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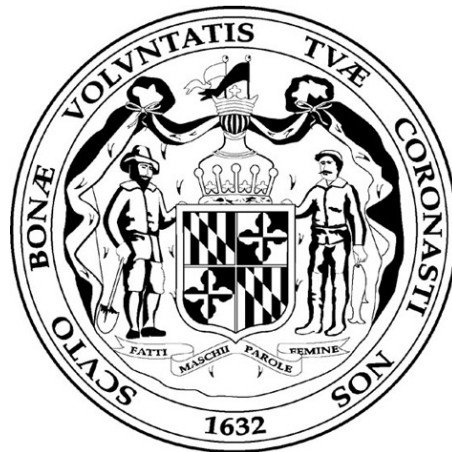
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MARYLAND



Davin L. Seamon *

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I. Proposed Regulations

Marcellus Shale development in Maryland’s Western panhandle remains at a standstill. A moratorium on the issuance of permits “for the hydraulic fracturing of a well for the exploration or production of natural gas” shall continue until October 1, 2017.¹ The Maryland statute defines hydraulic fracturing as:

[A] drilling technique that expands existing fractures or creates new fractures in rock by injecting fluids, often a mixture of water and chemicals, sand, or other substances, and often under pressure, into or underneath the surface of the rock for purposes that include well drilling for the exploration or production of natural gas.²

This also includes “Fracking[,] Hydrofracking[,] and Hydrofracturing.”³ Thus, the rich reserves situate in the counties of Garrett and Allegany remain untapped—but the end of this stagnation may be near.

Provisions of the aforesaid statute task the Maryland Department of the Environment (the “Department”) to promulgate a regulatory framework for permitting and production in Maryland’s Marcellus Shale. The Department was to “adopt regulations to provide for the hydraulic fracturing of a well for the exploration or production of natural gas” on or before October 1, 2016;⁴ however, “[r]egulations adopted by the Department in accordance with subsection (b) of this section may not become effective until October 1, 2017.”⁵ While the Department failed to meet the statutorily imposed promulgation deadline, it did manage to publish draft regulations in the

1. MD. CODE ANN., ENVIR. § 14-107.1(d) (West 2016).

2. *Id.* § 14-107.1(a)(1).

3. *Id.* § 14-107.1(a)(2).

4. *Id.* § 14-107.1(b).

5. *Id.* § 14-107.1(c).

Maryland Register on November 14, 2016, with the public comment period thereon closing a month later on December 14, 2016.⁶ While

[t]he purpose of the action is to update the regulations governing the exploration and production of oil and gas to address technologies that were not typically employed in Maryland when the existing regulations were adopted, including hydraulic fracturing and horizontal drilling[,] [t]he proposed regulations [also] ensure that any exploration and production of oil and gas is conducted in a manner protective of public health, safety, the environment, and natural resources.⁷

The Maryland General Assembly's Joint Committee on Administrative, Executive, and Legislative Review (the "AELR Committee") sent the Department a letter on December 29, 2016 "asking the Department to delay the final adoption of the regulations so that the [AELR C]ommittee could conduct a more detailed study of the regulations."⁸ "The Department will continue to work with the AELR Committee to provide the information they are requesting and . . . evaluate any input they provide."⁹

It remains important to note that the proposed regulations in no way represent the final version thereof to be enacted; however, here are a few interesting provisions to highlight within the large volume of proposed regulations:

A. Incident Notification

The proposed regulations require that:

[A]n operator shall report immediately, but no later than 30 minutes after detection, any condition such as a fire, break, blowout, leak, escape, spill, overflow, or other occurrence at the well pad, at a pipeline or compressor, or during transport that

6. Md. Dep't of Env't, Marcellus Shale Drilling Initiative, <http://mde.maryland.gov/programs/Land/mining/marcellus/Pages/index.aspx> (last visited Sept. 22, 2017); 43 Md. Reg. 1293 (Nov. 14, 2016), available at http://mde.maryland.gov/programs/LAND/mining/marcellus/Documents/261901_Proposed_111416.pdf.

7. *Id.*

8. Letter from Roger Manno, S. Chair, & Samuel I. Rosenberg, H. Chair, to Benjamin H. Grumbles, Dep't of the Env't Sec'y, Md. Gen. Assemb.: J. Comm. on Admin., Exec., & Legis. Review (Dec. 29, 2016), available at http://mde.maryland.gov/programs/LAND/mining/marcellus/Documents/16-232P_to_Sec.pdf; see also Md. Dep't of Env't, *supra* note 6.

9. *Id.*

creates a safety or pollution hazard to . . . [t]he emergency contact official of the nearest downstream water supplier if pollutants are not contained on the well pad; and . . . [to t]he Department.¹⁰

In addition, “[a]fter [such] an occurrence . . . , the operator shall remain available until clearance to leave is given by the Department.”¹¹

B. The Comprehensive Development Plan Concept

The proposed regulations define a Comprehensive Development Plan (“CDP”) as “a document prepared by a person holding oil or gas interests describing the person's plans for exploration and production in the Maryland portion of an oil- or gas-bearing formation for at least the succeeding 5 years.”¹² Notwithstanding a few narrow exceptions:

[U]nless the new oil or gas well is included in a final CDP . . . , the Department may not accept or process an application for a drilling and operating permit for an oil or gas well that will use one or more of the following techniques: (1) Directional drilling; (2) More than one well on a well pad; (3) Acid stimulation, except for acid stimulation of a storage well; and (4) High volume hydraulic fracturing.¹³

The CDP scope and contents section of the proposed regulations require the applicant to “ensure that the geographic scope of the CDP includes, at a minimum, all land on or under which the applicant expects to conduct exploration or production activities over a period of at least the succeeding 5 years[,]” while “avoid[ing], to the extent possible, the surface impacts associated with the applicant's planned development, minimize[ing] the surface impacts that cannot be avoided, and mitigate[ing] the remaining impacts.”¹⁴ In addition to maps, plats and geological information that are commonplace in laying out and working up a drilling unit, the CDP must also include “travel routes in Maryland for transportation of equipment and materials to and from the well pad” and a detailed “water acquisition plan” setting forth both sources and amounts of water “needed to support the CDP.”¹⁵

10. 43 Md. Reg. 1299.

11. *Id.*

12. *Id.* at 1296.

13. *Id.* at 1300.

14. *Id.* at 1301.

15. *Id.*

After the applicant completes the draft CDP and submits it to the Department, the Department of Natural Resources, the Department of Health and Mental Hygiene and “[t]he local agencies responsible for land use, roads, public health, emergency management, and environmental protection within the areas covered by the draft CDP[,]” the applicant must publish a notice of the draft CDP on its website and “[o]nce per week for two consecutive weeks in a newspaper of general circulation in the areas where the proposed development would occur.”¹⁶ This public notice must include, among other items:

[A] link to the applicant’s website where the public may view the draft CDP[,] . . . [n]otice of a comment period on the draft CDP, which shall be no earlier than “30 calendar days after the notice was last published in the newspaper . . . and 5 calendar days after [a required] public meeting” to occur “[w]ithin the area covered in the CDP . . . and [n]o sooner than 14 calendar days after the notice was last publish in the newspaper”¹⁷

The purposes of said public meeting are to provide an overview to the public of the CDP, answer questions regarding the CDP, and accept oral comments on the CDP.¹⁸ The applicant must accept and consider each public comment, publishing each written and oral comment on its website, and said applicant may make changes to the draft CDP in response thereto.¹⁹ Subsequently, the applicant “shall publish the final CDP on its website and notify the Department of the date the [final] CDP was published.”²⁰ A final CDP remains in effect for 10 years from its publication date, and any “significant modification” thereto, “such as a change in the location of a drilling pad that places it closer to special conservation areas or the addition of new drilling pads,” requires the applicant to begin the notice process above anew, while:

[A] modification that causes no change in the surface impact in the approved CDP, such as the installation of additional wells on an existing pad or a change in the sequence of development, may be made by publishing the modified CDP on the applicant’s

16. *Id.* at 1301-02.

17. *Id.* at 1302.

18. *Id.*

19. *Id.*

20. *Id.*

website and notifying the Department of the date the modified CDP was published.²¹

C. Initial Filing Fees

With these proposed changes, an applicant seeking a drilling and operating permit shall:

[P]ay a fee for each well to the Department of: (a) \$30,000 with the application for drilling a new well or reentering a well; (b) \$20,000 with the application for refracturing or reworking a well; and (3) \$25,000 for the 5-year renewal of a drilling and operating permit for an oil or gas well installed after October 1, 2010[, while] a permittee who requests a modification or transfer of a permit shall pay a fee of \$1,000 to the Department.²²

Put another way, “[i]n any fiscal year, if the fee schedule established by the Department generates revenue that exceeds or falls short of the amount necessary to operate a regulatory program to oversee the drilling of oil and gas wells, the Department shall adjust the fees in the following fiscal year.”²³

D. More Opportunity for Public Participation at the Application Review Stage

Under this proposed regulatory scheme, the Department “shall forward the application or portions of the application to appropriate State and local government agencies with responsibility for public health, natural resources, emergency management, cultural and historical resources, and roads, with a request for comment on the application within 30 calendar days.”²⁴ In addition, the Department is required to prepare a public notice for publication in the newspaper in the same manner as the draft CDP, which, among other items, must include:

The name, address, and telephone number of the office within the Department from which information about the application may be obtained[,] . . . [a] statement that any further notices about actions on the application will be provided by mail to those persons on a mailing list of interested persons[,] . . . [a]

21. *Id.*

22. *Id.* at 1301.

23. *Id.*

24. *Id.* at 1303.

description of how persons may submit information or comments about the application or request to be included on the mailing list of interested persons[,] . . . [a] description of how persons may request a public informational meeting, or, if requested by the applicant, a notice that a public informational meeting has been scheduled[,] and [a] deadline for the close of the public comment period by which information, comments, or requests must be received by the Department.²⁵

If requested of the Department by an interested person, the Department shall “[h]old the meeting within 45 calendar days after the date of the request, unless extenuating circumstances justify an extension of time[,]” publish notice of the meeting as provided above, and “[m]ail notice of the public informational meeting to those persons on the interested persons list no later than 14 calendar days before the meeting.”²⁶

E. Transportation and Truck Traffic

The Department’s proposed regulatory framework includes transportation and truck traffic requirements for applicants seeking an initial drilling and operating permit. The expectation is to minimize potential conflicts with the public resulting from travel. The language provides:

An applicant shall ensure that its transportation plan, at a minimum: (1) Avoids truck traffic during times of school bus transport of children to and from school locations; (2) Ensures that truck traffic does not interfere with public events or festivals; (3) Minimizes truck traffic in residential areas; and (4) Minimizes conflict with public uses such as hunting and fishing.²⁷

Further, “[i]f practicable, the applicant’s plan shall reduce the number of truck trips to deliver material to the well pad and remove wastes from the well pad, and minimize the impact of remaining trips.”²⁸

25. *Id.*

26. *Id.* at 1304.

27. *Id.* at 1307.

28. *Id.*

F. Site Security

Some proposed regulations place additional requirements on operators, including provisions for site security. Those provisions are as follows:

[T]he operator shall secure the site. [] At a minimum, the operator shall ensure that the security measures include: (1) Perimeter fencing, or another method of limiting access to the site approved by the Department; (2) Providing local emergency responders with duplicate keys to locks; (3) Fencing around any surface impoundments; and (4) Appropriate signage that: (a) Has letters at least 1 inch high; (b) Indicates the name of the permittee, the name of the lessor or landowner, and the Department and API well identification numbers; (c) Indicates phone numbers for the operator and regulatory agencies required to be contacted in the event of an emergency at the site; (d) Is posted in a prominent place as directed by the Department; and (e) Is kept in good condition.²⁹

G. Noise and Light

As to noise impacts—among other provisions:

The operator shall conduct noise modeling before beginning operations to demonstrate that noise standards in COMAR 26.02.03 will be met and noise sensitive areas will be protected [and] . . . shall conduct noise monitoring at least once during drilling and once during hydraulic fracturing, to confirm that noise standards are met.³⁰

In addition, “[t]he Department may require the operator to perform noise monitoring in response to complaints about noise.”³¹

As to light impacts—among other provisions, “[t]he operator shall ensure that night lighting: (1) Is used only when and where necessary; (2) Is directed downward; and (3) Uses low pressure sodium light sources wherever possible.”³² Further, “[i]n establishing light restrictions and management protocols, the operator shall minimize conflicts with

29. *Id.* at 1310.

30. *Id.* at 1311.

31. *Id.*

32. *Id.*

recreational activities, in addition to minimizing stress and disturbance to sensitive aquatic and terrestrial communities.”³³

H. Fines

Finally, the proposed regulatory scheme imposes some “bite” in that violators are subject to a misdemeanor charge and a daily fine capped at \$50,000.

For example:

A person who violates or causes an act which violates Environment Article, §§14-1.01 – 14-120, Annotated Code of Maryland, or this chapter, or who violates or fails to comply with a permit issued under this chapter, or an order of the Department when due notice is given, is guilty of a misdemeanor, and, upon conviction, the violator is subject to a fine not exceeding \$10,000 per day for each day of the offense, not to exceed a total fine of \$50,000, with costs imposed at the discretion of the court.³⁴

II. Conclusion

While waiting out the lumbering approval process of the Department and the AELR Committee, one must wonder if all of this effort is “too little, too late” for the State of Maryland. The state’s longstanding permitting moratorium and protracted discernment and approval processes leading up to this position on the precipice of *actually granting a drilling permit* have placed it at a distinct disadvantage—both temporally and in perception. Will operators flock to Maryland’s limited, but thus far untapped, reserves? Stay tuned to find out!

33. *Id.*

34. *Id.* at 1315.