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*Practice Group(s):*

*Energy, Infrastructure  
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*Oil & Gas*

## What do a Mountain, a Keystone, and a Buckeye Have in Common?

### Ohio Joins West Virginia and Pennsylvania as the Latest Appalachian Basin State to Enact New Laws Targeting Shale Gas Development

*By George A. Bibikos, David R. Overstreet, Bryan D. Rohm and Craig P. Wilson*

#### INTRODUCTION

Following legislative trends set by lawmakers in Pennsylvania and West Virginia, Ohio is the latest state in the Appalachian Basin to enact new laws governing natural gas development from unconventional formations like the Marcellus and Utica shales. A robust bill that covers a broad array of energy related topics, SB 315 (signed by Governor John Kasich on June 11, 2012) contains a number of new provisions for horizontal well development and related activities and sets forth standards and provisions applicable to gathering companies operating in the state.

#### HORIZONTAL WELLS

Ohio's Revised Code and its implementing regulations administered by the Division of Oil and Gas Resource Management ("Division") within the Ohio Department of Natural Resources ("ODNR") govern oil and gas well development in the state. SB 315 updates existing laws and creates new provisions mostly targeting "horizontal wells," defined as "a well that is drilled for the production of oil or gas in which the wellbore reaches a horizontal or near horizontal position in the Point Pleasant, Utica, or Marcellus formation and the well is stimulated."<sup>1</sup>

#### *What are some of the new requirements for horizontal wells?*

When SB 315 takes effect on September 9, 2012, well owners in Ohio will be subject to new obligations with respect to horizontal well development, including requirements to obtain and submit additional information with well permit applications. Some of the key provisions include the following:

- **Pre-Drilling Water Testing.** In order to obtain a permit to drill a new horizontal well, water wells within 1,500 feet of a proposed horizontal wellhead must be tested and the results included with the permit application.<sup>2</sup>
- **Water Source Identification.** As part of the application for a new well, including a horizontal well, the source of ground water and surface water used in production operations should be identified, indicating whether the water is sourced from the Lake Erie or Ohio river watershed. Additionally, the application should include the estimated rate and volume of water withdrawal used for

<sup>1</sup> OHIO REV. CODE ANN. § 1509.01(GG) (West 2012).

<sup>2</sup> *Id.* § 1509.06(A)(8)(c).

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production operations.<sup>3</sup> (Ohio has also recently enacted House Bill 473, which establishes a withdrawal and consumptive use permit program for waters sourced from the Lake Erie watershed.)

- Floodplains and Public Drinking Water Supplies. SB 315 authorizes the Chief of the Division to identify and evaluate site-specific permit conditions if a well is located in a 100-year floodplain or within the five-year time of travel associated with a public drinking water supply.<sup>4</sup>
- Road Use Agreements. An application for a permit for a new horizontal well must include a copy of the road maintenance agreement entered into between the operator and the appropriate local government. If an agreement cannot be reached, an affidavit to that effect must be submitted with the application.<sup>5</sup>
- Liability Insurance. Owners of horizontal wells are now required to obtain liability insurance of \$5,000,000 dollars of minimum coverage.<sup>6</sup>
- Pre-Construction Notice and Site Review. Well owners must notify the Division within 24 hours before constructing the “well pad,”<sup>7</sup> defined as “the area that is cleared or prepared for the drilling of one or more horizontal wells.”<sup>8</sup> The Division must inspect the site to determine any site-specific permit conditions before issuing the permit.<sup>9</sup>
- Impoundments. SB 315 authorizes the Chief of the Division to prescribe rules regarding location and construction of fresh water impoundments that are part of production operations.<sup>10</sup>
- Permit Conditions. Ohio previously required rules adopted by the Chief of the Division to identify subjects that the Chief will address when attaching terms and conditions to a permit, including (1) safety concerning the drilling or operation of a well; (2) protection of private and public water supplies; (3) fencing and screening at the well site; (4) containment and disposal of production wastes; (5) access road construction; and (6) noise mitigation.<sup>11</sup> SB 315 specifically applies this section to “horizontal well and production facilities associated with a horizontal well.”<sup>12</sup>
- Publication of Permits. All approved permits will be listed on ODNR’s website.<sup>13</sup>

### *What are the rules governing disclosure of chemicals used in drilling operations?*

SB 315 contains a detailed set of rules governing disclosure of chemicals used to facilitate drilling and stimulation of a well. In addition, SB 315 creates exemptions for disclosure of trade secrets, procedures to challenge claimed exemptions, and provisions allowing medical professionals to access information regarding the chemical composition of fluids used in drilling and stimulation operations. To illustrate:

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<sup>3</sup> *Id.* § 1509.06(A)(8)(a).

<sup>4</sup> *Id.* § 1509.06(H)(2).

<sup>5</sup> *Id.* § 1509.06(A)(11)(b).

<sup>6</sup> *Id.* § 1509.07(A)(2).

<sup>7</sup> *Id.* § 1509.06(K).

<sup>8</sup> *Id.* § 1509.01(HH).

<sup>9</sup> *Id.* § 1509.06(H)(1).

<sup>10</sup> *Id.* § 1509.23(A)(6).

<sup>11</sup> *Id.* § 1509.03(A).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* § 1509.06(F).

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- **Disclosures.** Within 60 days after completion of drilling operations, the owner of a well must file a well completion record disclosing the trade name and supplier of all products, fluids or substances (excluding cement) utilized to facilitate drilling and stimulation of the well. As part of the disclosure, the owner of the well must identify each additive used and provide a brief description of its purpose. Additionally, the owner of a well must include a list of all chemicals intentionally added to all products, fluids or substances including each chemical's corresponding chemical abstracts service number and the maximum concentration of each chemical. If a company that drills or stimulates a well provides incomplete information, the owner of the well is obligated to make reasonable efforts to obtain the required information. If recycled fluid is used, the owner of a well must disclose the well or facility that is the source.<sup>14</sup>
- **Exemptions for Trade Secrets.** The owner of a well may designate and withhold disclosure of the identity, amount, concentration, or purpose of a product, fluid, substance, or chemical component thereof, it considers to be trade secret. The owner of a well may enforce its rights to the identity, amount, concentration, or purpose of a product, fluid, substance, or chemical component thereof, pursuant Ohio's Uniform Trade Secret Act (R.C. §§ 1333.61, *et seq.*).<sup>15</sup> ODNR may obtain such information to investigate or respond to a spill, but is not permitted disclose such information.<sup>16</sup>
- **Challenges to Trade Secret Designation.** Property owners that have or may have an interest in obtaining chemical disclosures claimed to be trade secret may bring a civil action in the court of common pleas of Franklin County challenging trade secret designation. After commencement of the civil action, the court will conduct an in camera review to determine whether trade secret designation is appropriate.<sup>17</sup>
- **Disclosure to Medical Professionals.** Operators who claim trade secret protection for hydraulic fracturing fluid must provide medical professionals specific information about the chemical composition in order to assist in the diagnosis and treatment of individuals who may be affected by incidents associated with production operations of a well. Medical professionals who receive trade secret information are required to keep the information confidential. In contrast to Pennsylvania, a medical professional is not required to subsequently sign a confidentiality agreement with respect to trade secrets disclosed pursuant to SB 315.<sup>18</sup>

### GATHERING COMPANIES

With respect to gathering companies, SB 315 contains a number of new provisions of interest regarding gathering operations. SB 315 revises the definition of "pipe-line company" to exclude gathering companies from this classification; clarifies the jurisdiction of the Public Utilities Commission of Ohio ("PUCO") with respect to safety regulations applicable to newly constructed gathering lines; and exempts gathering facilities from the jurisdiction of the Ohio Power Siting Board ("OPSB") (the regulatory authority that issues certifications and approves construction of any "major utility facility").

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<sup>14</sup> *Id.* § 1509.10(A)(9–10).

<sup>15</sup> *Id.* § 1509.10(I)(1).

<sup>16</sup> *Id.* § 1509.10(J)(2).

<sup>17</sup> *Id.* § 1509.10(I)(2).

<sup>18</sup> *Id.* § 1509.10(H).

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### *What are the revisions to the definitions of “pipe-line company” and “natural gas company”?*

SB 315 revises the definitions of “pipe-line company” and “natural gas company” as follows:

- Transport Associated with Gathering Lines. SB 315 clarifies that an entity is a “pipe-line company” under Section 4905.03(A)(6) of the Ohio Revised Code “when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state; **but not when engaged in the business of the transport associated with gathering lines, raw natural gas liquids, or finished product natural gas liquids.**” (emphasis added).<sup>19</sup>
- Producers and Gatherers Delivering or Supplying Ohio-Produced Natural Gas Liquids. The current definition of “natural gas company” includes an entity “engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state” but not when the entity delivers or sells “Ohio-produced natural gas” to a lessor under a lease or a grantor of an easement to a gatherer. SB 315 provides that producers or gatherers delivering or supplying “Ohio-produced raw natural gas **liquids**” to such end users are also not natural gas companies for purposes of this definition.<sup>20</sup>

### *What are the revisions to the certification requirements of the Ohio Power Siting Board?*

The Power Siting Board’s jurisdiction over natural gas pipelines is generally limited to those falling within the definition of “major utility facility.”

- “Major Utility Facility.” SB 315 refined the definition of “major utility facility” to clarify and limit the OPSB’s jurisdiction over gas pipelines. A “major utility facility” is now limited to a gas pipeline that is (1) longer than 500 feet, (2) more than nine inches in outside diameter, and (3) designed for a maximum allowable operating pressure in excess of 125 psi.<sup>21</sup>
- Not a “Major Utility Facility.” Among others, the following are expressly excluded from the definition of “major utility facility:” gathering lines, gas gathering pipelines, processing plant gas stub pipelines, gas processing plants, natural gas liquids finished product pipelines, fractionation plants, production operations, and compressor stations.<sup>22</sup>

### *What are the changes to pipeline safety provisions?*

SB 315 provides that PUCO has the authority to require that operators of newly constructed gas gathering pipelines<sup>23</sup> and processing plant gas stub pipelines<sup>24</sup> comply with requirements of 49 C.F.R. 192 subpart C. To illustrate:

<sup>19</sup> OHIO REV. CODE ANN. § 4905.03(A)(6) (West 2012).

<sup>20</sup> *Id.* § 4905.03(A)(5).

<sup>21</sup> *Id.* § 4906.01(B)(1)(c).

<sup>22</sup> *Id.* § 4906.01(B)(2)(e), (f), (g), (h), (i), (j) and (k).

<sup>23</sup> “Gas gathering pipeline” means a gathering line that is not regulated under the Natural Gas Pipeline Safety Act and part 192 of 49 C.F.R., including a pipeline used to collect and transport raw natural gas or transmission quality gas to the inlet of a gas processing plant, the inlet of a distribution system, or to a transmission line. *Id.* § 4905.90(D). “Gas processing plant” means a plant that processes raw natural gas into merchantable products, including transmission quality gas or natural gas liquids and also may include a plant that treats raw natural gas or natural gas liquids and also may include a plant that treats raw natural gas to remove impurities such as carbon dioxide, helium, nitrogen or water. *Id.* § 4905.90(E). “Transmission quality gas” means gas consisting predominantly of methane that meets all downstream specifications for

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- **Gas Gathering Pipelines.** A gas gathering pipeline that is “completely constructed on or after the effective date” of SB 315 and that “transports gas produced by a horizontal well” (defined above) must comply with applicable pipeline requirements of 49 C.F.R. 192 subpart C and additional safety provisions.<sup>25</sup>
- **Additional Safety Provisions.** SB requires that operators of gas gathering pipelines and a processing plant gas stub pipeline: (i) design, install, construction, inspect and initially test the pipeline if new, replaced, relocated or changed; (ii) control corrosion according to 49 C.F.R. 192 subpart I for metallic pipelines; (iii) establish and implement a damage prevention program under 49 C.F.R. 192.614; (iv) establish and implement a public education program under 49 C.F.R. 192.616; (v) establish the MAOP (“maximum allowable operating pressure”) of the pipeline under 49 C.F.R. 192.619; (vi) install and maintain pipeline markers under 49 C.F.R. 192.707; (vii) perform leakage surveys according to the requirements of 49 C.F.R. 192.706; and (viii) retain records of leakage surveys for the longer of five years or until the next survey.<sup>26</sup>
- **Planned Construction of New Gas Gathering Pipelines.** SB 315 provides that any person planning to construct a pipeline after the effective date of SB 315 that is subject to the pipeline safety requirements above must file a form approved by the PUCO at least 21 days before commencing construction of the pipeline and include the following information about the pipeline: (a) the route; (b) the MAOP; (c) the outside diameter; (d) wall thickness; (e) the material that the pipeline will be made of; and (f) the yield strength.<sup>27</sup> Within 60 days after construction, the operator must file an “explanation of the constructed pipeline’s route and operating information.”<sup>28</sup>

### CONCLUSION

Ohio is now the latest state in the Appalachia Basin to enact new laws governing the operations of the growing upstream and midstream industries in the region. As noted above, upstream and midstream operations will be impacted in a number of ways as a result of the new laws. The details of how these provisions are interpreted and implemented by Ohio state agencies and officials will require close attention and active involvement by industry stakeholders.

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transportation in an intrastate or interstate transmission pipeline and that is suitable for use by public consumers. *Id.* § 4905.90(R).

<sup>24</sup> “Processing plant gas stub pipeline” means a gas pipeline that transports transmission quality gas from the tailgate of a gas processing plant to the inlet of an interstate or intrastate transmission line and that is considered an extension of the gas processing plant, is not for public use, and is not regulated under the Natural Gas Pipeline Safety Act and part 192 of 49 C.F.R. *Id.* § 4905.90(M).

<sup>25</sup> *Id.* § 4905.911(A)(1)

<sup>26</sup> *Id.* § 4905.911(A)(2).

<sup>27</sup> *Id.* § 4905.911(B)(1).

<sup>28</sup> *Id.* § 4905.911(B)(2)

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