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## PADEP Proposes Tough New Policy for Enforcing Oil and Gas Violations and Responding to Water Contamination Complaints

*By R. Timothy Weston and Tad J. Macfarlan*

On October 3, 2014, the Pennsylvania Department of Environmental Protection (“PADEP”) unveiled a new draft policy that would strengthen its compliance and enforcement protocols for both unconventional and conventional oil and gas operators in the Commonwealth. A 30-day public comment period was opened by a notice published in the October 4th *Pennsylvania Bulletin*.

The draft policy, entitled “Standards and Guidelines for Identifying, Tracking, and Resolving Oil and Gas Violations” (the “Draft Policy”), both modifies prior inspection and enforcement procedures and describes a new process for providing timely responses to water supply contamination complaints. The Draft Policy would place renewed emphasis on issuing Notices of Violation (“NOVs”) for any alleged violation that cannot be remedied during an inspection, and for fully resolving violation negotiations within 180 days of notice. Further, the Draft Policy would affirm PADEP’s commitment to inspecting every well in the Commonwealth at key operational stages, such as before and during drilling, during casing and cementing, following well stimulation and completion, after post-drilling restoration, during plugging, after post-plugging restoration, before financial security is released, and after any complaint or violation.

PADEP is accepting public comments on the Draft Policy through November 2, 2014. Together, this policy and other impending events portend a significant effect on oil and gas enforcement for years to come, and it will be important for the industry to review the policy carefully and offer appropriate comments on its compliance approaches and procedures.

### Relationship to Currently Effective Oil and Gas Enforcement Policies

The *Pennsylvania Bulletin* notice<sup>1</sup> announcing the release of the Draft Policy indicates that when finalized, the new policy will replace PADEP’s 2005 guidance document entitled “Compliance Monitoring of Oil and Gas Wells and Related Facilities and Activities.”<sup>2</sup> While not stated in the *Pennsylvania Bulletin*, the Draft Policy would also effectively supplant two additional PADEP policies, (1) “Enforcement Actions by DEP’s Oil and Gas Management Program”<sup>3</sup> and (2) “Inspection Policy Regarding Oil and Gas Well Activities,” codified at 25 Pa. Code Ch. 78 Subch. X.

Parts I and II of the Draft Policy closely track the language from the “Enforcement Actions” policy, with only minor modifications. Similarly, Part III of the Draft Policy (regarding frequency of well inspections) parallels the “Inspection Policy” codified at 25 Pa. Code

<sup>1</sup> 44 Pa.B. 6290 (October 4, 2014).

<sup>2</sup> Doc. No. 550-3000-001 (Rev. June 25, 2005).

<sup>3</sup> Doc. No. 550-4000-001 (Rev. June 25, 2005).

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§ 78.903, in that both establish a schedule for inspecting wells. However, the inspection schedules called for in the Draft Policy are somewhat different than those in current § 78.903.<sup>4</sup> Thus, the Draft Policy, if finalized, would essentially merge three important oil and gas enforcement policies into one.

However, the Draft Policy would not directly affect or supersede PADEP's current guidance document entitled "Civil Penalty Assessments in the Oil and Gas Management Program,"<sup>5</sup> which provides a methodology for calculating an appropriate civil penalty in instances where PADEP determines a civil penalty is appropriate. This important guidance is often used, for instance, to guide negotiations of consent assessments of civil penalty ("CACP") and consent orders and agreements ("CO&A"). Notably, however, the "Civil Penalty" guidance has not yet been updated to reflect changes (including statutorily increased penalty maximums) enacted as part of Act 13<sup>6</sup> in 2012.

### Water Supply Investigation Requests

One of the most notable aspects of the Draft Policy is the process it would establish for evaluating and responding to water supply contamination complaints. Part IV.B of the Draft Policy would set the following series of deadlines for actions by PADEP employees after receipt of a water supply investigation request:

- District Office staff where the request is received should immediately collect and enter basic information regarding the request into PADEP's "water supply investigation request tracking system."
- The same business day, a water quality specialist ("WQS") "should" attempt to contact the requestor, and "under no circumstances shall the WQS or the WQS's supervisor fail to attempt to contact the requestor within two business days" of receiving the request.
- Within two business days of contacting the requestor, the WQS "should" conduct and document a site inspection and obtain water samples if warranted. A site inspection "shall be conducted within 10 calendar days of contacting the requestor" unless the landowner refuses to grant access to the site.

If the WQS observes a potential impact to the water supply ("e.g. effervescence, turbidity, or similar obvious contamination"), the process then diverges depending on if the water supply is within the "rebuttable presumption area." In accordance with 58 Pa.C.S. § 3218(c), the "rebuttable presumption area" for conventional operators is within 1,000 feet of the well and six months of completion of drilling or alteration activities, and for unconventional operators is within 2,500 feet of the vertical well bore and 12 months of the later of completion, drilling, stimulation, or alteration activities.

- If the potentially impacted water supply is outside the rebuttable presumption area, the WQS should refer the request to a "Program Geologist" to conduct a hydrologic investigation, who will determine whether pollution or diminution of the water supply has occurred and, if so, whether the pollution or diminution was caused by oil and gas

<sup>4</sup> Presumably, the existing inspection policy set forth in § 78.901–78.906, which was originally adopted by the Department (but not as a rule by the Environmental Quality Board) in 1987, see 17 Pa.B. 3235 (August 1, 1987), would be repealed and removed from the Pennsylvania Code.

<sup>5</sup> Doc. No. 550-4180-001 (January 12, 2002).

<sup>6</sup> Act of February 14, 2012 (P.L. 87, No. 13), 58 Pa.C.S. §§ 2301–3504.

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activities. PADEP's "goal" is to make this determination within 45 calendar days of receiving the complaint. If "extenuating circumstances" prevent PADEP from making a determination within 45 days, a letter "shall" be sent to the water supply user/owner summarizing the state of the investigation. At the end of the investigation, if PADEP positively determines that oil and gas activities adversely impacted the water supply, PADEP will request that the responsible operator provide a temporary water supply, if necessary, within 24 hours.

- If the potentially impacted water supply is within the rebuttable presumption area, PADEP "shall advise" the operator to provide a temporary water supply within 24 hours, regardless of whether the operator can establish one of the statutory defenses to liability (including, for instance, results of pre-drill sampling indicating that the water supply was already contaminated, or that the landowner refused access to the site to conduct such sampling). Instead, PADEP is to request information from the operator supporting the statutory defenses at the same time the operator is advised to provide a temporary water supply. If the operator fails or refuses to provide a temporary water supply within 24 hours *and* fails to rebut the presumption of liability, PADEP "shall" issue an administrative order directing the operator to provide a temporary water supply within 24 hours. Then PADEP will fully investigate whether pollution or diminution of the water supply has occurred and, if so, whether the pollution or diminution was caused by oil and gas activities, as above.

Within 30 calendar days of a final positive determination, PADEP "shall" issue an NOV to the responsible operator, directing the operator to respond in writing within 10 business days. Within 30 calendar days of the operators' written response, PADEP "shall" issue an administrative order to permanently restore or replace an adversely affected water supply, unless (1) the water has already been restored or replaced, (2) the water supply investigation request has been withdrawn, (3) the operator and water supply owner have come to an agreement, or (4) the water supply is no longer polluted or diminished.

While certain aspects of this process adhere to the language of Act 13, other elements go beyond Act 13, such as the suggestion that PADEP can and should "advise" an operator to provide a temporary water supply even if the operator can firmly rebut the presumption of liability.

### Issuance and Negotiations of NOV's

The release of the Draft Policy may also signal the beginning of a more stringent enforcement stance regarding oil and gas well operations with respect to the issuance and expedited resolution of NOV's.

The Draft Policy provides that all oil and gas violations should trigger the issuance of an NOV within 14 days of discovery unless "the violation is corrected ***before the end of an inspection,***" in which case PADEP may exercise its discretion to merely record the violation in an inspection report. Notably, this policy is more stringent than required by PADEP's generally applicable "Standards and Guidelines for Identifying, Tracking, And Resolving Violations"<sup>7</sup> across all programs, which only requires the issuance of an NOV if an operator

<sup>7</sup> Standards And Guidelines For Identifying, Tracking, And Resolving Violations (April 4, 2004), available at [http://www.dos.state.pa.us/portal/server.pt/document/504415/standardsandguidelines\\_pdf](http://www.dos.state.pa.us/portal/server.pt/document/504415/standardsandguidelines_pdf).

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fails to resolve a violation “within the 14 calendar day period”—not before the end of an inspection, which is often impossible to do.

The Draft Policy also states that violation negotiations addressed through an enforcement document (such as a CACP or CO&A) “must be finalized within 180 calendar days” of notification to the alleged violator, “unless the Deputy Secretary or Bureau Director agrees that an extension of time is acceptable in the specific case. Otherwise, [PADEP] should take the applicable enforcement action that imposes the obligations necessary to resolve the violations.” Under current practice, violation negotiations often take more than 180 days to complete, especially when there are novel or complex technical and legal issues involved. This policy, if strictly adhered to, could result in fewer negotiated settlements and more unilateral enforcement actions resulting in costly litigation before the Environmental Hearing Board.

It should be noted that most or all of the above-referenced language is already included almost verbatim in PADEP’s “Enforcement Actions” policy, which was last updated in 2005. The restatement of this language in the Draft Policy may be an indication that PADEP plans to more literally adhere to these procedures in the future, and provides operators with a new opportunity to comment on its appropriateness.

### Inspection Schedule

The Draft Policy also includes a rigorous inspection schedule, requiring district offices to ensure that all wells are inspected at least once at the following intervals:

- a) Prior to the commencement of drilling on a new well pad.
- b) During drilling, casing, and cementing operations.
- c) Following well stimulation and completion activities.
- d) Following the time period in which the owner or operator is required to restore a site after drilling a well.
- e) While a well is being altered or repaired or when casing is being replaced.
- f) Prior to a well being granted inactive status.
- g) During the plugging of a well.
- h) After the owner or operator restores a site following plugging or abandonment.
- i) Before a bond or other financial security is released.
- j) Annually for disposal wells.
- k) Following a violation to determine whether the violation has been corrected.
- l) Following a complaint.

This schedule is similar to the well inspection schedule already codified at 25 Pa. Code § 78.903 of the “Inspection Policy,” but the two schedules are not the same. Most notably, the Draft Policy drops the blanket once-per-year inspection of operating wells—a change that PADEP oil and gas program leaders indicate is needed to focus available inspection resources on those activities that are most likely to present compliance issues. It is unclear

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if and when PADEP plans to amend the “Inspection Policy” codified in the Pa. Code to conform to the Draft Policy.

### Conclusion

The release of the Draft Policy provides an important opportunity for operators in the Commonwealth to provide input to the direction and procedures used in PADEP's enforcement of oil and gas regulations, both for conventional and unconventional operations. Broader enforcement priorities will also be shaped by the outcome of the upcoming gubernatorial election and the selection of the next PADEP Secretary, among other developments. There is little doubt that in the current political setting, high public attention has been placed on compliance issues related to the industry, with significant implications as to the future for both public trust in regulatory regimes and the industry's reputation. The industry must closely monitor and consider its options for participation in shaping these compliance policies and procedures, as they have a substantial potential to significantly affect operations in the years ahead.

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