

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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THE MARCELLUS SHALE ADVISORY COMMISSION'S REPORT TO THE GOVERNOR: Environmental Recommendations

On July 22, 2011, the Governor's Marcellus Shale Advisory Commission presented its final Report with numerous recommendations for environmental policy, legislative and regulatory reforms to address development of the Marcellus Shale in Pennsylvania. The Report addresses complex questions, the solutions to which cannot be fully understood until the various recommendations evolve into realities. Some recommendations are clearly beneficial to all stakeholders; others may have unintended consequences for industry as the cumulative impact of increased regulation will likely slow the pace of the development of natural gas in the Commonwealth.

The following recommendations are likely to be mutually beneficial to the natural gas industry, the public and the environment:

- encouraging the beneficial re-use of steel and blast furnace slag for aggregate applications;
- eliminating redundant permit reviews;
- promoting the recycling of flow back and produced water from gas wells; and
- encouraging the use of alternative water sources, such as acid mine drainage for hydrofrac operations.

Other recommendations have the potential to impede the development of natural gas without providing significant environmental benefits if not implemented with careful consideration for the cumulative impacts of new regulation:

- The Oil and Gas Act currently directs the Pennsylvania Department of Environmental Protection (DEP) to consider the impact of a proposed well on defined public resources such as national natural landmarks, publicly owned parks, forests and gamelands, and habitats of rare and endangered species. The Report directs DEP, the Department of Conservation and Natural Resources (DCNR), and other state agencies to identify new categories of "high ecological value" areas and "high conservation value" forests, and requires applicants to demonstrate how they will avoid or mitigate impacts in these areas.
- Currently, DEP must follow established administrative procedures to deny, suspend or revoke permits, in accordance with due process. The Report calls for authorizing DEP to suspend, revoke or deny permits more quickly if an operator fails to comply with the Act or other environmental law, but it is unclear how due process rights will be preserved.
- Under the Act, wells may not be drilled within 200 feet from existing water wells without the owner's consent nor may well sites be built within

100 feet of any stream, spring or body of water, or within 100 feet of any wetlands greater than one acre in size. The Report recommends increasing these setbacks to 500 feet from private water wells and from 1000 feet from public water supplies and to 300 feet from streams and water bodies at the same time that U.S. EPA is expanding the scope of these areas.

- The Report contains several recommendations to increase the role of DCNR, which is the leasing agent for gas extraction activities on state lands it manages. There are recommendations to incorporate DCNR practices into DEP regulation and guidance; to recognize the expertise of DCNR to advise other Commonwealth agencies; and to have DCNR establish a Natural Gas Advisory Committee regarding natural gas development on state forest and park land.

Other recommendations of note include:

- A proposal to extend the presumption of liability for affecting a water supply to 2500 feet from a well; the current presumption is 1000 feet.
- A proposal to designate a state agency as a one-stop permit process for pipelines and not to expand the jurisdiction of the Public Utility Commission beyond gas safety oversight of gathering lines.
- The recommendation to develop impact fees to offset the uncompensated portion of demonstrated impacts by local governments, such as local emergency response, water and sewer infrastructure, inspection costs, and land use planning.

We expect a variety of legislative and regulatory proposals to come forward in the coming weeks in response to the Commission's Report, including one legislative proposal from Representative Matthew Baker dated July 22, 2011. Any such legislation or regulation should be evaluated for unintended obstacles to the development of natural gas and unnecessary restrictions on the due process rights of owners and operators.

Our multi-disciplinary National Resources Group will summarize the Report's recommendations in the individual areas of land use, employment, business and litigation in coming issues of the Administrative Watch. In the meantime, if you have any questions regarding the Report and or any other oil and gas issues, please contact Kevin J. Garber at 412-394-5404 or kgarber@babstcalland.com or Jean M. Mosites at 412-394-6468 or jmosites@babstcalland.com.