

## The new Chapter 78a regulations have arrived

After years of rulemaking activity, the Pennsylvania Department of Environmental Protection's new Chapter 78a regulations for surface activities associated with unconventional wells became effective on October 8. This article will review the status of the regulations and the next steps for implementing Chapter 78a across the Commonwealth.

### Timing

The Chapter 78 (conventional wells) and 78a (unconventional wells) Subchapter C rulemaking was adopted in February by the Environmental Quality Board (EQB). However, as discussed in the July issue of *The PIOGA Press*, the passage of Act 52 of 2016 abrogated the portion of rulemaking applicable to conventional oil and gas development. After review by the Attorney General's Office and the Commonwealth Joint Committee on Documents, DEP withdrew all proposed amendments applicable to conventional oil and gas wells, making changes in Chapter 78 only to clarify its scope and remove all references to unconventional wells. Chapter 78a will be published in substantially the same form as approved by EQB in February and the Independent Regulatory Review Commission in April.

DEP published the final Chapter 78a rules, titled "Environmental Protection Performance Standards at Oil and Gas Well Sites," in the *Pennsylvania Bulletin* on Saturday, October 8. The new rules became effective upon publication, with some provisions for future registration and modification of permitting facilities, such as fresh water and centralized impoundments. DEP was required to complete all the new forms and guidance referenced in Chapter 78a before publication.

### Training

In August and September, DEP presented training webinars on topics associated with the final Chapter 78a rulemaking for operators, contractors and any other interested parties. Training topics included pipelines and horizontal directional drilling, waste management, emergency response, secondary containment, spills and releases, well permits and reporting, water management plans, area of review, erosion control, and site restoration. Audio recordings of the webinars, along with DEP's slideshows, are available for reference on DEP's

website. DEP has also created frequently asked questions (FAQ) documents for each webinar topic, covering matters that were raised by participants during the live training sessions. Full-day training sessions conducted by DEP in September covered the same material as the webinars.

### Implementation

To implement Chapter 78a, DEP has prepared or updated more than 20 forms for unconventional operations. Many provisions of the new rules allow the agency to request information in addition to what is specified in the regulations, making the forms themselves a critical part of rule implementation. The new forms include a monthly tank maintenance checklist, well site restoration reporting forms, requests for approval of alternative waste management practices and well site restoration extensions, and a variety of forms related to the Area of Review requirements in § 78a.52a. All of the new forms are available on DEP's eLibrary, [www.elibrary.dep.state.pa.us/dsweb/HomePage](http://www.elibrary.dep.state.pa.us/dsweb/HomePage).

Under Chapter 78a, almost all operator submissions are required to be electronic. The rules require unconventional operators to submit notifications, requests, well permits and reports electronically, and DEP states that it has updated its Greenport system to accept these submissions. The Greenport system has a revised version of "eWell" for electronic submissions of unconventional well permits and an updated "DEP Notifications" application for well operator and pipeline operator notifications to the department. DEP also created a new application, "eSubmission," for reports and requests under other sections of Chapter 78a. For example, eSubmission will be used to request extensions for the well site restoration period, to register borrow pits or underground tanks and to submit pre-drill survey sample results. DEP is providing webinars about the eWell, DEP Notifications and eSubmission applications in October, and the recorded webinars will be available on the agency's website for future reference.

Pipeline operators in particular may be new to DEP's electronic reporting system because pipelines have never been within the scope of Chapter 78 until now. Under Section 78a.68a, pipeline operators conducting horizontal directional

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drilling (HDD) beneath a body of water or a watercourse are subject to notification requirements. As a result, pipeline operators intending to use HDD beneath water must register as users on Greenport if they are not currently registered. The rule requires such operators to use the DEP Notifications application in Greenport to notify DEP at least 24 hours prior to beginning HDD beneath a body of water or watercourse and, in the case of a water supply complaint, to report the complaint to DEP within 24 hours of receipt. DEP will also be issuing several technical guidance documents (TGDs) associated with the Chapter 78a rules, including guidelines for implementing the Area of Review regulatory requirements and a policy on replacing and restoring private water supplies. Draft guidance documents on those two topics were provided for public review at the Oil and Gas Technical Advisory Board meeting in June and also were published in the October 8 Pennsylvania Bulletin as interim final rules, with a 60-day comment period. Industry representatives have participated in the workgroups for these TGDs, but the final policies could reflect additional public comment at the end of the comment period.

### Major components of Chapter 78a

Unconventional well operators should look closely at provisions affecting well permitting, site construction, PPC plans, prefracturing diligence, waste handling, secondary containment, impoundments, pipelines, borrow pits, site restoration, water replacement and spill remediation. Each of these has a substantive change from existing law that will affect operations over the life of the well.

One major revision to the rules arises in sections 78a.15(f) and (g), which set out the pre-application requirements for a well permit at a location that “may impact a public resource.” This provision requires operators who propose to drill a well in such locations to notify the public resource agency, which now by definition includes schools, municipalities and owners of playgrounds or water supplies, and to provide additional information to DEP. The regulation applies if the limit of disturbance of the well site is located in any of eight specified areas, including “in a location that will impact other critical communities” and “within 200 feet of...a playground.” The public resource agency must be notified at least 30 days prior to the submission of the well permit application to DEP to allow the agency to provide written comments to DEP and the applicant. The applicant may provide a response to the comments. DEP will then consider various factors, including the comments submitted by both the public resource agency and the applicant, before setting conditions for the well permit based on impacts to public resources.

PIOGA has challenged EQB’s authority to promulgate the new rules related to public resources in light of two Pennsylvania Supreme Court decisions holding and clarifying that the statutory authority for such rulemaking has been enjoined. *Robinson Township, et al. v. Commonwealth of Pennsylvania*, 623 Pa. 564, 83 A.3d 901 (Pa. 2013); *Robinson Township, et al. v. Commonwealth of Pennsylvania*, — A.3d — (Pa. Sept. 28, 2016). PIOGA filed an appeal of the Commonwealth Court decision in *PIOGA v. DEP*, No. 321 MD. 2015, —A.3d — (Commw. Ct., Sept 1, 2016) in the Supreme

Court on September 29.

DEP has altered the water replacement/restoration standard in Section 78a.51(d)(2) to require replacement water supplies to meet or exceed Safe Drinking Water Act (SDWA) standards, whereas the prior regulation required replacement water supplies to meet SDWA standards or be comparable to the water quality prior to impact if those supplies did not meet that standard. In effect, the SDWA is now the floor, rather than the ceiling for the water quality standard of replacement water supplies. As PIOGA has noted in its comments on the rulemaking, this obligation may create costly obligations, and in some cases, obligations that cannot be met even with the provision of a public drinking water supply. In its comments, PIOGA has disagreed with DEP that the new rule is the correct interpretation of Act 13, Section 3218(a).

An entirely new obligation is the Area of Review provision in Section 78a.52a, which requires operators to submit a report identifying the surface and bottom hole locations of active, inactive, orphan, abandoned, and plugged and abandoned wells within 1,000 feet of both the vertical and horizontal wellbores. Operators must review DEP’s well databases, review historical sources of information and mail a questionnaire to landowners within the specified area in order to gather information. Operators must create a monitoring plan and provide notice, as now required in Section 78a.73, to owners and operators of nearby wells that may penetrate the same formation being stimulated in the new well. Operators must cease operations if communication occurs and may not resume without DEP authorization.

The revised Section 78a.58 allows operators to conduct processing of fluids (including mine-influenced water) and drill cuttings on the well site with DEP approval, similar to the existing OG-71 approval process. In addition, operators may mix fluids with freshwater, aerate fluids and filter solids from fluids without DEP approval, provided that the activities are conducted within secondary containment. For any onsite processing activities, the operator must develop an action plan for monitoring and responding to radioactive materials.

The new rules completely overhaul the requirements for reporting and remediating spills. Section 78a.66 requires immediate reporting of spills that cause or threaten to pollute waters of the Commonwealth and requires reports within two hours for any spill or release of 5 gallons or more over a 24-hour period that is not completely contained on secondary containment. Remediation procedures for spills of at least 42 gallons (or spills that threaten to pollute waters of the Commonwealth) require attainment of Act 2 standards within new reporting and time limits that are not required within Act 2 or applied to any other industry.

Finally, the use of pits for temporary storage on unconventional well sites is entirely prohibited under section 78a.56, and three new provisions establish rules for off-site impoundments. Section 78a.59a sets requirements for impoundment embankments. Section 78a.59b provides for the registration, location and construction of well development impoundments (freshwater impoundments). The bottom of well development impoundments must be at least 20 inches above the seasonal high groundwater table, as certified by a soil

scientist or similarly trained person. Section 78a.59c requires the closure of all centralized impoundments within three years, unless a permit is obtained under the Solid Waste Management Act. Closure plans must be submitted within six months.

The department plans to begin revisions to Subchapter D of Chapter 78a, Well Drilling, Operations and Plugging, sometime later this year. ■

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