas production.

Both bills use "unconventional" to mean a gas well targeting the Marcellus or Utica shale that will not produce in paying quantities without hydraulic fracturing. All studies seem to suggest that within a few years natural gas from shale formations will dominate production in North America, and certainly in Pennsylvania. When most of the gas

produced, and certainly most of the gas produced from new wells, comes from shale formations, it is hard to call that gas "unconventional." I confess to having done so repeatedly. Some have observed that if we stopped calling shale gas that, the tone of discourse around "fracking" might moderate.

Of more interest to environmental practitioners, both bills would repeal, re-enact and officially codify the Oil and Gas Act in Pennsylvania Consolidated Statutes. The amendments would affect not only impact fees, but also bonding, location standards, liability for pollution, and interactions with local zoning. These adjustments would follow a number of new regulations and guidance over just the past two years.

During 2009 and 2010, concern emerged over management of wastewater from shale gas well pads. During hydraulic fracturing, about half of the millions of gallons of water used returns to the surface. That water will contain hydrocarbons from the formation, suspended solids (some of which exhibit naturally occurring radiation), and dissolved solids (mostly salts). Conventional wastewater treatment plants do a good job of removing hydrocarbons and suspended solids (and therefore radiation), but do not treat well for salts.

The Environmental Quality Board adopted amendments to Chapter 95 of the Department of Environmental Protection's regulations published in August 2010. Those new rules prohibited any wastewater treatment plant with a discharge to a surface water from receiving any gas well pad wastewaters unless the wastewater already met the 500 milligrams per liter secondary drinking water standard for total dissolved solids. That is, influent to the wastewater treatment plant could not be saltier than the standard adopted to assure acceptable taste and odor in tap water.

Approximately 15 wastewater treatment plants were "grandfathered" and did not have to comply with the Chapter 95 rules.

In April 2011, DEP Secretary Michael Krancer wrote to the natural gas producers and asked them not to use those plants and to certify that they had not. The EPA reacted skeptically to a voluntary compliance approach, and you will find an exchange of letters on the EPA Region 3 website.

Much of the popular concern over Marcellus Shale development centers on protection of groundwater resources. In February 2011, the Environmental Quality Board published new regulations under the Oil and Gas Act. These new Chapter 78 rules imposed revised standards for casing natural gas wells.

In order to protect groundwater from materials travelling up and down the bore of the natural gas well one must cement a pipe — or, under Chapter 78, three nested pipes — to the wall of the natural gas well as the bore passes through an aquifer. The new rules also establish numerical standards for the performance of the cement; if the vapor pressure of the gas between the pipe and the rock or between the nested pipes exceeds certain established standards, the natural gas well has to be fixed.

The February regulations also address remedies for groundwater pollution. Section 208 of the Oil and Gas Act imposes a duty on an oil or gas operator to restore or to replace a drinking water "source" – that is a well, spring, stream, or the like – that is either polluted or diminished by the oil or gas activity.

The oil or gas well is presumed to have caused the pollution or diminution if the gas well is within 1,000 feet of the water well and the pollution or diminution manifests within six months. The new rules expanded on this obligation. They also added section 78.89 that requires a gas well operators to investigate and to address gas migration incidents independent of the presence of a potable water supply and without specific geographic or temporal limitation.

The two bills would each re-adopt (with new numbering) section 208, but they would expand the presumption to either 2,500 or 3,000 feet and 12 months for shale gas wells. Neither bill specifically addresses the status of the February regulations, except that the House version makes clear that the new Chapter 78 applies only to "unconventional" gas wells. That, of course, begs the question of what applies to the tens of thousands of other gas wells in Pennsylvania given that the old Chapter 78 has been rescinded.

Neither bill would provide additional statutory authority for section 78.89 of the regulations. The obligation to investigate a gas migration incident, no matter how distant, seems to have no specific underpinning in the statute. The omission of any language to fill that gap may be significant.

Since the beginning of the recent natural gas "boom," litigation has arisen repeatedly over efforts by local

municipalities to ban or to slow natural gas development through land use or other controls. Section 602 of the Oil and Gas Act includes language pre-empting local regulation except certain ordinances adopted under the Municipalities Planning Code or the Flood Plain Management Act.

The cases are reasonably clear that a municipality may regulate where natural gas development occurs, but not how it occurs, and the municipality may not regulate issues specifically addressed by the Commonwealth under the Oil and Gas Act.

Both of the new bills would insert additional provisions intended to limit the ability of municipalities to impose land use regulations that do not provide a reasonable opportunity to develop natural gas resources. Each bill would authorize the attorney general to review municipal ordinances on request of any person after they are adopted or at the request of the municipality before adoption. The report of the attorney general would become part of any litigation record on a challenge to the ordinance. Challenges to ordinances would go directly to the Commonwealth Court, skipping a local administrative hearing and the court of common pleas. In addition, the House bill would deprive municipalities of standing to challenge the issuance of a natural gas well permit in the Environmental Hearing Board.

The House bill calls for development of protocols for air emission reporting. Otherwise, neither bill adds to the recent spate of activity on air emissions from natural gas wells, compressor stations, and treatment plants.

Does Pennsylvania's evident adaptive management approach make sense? Merely by passing a bill, each house of the General Assembly has implicitly decided that the regulatory scheme presently in place is less than optimal. Should development occur in the interim?

In New York, for example, shale gas development is under a moratorium until the New York State Department of Environmental Conservation completes work on substantive requirements implied by its Supplemental Generic Environmental Impact Statement. The Delaware River Basin Commission has imposed a moratorium on natural gas well pad approvals (assuming that the DRBC has authority to demand those approvals at all) until it completes its regulations. It has, in fact, completed those regulations, but has twice deferred the meeting of the Commission to vote on them.

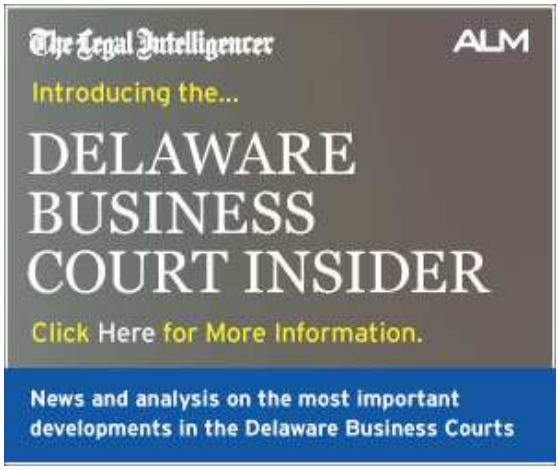
Waiting until you get the regulatory scheme perfect may ask too much of the process. No matter what, there will always be new information coming soon. Each new application, each new well, each new problem provides additional experience that informs the regulatory scheme. Pennsylvania's course allows the regulators and legislators to adapt the regulatory scheme through experience.

Moreover, if gas is not available to burn, we are likely to burn something else to make electricity or process steam. That something else is not necessarily better than the gas.

So, the passage of these bills does clearly imply that what we have now is not perfect. We can also say with certainty that a year from now we can do better than we can do today. That is just inherent in the ability of human beings to design a regulatory scheme.

All of this is not to say that the bills that have been adopted are an improvement. We have to see what happens next.

David Mandelbaum *is national co-chair of the environmental practice group of Greenberg Traurig; his principal office is in Philadelphia. He teaches "Oil and Gas Law," "Environmental Litigation: Superfund," and "Global Climate Change" in rotation at Temple Law School, and serves as vice chair of the Pennsylvania Statewide Water Resources Committee. He was educated at Harvard College and Harvard Law School.*



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