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Energy

A Delaware River Basin Commission vote on its proposed final regulations, lifting a moratorium on “natural gas development projects” in the Delaware River Basin, is far from certain in the near term, write Harry Weiss and Ronald Varnum of Ballard Spahr LLP. Everything from election-year politics to renewed concerns about the safety of modern natural gas extraction techniques like hydraulic fracturing, to the need for another layer of regulation, presents a real question mark as to whether the commission has mustered the requisite stakeholder support to push the final proposed regulations to a meaningful resolution.

The Future of Oil, Gas Drilling in the Delaware River Basin

By HARRY WEISS AND RONALD VARNUM

An important piece of the Marcellus Shale regulatory picture recently came into better focus with the Delaware River Basin Commission’s release of its proposed final regulations for “natural gas development projects” in the Delaware River Basin. The overall picture, however, remains blurry because the commission has not yet voted to implement the new rules, nor set a date for a meeting to do so. Worse yet, there does not seem to be consensus among commission members on whether the commission should even permit oil and gas development in the areas of the Basin lying atop to the gas-rich Marcellus Shale, or, if exploration is permitted, how it should proceed.

The Delaware River Basin Commission (DRBC) exercises jurisdiction over water quantity and quality in the Basin through a 1961 interstate compact by and be-

tween Delaware, New Jersey, New York, Pennsylvania, and the United States. The United States is represented on the commission by the U.S. Army Corps of Engineers. For major commission actions, each of the states has one vote, as does the Corps. In general, most actions of the commission are passed unanimously. Straw polls taken before an anticipated vote on the proposed rules in November revealed that the vote on proposed regulations, which would open the Delaware River watershed to natural gas development, would be a big exception (224 DER A-22, 11/21/11). Pennsylvania, which already has made a large investment in shale gas extraction, supports the measures; New York, with rich natural gas deposits of its own, opposes the measures and in fact has commenced litigation in opposition to the current structure. The two other member states, Delaware and New Jersey, which do not have significant natural gas reserves and are not likely to see any drilling at all, cannot agree on the proposed rules. Delaware opposes, while New Jersey supports, implementation of the regulatory program. That currently leaves the United States as the swing vote, and the political climate in Washington, D.C., aside, there is a real issue as to the viability of a regulatory scheme that cannot find unanimous support among commission members.

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Watersheds a Concern.

Concern for the environmental impact from drilling in the Marcellus Shale on waters the commission designates for “Special Protection,” including watersheds

that supply New York City with drinking water, had prompted the commission in 2009 to issue a moratorium on well drilling activities in the Basin pending promulgation of new rules to govern all oil and gas extraction in the Basin. The commission published its initial proposed regulations in December 2010 and took public comment through April 15, 2011, before issuing its proposed final regulations.

Highlights of the proposed final rules include:

- The commission would rely upon member states to regulate construction and operation of individual natural gas wells and well pads.
- All water sources within the Basin used for natural gas development activities would require commission approval.
- Natural gas development projects in the Basin would have to obtain a Bulk Water Use and Management Approval (BWA) from the commission before using water from any source—whether inside or outside the Basin—for natural gas development activities, and before commencing well pad construction or beginning operation of a pre-existing well pad or natural gas well.
- The BWA may be issued by order of the DRBC executive director, except that approval of the full commission would be necessary where a project is proposed for areas managed by the National Park Service or other federal agencies, or for the watersheds draining into New York City's Delaware River Basin reservoirs. A variance also would be required in the Upper Delaware Scenic and Recreational River corridor.
- BWA approval would be subject to a number of conditions and include particular elements designed to protect water resources in the Basin. For example, the BWA would limit the volume of water approved for use, would be conditioned on a program to encourage water conservation, and would require well pad projects to meet applicable siting and setback restrictions.
- Developers constructing more than five well pads in the Basin, or project sponsors with leaseholds totaling more than 3,200 acres, would be obligated to design a Natural Gas Development Plan (NGDP) intended to analyze potential water resource impacts and develop measures to avoid, minimize, mitigate, or compensate for impacts.
- Initial development would be limited to 300 wells in the Basin, because the regulations would require the commission to authorize BWAs for additional wells at a public meeting.
- Wastewater from hydraulic fracturing and other production wastewater would have to be stored in closed tanks and then reused or removed from the drilling site within a prescribed time period, usually 90 days.
- Open impoundments at well drilling sites could be used only to store fresh water.
- Eighteen months into the program, commission staffers will provide the commission with an operational review of the program along with recom-

mendations for adjustments to the program which the commission must take up in six months.

Decision Would Lift Drilling Moratorium.

Implementation of the rules presumably would lift the moratorium on shale oil and gas development in the Basin, which covers portions of New York, New Jersey, Pennsylvania, and Delaware in the Delaware River watershed. Approval of the regulations would open up to drilling and exploration tens of thousands of acres (much of that land already leased from anxious landowners) in Wayne and Pike counties in northeastern Pennsylvania, and remove one more obstacle facing industry and landowners hoping to cash in on Marcellus and Utica shale reserves underlying hundreds of thousands of acres in New York. Further delay promises to increase the frustration of hundreds of landowners in Wayne County who only have to take a few steps to the west, over the hill into Susquehanna County, to see their Pennsylvania neighbors already reaping economic benefits from the drilling activity there.

The revised draft regulations are not open to further public comment. A vote on the final regulations had been scheduled for November 21, 2011, but that vote was postponed when it became apparent that the four member states of the compact would split their vote, and the role of tiebreaker would fall to the federal government in the form of the U.S. Army Corps of Engineers.

As of the drafting of this article, the DRBC still has not announced a new date for the vote, perhaps suggesting there may not be any action absent reaching consensus at least from New York, which itself does not yet permit any drilling in or out of the Basin and is pursuing litigation against the Corps. New York's Attorney General has objected to the commission's promulgation of regulations without an environmental review consistent with the National Environmental Policy Act. New York has brought a lawsuit against the Corps and other federal agencies to compel that review of the proposed regulations.

In addition to New York's preemptive strike, other member states are presumed to be evaluating whether the revised draft regulations satisfy the concerns they expressed during the public comment period and whether further action needs to be taken.

Some environmental groups have already sued to block drilling in the Basin, and drilling opponents may further challenge the commission's authority to finalize regulations or may contend that the regulations do not go far enough in protecting water resources of the Basin. Industry has generally expressed a desire to work with the commission and its staff to ensure that, should drilling programs be permitted to commence, water quality concerns in the Basin would be addressed in accordance with the regulations.

Industry could, however, object to particular aspects of the regulations, or even to the commission's authority to regulate well development in light of existing state water quality and well pad development regulations.

All of this has created the perception that the best efforts of the commission to balance stakeholder concerns has resulted in a set of regulations that makes no one particularly happy with the end product, with the possible exception of commission staffers who simply

may be content to be done sorting through 69,000 comments on the way to putting together the draft rules.

Industry Concerns About Regulation.

The draft rules have also raised fundamental questions about whether industry would find it attractive from an economic standpoint to develop in the basin. The entire regulatory program adds another layer of regulation to an industry that believes its conduct may already be regulated enough by the several states. Also, large swaths of Marcellus and Utica Shale natural gas deposits remain that lie outside the commission's jurisdiction in Ohio, Pennsylvania, and West Virginia that have yet to undergo significant development.

Some regulations go far beyond what industry is accustomed to seeing in other areas of the country. For example, industry generally sees little regulation in Pennsylvania impairing its ability to select the well sites it would prefer. The proposed rules, however, require large-scale developers in the Basin to submit for commission review and approval Natural Gas Development Plans. Moreover, the concept of a Natural Gas Development Plan in Pennsylvania could directly conflict with Pennsylvania law, recently reconfirmed in a series of federal court rulings, that generally provides the holder of the subsurface oil, gas or mineral estate with dominant rights over the surface estate.

Politically, the fuss over the regulations has broadened in scope with the presidential election approaching, and the Army Corps of Engineers holding the tie-breaking vote. In effect, the decision whether to support the regulations—or even to have a vote at all before November 2012—may now rest at the door of the Oval Office. President Obama is receiving intense criticism from Republican lawmakers for his decision Jan. 18 to defer the State Department's decision on whether to approve the XL Keystone pipeline project to funnel tar sand crude oil from western Canada to Gulf of Mexico

refineries, a decision project proponents contend will create jobs, promote overall economic activity and increase energy security. Development of shale gas in the East has been trumpeted for those very same virtues.

Of course, no one should assume that environmental groups are all that happy with the proposed rules either (not to mention drilling at all). The hydraulic fracturing process, or fracking, involves the high-pressure injection of water, sand, and a small amount of chemicals into rock formations deep underground to release trapped oil and gas that would otherwise be uneconomical to extract.

Of course, fears that hydraulic fracturing could contaminate groundwater persist, inflamed by a recent preliminary study conducted by EPA in Wyoming gas fields that announced what many think is the first evidence of fracking chemicals making their way into drinking water supplies (224 DER A-27, 11/21/11). Industry and the state of Wyoming have questioned the validity of the results. Despite the fixation on fracking, opponents might also begin to focus attention on studies of the potential impact of drilling activity on stream health in the northern reaches of the Susquehanna River Basin. Early returns from the Academy of Natural Sciences Patrick Research Center suggest that the uptick in industrial activity generated by drilling activity in that region of Pennsylvania has coincided with a general decline in the ecological health of streams in the area.

Everything from election-year politics to renewed concerns about the safety of modern natural gas extraction techniques like hydraulic fracturing, to the need for another layer of regulation, presents a real question mark as to whether the commission has mustered the requisite stakeholder support to push the final proposed regulations to a meaningful resolution in the near term. Right now, however, there is little reason to be optimistic for resolution of a process that has not even calendared a meeting for the actual vote.