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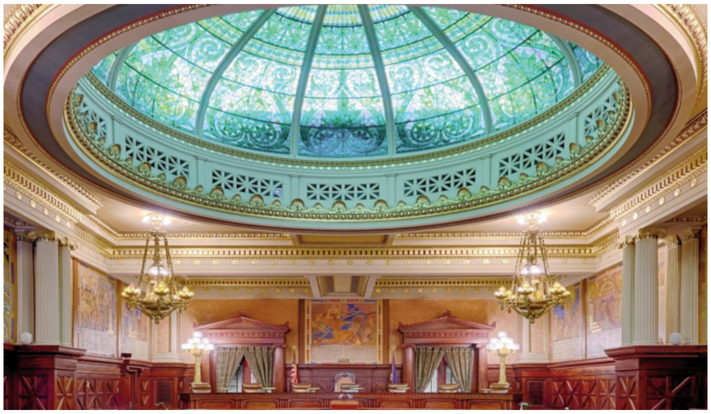

State Supreme Court rules against Snyder Brothers and PIOGA in impact fee case

In a surprising move, the Pennsylvania Supreme Court on December 28 reversed a March 2017 Commonwealth Court decision and ruled in favor of the Pennsylvania Public Utility Commission (PUC) in two cases involving the definition of a stripper well for the purposes of the Act 13 unconventional well impact fee. PIOGA expressed disappointment that the high court ignored, among other key points, a significant term (the word "incapable") the General Assembly used to express its intent to describe when low-producing wells are to be exempt from the fee.

The resolution of the two cases, *Snyder Brothers, Inc. v. PUC* and *PIOGA v. PUC,* essentially hinges on the meaning of a single word—"any." Under Act 13, stripper wells are not required to pay the annual impact fee. The act defines of a stripper well as an "unconventional gas well incapable of producing more than 90 Mcf/d during *any* calendar month" [emphasis added]. Snyder Brothers and PIOGA have argued that the law plainly means a well is exempt if it was incapable of exceeding the 90 Mcf/d threshold in *any one month* during the reporting period, while the PUC contended that a well must not exceed the threshold volume during *each and every month* of the year to qualify as an exempt stripper well.

In 2014, the PUC, which is responsible for administering the impact fee, assessed PIOGA member company Snyder Brothers nearly $500,000 for unpaid impact fees and administrative costs, including a penalty of $50,000 for failing to include 45 vertical unconventional wells on its annual production reports and pay the fee on those wells. The PUC rejected the company's and PIOGA's appeal of the PUC administrative law judge's decision, but on March 29, 2017, the Commonwealth Court reversed the PUC's order and ruled 5-2 in favor of Snyder Brothers and PIOGA *(April 2017 PIOGA Press, page 1)*.

The PUC argued before the Commonwealth Court that because "any" could mean either "one or another taken at random" or "every" month the meaning of the word in the stripper well definition was ambiguous, which required the commission initially, and the court on appeal, to engage in full-blown statutory construction to determine the word's meaning intended by the General Assembly.

"For example, [under Snyder Brothers' and PIOGA's interpretation] if a well produces gas in excess of an average of 90 Mcf/d for 11 months of the year, but falls below the threshold in the twelfth month, the well

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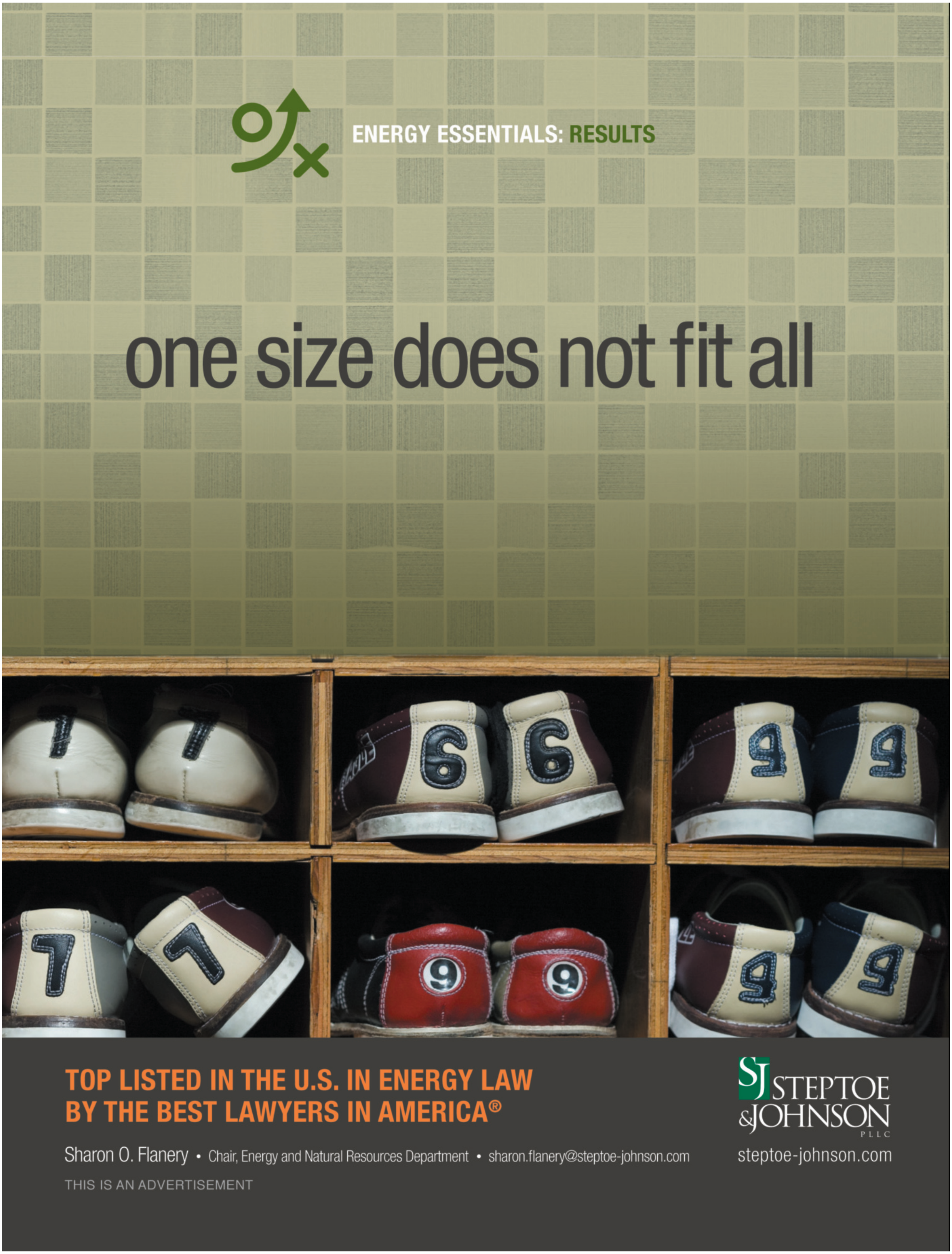
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Impact fee decision *Continued from page 1*

would be exempt from the Act 13 impact and administrative fees," the PUC wrote in its order. "As a result, the community impacted by the significant levels of drilling, collection and distribution of gas from that well might not receive financial disbursements as Act 13 had intended."

Commonwealth Court disagreed, with the majority opinion asserting, "We conclude that the word 'any' in the term 'stripper well' unambiguously means 'any' or 'one' and not 'all' or 'every.'" The opinion stated that "[i]t is the General Assembly's duty to write the laws and the General Assembly could have easily replaced the word 'any' with the term 'every' if it so intended," and that the court was not authorized to rewrite the statute to do so.

The Commonwealth Court also rejected the notion that its interpretation would result in communities not receiving financial disbursements as Act 13 had intended, concluding that the General Assembly made the policy choice reflected in the stripper and vertical gas well definitions—and that policy decision was the General Assembly's to make.

Supreme Court action

The PUC subsequently appealed the Commonwealth Court decision to the state Supreme Court, with arguments heard in April 2018. At that time, based on the line of questioning, PIOGA felt that the justices understood our arguments and looked favorably on industry's point of view.

However, that optimism was dashed when the Supreme Court issued its 40-page opinion (Justice Mundy dissenting) on December 28. The Court asserted that the word "any" can have numerous meanings and can be interpreted differently, depending on context, and so full-blown statutory construction was required to determine legislative intent to resolve the ambiguity. In applying the rules of statutory interpretation the Court focused on comments made by now-House Speaker Mike Turzai, one of the statute's primary sponsors. Turzai was quoted as stating: "The impact fee we are addressing is designed to provide for infrastructure improvements based upon direct impacts, which have created a strain throughout the state, and to provide services that are vital to the health, welfare, and safety of each and every Pennsylvania citizen."

The Supreme Court found the intent of the General Assembly was to assist communities affected by unconventional drilling by providing "an adequate and stable source of revenue" and to have that fee paid by more producers. "Accordingly, the General Assembly structured the impact fee in a manner to ensure that it would provide counties and municipalities with a sufficient revenue stream to meet their additional drilling-related needs by making these governmental entities the primary recipients of the monies the PUC collects through the fee," the majority wrote.

The Court also gave weight in its decision to the potential for a producer to manipulate production for one month so that a well would drop below the 90 Mcf/d threshold—even though no evidence was ever provided that Snyder Brothers or any other operator has done so.

"Nonetheless," the majority opinion stated, "we defer to the PUC's judgment that, as a general matter, this is a legitimate administrative concern."

The justices continued, "Consequently, the PUC's interpretation ensures stability in the impact fee assessment process. The contrary interpretation advanced by Appellees would lead to an unreasonable result, as it would permit well operators who have enjoyed robust production from their wells for the majority of a calendar year to avoid paying the impact fees to the municipalities merely because of the happenstance of one month's diminished production.... Moreover, such an interpretation would impermissibly favor the private financial interests of producers over the public interest of counties and municipalities in having sufficient fiscal capabilities to protect their residents from the deleterious effects of unconventional drilling activities."

The Court concluded that "under Act 13, an unconventional vertical well is a 'vertical gas well' subject to assessment of an impact fee for a calendar year whenever that well's natural gas production exceeds 90,000 cubic feet per day in at least one calendar month of that year."

PIOGA response

In response to the Court's decision, PIOGA General Counsel Kevin Moody stated: "We are extremely disappointed that the majority ignored the unrebutted evidence of the PUC's consistent interpretation of the word 'any' to mean 'one' and instead agreed with the PUC that the meaning of the word in this context is ambiguous. This disappointment extends to the majority's ignoring other unrebutted evidence that the PUC reversed many of its initial impact fee interpretations in finding that the PUC's interpretation at issue in this appeal is entitled to deference. The majority also ignored legislative debate showing that the General Assembly intended to exempt stripper wells from the fee even though these wells had impacts intended to be mitigated by the fee. Finally, while the majority found 'nothing about the peculiarities' of the stripper well definition's 'incapability' requirement that affected its interpretation of the word 'any,' the majority nonetheless relied upon the notion that producers might 'manipulate' production to avoid the fee to support its interpretation—even though that notion implicates the 'incapability' requirement."

Moody also noted that by reinstating the PUC assessments, the Court failed to address Snyder Brothers' challenge to the imposition of penalties and interest on the unpaid fees. The company had raised these issues in its appeal to the Commonwealth Court but that court didn't address them because it ruled the fees weren't due and payable. The company will be asking the

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PIOGA's Mix, Mingle and Jingle Holiday Party

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Approximately 200 PIOGA members and guests turned out on December 18 at The Chadwick in Wexford for some fun, networking and to celebrate the holidays. Thanks to all who participated and to our sponsors for helping to make it a great event. For upcoming networking events, check the PIOGA Events listings at www.pioga.org.

PIOGATech training held on air quality compliance

On December 18, the Environmental Committee hosted its fourth PIOGATech training of the year, this one focusing on air quality compliance. As air emissions continues to be a major focus for federal and state regulators, this training provided a comprehensive overview of compliance topics as they relate to oil and gas operations.

More than 70 people attended the five-hour training that concentrated on air quality regulations, New Source eview, Subpart OOOOa, optical gas imaging, ambient pollutant monitoring, VOC testing considerations and learning more about Pennsylvania-centric air quality requirements. Additionally, participants got to demo optical gas imaging instrumentation and next-generation air monitoring equipment.

Thank you to ALL4 Inc., Civil and Environmental Consultants, Inc. and CleanAir Engineering for putting together a very relevant program and for providing their expertise on this important topic for our members. Watch your email or check the PIOGA Events section for upcoming installments in PIOGA's Technical Training Series. ■

Above left: Sean Hill from CleanAir Engineering demonstrates monitoring equipment to attendees. Center: Amanda Black of CEC, Inc. discusses New Source Review. Right: Volker Schmid from CleanAir Engineering provides an overview of ambient pollutant monitoring.

Spring Meeting call for presentations

PIOGA is seeking presentation proposals for its 2019 Spring Meeting that will be held on April 10 at Rivers Casino in Pittsburgh. This year's meeting will showcase progressive, innovative and collaborative work being done at the local, regional and national level to support the growth of the oil and gas industry.

PIOGA is seeking presenters to share model programs, best practices and evidence-based strategies to help producers (conventional and unconventional), pipeline/midstream and downstream markets.

This year's event will attract 300 industry leaders from across Pennsylvania and beyond, representing E&P, pipeline/midstream, land, upstream service companies, finance, investors, regulators, policy-makers, attorneys and other professionals.

To submit a proposal outlining your presentation please include the items below and email to PIOGA's Director of Administration, Danielle Boston, at danielle@pioga.org by Thursday, January 31:

- Presenter name(s)
- Short bio (one brief paragraph)
- Title of presentation
- Abstract (approximately 200 words)
- Approximate length of presentation
- Title/position
- Company/organization
- Mailing address
- Phone number and email address

Suggestions for conference session topics are always welcome. If you have a presenter in mind, please share the information above with them or contact Danielle Boston. ■

First networking event of 2019: Pins and Pints

There still may be time to sign up for our first networking event of the year—the January 17 Pins and Pints at Main Event in Robinson Township. The event runs from 6 to 8 p.m. Registrations are available for individuals and for teams of up to five people. Included are two hours of bowling, shoes and balls, buffet, and two drink tickets.

It's going to be fun! Visit the PIOGA Events section at www.pioga.org. ■

PIOGA committee leadership changes

Don Nestor

Don Nestor retired from member company Arnett Carbis Toothman at the end of 2018 and subsequently ended his long tenure as chairman of PIOGA's Tax Committee. We thank Don for his guidance and leadership on tax matters over the years, including organizing our annual Oil & Gas Tax and Accounting Seminar, and we wish him all the best in his future endeavors. We hope to announce a new committee chair in the near future.

David Marks

Meanwhile, David Marks of Dominion Energy Field Services has been named co-chairman of PIOGA's Pipeline and Gas Market Development Committee. David, who serves as Appalachian Supply Coordinator for Dominion, will assist Robert Beatty Jr. of InsightFuel and Robert Beatty Oil & Gas in overseeing the committee. ■

DEP airs new emissions regulations

Rules will focus on leaks from existing wells and equipment

At the December 13 meeting of its Air Quality Technical Advisory Committee (AQTAC), the Department of Environmental Protection unveiled a preliminary draft of rules to reduce emissions of volatile organic compounds (VOC) from existing unconventional and conventional oil and gas well sites and related equipment. DEP officials emphasized the proposal is in a very early stage and the department wants to work with stakeholders as the process moves forward. However, an initial review of the draft regulations reveal they have the potential to impose a large burden on some operators, particularly conventional producers.

The regulations are intended to reduce VOC emissions through the imposition of requirements similar to several of the federal requirements associated with 40 CFR Part 60 Subpart OOOOa. The provisions of the draft rule would also reduce methane emissions as a "co-benefit," from storage tanks, pneumatic controllers and pumps, and compressors at natural gas processing plants, other midstream facilities and well sites. Operators would be required to conduct more stringent leak monitoring and repair on a quarterly basis at existing well sites, gathering and compression facilities, and processing plants.

The rules are based on a federal Control Technique Guideline (CTG) for oil and gas facilities which are used to develop a Reasonably Available Control Technology (RACT) standard in Pennsylvania. RACT is the lowest emission limitation that a particular source is capable of meeting with economically feasible, reasonably available technology. The CTG document for oil and gas facilities, in general, reflects RACT requirements for existing facilities similar to those required under 40 CFR Part 60 Subpart OOOOa for new, reconstructed, and modified oil and gas facilities.

The U.S. Environmental Protection Agency under the current administration is proposing to withdraw the Obama-era CTG document for oil and gas operations, but DEP has indicated that it intends to move ahead with a proposed RACT rule regardless, due to commitments to meet federal ozone standards.

The governor's office said Pennsylvania has the legal authority to enforce its proposed rule, with or without the federal requirement. "This process, which is just beginning, does not depend on actions by the EPA," the governor's office said in a statement. The administration said it will work with "industry, organizations, and the public to understand any and all concerns that arise."

The outline of the draft DEP regulation calls for a 95-percent reduction in VOC emissions, with some equipment-specific variations. Gas processing plants, for instance, would require the use of "no-bleed" pneumatic controllers, which equates to zero VOC emissions from such units.

At the December AQTAC meeting, the department indicated that perhaps as many as 80 percent of conventional oil and gas wells and approximately 6 percent of unconventional wells would be exempt from the leak detection and repair requirements (LDAR) provisions of the rule due to a low-production well exemption. However, the burden to evaluate and document that a well is exempt is on the operator, and associated exemption determinations would be required to be retained on file.

There are also exemptions for certain storage vessels that exhibit a VOC "potential to emit" (PTE) of less than 6 tons per year, with actual VOC emissions of less than 4 tons per year. Again, the operator would be responsible for the initial evaluation of PTE or actual emissions, and then subsequently tracking VOC emissions, month-by-month, to document that actual VOC emissions never exceed 4 tons per year on a rolling 12-month basis.

While the actual rule provisions may not affect most of conventional operators, such operators would be required to evaluate rule applicability to each potentially affected operation, document non-applicability and retain records to demonstrate that that the rule exemptions continue to apply.

This is just the beginning of what is expected to be a long rulemaking process. DEP told AQTAC members that after it reviewed initial feedback it would provide a revised version of the proposal to the committee, but no definitive timetable was provided. PIOGA, led by the Environmental Committee, will take every opportunity to engage with the department in development of the rules and will keep members informed of developments and opportunities to provide input.

The preliminary draft RACT regulations and a presentation are available under the December 13 agenda items on AQTAC's webpage, www.dep.pa.gov/Business/Air/BAQ/AdvisoryGroups/Air-Quality-Technical-Advisory-Committee/Pages/ default.aspx. ■

Two-year permit renewal is a one-time thing

The Department of Environmental Protection's Office of Oil and Gas Management wants operators to know that two-year well permit renewals are offered just one time. Once the two-year renewal expires, operators must apply for a new permit.

DEP indicates that it is beginning to receive second permit renewal requests. Operators will be asked to withdraw their requests and their fee will be refunded.

At some point, DEP said, it may begin denying renewal requests.

Newly proposed definition of 'waters of the United States' could ease federal compliance burdens for oil and gas sector

Authors:

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Babst Calland
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On December 11, the U.S. Environmental Protection Agency and Army Corps of Engineers released a much-anticipated proposed rule that would redefine "waters of the United States" (WOTUS) under the Clean Water Act (CWA).[1.] As compared to the WOTUS definition in the Obama administration's 2015 "Clean Water Rule" (CWR) (currently applicable in Pennsylvania), the proposed rule would significantly reduce the federal government's jurisdiction over surface water, including wetlands, nationwide. Should the proposed rule be finalized as written, the oil and gas sector could see significant changes in CWA permitting/compliance obligations associated with well sites and pipeline construction.

Revised definition limits federal government's CWA jurisdiction

The proposed rule's WOTUS definition is intended to provide predictability and consistency in identifying federally regulated surface waters. The agencies state the proposed WOTUS definition is "straightforward" and cost-effective while still being protective of the nation's navigable waters and respectful of state and tribal authority over their land and water resources.

The proposal focuses on surface waters that are "physically and meaningfully connected to traditional navigable waters," and relies largely on the "relatively permanent water" jurisdictional test established in the late Justice Antonin Scalia's plurality opinion in *United States v. Rapanos*, 547 U.S. 715 (2006). The proposed rule includes the following six categories of waters that are WOTUS and also includes 11 categories of waters or features that are not WOTUS:

WOTUS includes

1. Traditional navigable waters, including territorial seas (TNWs)
2. Tributaries that contribute perennial or intermittent flow to TNWs
3. Ditches that (a) are TNWs, (b) are constructed in a tributary, (c) relocate or alter a tributary such that they are a tributary, or (d) are constructed in an adjacent wetland so long as they meet the definition of tributary
4. Lakes and ponds that (a) are TNWs, (b) contribute perennial or intermittent flow to a TNW in a typical year directly or indirectly through a jurisdictional water, or (c) are flooded by jurisdictional waters in a typical year
5. Impoundments of otherwise jurisdictional waters
6. Wetlands adjacent to jurisdictional waters

WOTUS does NOT include

1. Any feature not identified in the proposal as jurisdictional
2. Groundwater
3. Ephemeral features and diffuse stormwater run-off
4. Ditches that are not defined as WOTUS
5. Prior converted cropland
6. Artificially irrigated areas that would revert to upland if irrigation stopped
7. Artificial lakes/ponds constructed in upland that are not defined as WOTUS
8. Water-filled depressions and pits created in upland incidental to mining or construction activity, and pits excavated in upland to obtain fill, sand or gravel
9. Stormwater control features created in upland to convey, treat, infiltrate or store stormwater run-off
10. Wastewater recycling structures constructed in upland
11. Waste treatment systems

The proposed rule's definition of WOTUS is significantly different from the definition of WOTUS under the CWR, and, as such, would significantly reduce the extent of federally regulated waters. This is especially true in states, such as Pennsylvania, where the CWR's WOTUS definition currently applies. Some of the key differences include:

• **References to "significant nexus" are eliminated.** The proposed rule does not reference the "significant nexus" jurisdictional test, a hallmark of the CWR, that is based on former Justice Anthony Kennedy's concurring opinion in *Rapanos.* Rather, the proposed rule focuses on "relatively permanent flowing and standing waterbodies" that are or have a surface connection to TNWs.

• **"Tributary" is narrowed.** Only surface water channels with perennial or intermittent flow to a WOTUS in a "typical year" would be federally defined as tributaries. Ephemeral features are excluded from the definition. Unlike the CWR's definition of tributary, the proposed rule does not define a tributary based on the presence of defined beds, banks and ordinary high water marks.

• **"Adjacent wetlands" are narrowed**. "Adjacent wetlands" would not be jurisdictional unless they either physically abut a WOTUS or have a direct hydrologic surface connection to another WOTUS other than a wetland. By contrast, the CWR's definition of WOTUS extends jurisdiction to wetlands within a certain dis-

[1.] For additional background on the events leading up to the release of the proposed rule, please see the authors' *PIOGA Press* articles from February and November 2018, and relevant Environmental Alerts on Babst Calland's Perspectives webpage at www.babstcalland.com/perspectives.

tance from an ordinary high water mark or within the 100-year floodplain of a WOTUS, even if they are physically separated from a WOTUS.

• **Jurisdiction over ditches clarified.** The proposed rule generally would not categorize ditches as WOTUS, unless they function as TNWs, are constructed in or satisfy the definition of a "tributary," or are constructed in an "adjacent wetland." Even though certain "ditches" under the proposed rule would not be considered jurisdictional, the agencies note that they could be subject to CWA permitting if they meet the definition of "point source."

Potential advantages for oil and gas sector and public comment opportunities

The proposed rule's definition of WOTUS, if finalized as written, would fundamentally alter and substantially narrow the scope of federal CWA authority. For the oil and gas industry, this proposed narrower definition would likely simplify the federal obligations associated with the construction and maintenance of well pads, pipelines and access roads, including the following:

• **Section 404 permitting.** Because, under the proposed rule, fewer waters would be considered to be WOTUS, the extent of impacts to federally jurisdictional waters from well pad, access road or pipeline construction would be expected to decrease, thereby lessening the likelihood of requiring more expensive, resource-intensive and time-consuming individual Section 404 permits.

• **Spill reporting.** Under the proposed rule, the likelihood of spilled materials entering a WOTUS and triggering federal spill reporting requirements would be lessened.

• **Maintenance of ditches.** Under the proposed rule, fewer drainage ditches would be considered to be WOTUS, therefore decreasing the need for Section 404 permits or authorizations to maintain these ditches.

We note that, while the proposed rule may reduce certain federal obligations, it does not alter existing state permitting or reporting obligations (e.g., Chapter 102 and Chapter 105 permitting obligations, PPC planning requirements, state spill reporting obligations, etc.).

Oil and gas operators are encouraged to provide their comments on the proposed rule. A 60-day public comment period will open upon publication of the proposal in the *Federal Register*. The agencies are soliciting public comment on all aspects of the proposed rule, including whether:

• The "significant nexus" test must be a component of the proposed new definition of WOTUS.

• The definition of "tributary" should be limited to perennial waters and not those with intermittent flows.

• "Effluent-dependent streams" should be included in the definition of "tributary."

• The jurisdictional cut-off for "adjacent wetlands" should be within the wetland or at the wetland's outer limits.

• A ditch can be both a "point source" and a WOTUS.

• The agencies should work with states to develop, and make publicly available, state-of-the-art geospatial data tools to identify the locations of WOTUS.

Continuing jurisdictional uncertainty and inevitable litigation

While the proposed rule may ultimately be beneficial for the oil and gas sector, it does not bring any immediate changes to the regulatory landscape and is but the first step in what could be a long road to redefine WOTUS. Even if finalized, litigation challenging any final rule adopting all or part of the proposed rule is almost certain. As we have described in previous articles, the litigation challenging the 2015 CWR began almost immediately upon its finalization and still continues. In addition, challenges by states and environmental groups to the Trump administration's efforts to delay implementation of the CWR have resulted in the current regulatory patchwork where the pre-CWR definition of WOTUS is in effect in 28 states and the arguably more expansive CWR definition of WOTUS is in effect in 22 states, including Pennsylvania.

While efforts to finalize this newly proposed rulemaking continue and the inevitable litigation runs its course, the regulated community must continue to contend with these state-dependent differences in the scope of the federal government's authority under the CWA. ■

If you have any questions about the topics discussed in this article or how they may impact your operations and compliance obligations, contact Lisa M. Bruderly at 412-394-6495 or llbruderly@babstcalland.com, or Gary E. Steinbauer at 412-394-6590 or gsteinbauer@ babstcalland.com.

OSHA clarification of safety incentive programs and drug testing

By Wayne Vanderhoof, CSP
Chair, PIOGA Safety Committee

On May 12, 2016, OSHA published a final rule amending 29CFR1904.35 that, among other things, prohibited employers from retaliating against employees for reporting work-related injuries or illnesses, prohibited employers from enacting workplace safety incentive programs and prohibited employers instituting post-incident drug testing policies.

On October 11, 2018, OSHA issued a memorandum to regional administrators to "clarify the Department's position" on the May 12, 2016, final rule described above. The document is titled, "Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29CFR1904.35(b)(1)(iv)." The clarification all centers around one sentence in the Recordkeeping regulations 29CFR1904. The one sentence in the regulation is: "1*904.35(b)(1)(iv) - You must not discharge or, in any manner, discriminate against any employee for reporting a work-related injury or illness."*

Blanket statement

In the clarification, OSHA makes a blanket statement to the affect that OSHA "believes that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health." OSHA believes there is "evidence that the employer that consistently enforces legitimate work rules" demonstrates that "the employer is serious about creating a culture of safety, not just (presenting) the appearance of reducing rates."

"Actions taken (by an employer) under a safety incentive program or post-incident drug testing policy would only violate (the one sentence in the regulation,) 29CFR1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health."

Safety incentive programs

OSHA, in the clarification document, states it believes safety incentive programs "can be an important tool to promote workplace safety and health." The clarification document refers to two different types of incentive programs. "One type of incentive program rewards workers for (items that could be considered leading indicators such as) reporting near-misses or hazards," thereby "encouraging involvement in a safety and health management system." OSHA states, "Positive action taken

under this type of program is always permissible…"

The other type of safety incentive program OSHA identifies is a "rate-based" system focusing on lagging indicators such as the reduction in "the number of reported injuries and illnesses. This type of program typically rewards employees with a prize or bonus at the end of an injury-free month or evaluates managers based on their work unit's lack of injuries." OSHA indicates such "(r)ate-based incentive programs are also permissible…as long as they are not implemented in a manner that discourages reporting." If "an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, OSHA would not cite the employer…as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness."

OSHA explains what it considers as "adequate precautions." OSHA explains that a "statement that employees are encouraged to report and will not face retaliation for reporting may not by itself be adequate to ensure that employees actually feel free to report, particularly when the consequence for reporting will be a lost opportunity to receive a substantial reward."

The clarification document further explains that an "employer could avoid any inadvertent deterrent effects of a rate-based incentive program by taking positive steps to create a workplace culture that emphasizes safety, not just rates." OSHA provides, as an example, that any "inadvertent deterrent effect of a rate-based incentive program on employee reporting would likely be counterbalanced if the employer also implements certain elements" such as "an incentive program that rewards employees for identifying unsafe conditions in the workplace;" or "a training program for all employees to reinforce reporting rights and responsibilities and emphasizes the employer's non-retaliation policy" (Section 11(c) - Whistleblower Protection) or "a mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

One element that OSHA does not explain is how employers measure "employees' willingness to report injuries and illnesses." This is left up to individual employers to determine for themselves.

Another element that OSHA does not address is an employee complaint about feeling discriminated against with the rate-based incentive program or feeling retaliated against for reporting injury or illness. This would come under Section 11(c) – Whistleblower Protection which requires an employee to file complaint within 30 days of the discriminatory event or the right is waived. Or, during an OSHA inspection, the agency finds that discrimination due to a rate-based incentive program is present or believes employees are retaliated against for reporting injury or illness. The Notice of Citation and Violation must be issued within 180 days with a maximum potential fine of $129,336 per affected worker. The concern becomes an employee has 30 days to file a Whistleblower complaint versus 180 days for OSHA to notify the employer about a finding and assessing a fine and requiring abatement.

Workplace drug testing

OSHA states in the clarification document that "most instances of workplace drug testing are permissible, including random drug testing, drug testing unrelated to the reporting of a work-related injury or illness, drug testing under a state workers' compensation law, drug testing under other federal law," such as a U.S. DOT rules, or drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees."

The one qualifier OSHA places on workplace drug testing when the employer "chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries."

Memorandum supersedes

OSHA specifically states that this clarification memorandum supersedes "any other OSHA interpretive documents…inconsistent with the interpretive position" and then lists four of the main previous attempts at clarification.

References

- OSHA Memorandum issued October 11, 2018, to Regional Administrators titled "Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29CFR1904.35(b)(1)(iv)."
- November 2018 newsletter from Law Offices of Adele L Abrams (Issue 9) article titled "OSHA Issues Revised Policy on Safety Incentive & Drug Testing Programs."

This article is a summary of the information that was covered and discussed at the PIOGA Safety Committee meeting on December 12. Thanks to Kevin Moody, PIOGA General Counsel, for contributing to the presentation at the meeting.

Legislation backs owners of mineral rights in forest

Congressman Glenn "GT" Thompson on January 4 reintroduced a bill to ensure further protections for private property owners and energy producers in the Allegheny National Forest (ANF).

H.R. 245, the Cooperative Management of Mineral Rights Act of 2019, is in direct response to prior unsuccessful legal challenges, which aimed to stifle the rights of private property owners and energy producers in Pennsylvania's only national forest, the ANF.

U.S. District Judge Sean McLaughlin in December 2009 ruled that the U.S. Forest Service did not have the ability to regulate subsurface mineral rights in the ANF because these rights are privately owned. The ruling came after days of intense hearings in the U.S. District Court in Erie.

The plaintiffs in the case included Minard Run Oil of Bradford and the Pennsylvania Independent Oil & Gas Association.

The lawsuit developed after the Forest Service placed a moratorium on drilling in the ANF pending an environmental impact assessment.

McLaughlin's ruling reinstated previous Forest Service oversight for ANF drilling that had been in place for years.

The U.S. Third Circuit Court of Appeals in 2013 upheld the federal district court ruling, which was challenged by the Sierra Club and the Allegheny Defense Project.

When the forest was formed in 1923, the federal government acquired the surface, which now covers more than 500,000 acres. However, more than 90 percent of the subsurface mineral rights remained in private hands and are still privately held today.

Despite being successfully regulated by the state for decades, a federal law passed in 1992 required the Forest Service to write new regulations on oil and gas production in the ANF.

However, federal courts have several times ruled that the Forest Service does not have the authority to do so because the minerals in the ANF are privately owned.

Thompson's bill, which is consistent with the findings of the courts, corrects federal law by repealing the improper 1992 requirement.

"The legislation specifically repeals the 1992 provision directly citing oil and gas production in the ANF, as it runs contrary to the findings of the courts," according to Thompson's office.

The House of Representatives previously passed Thompson's legislation twice with strong bipartisan support, overwhelmingly in 2016 and unanimously in 2017. Since the House-approved legislation has yet to be finalized, Thompson had to reintroduce the bill in the new Congress.

"The Cooperative Management of Mineral Rights Act will clarify existing law, put the brakes on more excessive litigation over oil and gas production in the ANF and ensure mineral owners access to their property," Thompson said in a statement. "I am proud to sponsor this common-sense legislation and look forward to working with my colleagues to get it across the finish line during the 116th Congress."

—The Kane Republican

Become a PIOGA Partner

Building off the success of this year's program, we are pleased to announce the 2019 PIOGA Partners. The program was launched in 2018 in response to member requests for a "one stop" yearlong event sponsorship option for budgetary purposes. The program also offers unique opportunities—like the Committee Partner—to both support the association and make your company stand out. We also continue to offer traditional event-by-event sponsorships.

The various Partner levels are described below. If you have questions or are ready to sign on now for 2019, contact Debbie Oyler at debbie@pioga.org or 724-933-7306 ext. 22.

Keystone Partner, $10,000, Your company's logo will be recognized as an official PIOGA Partner at all events, in the monthly *PIOGA Press,* PIOGA eWeekly and on the rotating slides on PIOGA's homepage. Plus, you receive two tickets to all PIOGA events (Spring Meeting, PIOGA-Techs, networking events, golf outings, sporting clay outings and the Summer Meeting). In addition, you will be eligible to submit an article highlighting your company in *The PIOGA Press* and receive a 30 percent discount off advertising rates in *The PIOGA Press* and eWeekly for one year. Over 10,000 monthly impressions.

Executive Partner, $7,500. Your logo will be recognized as an official PIOGA Partner at events, in *The PIOGA Press,* PIOGA eWeekly and on the rotating slides on PIOGA homepage. Plus, two tickets to select PIOGA events (Spring Meeting, networking events and Summer Meeting). In addition, you will be eligible to submit an article highlighting your company in *The PIOGA Press* and receive a 20 percent discount off advertising rates in *The PIOGA Press* and eWeekly for one year. Up to 8,000 monthly impressions.

Meetings Partner, $5,000. Your logo will be recognized as an official PIOGA Partner at events, in *The PIOGA Press,* PIOGA eWeekly and on the rotating slides on PIOGA's homepage. Plus, four tickets to the two major PIOGA events (Spring Meeting and Summer Meeting). In addition, you will be eligible to submit an article highlighting your company in *The PIOGA Press* and also receive a 10 percent discount off advertising rates in *The PIOGA Press* and eWeekly for one year. Up to 7,000 monthly impressions.

Golf Partner, $4,000. Your logo will be recognized as an official PIOGA Partner at golf events, in *The PIOGA Press* and the PIOGA eWeekly. Plus, four entries at all three PIOGA golf events (Ted Cranmer Memorial, Divot Diggers and Summer Meeting outing) and a tee & green sign at each event. Up to 6,000 monthly impressions.

Committee Partner, $3,000. Your logo will be recognized as an official PIOGA Partner at committee meetings, in *The PIOGA Press,* PIOGA eWeekly and all PIOGA-initiated committee correspondence. Up to 6,250-7,500 monthly impressions.

Engineer Level, $2,500. Your logo will be recognized as an official PIOGA Partner at the Spring and Summer Meetings, in *The PIOGA Press* and PIOGA eWeekly. Over 5,000 monthly impressions.

Driller Level, $1,500. Your logo will be recognized as an official PIOGA Partner at the Spring and Summer Meetings and in *The PIOGA Press.* Over 2,000 monthly impressions. ■

Electronic permitting update for ESCGP-3

The Department of Environmental Protection has released an updated transition plan for the Erosion and Sediment Control General Permit (ESCGP-3), as well as updated ESCGP-3 Notice of Intent (NOI) Instructions.

For ESCGP-3 applications submitted to the Office of Oil and Gas Management, operators will continue to have the option to submit paper ESCGP-3s to district oil and gas offices or submit electronic ESCGP-3s through the department's electronic ePermitting application, until further notice.

Links to both the updated transition plan and NOI document are can be found in the news item on the main page of PIOGA's Members Only site—members.pioga.org—and in the Environmental Committee's document library of the site.

Questions regarding this information should be directed to DEP's Joe Kelly at 717-772-5991 or josephkel @pa.gov or Brian Bailey at 570-974-2604 or bribailey@pa.gov.

Additional information about DEP's ePermitting can be found in December's *PIOGA Press,* page 14.

Report looks at midstream infrastructure needs through 2035

North America has seen oil and natural gas production soar as advances in science and technology and new geological assessments occur. Strong pipeline activity has been occurring, but how much more is needed to keep up with the supply and demand?

The Interstate Natural Gas Association of American (INGAA) Foundation retained ICF to help forecast the amount of midstream infrastructure development needed in the near future. The study considered infrastructure investments for surface and lease equipment; gathering and processing facilities; oil, gas, and natural gas liquids (NGL) pipelines; oil and gas storage facilities;

refineries and oil products pipelines; and export terminals. Key findings of the study were:

• Infrastructure investment, while projected to peak in 2019, will remain strong through 2035 due to continued shale development, strong market demand and relatively low pricing due to the new oil and gas supplies.

• New midstream infrastructure capital expenditures (CAPEX) will average $791 billion over the next 17 years, for an average of $44 billion/year.

• For oil, gas and NGL transport, an additional 41,000 miles of pipeline and 7 million horsepower of compression and pumping are anticipated through 2035.

• To support gathering, processing and storage of oil, gas, and NGLs, an additional 139,000 miles of gathering lines and 10 million horsepower are required.

• $1.3 trillion to U.S. and Canadian Gross Domestic Products, or approximately $70 billion annually, is anticipated to be invested in infrastructure through 2035.

• Significant employment opportunities are created not only within states where infrastructure development occurs but across all states because of indirect and induced labor impacts to the tune of approximately 725,000 workers.

• The infrastructure development is dependent on regulatory approvals of the projects as to the costs for pipeline construction. Two scenarios are used—a constant unit cost and an escalating unit cost.

Regional investment in oil and gas infrastructure

Regionally, the Southwest leads the pack in oil and gas infrastructure development with CAPEX between $169 billion and $217 billion, or 24 to 25 percent of the total investment throughout the projection. This area is relatively friendly to oil and gas development and already home to a significant amount of infrastructure.

The U.S. Northeast will see total investment between $117 billion and $148 billion, roughly 17 percent of total U.S. oil and gas infrastructure investment. The focus for this region remains on developing and transporting the vast amount of natural gas resource contained in the Marcellus/Utica producing basin. Infrastructure development for this area depends greatly on pipeline project regulatory approvals and market evolution.

The study estimates offshore Gulf of Mexico infrastructure development at $135 billion to $198 billion, or 20 to 22 percent of the total investment. The relatively stable and consistent investment in this area is linked to offshore oil platforms.

Collectively, the other geographic areas account for the remaining $263 billion to $335 billion, or roughly 37 percent of the total investment across the projections. Reasons for development of these other areas are varied.

The complete report, "North American Midstream Infrastructure through 2035: Significant Development Continues," is at www.ingaa.org/File.aspx?id=34658. ■

Impact fee decision *Continued from page 3*

Supreme Court to reconsider its reinstatement of the PUC assessments without resolving the company's arguments against the imposition of penalty and interest, which are based in part on the absence of a refund mechanism.

As Moody stated, "Because the statute has no mechanism to refund impact fees paid in error and the administrative law judge rejected Snyder Brothers' request to escrow the disputed fees while the dispute was being resolved, the company had no alternative to not paying the fees based on its good faith reasonable legal interpretation. If Snyder Brothers had paid the disputed fees and its interpretation was upheld, as the Commonwealth Court did, the company would have won a 'Pyrrhic victory.' Producers shouldn't be penalized because the statute forces them not to pay fees they have a good faith reasonable legal basis for believing aren't due."

Next steps

PIOGA is asking the Supreme Court to reconsider its decision.

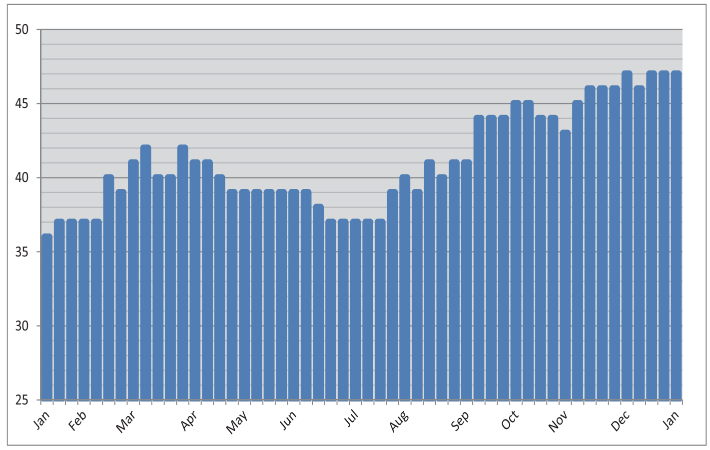
According to a report in the *Pittsburgh Post-Gazette,* after the decision the PUC was preparing to send invoices early this year to about 17 producers for millions of dollars in impact fees owed on low-producing wells.

"We estimate that the recent Pa. Supreme Court decision will involve hundreds of wells with outstanding impact fees totaling millions of dollars," a PUC spokesperson told the newspaper, noting that the agency does not yet have precise figures.

In June, the PUC representative indicated 17 producers disputed that they owed fees on more than 300 wells due to the stripper well debate. That reduced the impact fee collection for 2017 by $6.1 million. Producers disputed impact fees on 160 wells for 2016 and 35 wells for 2015, according to PUC records, although the *Post-Gazette* said it is unclear whether all of those disputes had to do with the stripper well definition. ■

Oil & Gas Dashboard

Pennsylvania Rig Count



Penn Grade Crude Oil Prices

Natural Gas Futures Closing Prices

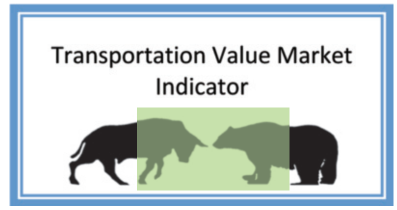
Month	Price
February	$2.950
March	2.864
April	2.685
May	2.673
June	2.714
July	2.755
August	2.756
September	2.726
October	2.771
November	2.823
December	2.979
January 2020	3.077

Prices as of January 7

Sources

American Refining Group: www.amref.com/Crude-Prices-New.aspx
Ergon Oil Purchasing: www.ergon.com/prices.php
Gas futures: quotes.ino.com/exchanges/?r=NYMEX_NG
Baker Hughes rig count: phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reportsother
NYMEX strip chart: Nucomer Energy, LLC, emkeyenergy.com

Northeast Pricing Report — January 2019

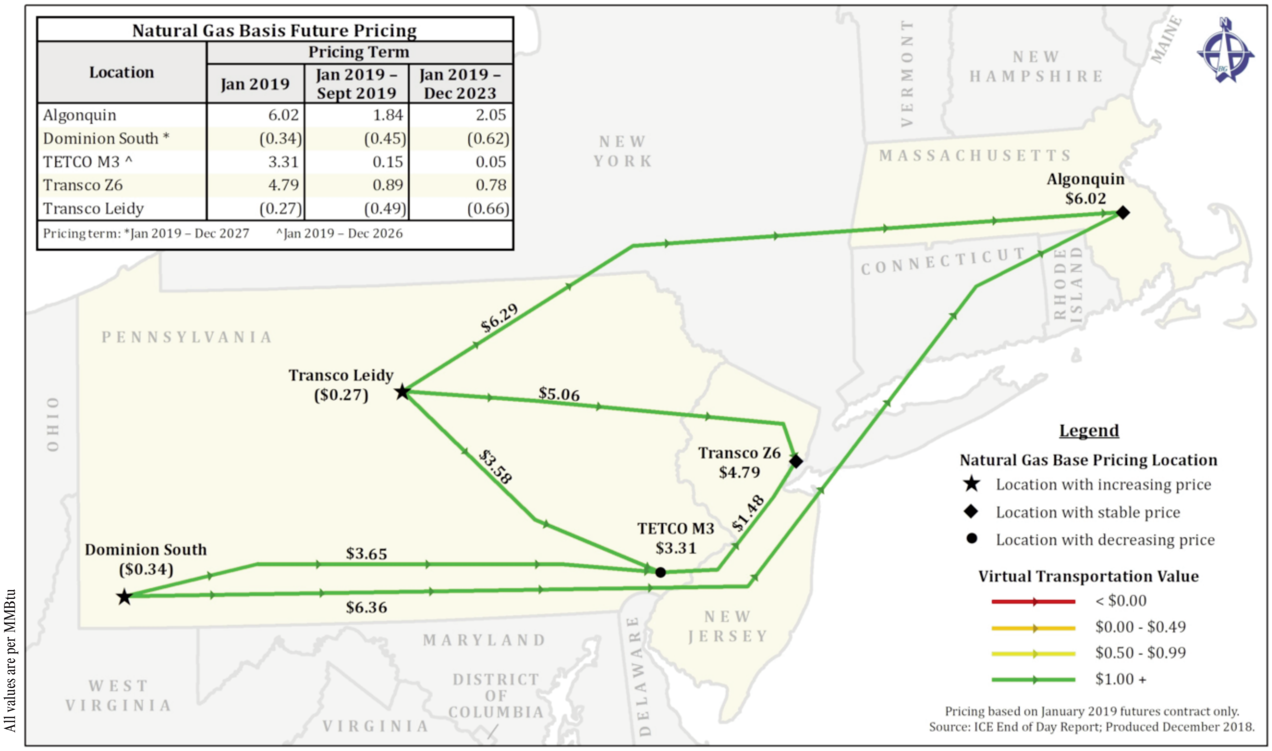


Provided by Bertison-George, LLC
www.bertison-george.com

Pricing was mixed over the three trading periods. Algonquin, Dominion South, and Transco Leidy increased slightly for front-month trading. However, Transco Z6 and TETCO M3 significantly increased by $4.79 and $3.31 per MMBtu respectively. For the 1-year trading term, pricing was all over the board. Dominion South and Transco Leidy both decreased by $0.45 and $0.49 per MMBtu respectively. Conversely, Algonquin increased by $1.84 per MMBtu. Trading for the full-term trading period was relatively flat across the board. Dominion South increased the largest amount by $0.05 per MMBtu, while Algonquin decreased the largest amount at $0.05 per MMBtu.

Transportation values continue to rise. Transco Leidy to Z6 increased the greatest amount of $2.76 per MMBtu. Both Dominion South and Transco Leidy to TETCO M3 increased nearly the identical amounts of $2.30 and $2.31 per MMBtu respectively. All other routes increased as well. TETCO M3 to Transco Z6 increased 44% or $0.45 per MMBtu.

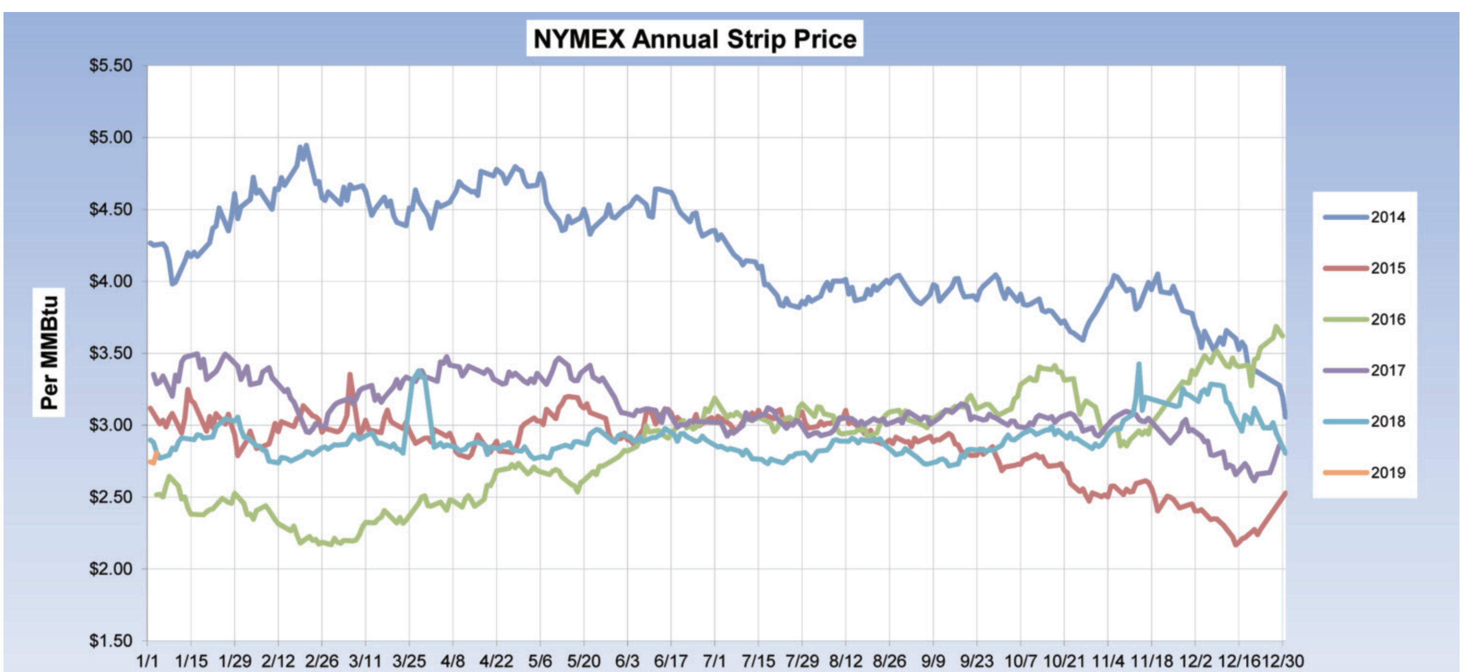
Weather forecasts for the New England area are estimating average to above average temperatures for the rest of January. That would leave 1-2 months for potential polar vortex anomalies.



Natural Gas Basis Future Pricing

Location	Pricing Term: Jan 2019	Jan 2019 – Sept 2019	Jan 2019 – Dec 2023
Algonquin	6.02	1.84	2.05
Dominion South *	(0.34)	(0.45)	(0.62)
TETCO M3 ^	3.31	0.15	0.05
Transco Z6	4.79	0.89	0.78
Transco Leidy	(0.27)	(0.49)	(0.66)

Pricing term: *Jan 2019 – Dec 2027 ^Jan 2019 – Dec 2026



Spud Report: December 2018

The data show below comes from the Department of Environmental Protection. A variety of interactive reports are available at www.dep.pa.gov/DataandTools/Reports/Oil and Gas Reports.

The table is sorted by operator and lists the total wells reported as drilled last month. **Spud** is the date drilling began at a well site. The **API number** is the drilling permit number issued to the well operator. An asterisk (*) after the API number indicates a conventional well.

OPERATOR	WELLS	SPUD	API #	COUNTY	MUNICIPALITY
Allegheny Enterprises Inc	1	12/12/18	047-25055*	Elk	Benezette Twp
Bearcat Oil Co LLC	1	12/20/18	123-48173*	Warren	Mead Twp
Bull Run Resources LLC	2	12/17/18	123-48226*	Warren	Cherry Grove Twp
		12/26/18	123-48227*	Warren	Cherry Grove Twp
Cameron Energy Co	2	12/11/18	123-48191*	Warren	Sheffield Twp
		12/19/18	123-48207*	Warren	Sheffield Twp
Chesapeake Appalachia LLC	1	12/27/18	131-20570	Wyoming	Windham Twp
Chief Oil & Gas LLC	5	12/6/18	015-23413	Bradford	Overton Twp
		12/6/18	015-23414	Bradford	Overton Twp
		12/6/18	015-23415	Bradford	Overton Twp
		12/6/18	015-23416	Bradford	Overton Twp
		12/6/18	015-23417	Bradford	Overton Twp
Gas & Oil Mgmt Assoc Inc	2	12/20/18	123-48183*	Warren	Pleasant Twp
		12/12/18	123-48172*	Warren	Sheffield Twp
Huntley & Huntley Energy Expl	2	12/20/18	129-29061	Westmoreland	Upper Burrell Twp
		12/20/18	129-28955	Westmoreland	Upper Burrell Twp
Pierce & Petersen	4	12/4/18	123-48238*	Warren	Glade Twp
		12/13/18	123-48239*	Warren	Glade Twp
		12/17/18	123-48237*	Warren	Glade Twp
		12/20/18	123-48236*	Warren	Glade Twp
PVE Oil Corp Inc	1	12/5/18	083-57092*	McKean	Sergeant Twp
Range Resources Appalachia	14	12/20/18	125-28623	Washington	Amwell Twp
		12/20/18	125-28624	Washington	Amwell Twp
		12/21/18	125-28626	Washington	Amwell Twp
		12/21/18	125-28627	Washington	Amwell Twp
		12/21/18	125-28628	Washington	Amwell Twp
		12/21/18	125-28625	Washington	Amwell Twp
		12/22/18	125-28629	Washington	Amwell Twp
		12/2/18	125-28568	Washington	Cross Creek Twp
		12/5/18	125-28566	Washington	Cross Creek Twp
		12/22/18	125-28569	Washington	Cross Creek Twp
		12/18/18	125-28639	Washington	Smith Twp
		12/20/18	125-28637	Washington	Smith Twp
		12/22/18	125-28638	Washington	Smith Twp
		12/27/18	125-28636	Washington	Smith Twp
Repsol Oil & Gas USA LLC	4	12/18/18	015-23437	Bradford	Troy Twp
		12/18/18	015-23438	Bradford	Troy Twp
		12/18/18	015-23439	Bradford	Troy Twp
		12/18/18	015-23440	Bradford	Troy Twp
Rice Drilling B LLC	3	12/21/18	059-27776	Greene	Gray Twp
		12/20/18	059-27762	Greene	Washington Twp
		12/20/18	059-27763	Greene	Washington Twp
Seneca Resources Corp	8	12/5/18	047-25049	Elk	Jones Twp
		12/5/18	047-25052	Elk	Jones Twp
		12/6/18	047-25051	Elk	Jones Twp
		12/6/18	047-25050	Elk	Jones Twp
		12/18/18	081-21768	Lycoming	Gamble Twp
		12/18/18	081-21769	Lycoming	Gamble Twp
		12/19/18	081-21770	Lycoming	Gamble Twp
		12/19/18	081-21771	Lycoming	Gamble Twp
SWN Production Co LLC	2	12/1/18	115-22562	Susquehanna	Oakland Twp
		12/2/18	115-22561	Susquehanna	Oakland Twp
XTO Energy Inc	3	12/5/18	019-22784	Butler	Penn Twp
		12/5/18	019-22785	Butler	Penn Twp
		12/6/18	019-22786	Butler	Penn Twp

	December	November	October	September	August	July
Total wells	**55**	**90**	**104**	**76**	**69**	**99**
Unconventional Gas	42	78	85	54	51	89
Conventional Gas	1	0	0	0	0	0
Oil	8	12	13	22	13	9
Combination Oil/Gas	4	0	6	0	5	0

Calendar of Events

PIOGA events

Pins & Pints Networking Event
January 17, Main Event, Robinson Township

PIOGA Cigar Dinner Networking Event
February 21, The Lot at Edgewater, Oakmont

PIOGATech: Erosion & Sedimentation
February 28, location TBA

Spring Meeting
April 10, Rivers Casino, Pittsburgh

PIOGATech: Well Construction
April 25, location TBA

Ted Cranmer Memorial Golf Outing and Steak Fry
June 3, Wanango Country Club, Reno

Divot Diggers Golf Outing
August 22, Tam O'Shanter Golf Course, Hermitage

Other association & industry events

IOGAWV Winter Meeting
January 22-23, Charleston, WV

OOGA Annual Meeting
March 6-8, Columbus, Ohio

IPAA Midyear Meeting
June 24-26, Colorado Springs, CO

Find more events at www.pioga.org

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