

## PIOGA Contests Stringent Regulations

HARRISBURG, PA.—Pennsylvania's oil and gas industry is facing one of the most stringent regulatory environments in the country, energy leaders there suggest. And if present trends continue, the situation likely will worsen.

Pennsylvania Independent Oil & Gas Association Chairman Gary Slagel comments that the commonwealth's Department of Environmental Protection seems to respond to every complaint or concern it receives about the industry with new requirements or policies. The DEP appears to want to regulate all aspects of the industry, rather than allowing companies and industry groups to develop their own best practices, he says.

"The DEP does not seem willing to recognize that Pennsylvania's already comprehensive (regulatory) program is more than sufficient," Slagel remarks. "There is no need to develop new regulations to govern everyday occurrences, such as a slip that occurs on an access road. Those kinds of things happen; that is why we have inspectors and compliance requirements. But it certainly doesn't indicate there is a need for more regulations to cover those occurrences."

Slagel says PIOGA is growing concerned with the building trend because the "cost of doing business" continues to increase with each new regulation and requirement. And, because there is limited state pre-emption over municipal ordinances, PIOGA members have to meet requirements at all levels, he says. "Because of all this, Pennsylvania's regulatory environment remains a very complex situation," he adds.

Among the regulations Slagel says PIOGA is monitoring and commenting on is DEP's latest draft final-form rule

for oil and gas surface operations. Subchapter C of Chapter 78 for conventional operations and Chapter 78a for unconventional resources have been in the rule-making process for four years, he notes. The latest revisions were made public in August and early September.

"The Chapter 78 rules are a very high priority for PIOGA," Slagel remarks. "We cannot follow through with any legal action until the rules take effect, but we are looking at all our options. If at all possible, we want to encourage the DEP to scale the regulations back."

### Chapter 78 Rules

PIOGA Legal Counsel Jean Mosites of Babst Calland advises and assists with the association's political and legal responses to the proposed revisions to the Chapter 78 Oil & Gas Rules. She says the association's substantive objections to and concerns about the rules include at least five categories.

First, Mosites says the new well permitting application process will add several items that will make the process longer and more difficult for both conventional and unconventional well operators. This includes adding a new process for broadly defined "agencies" to provide comments for DEP to consider in developing permit conditions for wells near schools, playgrounds, state forests, and other listed areas.

The process also would allow DEP to require protecting species that are not listed as threatened or endangered, but have been categorized as "special concern species" by various agencies and entities. Categorizing such species is not subject to any scientific standard or peer review, and proceeds without public input or accountability, Mosites says.

The second category is waste and water handling, where Mosites says the association is seeking more flexibility so that companies can recycle more. However, the DEP has constrained ways that wastewater may be handled, including transportation, storage and disposal.

Mosites lists the third category of concern as site restoration after wells have been drilled. She says that while this is regulated already under Pennsylvania's Clean Stream Law, the DEP wants to create additional obligations that will increase a well site's footprint and environmental impact. "The DEP has added requirements regarding post-construction stormwater controls that increase the size of the well pad," she explains. "That is one example of (the proposed rules) being more costly and creating a bigger footprint, if this is finalized."

Fourth, PIOGA is concerned with the DEP's proposed rules on spill remediation, which will affect any and all materials spilled at a well site. Mosites clarifies that these rules do not acknowledge variations in the materials spilled, commenting that some, such as brine, are more benign than others. Instead, the rules include all materials under a very strict and overly complicated procedure, she contends.

"For example, on a well site, brine is a fairly benign material, relatively speaking, because it's not excessively toxic," she elaborates. "Yet the regulations are stricter for well site spills than they are for other industries or other materials. It's not a good fit. The department is creating a very costly cleanup process that does not match the potential impact from spills, especially small ones."

The last category Mosites describes is a proposal for applicants to identify abandoned wells, which is an issue that

she says will affect operators of both conventional and unconventional wells. Under the proposed rules, operators must identify active, inactive, abandoned and plugged wells 30 days before drilling. She says PIOGA objects that several parts of the identification rules are unclear.

“Operators have to report these other wells, but sometimes there isn’t any good information, or sometimes they are on private property to which (the operator) doesn’t have access,” she worries. “Nevertheless, the department proposes to require operators to monitor these wells, which seems to imply that you need someone physically on site to look at each one of them.”

Even though, in concept, all operators look for nearby wells as part of their due diligence, Mosites asserts DEP’s proposal raises the level of confusion about “what the new obligations include, how far they go, and when they end.”

Mosites gives one example of this ambiguity: Operators must submit a questionnaire to landowners on forms to be provided by the DEP. “We don’t have the forms, so we don’t know what they will say,” she protests. “The department has provisions we can’t evaluate yet, because we don’t have the form.”

“I would say there are more than a dozen circumstances in the rule where that is the case—where there is a form or something that you need to know to actually understand the rule, but the forms haven’t been developed,” she continues.

Mosites emphasizes PIOGA objects to the rules’ enormous cumulative impact, as almost all of them would take effect on publication in early 2016. However, PIOGA recommends that the DEP allow additional time for industry to adjust, and that the rules’ effective dates should be staggered and phased in, so that the majority of the rules do not take effect simultaneously.

### Rule 13 Lawsuits

In June, PIOGA asked the Pennsylvania Supreme Court to enjoin the DEP from requiring well permit applicants to comply with certain provisions of Act 13—its comprehensive oil and gas regulatory package—that the court invalidated in its December 2013 *Robinson Township v. Commonwealth* decision (AOG, August 2015, pg. 20).

The Act 13 ruling declares specific well permitting requirements unconsti-

tutional, PIOGA Vice President and General Counsel Kevin Moody comments. “Court decisions apply to government agencies the same way they apply to others, but the DEP has ignored that,” he adds.

Because PIOGA was not a party in *Robinson Township*, Moody says the association first had to ask the Supreme Court to permit PIOGA’s intervention in the case so that it might ask the court to enforce its injunction. Moody reports the Supreme Court has denied the August intervention request, without explanation. However, at the same time PIOGA had also filed a declaratory judgment action in the commonwealth court, which he says asks that court to acknowledge the Supreme Court’s injunction and that the DEP is violating it.

The DEP’s preliminary objections to the declaratory judgment action do not address what the association is arguing, Moody asserts. “It was almost as if the DEP was responding to a complaint about another matter,” he describes.

The department was scheduled to file a brief supporting its preliminary objections before Oct. 1, he confirms. PIOGA already has filed a brief, but is allowed to file another, once the DEP has filed its brief in October.

Following that, the court is scheduled to hear oral arguments on the preliminary objections during the week of Nov. 16, Moody says. The arguments likely will be heard in Pittsburgh, as that is where the court will be sitting that week.

“We fully expect the DEP’s preliminary objections to be denied,” he states. “Then, finally, after all of this, the DEP will have to answer what we are arguing, because it hasn’t yet. I definitely think we have a very good chance of winning.”

If PIOGA wins its challenge, the DEP will have to stop requiring permit applicants to engage in the Pennsylvania Natural Diversity Inventory (PNDI) review process, which Moody says the department has been running through policy documents and not regulations.

“That has been one of our primary complaints over the years,” he says. “PNDI has been a special problem because it requires permit applicants to jump through a bunch of hoops set up by other agencies that exceed the scope of the Section 3215 public resources protections.”

Moody says the department has tried to make the PNDI process a part of the

Chapter 78 oil and gas regulations, and expand it tremendously in the regulations.

“If operators ignore any of these non-legal requirements, it could delay their projects and create additional costs, and a lot of them aren’t willing to do that,” he outlines. “There may be a good legal reason (to ignore a policy requirement), but not a good business reason. Many operators will do things they don’t have to do simply to move their projects along.”

### Local Regulations

PIOGA continues to monitor, comment on, and fight various unreasonable municipal, township and county ordinances against development activities. Opponents of natural gas development are citing *Robinson Township* in challenges to local zoning ordinances (AOG, July 2015, pg. 170). At the same time, Moody comments, there have been several cases of oil and gas companies disputing municipal ordinances’ validity or necessity.

While the majority of these battles have been uphill for the association, Moody describes one case as a “welcome and favorable decision.”

In September, a Pennsylvania appellate court upheld a conditional use permit issued by a Lycoming County township to allow gas drilling to go forward in a “residential agriculture” zoning district, Moody says. The key ruling finds that such operations are similar to and compatible with other uses in that zoning district.

Moody says the case went forward after homeowners in the Fairfield Township appealed Inflection Energy LLC’s conditional use permit. The homeowners cited concerns about well water contamination, truck traffic, and noise and light pollution.

“All these protests were against things that happen during the construction phase of the well site, or in the short-term,” he clarifies. “However, zoning laws are meant to allow or restrict things on a long-term basis.”

Additionally, Moody explains that the association’s greatest concern regarding local regulations is the campaign by Pennsylvania-based Community Environment Legal Defense Fund to establish additional local ordinances, “because it is the most egregious and illegal.”

“The group calls them ‘human-rights based ordinances,’” he says. “CELDF’s ordinances are premised on a ‘right to local self-government’ and have two

basic features: Denying rights as ‘persons’ that corporations have had for decades; and granting ‘personal’ rights to natural communities and ecosystems. And because its members believe they speak for the wetlands, they try to pass unconstitutional ordinances that deny corporation’s rights.”

Moody gives the examples of PIOGA members Seneca Resources’ and Pennsylvania General Energy’s legal challenges to CELDF ordinances in Highland Township, Elk County, Pa. and Grant Township, Indiana County, Pa. He says CELDF convinced these townships to ban injection wells, even though Seneca and PGE had received or were in the process of receiving permits from both federal and commonwealth regulators. The DEP revoked the

operators’ injection well permits during the litigation and will not reissue them because of the litigation.

“The CELDF and ill-advised local governments are disrupting operations based on ordinances that are completely unlawful,” he stresses. “Yet, they are enough to tie up operations for years, and CELDF still argues that the ordinances are not harming operators.”

Moody suggests that if local governments “want to change their form of government,” they should do it the way the Pennsylvania Constitution requires. Otherwise, he says the commonwealth’s local governments would start to resemble Italian city-states between the 9th and 15th centuries with no centralized govern-

ment.

“*Robinson Township* said municipalities had the authority and right to zone,” Moody adds. “But the question remains ‘What can they do, and what can’t they do?’

“It is a piecemeal situation all over the commonwealth,” he concludes. “We are seeing a whole gamut of ordinances. Some are reasonable, and some are very overreaching. It really hampers development because ordinances can be very different in adjacent municipalities. One of the dissenting opinions in *Robinson Township* said denying the commonwealth’s sovereign authority over local government was opening a Pandora’s box of municipal mischief, and that is exactly what we are seeing.” □