

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



New Policy to Address Spills and Releases from Oil and Gas Wells and Related Operations

The Bureau of Oil and Gas Management (BOGM), within the Pennsylvania Department of Environmental Protection, has drafted a new policy, *Addressing Spills and Releases from Oil and Gas Wells and Related Operations* (Policy). The Policy is notable because it provides guidance regarding the manner in which the BOGM intends to evaluate remediation activities at oil and natural gas well sites pursuant to the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2). While the Policy has not been published as final guidance or opened for comments, the Department has already begun implementing the Policy on a case-by-case basis across the Marcellus Shale region.

The Policy is directed broadly to “persons responsible for spills and/or releases from and related to oil and gas well operations,” with a goal of facilitating consistent and uniform response to spills and releases related to oil and gas operations. The Policy includes both new guidelines for evaluating media impacted by chemical releases using Act 2 risk-based cleanup criteria as well as new rules governing the manner in which spills are to be reported to the Department.

First, the Policy imposes new reporting obligations for a spill or release of any “regulated substance.” Consequently, the Policy appears to apply to spills of virtually any material commonly managed at a well site, from produced water to diesel fuel. Although the Policy has a general statement suggesting that any spill must be reported, *regardless of quantity*, it creates distinctions regarding cleanup criteria based upon whether the release is more or less than 42 gallons and whether the spill occurs within secondary containment. The Policy requires notification to the Department by telephone, within two hours of detection, unless applicable regulations require immediate notice to emergency responders. Voice mail, email or texts, or communications from a third party “are not acceptable forms of initial notification.”

Second, the Policy requires attainment of remediation standards under Act 2—as well as compliance with all administrative procedures in Act 2 regulations—for spills greater than 42 gallons or those that pollute or create a danger of polluting surface water or groundwater. Although the Policy may be helpful confirmation that persons conducting cleanups at well sites are eligible to use Act 2 soil and groundwater cleanup criteria, the Policy’s emphasis on required actions seems out of step with Act 2, which generally provides incentives for voluntary cleanups.

Act 2 has proven to be very successful in encouraging the cleanup of a wide variety of commercial and industrial properties in Pennsylvania. Act 2 provides flexible cleanup criteria, releasing persons conducting cleanups from liability for spills identified in approved site characterization reports. Act 2 does not dictate the scope of a remediation. Usually, the scope of remediation is determined by a remediator motivated by the promise of securing liability protection for specific regulated substances on a defined parcel of land. In some cases, the Department may order the remediation of a spill that may be conducted in accordance with Act 2 criteria, but the order’s authority is based on environmental laws other than Act 2.

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The Policy, however, does not specify which constituents must be addressed in the Act 2 process associated with a release at an oil or gas well site. Although in other guidance the Department provides “short lists” of parameters that industry must evaluate in the context of spills from regulated facilities, such as petroleum storage tanks, the Policy does not provide any such list for spills relating to oil and gas well sites. Nevertheless, in an apparent reference to releases of produced water, the Policy specifically acknowledges that there is no Act 2 statewide health standard for releases of chlorides in soil, and would thus require operators to develop background or site-specific standards for produced waters and brines. An additional complication with the remediation of chlorides in soil is their transient nature and their tendency to attenuate naturally, which may eliminate the need for remediation at all.

Because the Policy appears to mandate certain actions at well sites, it suggests that the BOGM intends to direct the manner in which an operator implements a cleanup under Act 2. However, because the Policy does not articulate any specific limits on Act 2 cleanup procedures, it seems likely that the BOGM intends to make these decisions on a case-by-case basis. The Policy notes that site restoration obligations imposed on operators under the Oil and Gas Act include a general duty to revegetate a well site. The Policy thus raises issues related to impacts on vegetation and implicates other transient impacts that have not commonly been a concern at most Act 2 sites.

The Policy also makes reference to consultation with landowners regarding cleanups. This reference could be interpreted as requiring operators to demonstrate that any response action taken under Act 2 has been approved by a landowner. If so, the Policy may appear to give new authority to landowners other than is currently set forth under existing agency rules governing well site restoration or standard leases with operators.

As can be seen, the Policy raises numerous questions in its application and consequences. While departmental policy documents cannot create new regulation or affect existing regulatory requirements, there is some question about whether this Policy goes beyond a mere framework within which the Department is exercising its administrative discretion. We understand that the Department intends to publish the Policy in the *Pennsylvania Bulletin* and accept comments from interested parties, so there may be an opportunity to raise these and other issues in a public venue.

The Policy, which was discussed at the October 21, 2011 Oil and Gas Technical Advisory Board meeting, is available on its website: http://www.dep.state.pa.us/dep/subject/advcoun/oil_gas/2011_oil_gas.htm.

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