

Midstream Operations: Breaking the Bottleneck

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Issues Affecting Development of the Marcellus and Utica Shale Plays

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MIDSTREAM OPERATIONS: BREAKING THE BOTTLENECK

The Pennsylvania Gas and Hazardous Liquids Pipeline Act

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- I. The Pennsylvania Gas and Hazardous Liquids Pipeline Act (the "Act") was signed into law by Governor Corbett on December 22, 2011 and became effective February 20, 2012. The Act is published at 58 P.S. §§ 801.101 to 801.701. The Act expands the jurisdiction of the Pennsylvania Public Utility Commission ("Commission") to enforce Federal pipeline safety laws as they relate to non-public utility gas and hazardous liquids pipeline equipment and facilities within Pennsylvania.
 - A. The Commission is an agent for the Federal Department of Transportation's Office of Pipeline and Hazardous Materials Safety Administration ("PHMSA") for public utilities. The Act provides jurisdiction to the Commission to enforce the Federal pipeline safety laws as they relate to non-public utility gas and hazardous liquid pipeline equipment and facilities within Pennsylvania.
 - B. The Commission issued a Final Implementation Order on February 17, 2012 at Dkt. No. M-2012-2282031 which identified the procedures that the Commission will follow in implementing the Act. The forms that must be filed with the Commission are attached to this order which can be downloaded from the Act 127 page of the Commission's website at www.puc.state.pa.us/naturalgas/Act_127_info.aspx.
 - C. The Act provides the Commission with jurisdiction to enforce the Federal pipeline safety regulations on pipeline operators, to develop and maintain a registry of all pipeline operators within Pennsylvania which is renewed on an annual basis, and to implement an annual assessment on pipeline operators to recover the Commission's cost of its enforcement of the Federal pipeline safety requirements.
- II. Scope of Commission Jurisdiction Under the Act
 - A. The Act provides the Commission with jurisdiction over Pipeline Operators, which are defined to be a person that owns or operates equipment or facilities for the transportation of gas or hazardous liquids by pipeline or pipeline facilities which are regulated under the Federal pipeline safety laws.

1. The Federal pipeline safety laws are defined to be the provisions of 49 U.S.C. Ch. 601, the Hazardous Liquid Pipeline Safety Act of 1979, the Pipeline Safety Improvement Act of 2002 and the regulations promulgated under those Acts.
2. The regulations being enforced by the Commission are those found in Part 49 of the Code of Federal Regulations, Subtitle B, Chapter 1, Subchapter D ("Pipeline Safety") which encompass parts 190-199 of C.F.R. Title 49.
3. The gathering lines that are subject to the Act are those that are classified as regulated onshore gathering lines pursuant to 49 C.F.R. § 192.8.
4. Non-public utility transmission lines are subject to the Act.
5. Pennsylvania public utilities and FERC regulated utilities are not subject to the Act.

III. Registry of Pipeline Operators.

- A. Section 301 of the Act requires the Commission to develop and maintain a registry of pipeline operators in Pennsylvania. The registration is required to be filed and renewed annually with an annual filing fee of \$250.00. Operators must provide the mileage of pipelines in Pennsylvania in operation as of December 31 of the prior year by class location and county.
- B. Using the form supplied by the Commission, registrants must provide contact information, U.S. Department of Transportation ("USDOT") operator ID numbers, and Federal employee ID number. The registry will be organized by USDOT operator ID numbers.
- C. The operator of a pipeline in a Class I location that collects or transports gas from an unconventional well (i.e., one producing gas by using hydraulic fracture) must report the location of the pipeline by class location and approximate aggregate miles for inclusion in the Commission's registry.
 1. If a Class I pipeline is transporting mixtures of gas, a threshold of at least 50% of gas through-put from unconventional wells will trigger Commission jurisdiction over a Class I pipeline serving unconventional wells but transporting mixed gas.
- D. Operators of pipelines in Class I locations with farm taps are required to register as pipeline operators. The entire pipeline, however, will not be

treated as jurisdictional or subject to assessment due to the existence of the farm tap. Since farm taps are a type of distribution service regulated under Federal pipeline safety laws, regardless of class location, operators of pipelines in Class I locations with farm taps are required to register.

- E. The Act requires each pipeline operator, regardless of class location, to disclose in its initial registration and in each annual renewal the country of manufacture for all tubular steel products used in the gathering or transportation of natural gas or hazardous liquids.
 - 1. The pipeline operator must report the country of manufacture for all tubular steel products installed in Pennsylvania during the prior calendar year for the gathering or transportation of natural gas or hazardous liquids. If more than one country of manufacture is indicated, the pipeline mileage for all countries by the percentage of content from each country must be listed if known. The operator must also indicate whether a material test report form is available for the listed pipe.
 - 2. Steel pipe used on the well pad and in down hole operations is not subject to disclosure reporting.
 - 3. All pipeline operators are required to report the country of manufacture for tubular steel products for their Class I pipelines that are not otherwise subject to the Act since the Act requires such reporting regardless of class location for those entities that are subject to the Act.

IV. Assessments On Pipeline Operators.

Section 503 of the Act authorizes the Commission to impose an assessment on pipeline operators to recover the costs of its pipeline safety program.

- A. The assessment is based on intrastate regulated transmission, regulated distribution and regulated onshore gathering pipelines. The assessment will be calculated to recover the Commission's total costs of its gas pipeline safety program, the hazardous liquids pipeline safety program, plus a reasonable allocation of the Commission's indirect costs. The costs reimbursed by the Federal Department of Transportation will be excluded from the assessment.
 - 1. The assessment is due and payable within 30 days from the notice of the assessment provided by the Commission. The amount of the assessment may be challenged by a pipeline operator pursuant to the provisions of Section 510 of the Public Utility Code, 66 Pa. C.S. § 510. Note, however, that an objection to the proposed

assessment must be filed by the pipeline operator within 15 days of receipt of the notice of assessment.

- B. Following the submission of the original application for the pipeline registry, each pipeline operator is required on or before March 31 of each calendar year to report to the Commission its total intrastate regulated transmission, regulated distribution and regulated onshore gathering pipeline miles in operation for the transportation of gas and hazardous liquids in the Commonwealth during the prior calendar year.
- C. The Commission's implementation orders provide that it will determine its annual costs (excluding costs otherwise reimbursed by the Federal government) based upon its fiscal year (July 1 through June 30).
 - 1. For the 2011-12 and 2012-13 fiscal years, the annual assessment on pipeline operators will be estimated by the Commission.
 - 2. Invoices for the 2011-12 fiscal year will be issued on March 30, 2012 with payments due no later than April 30, 2012.
 - 3. Invoices for the 2012-13 fiscal year will be issued in July 2012 with payments due within 30 days of the postmark date of the invoice.
 - 4. Beginning in the 2013-14 fiscal year, the Commission will begin assessing in accordance with its legislatively approved budget and conduct an initial reconciliation for any over or under collection of the estimated assessments for 2011-12 and 2012-13.
- D. The assessments imposed on pipeline operators by the Act are not applicable to natural gas public utilities or boroughs.

V. Hazardous Liquid Pipelines.

Hazardous liquid pipelines are subject to the Act. However, the Commission's implementation orders indicate that inspections of these pipelines may not occur in the initial year of the Act's implementation.

- A. The Commission confirmed in its final implementation order that non-public utility hazardous liquid pipelines within Pennsylvania must be registered as part of the Act. The order also acknowledged that the Commission had not entered into an agreement with PHMSA to perform inspections of hazardous liquids pipelines. As a result, the Commission made the following determinations in the implementation order:
 - 1. For the 2011-12 fiscal year, the Commission will require registration of hazardous liquid pipelines but not conduct any inspections until

the Commission and the PHMSA enter into an agreement addressing such inspections.

2. The Commission will not access hazardous liquid pipelines for the 2011-12 assessment year.
3. In anticipation of reaching an agreement with PHMSA for the 2012-13 assessment year, an attachment to the registration form has been included for reporting mileage for hazardous liquids pipelines for the later implementation of an assessment.

VI. Commission Powers Under the Act.

A. The Act provides the Commission with general administrative authority to supervise and regulate pipeline operators within the Commonwealth consistent with the Federal pipeline safety laws.

1. The Commission is authorized to adopt regulations consistent with the Federal pipeline safety laws as may be necessary or proper in the exercise of its powers and to perform its duties under the Act. The regulations cannot be inconsistent with or greater or more stringent than the minimum standards and regulations adopted under the Federal pipeline safety law.

B. The Act imposes several duties upon the Commission which include the following:

1. To investigate actions or policies of a pipeline operator to determine compliance with the Act.
2. To investigate pipeline transportation facilities to determine if they are hazardous to life or property.
3. To investigate the existence or a report of safety related conditions involving a pipeline transportation facility.
4. To enter into contracts or agreements with the U.S. Department of Transportation to inspect intrastate or interstate transmission facilities and to accept grants in aid, cash and reimbursements made available to the Commonwealth by the Federal government to implement the Federal pipeline safety laws.
5. To enforce the Federal pipeline safety laws and, after notice and opportunity for a hearing, to impose civil penalties and fines and take other appropriate enforcement actions.

- C. For purposes of petroleum gas pipelines, the Commission's jurisdiction under the Act is limited to petroleum gas systems that are subject to the Federal pipeline safety laws and which are not public utilities.
- D. Violations by a pipeline operator of the Act or the Commission's regulations are subject to a penalty provided under the Federal pipeline safety laws or the Public Utility Code § 3301(c), 66 Pa. C.S. § 3301(c), whichever is greater.

VII. Limitations on the Jurisdiction and Authority of the Commission.

Section 504 of the Act places specific limitations on the jurisdiction and authority of the Commission under the Act.

- A. No authority is given the Commission in the Act over any pipeline operator for purposes of rates or ratemaking or for any purpose other than expressly set forth in the Act.
- B. For landfill gas distribution systems, the jurisdiction of the Commission is limited to systems subject to the Federal pipeline safety laws. The Commission has no jurisdiction over operations and systems within the property boundary of the landfill.
- C. The Act provides the Commission with no additional authority to determine or regulate a pipeline operator as a public utility or as a natural gas supplier as those terms are defined in the Public Utility Code.

Midstream Operations: Navigating Municipal Regulation

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Introduction


Pennsylvania

- Impact of Act 13 on municipal regulation

Key Issues in Ohio

Key Issues in West Virginia





Pennsylvania

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**Chapter 33 of Act 13: Local Ordinances
Relating to Oil and Gas Operations- What
Midstream Operators Need to Know**

Definition Changes

Preemption Changes

Uniformity Requirement

Additional Ways to Challenge Municipal Regulation

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Definitions Under Chapter 33

“Oil and gas operations” expressly include midstream operations

- “Oil and gas operations.” The term includes the following...
 - (3) construction, installation, use, maintenance and repair of:
 - (i) oil and gas pipelines;
 - (ii) natural gas compressor stations; and
 - (iii) natural gas processing plants or facilities performing equivalent functions . . .
- 58 Pa.C.S. § 3301.

Preemption Under Chapter 33

Maintains the preemption language of the old Oil and Gas Act:

Except with respect to local ordinances adopted pursuant to the MPC and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances purporting to regulate *oil and gas operations* regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of *oil and gas operations* regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32. The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations as provided in this chapter.

58 Pa.C.S. § 3302 (emphasis added).

Preemption Under Chapter 33

- Expressly includes midstream operations because of the expanded definition of “oil and gas operations”
- Preemption cases, under the old Oil and Gas Act, are still applicable
 - *Huntley & Huntley, Inc. v. Borough of Oakmont*, 929 A.2d 1252 (Pa. Cmwlth. 2007).
 - *Range Resources-Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009).

Preemption Under Chapter 33

Based on *Huntley* and *Salem*, three questions determine whether local regulation is preempted:

- Does the local regulation target midstream operations?
- Does the local regulation overlap features regulated by Act 13?
- Does local regulation seek to achieve the same purposes as Act 13?

Environmental Preemption Under Chapter 33

Chapter 33 provides a new independent preemption provision for local regulation of “environmental aspects” of midstream operations.

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, *to the extent that they regulate oil and gas operations, occupy the entire field of regulation*, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.

58 Pa.C.S. § 3303.

Pennsylvania Environmental Laws

- Clean Streams Law
- Storm Water Management Act
- Dam Safety and Encroachment Act
- Air Pollution Control Act
- Solid Waste Management Act



Environmental Preemption

Based on this additional preemption provision (58 Pa.C.S. § 3303), local regulation is preempted when it regulates the same environmental concerns as Pennsylvania environmental laws.

- Erosion and sedimentation

- Waste management

- Storm water management

- Water quality

Uniformity Under Chapter 33

Municipalities must permit “reasonable development” of oil and gas resources. 58 Pa.C.S. § 3304(a).

Municipalities cannot:

- Impose conditions, requirements or limitations on the construction of midstream operations more stringent than those imposed on construction activities for other industrial uses within the municipality
- Impose setback requirements more stringent than Chapter 32 of Act 13
- Regulate the hours of operation

58 Pa.C.S. § 3304.

Uniformity

“Reasonable Development” means that municipal ordinances must comply with the following requirements:

- Pipelines
 - Permitted use in all zoning districts as long as development complies with Act 13
- Compressor stations
 - Permitted use in agricultural and industrial zoning districts
 - Conditional use in all other zoning districts if setbacks and noise levels meet Act 13
- Processing facilities
 - Permitted use in all industrial zoning districts
 - Conditional use in agricultural zoning districts if setbacks and noise levels meet Act 13

58 Pa.C.S. § 3304.

Procedural Options for Midstream Operations

The Pennsylvania Municipalities Planning Code (“MPC”)

- Grants municipalities the authority to enact local regulation
- Provides procedural options for challenges to local regulation

Chapter 33 of Act 13

- Limits municipal authority under the MPC
- Provides two new procedural options for challenges

MPC Options

Municipalities have the authority to enact and enforce local regulation, subject to the provisions of Act 13. The MPC provides avenues for challenge, including appeals to the Municipality's Zoning Hearing Board and the Court of Common Pleas

- Zoning Regulation
 - Conditional Use (subject to Act 13), variance, special exception
- Subdivision and Land Development Approval ("SALDO")
 - May or may not apply
- Permits
 - Roadway permits, building permits, driveway permits, and others.

Applicability of a SALDO to Midstream Operations

Each aspect of midstream operations must be evaluated separately.

- Pipeline Operations
 - K&L Gates has successfully asserted that pipeline construction is not subdivision or land development.
- Compressor Stations and Processing Plants
 - Likely constitute land development, regulated by a Municipality under its SALDO, subject to the limitations imposed by Act 13.

New Chapter 33 Options:

1. Pennsylvania Public Utility Commission (“PUC”) review (58 Pa.C.S. § 3305).
 - Based on the enactment or enforcement of local regulation in violation of the MPC or Act 13.
 - PUC orders can be appealed to the Pennsylvania Commonwealth Court

Chapter 33 Options

2. Pennsylvania Commonwealth Court
 - Any local regulation in violation of the MPC or Act 13 may be challenged directly in the Commonwealth Court.
 - No requirement to first petition the PUC
 - 58 Pa.C.S. § 3306.
 - Benefit to midstream operators
 - Attorneys fees and costs for local regulation enacted/enforced with “willful or reckless disregard” of Act 13 or the MPC. 58 Pa.C.S. § 3307.

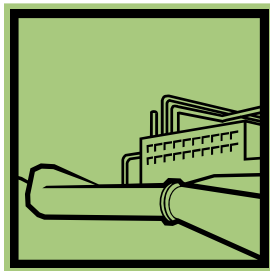
Ohio

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Ohio Oil and Gas Law

Midstream operations are expressly included in the definition of “production operation.” Ohio Rev. Code § 1509.1(AA).



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Preemption of Local Regulation

Broad preemption language makes the Division of Oil and Gas Resources Management the “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state. . . .” Ohio Rev. Code § 1509.02.

Natale v. Everflow Eastern, Inc., 959 N.E.2d 602 (Ohio Ct. App. 2011) (addressing oil and gas wells)

- Local ordinances are preempted when they attempt to regulate the location and operation of oil and gas operations.

West Virginia

West Virginia Horizontal Well Control Act

Signed into law on December 14, 2011

- Does not address local regulation preemption
 - A preemption provision existed in early drafts

What Midstream Operators Can Do

Few municipalities within West Virginia's producing regions have enacted zoning regulation

- If no local regulation exists:
 - Comply with state law (permitting)
 - Ensure operators acquire appropriate property rights from landowners
- If local regulation exists:
 - Appeal to the Board of Zoning Appeals seeking relief pursuant to W. Va. Code § 8A-8-9.
 - Appeal Board of Zoning decisions by petition for writ of certiorari to the Circuit Court pursuant to W. Va. Code § 8A-9-1.

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Topics

- Regulatory Background & Permits of Interest
- PASPGP-4
- HQ/EV Streams and Wetlands
- Reissuance of Nationwide Permit Package
- Mitigation Banking

Crossing Streams & Wetlands

Regulatory Background

Federal

- *Section 404 of the Clean Water Act* - U.S. Army Corps of Engineers (under the direction of EPA) is empowered to regulate the “discharge of dredged and fill material” into “waters of the United States.” Included under this provision is the placement of any fill – such as dirt, sand, gravel, rubble, or even concrete forms – into streams or into wetlands.

Pennsylvania

- *Dam Safety & Encroachments Act* – focused on activities involving “water obstructions” and “encroachments” – that is, those projects involving either the placement of fill or structures in, along or across wetlands and other bodies of water, or activities that change the course, current and cross-section of any body of water
 - 25 Pa. Code Chapter 105 – Dam Safety & Encroachment Act Regulations

Crossing Streams & Wetlands

Permits of Interest to PA Gathering/Transmission Systems

Pennsylvania

- Individual Permits – wetland >10 acres, HQ/EV waters, etc.
- General Permits – activities similar in nature that can be regulated with standardized conditions
 - GP-5 – utility line stream crossings
 - GP-7 – minor road crossings
 - GP-8 – temporary road crossings
- Limited Permit Waivers - PaDEP can waive permitting requirements (subject to certain conditions) for a variety of minor projects.

Federal

- Individual Permits
- Nationwide/Regional/Statewide Permits
 - Pennsylvania State Programmatic General Permit – PASPGP-4

Crossing Streams & Wetlands

Permits of Interest to PA Gathering/Transmission Systems - Continued

PASPGP-4

- PASPGP-4 authorizes work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act and the discharge of dredged and/or fill material into waters of the United States, including jurisdictional wetlands, under Section 404 of the Clean Water Act
- The Corps issued PASPGP-4 on July 1, 2011, for a five year period and delegated to PaDEP the ability to verify Federal authorization under the PASPGP-4
- Under PASPGP-4, the Corps has pre-determined that certain projects authorized under the Dam Safety and Encroachments Act qualify for federal approval under Section 404 of the Clean Water Act

PASPGP-4, Continued

Eligibility

- The PASPGP-4 applies to the discharge of dredged or fill materials and/or the placement of structures, for a **single and complete project**, including all attendant features both temporary and/or permanent, which individually or cumulatively results in direct or indirect impacts to 1.0 acre or less of waters of the United States, including jurisdictional wetlands.
- The PASPGP-4 applies only to activities within the Commonwealth of Pennsylvania.
- Discharges of dredged or fill materials and/or the placement of structures that comply with all terms, conditions, and processing procedures contained in the PASPGP-4, and have only minimal individual or cumulative environmental impacts, are eligible.
- Projects that are **not** eligible:
 - Single and complete projects that will have more than a minimal individual or cumulative adverse environmental impacts
 - Single and complete projects that do not comply with PASPGP-4 conditions
 - Single and complete projects that will result in total of more than 1.0 acre of temporary and/or permanent impacts (both direct and indirect) to waters of the United States
 - Projects located in ineligible waters

PASPGP-4, Continued

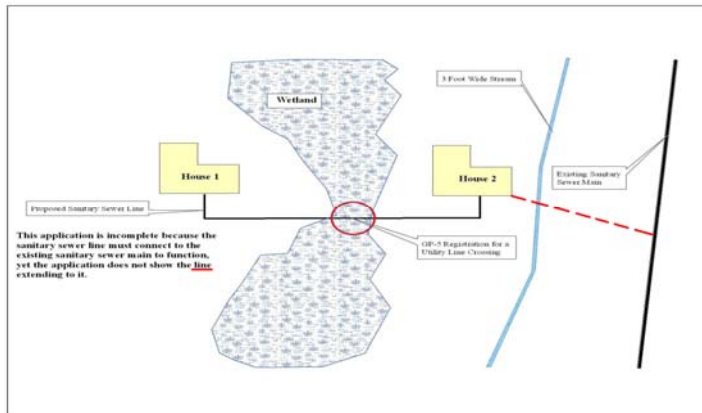
Categories of Activities - Activities authorized by PASPGP-4 have been divided into three categories of activities based on the Department's Chapter 105 program and the need for Corps review:

- **Category I** – authorized without notice to Corps. Associated with:
 - work authorized by PaDEP General Permits and most PaDEP waivers; and
 - an overall project that cumulatively results in 1.0 acre or less of jurisdictional impacts (including wetlands), or 250 linear feet or less of stream impacts
- **Category II** – authorized after Corps review and comment. Associated with:
 - work authorized by PaDEP Individual Permits and some PaDEP waivers; and
 - an overall project that cumulatively results in 1.0 acre or less of jurisdictional impacts (including wetlands), or 250 linear feet or less of stream impacts
- **Category III** – authorized after Corps project specific review. Associated with:
 - work that requires a project specific review by the Corps to ensure compliance with applicable federal laws and regulations; and
 - an overall project that cumulatively results in greater than 1.0 acre of jurisdictional impacts (including wetlands), or greater than 250 linear feet of stream impacts

PASPGP-4, Continued

- PASPGP-4 only authorizes “single and complete projects” – the total project proposed or accomplished by one owner/developer
- For **linear** projects (*i.e.*, a gas pipeline), a single and complete project applies to each crossing of a separate waterbody (*i.e.*, a single waterbody) at that location; except for linear projects crossing a single waterbody several times at separate and distant locations, whereby each crossing is considered a separate single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate water bodies, and such crossings are considered one single and complete crossing
- For **non-linear projects**, the single and complete project must have **independent utility** – *i.e.*, it would be constructed absent the construction of other projects in the project area
- For **linear** projects, the independent utility test applies to the **overall project**, and **not** each separate crossing of a water or wetland

PASPGP-4, Continued

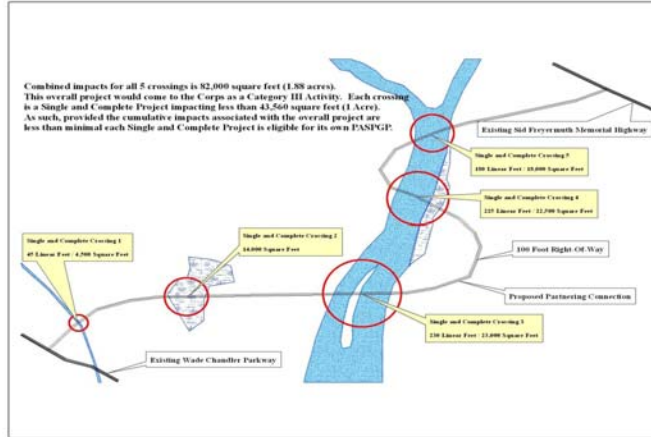


Adapted from Pennsylvania State Programmatic General Permit-4, Standard Operating Procedures (June 7, 2011)

PASPGP-4, Continued

- For linear projects, the cumulative impacts of regulated fills needed to accomplish the **overall project**, which **includes all single and complete projects** (i.e. typically, each single crossing), will be considered cumulatively in determining the appropriate PASPGP-4 **category** of review.
- An applicant proposing a linear project must submit information describing the locations of the starting point, end point, and proposed crossings, and all other impacts to aquatic resources, including submission of a plan that depicts the **overall project**.

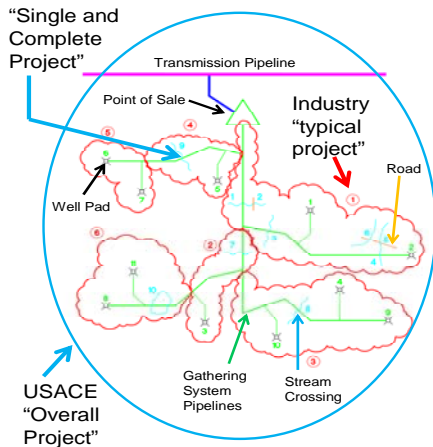
PASPGP-4, Continued
Example 1



Adapted from Pennsylvania State Programmatic General Permit-4, Standard Operating Procedures (June 7, 2011)

PASPGP-4, Continued
Example 2

Calculation



- If more than 250 linear feet of total impacts, **all crossings associated with an ‘overall project’ will require Category III review**
- Projects 1 – 6 are all part of the ‘overall project’ as defined by USACE
- Projects 1 – 6 (excluding 5, with no crossings) would be Category III, regardless of the size of the streams or impacts of individual crossings

PASPGP-4, Continued

Implementation Issues

- Ongoing dialogue between industry and the Corps
- Pending Environmental Hearing Board Appeal
 - Challenge to approvals for *temporary* water lines
 - Questions regarding Board jurisdiction over PASPGP-4 “issuance”
 - Scope of “Overall Project”
 - “Cumulative Impacts” analysis
 - “Alternatives” analysis

High Quality/Exception Value Streams & Wetlands

- Increasing scrutiny by environmental groups with respect to midstream activities moving into high quality/exceptional value stream and wetland areas
- HQ or EV designation requires that new or expanding activities do not degrade existing water quality, which equals (i) more rigorous permit review by PaDEP; and (ii) in some case, more stringent requirements and conditions to protect water quality
- HQ or EV designation impacts Chapter 105 requirements for streams and associated wetlands
 - Chapter 105 regulations prohibit PaDEP from granting a permit for an obstruction or encroachment affecting an EV wetland unless certain conditions are met
 - *Example* - Applicant must demonstrate that there is no “practicable alternative” to the proposed project that would not involve a wetland or that would have less effect on the wetland, and not have other significant adverse effects on the environment
 - *Pennsylvania Trout v. DEP*, 2004 EHB 310, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004) – demonstrates scope and intensity of the no practicable alternatives analysis, and the extensive project delays that can be caused by third-party appeals of Chapter 105 wetland permits – case involved *non-EV* wetlands

Corps' Reissuance of Nationwide Permits

- The federal Clean Water Act requires the Corps to reissue NWP every five years. The prior suite of 49 nationwide permits expired on March 18, 2012; The 2012 NWPs became effective on March 19, 2012 – see Reissuance of Nationwide Permits Final Notice, 77 Fed. Reg. 10184 (Feb. 21, 2012)
- In many parts of the country, pipeline projects are authorized by NWP-12, "Utility Line Activities"
 - NWP-12 differs from PASPGP-4 – various individual crossings of a linear project are **not** combined or treated as an "overall project" as they are under PASPGP-4
 - NWP-12 does not apply in Pennsylvania – it has been suspended in favor of PASPGP-4

Mitigation Banking

- DEP's Chapter 105 regulations require affected wetlands to be replaced – new wetlands must be constructed to compensate for those that are affected. General rule is that:
 - Affected wetlands must be replaced on a ratio of at least 1:1; and
 - Replacement must be conducted *adjacent* to affected wetland, or, if DEP approves, in the *same watershed*
- DEP's regulations do not expressly provide for, and are a potential impediment to, wetlands mitigation banking
- A wetlands mitigation bank is a wetland area that has been restored, established, enhanced or preserved, which is then set aside to compensate for future conversions of wetlands for development activities. Permittees, with agency approval, can purchase credits from a mitigation bank to meet requirements for compensatory mitigation
- Mitigation banking has certain advantages over traditional permittee-responsible mitigation – e.g., reduction in uncertainty, increased flexibility and reduction in permit processing times
- DEP established Pennsylvania Wetland Replacement Project in 1996 – allows applicants impacting 0.5 acre of wetland or less and that have no onsite wetland replacement options or alternative mitigation opportunities to contribute into DEP managed fund, which is used to finance wetland mitigation banks and other mitigation projects
- PennDOT is currently working with DEP on wetland banking
- Need for further development of mitigation banking programs in the Commonwealth



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AREAS OF PRACTICE

Mr. Delaney practices in the areas of public utility law, litigation, and administrative litigation representing a diverse group of clients in administrative proceedings before regulatory agencies and in judicial proceedings before state and federal courts. His clients include gas, telecommunications, electric and water utilities, independent power producers and industrial energy consumers. Mr. Delaney is a frequent lecturer and author of articles on public utility regulatory issues and administrative litigation.

PROFESSIONAL BACKGROUND

Mr. Delaney initially joined the Pennsylvania Public Utility Commission in 1978 and served as Assistant Counsel, Special Counsel and First Deputy Chief Counsel before assuming the post of Chief Counsel from 1986 to 1988. In addition, he also served as Chairman of the Pennsylvania Commission's Procedural Rules Committee from 1982-88. Mr. Delaney has been a Partner with K&L Gates since 1988.

Mr. Delaney has also served as Chairman, Vice-Chairman and Secretary of the Public Utility Law Section of the Pennsylvania Bar Association and has served as Editor of that Section's Newsletter. He is also active in public education, having served as a School Board Director and currently serving as a Community College Trustee. Mr. Delaney has an AV rating from Martindale-Hubbell. Mr. Delaney is also included in the 2008 – 2012 editions of Best Lawyers in America for telecommunications and energy law.

Prior to employment with the Pennsylvania Public Utility Commission, Mr. Delaney began his legal career as law clerk to Commonwealth Court Judge Genevieve Blatt from 1976 to 1978.

PROFESSIONAL/CIVIC ACTIVITIES

- American Bar Association
- Pennsylvania Bar Association
- Pennsylvania Public Utility Law Section

COURT ADMISSIONS

- U.S. Court of Appeals for D.C. Circuit
- U.S. Court of Appeals for Third Circuit
- U.S. Supreme Court

BAR MEMBERSHIP

Pennsylvania

EDUCATION

Pennsylvania Chamber of Business and Industry Leadership Pennsylvania Program,
1991

J.D., John Marshall Law School, 1976 (*cum laude*; Staff Member, *Law Review*)

B.S., LaSalle University, 1971

Daniel P. Delaney

REPRESENTATIVE EXPERIENCE

- Represented major telephone company in litigated proceedings on merger with large telecommunications provider.
- Represented major competitive telecommunications provider in multiple applications for merger with competitive telephone companies.
- Represented large industrial customer with alternative energy generation capacity in proceedings to establish Pennsylvania alternative energy regulations and acquisition of alternative energy credits.
- Represented electric distribution company in litigated proceeding to establish provider of last resort service responsibilities.
- Represented electric distribution company in litigated proceedings to establish tariff provisions controlling operations of competitive electric generation suppliers in the company's service area.
- Assisted potential purchaser with regulatory issues concerning the sale of a large natural gas distribution company.
- Assisted developers with regulatory issues concerning the development of Pennsylvania natural gas storage facilities.
- Represented interstate pipeline in natural gas distribution company proceedings involving pipeline capacity issues.
- Represented electric distribution company in litigation concerning the utility's discretion in the design and installation of electric distribution lines.



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Pierce Richardson

AREAS OF PRACTICE

Mr. Richardson practices real estate and transactional law. His practice is concentrated on real estate development (retail, office, commercial and industrial facilities), including land acquisition, zoning, subdivision, utility, roadway and other land development matters, property acquisitions and sales, leasing, and all aspects of real estate finance. He has represented national developers in connection with the development of retail and commercial centers, office buildings and light industrial facilities, and has represented purchasers and sellers of regional shopping centers, office buildings and industrial properties. Mr. Richardson has experience in the acquisition or disposition of heavy industrial facilities, including the creative use of subdivision, easements, licenses and other techniques to accomplish the separation of industrial facilities into multi-user properties, and has represented owners and developers of power plant projects in connection with the development, acquisition and financing of power generation facilities. Mr. Richardson has represented lenders and borrowers in a variety of real estate financing transactions. He represents landlords and tenants in a variety of leasing matters, focusing on office and light industrial facilities. He also serves as a practice group coordinator for the firm's Real Estate Investment Development and Finance Practice Group.

Mr. Richardson is a LEED Accredited Professional (LEED-AP), a distinction he earned through the Green Building Certification Institute. As a LEED-AP, he has demonstrated a thorough understanding of green building practices and principles, as well as the LEED Rating System.

PROFESSIONAL/CIVIC ACTIVITIES

- Allegheny County Bar Association (Real Property Section – Council Member)
- Allegheny County Bar Foundation Fellow
- Western Pennsylvania Chapter of NAIOP – Former member of Board of Directors
- St. Winifred's Church Parish Finance Council – Vice Chairman
- Volunteer Lawyer – Allegheny County Bar Association Indigent Divorce Program
- Leadership Pittsburgh XIX
- Banking and Lending Institution Forms – Contributing Editor
- International Council of Shopping Centers

BAR MEMBERSHIP

Pennsylvania

EDUCATION

J.D., University of Akron, 1986 (*cum laude*)

B.A., Miami University, 1983



Christopher R. Nestor

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AREAS OF PRACTICE

Mr. Nestor maintains a complex commercial and administrative litigation and regulatory compliance practice. His practice involves a diverse client base across multiple industry segments and focuses on federal and state administrative law, including rulemakings, administrative hearings and judicial proceedings; environmental and land use law, including permitting, administrative hearings and appeals; commercial and industrial tax assessment; and complex commercial litigation and related counseling. Mr. Nestor's experience spans many substantive disciplines, including:

- state and federal environmental laws and regulations, with particular emphasis on permitting and land use litigation and defending against citizen suits;
- disputes and litigation in connection with natural gas development, collection and distribution activities in Pennsylvania;
- disputes and litigation in connection with the development of controversial projects, such as landfills and electric generation facilities;
- healthcare industry compliance investigations together with related litigation, audits, and recoupment actions;
- real estate tax assessment appeals pertaining to complex industrial and commercial properties;
- disputes and litigation involving the retail and specialty pharmacy industries, including pharmacy reimbursement contracts;
- disputes and litigation in connection with commercial mortgage-backed securities; and
- disputes and litigation involving the permitting of vessels under the federal Clean Water Act.

PROFESSIONAL/CIVIC ACTIVITIES

- Pennsylvania Bar Association
- Dauphin County Bar Association
- Federal Bar Association
- Rebuilding Together of Greater Harrisburg, Board Member

COURT ADMISSIONS

- Supreme Court of Pennsylvania
- United States Court of Appeals for the District of Columbia Circuit
- United States Court of Appeals for the Third Circuit
- United States Court of Appeals for the Fifth Circuit
- United States District Court for the Eastern District of Pennsylvania
- United States District Court for the Middle District of Pennsylvania
- United States District Court for the Western District of Pennsylvania
- Numerous *pro hac vice* admissions

Christopher R. Nestor

BAR MEMBERSHIP

Pennsylvania

EDUCATION

J.D., George Washington University, 1998 (with honors): Member, *The Environmental Lawyer*

B.A., Dickinson College, 1995 (*magna cum laude; Phi Beta Kappa*)



K&L Gates has for decades represented clients in the oil and gas industry. Our lawyers have experience with the full range of legal issues affecting the transportation, storage and processing of oil, gas, and other petroleum products. We have represented producers, pipeline operators, storage and distribution systems, and public utilities with respect to midstream projects and services and a wide variety of other legal matters.

The strength of the K&L Gates team is rooted in our broad knowledge of the industry, the government regulators that authorize project development and service, and the structure of agreements that best serve the objectives of our clients. We have represented clients in all phases of midstream project development and operation, including site identification and right-of-way acquisition, procurement and supply contracting, project authorization, and regulatory compliance. We have represented interstate and intrastate pipeline operators in the development, permitting and construction of transportation pipelines and gas storage facilities; we have extensive experience in securing rights-of-way to locate interstate and intrastate natural gas and petroleum product pipelines and other infrastructure; we have represented the owners of facilities for

the treating, processing and fractionation of natural gas products in the negotiation of upstream and downstream contracts; and we have represented both buyers and sellers in the negotiation of natural gas supply and transportation contracts.

One of the keys to our success in these matters is the breadth of our experience with the governing regulatory authorities, and our knowledge of the agency leaders. The firm regularly appears in proceedings before state utilities commissions, state environmental agencies, and various federal agencies, including the Department of Energy, the Federal Energy Regulatory Commission, the U.S. Department of Justice, and the U.S. Environmental Protection Agency. In addition, a number of our lawyers have served in leadership positions within state and federal agencies.

“The strength of the K&L Gates team is rooted in our broad knowledge of the industry.”

Our Experience

The following examples provide just a sample of the breadth and depth of our experience in these areas:

Real Estate and Right-of-Way Acquisitions

- Represented owners and operators of an interstate natural gas pipeline system in land acquisition for additions to the company's interstate natural gas pipeline system in the Pacific Northwest.
- Represented a Wyoming petroleum producer in the purchase of a gathering system and several common carrier pipelines supporting its production.
- Represented project developers with respect to acquisition of rights-of-way in a wide variety of contexts, including development of water treatment system pipelines, roadways, light rail, and high-capacity electric transmission cables (including across an ocean and a Great Lake).
- Represented interstate and intrastate pipeline companies and utilities in securing rights-of-way for natural gas gathering and transportation lines and compressor stations.
- Represented reservoir operators in depleted sandstone formations with respect to facility development and rights-of-way.

- Represented a Texas gas pipeline related to easements and condemnation.
- Represented a major national pipeline company on acquisition of real estate across Pennsylvania.

Project Permitting

- Represented and advised a leading natural gas infrastructure company in connection with development of interstate natural gas pipeline projects and natural gas storage projects in Pennsylvania.
- Represented a developer of an innovative salt cavern high-deliverability natural gas storage project in northern Pennsylvania, including administrative proceedings for all environmental permits.
- Represented an independent gas distribution company in permit applications for natural gas storage project in western Pennsylvania utilizing Tiona Sands formation.
- Advised gas production and distribution companies in Pennsylvania on utility regulatory issues addressing PUC regulation of gathering and distribution systems and service requirements where customers are served from production and gathering lines.
- Represented the developer in permitting a send-out pipeline to connect a proposed LNG gasification terminal with the natural gas interstate pipeline system.
- Represented owners and operators of an interstate natural gas pipeline system in permitting additions to the company's interstate natural gas pipeline system in the Pacific Northwest, including preemption of conflicting state authorizations and successful negotiation of conditions of state-administered federal authorizations such as 401 water quality certifications and Coastal Zone consistency concurrences.
- Represented major pipeline owners on NEPA, MSA and ESA issues concerning a right-of-way renewal for Trans-Alaska Oil Pipeline.
- Secured federal certificate authority of major interstate pipeline projects.

- Secured authorization from Department of Energy for authority to import and export natural gas.
- Represented the developer of underground salt dome storage caverns and pipelines and facilities serving the storage, operation and treatment of brine.
- Represented major E&P producer in air permitting issues for substantial compressor station facilities.

Contracting

- Represented interstate pipeline companies in structuring cross-border transactions in Canada and Mexico.
- Represented power producers and distribution companies in negotiations for capacity on interstate pipeline systems.
- Advised and represented interstate pipeline companies on complex negotiated rate transactions.
- Represented an interstate pipeline company in the establishment of a joint venture for development of natural gas storage.
- Represented an interstate pipeline company in the establishment of a joint venture for development of greenfield interstate pipeline.
- Advised major interstate pipeline company on commercial agreements underpinning development of major system expansion.
- Advised major interstate pipeline companies in negotiations with LNG developers.
- Advised major interstate pipeline companies in negotiations with gas production companies.
- Represented an independent exploration and production company in negotiating a gas gathering agreement with a midstream company providing for the construction of up to 20 miles of pipeline.
- Advised gas production and distribution companies with respect to sales transactions with local distribution companies (including tax matters).
- Represented a county methane gas producer in agreements for sale of gas to a natural gas company.



- Represented county in long-term contracts for the purchase of natural gas to fuel transit fleet.
- Represented a transit agency in connection with gas purchases for one of the nation's largest LNG-powered transit fleets.
- Represented a natural gas broker in the negotiation of a natural gas sales agreement for wells involving issues of price calculation and take-or-pay provisions.
- Represented an established management team in obtaining funding from private equity firm to establish a platform company for the acquisition of gas pipelines.
- Represented a natural gas processor in Michigan in the upgrading of its facilities, including negotiating the related construction contracts and long-term sales and processing agreements with Michigan's largest utility and hundreds of natural gas producers.

- Represented producers in connection with swaps, collars and other physical and financial hedging arrangements for petroleum production.
- Represented producers in the negotiation of various petroleum product marketing agreements.
- Represented producers and processors in various percent-of-proceeds and volume fee-based processing contracts.
- Acted as counsel for the lender in a financing transaction for the acquisition of gathering systems.
- Represented lenders in a project finance transaction for the construction and operation of a 4 Bcf equivalent LNG storage facility.
- Represented major natural gas companies and interstate pipeline companies with respect to the leasing of natural gas storage areas.

Regulatory Compliance

- Represented a major interstate gas transmission pipeline system in air quality and water quality issues.
- Represented a gas transmission company and numerous natural gas producers in state regulatory proceedings impacting interstate pipelines in Pennsylvania, West Virginia and New York.
- Provided advice to numerous oil and gas clients on state, CFTC, FERC, DOJ investigations, and enforcement actions and other regulatory issues.

- Assisted potential purchaser with regulatory issues concerning the sale of a large natural gas distribution company.
- Represented a major gas transmission company in Pennsylvania and New York state regulatory proceedings impacting interstate pipelines including due diligence reviews of proposed gas storage projects.
- Represented a natural gas processing and treating plant owner in its negotiations with USEPA over the BACT implications of prior alleged modifications.
- Advised and represented an intrastate pipeline company concerning state regulatory issues related to the certification of a gathering and transportation pipeline in Pennsylvania.
- Advised major interstate pipeline companies in development of FERC gas tariffs and on FERC compliance matters.

Litigation

- Litigated eminent domain takings and rights-of-way for pipelines.
- Represented pipeline developers in pipeline fires and explosions.
- Litigated pipeline construction disputes.
- Represented pipeline and storage cavern developers in litigation over lease disputes.
- Litigated property damage claims as a result of pipeline construction.

- Represented storage developers in property damage and personal injury claims.
- Litigated salt dome storage cavern construction with respect to safety and other concerns.
- Represented pipeline storage developers in various preliminary injunction issues.
- Advised and represented interstate pipeline companies in major rate case proceedings before the Federal Energy Regulatory Commission.
- Represented interstate pipeline company in claims regarding merchantability of gas.
- Represented a public utility and its pipeline service related to pipeline failures and fires.
- Represented natural gas storage operations in litigation over reservoir and facility construction.
- Represented pipeline owner in claims against GC and inspection firms with respect to damage to compressor station.
- Represented interstate pipeline company in Natural Gas Act preemption litigation regarding state and local permitting requirements.

Learn more about our Oil and Gas practice at klgates.com.

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K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.

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