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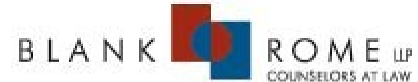
RT ENVIRONMENTAL SERVICES THANKS BLANK ROME, LLP FOR THIS TIMELY UPDATE WITH REGARD TO MARCELLUS SHALE AND OIL AND GAS REGULATIONS



Energy

Court Rebuffs DEP's New Chapter 78a Oil and Gas Regulations

Energy Industry Update

Action Item: The Pennsylvania Commonwealth Court stayed, at least for now, implementation of portions of the new Chapter 78a oil and gas regulations that it considered rogue. These new rules are the poster child for "train-wreck" regulation-they come with the trifecta of horribles: (1) a huge price tag; (2) little or no environmental benefit; and (3) at a time when prices for Pennsylvania producers are low. This is good news for the competitiveness of Pennsylvania as a leader in responsible energy production. Businesses in the oil and gas industry, royalty owners, and companies in the supply chain should keep a close eye out as this case progresses, as they will be significantly impacted depending on future developments in this case.

Judge Kevin Brobson of the Commonwealth Court of Pennsylvania hit the brakes on a number of Chapter 78a Regulations promulgated by the Department of Environmental Protection's ("DEP") environmental quality board ("EQB") aimed at the oil and gas extraction industry. The decision was rendered in *Marcellus Shale Coalition v. Department of Environmental Protection, No. 573 M.D. 2016*. The Marcellus Shale Coalition ("MSC") successfully secured a preliminary injunction upon application for expedited special relief staying the enforcement of several sections of the Chapter 78a Regulations, and, in the process, spared Pennsylvania oil and gas business and its economy from substantial additional compliance costs with a suite of regulations with little if any marginal environmental benefit.

The dispute arose out of rules contained in 25 Pa. Code Chapter 78a, which went into effect on October 8. As anyone who has been following the development of these regulations well knows, the Chapter 78a Regulations have a sordid and controversial history. After Governor Tom Wolf's administration arrived

in Harrisburg, it "reworked" the original version of the rules, and then pushed them through the EQB, even after Wolf's own advisory board disapproved of the reworked regulatory package. Industry comments were pretty much ignored by the administration.

These new rules are the poster child for "train-wreck" regulations-they come with the trifecta of horribles: a huge price tag; little or no environmental benefit; and at a time when prices for Pennsylvania producers are low. In fact, we calculate that Marcellus producers are currently losing about $15.6 million per day compared to other markets. That is due to inadequate pipeline takeaway capacity, which is another topic for another day. But the costs to Pennsylvanians is huge in terms of lost revenue to producers and royalty owners to the tune of $5.75 billion annually, representing lost capital investment and loss of jobs and job growth. While the DEP said costs of compliance for unconventional operators would be about $31 million annually, with initial compliance costs at about $73 million, experts debunked that estimate. Actual cost of compliance they said would be closer to $2 million per well, or up to $2 billion annually at 1,000 new wells per year.

In response to the promulgation of the Chapter 78a Regulations, the MSC filed a narrowly crafted petition in the Commonwealth Court seeking injunctive relief and challenging certain parts of the most egregious provisions of the regulations. Specifically, the MSC challenged sections of the regulations concerning "public resource" notification requirements, monitoring of areas surrounding well sites, onsite processing of residual waste, impoundments, site restoration, remediation of spills and waste reporting.

Two days of argument were held before Brobson on Oct. 26 and 27, and he issued his decision Nov. 8. He enjoined the DEP from implementing and enforcing all or portions of provisions of the Chapter 78a Regulations concerning public resources, monitoring of surrounding areas, impoundments and site restorations.

On "public resources," Brobson saw that the expansive and duplicative notification requirements to entities that are not "public" in any sense (such as shopping centers, movie theatres, senior centers, arenas, sports stadiums, amusement parks and the list could go on) as the DEP exceeding the scope of the law, namely, Act 13. He also found, correctly, that the DEP acted unlawfully by including so-called "special protection species," species that are not listed as threatened or endangered under any state or federal law-within the public resource provisions of Chapter 78a.

Next, the court made the commonsense ruling to enjoin provisions of the Chapter 78a Regulations that seemingly required well operators to trespass onto private property, saying that the implementation problems are "readily apparent." The regulations would have required monitoring and plugging of other wells even if there was no way to access them. Notably, the regulations did not carve out an extension for wells or property not owned by the well operator, thereby creating a regulatory mandate, which Brobson recognized as probably directly contrary to Act 13, for well operators to monitor and plug wells they don't own and don't have legal access to.

The court also rebuffed the regulation's requirement to retrofit existing impoundments built to store water that are used during the drilling process-with millions of dollars' worth of unnecessary upgrades. In another example of "regulating for the sake of regulating," Brobson noted that "DEP presented no evidence that a single existing impoundment poses an immediate threat to the health and safety of the commonwealth, including its citizens and the environment ..." Also, the DEP tripped up badly here as it admitted that these regulations were not the result of any new law, but from a supposed "change in the DEP's interpretation of long-standing law." While an agency can "change its mind," it must explain why (which the DEP didn't) or it is acting quintessentially arbitrarily and capriciously-as was the case here.

Finally, the court enjoined the DEP from implementing regulations that imposed restoration requirements that exceed those under Pennsylvania's Clean Streams Law. The court found that a substantial legal question existed concerning whether the DEP was imposing erosion and sediment

control measure requirements that exceeded the requirements listed in the Clean Streams Law and its corresponding regulations.

The court did leave several provisions of the regulations under challenge in effect-for now. There are still requirements to process residual waste at the well site it was generated or where the processed residual waste will be beneficially used; remediate certain releases of "regulated substances;" and provide monthly reports to the DEP concerning on-site waste production, disposal, and reuse.

The case is hardly over though for even those parts of the regulation. The court suggests that it would have enjoined the regulations concerning on-site residual waste processing, if the MSC had provided evidence of the types of residual wastes that would have been subject to the regulations. Similarly, the court found compelling MSC's argument that the monthly reporting requirements demonstrated "disparate treatment" of the oil and gas industry. The court, however, declined to enjoin implementation of the regulations because MSC failed to provide evidence that the disparate treatment was unreasonable or unjustified. It is very likely that as the case develops, the evidence referred to will be developed and that those provisions will ultimately fall.

At the end of the day, this decision is vindication of law over regulatory fiat and just plain bad regulations. Pennsylvania's oil and gas industry has been a prodigious economic boon to the commonwealth, and if politicians and regulators do their job, it will be for a long time. But make no mistake, we are in competition with other states in the region and other shale plays in this country and around the world. If politicians and regulators make decisions that not only add little, if any, marginal environmental benefit, but also ultimately prejudice Pennsylvania and the United States, then others will gain and the environment will suffer as operations are shifted to areas with lesser protections than here.

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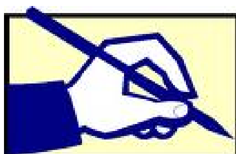

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