


Robinson Twp., Delaware Riverkeepers, et al.
v.
Commonwealth et al.

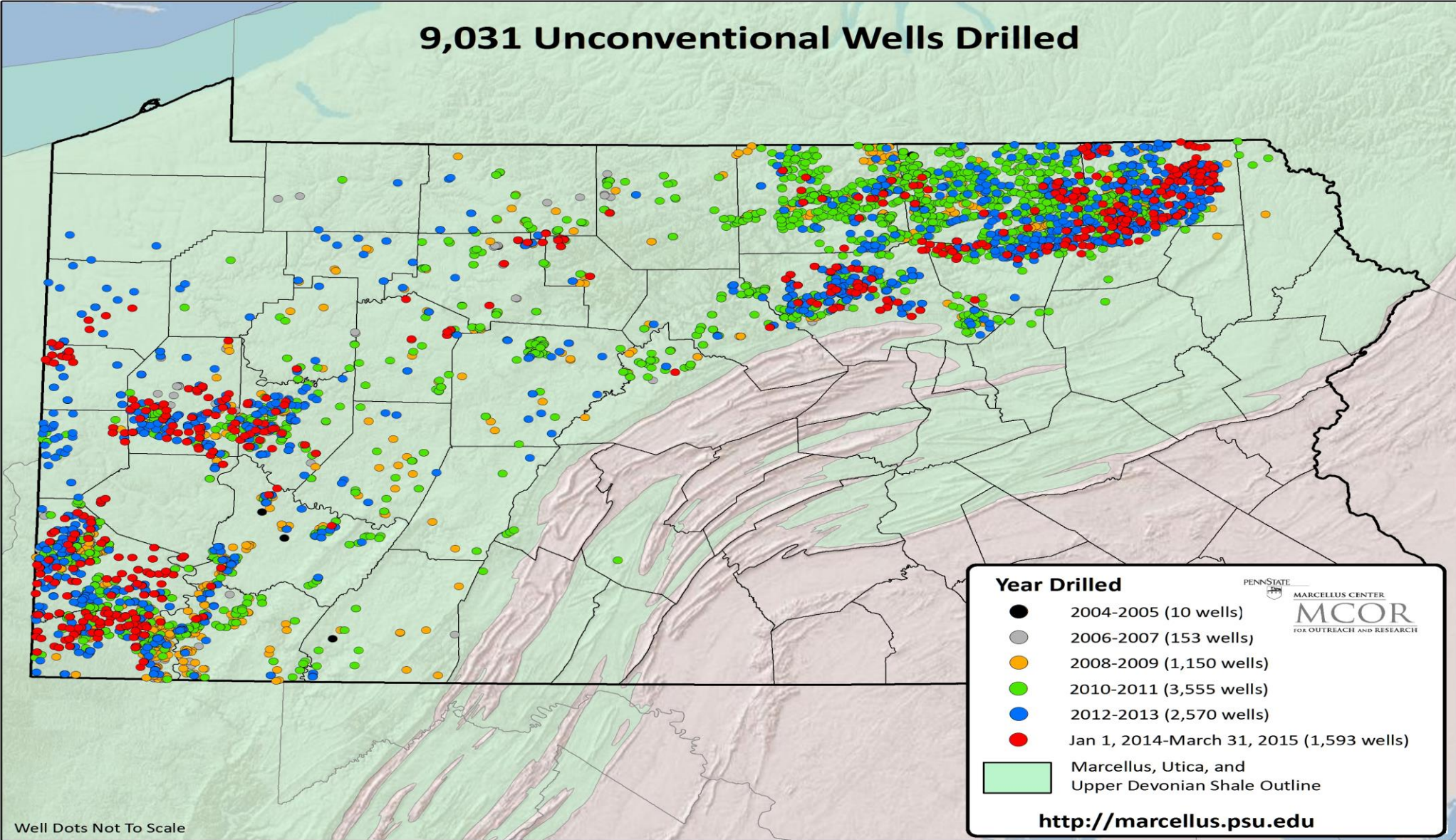
NOTICE OF SPILLS AND RELEASES TO
PUBLIC VS. PRIVATE WATER SUPPLIES

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- ▶ Section 3218.1 of Act 13 constitutes a “Special Law” which violates *Article III, Sec. 32* of the PA Constitution

Section 3218.1 states:

Upon receiving notification of a spill, the DEP shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that occurred. The notification shall contain a brief description of the event and any expected impact on water quality.

9,031 Unconventional Wells Drilled



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Well Dots Not To Scale

The Commonwealth Court found 3218.1 not unconstitutional:


- ▶ While the Court conceded that the bulk of the drilling for oil & gas occurs in rural areas, it found reasons for dissimilar notice requirements for citizens that rely on private water supplies.
 - ▶ 1. Not subject to state *Drinking Water Act*
 - ▶ 2. DEP does not keep track of location of private wells
- ▶ Given what it perceived as the DEP's lack of knowledge on the location of private wells, the Court reasoned that it was unfeasible for that agency to warn private well owners in the event of a spill

Robinson Twp. v. Com., 96 A.3d 1104 (Pa. Cmwlth. 2014).

In explaining the “Citizens” position, the Supreme Court set forth:

- ▶ “They first maintain its distinction between notification requirements in the event of a spill between the owners and operators of public and private sources of drinking water is not reasonably related to a legitimate state purpose. Citizens note that owners and operators of both such water sources have the same need to be made aware, in the event of a spill, of its potential impact on drinking water due to its potential to affect the health of those who use the affected water supplies. Indeed, Citizens aver, owners of private wells who rely on them for drinking water have an even greater need for such notification since public water supplies are routinely and regularly tested, thereby making it likely that a spill would be detected even absent such notification, whereas private wells do not undergo such a regular testing regimen.”

Robinson Twp. v. Com., 2016 WL 5597310 at *30; ___A.3d ___ (Pa. 2016).

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- ▶ “Relying on official United States Census Bureau data, Citizens contend that over three million Pennsylvania residents, most of whom live in rural areas, are dependent on private wells for their drinking water and for agricultural purposes. And because of the great amount of oil and gas drilling occurring in these areas, they could be affected by a spill of chemicals or other water contaminants.”

Robinson Twp. v. Com., 2016 WL 5597310 at *30; ___A.3d ___ (Pa. 2016).

- ▶ “Indeed, according to Citizens, private well owners may never receive notice of the existence of a spill under their water supply has been adversely affected, even though oil and gas well operators must ‘restore or replace’ water supplies to a nearby well owner, who draws from the same aquifer and has been adversely affected. **58 Pa.C.S. § 3218.1** Citizens claim that, in such circumstances, the DEP does not issue a public notice of violation against the well operator, nor a formal determination that contamination has occurred, and this lack of warning exposes the users of an affected well, who are unaware of its condition, to the significant risk that they would use the contaminated water.”

Robinson Twp. v. Com., 2016 WL 5597310 at *30; ___A.3d ___ (Pa. 2016).

Deposition Testimony of PA DEP Official

20 Q Well, as a result of contaminating Mr. ---'s
21 drinking water from the --- drill site did
22 --- --- have to pay a penalty to the
23 DEP for violating the law?

24 A No, we did not issue a penalty.

25 Q Why not?

26 A As I said earlier, we have discretion. And
27 generally in water supply replacement cases we
28 have not issued penalties. We have required
29 the operator to resolve the issues either under
30 our order or by a settlement with the
31 homeowner.




32 Q So then how would the public know that Mr.
33 ---'s drinking water had been impacted and
34 contaminated by --- ---'s drilling
35 operations at the --- site if there is no
36 Notice of Violation, no order issued, and no
37 penalty paid?

38 A I have to think about that. Without a
39 determination letter, without an order I am not
40 ... It is not clear to me how the public would
41 find out that we had issued a positive
42 determination on his water supply. It's not
43 clear to me at this point. I just can't think
44 of how maybe the public would know that.

Sample Water Replacement Agreement

- ▶ In order to receive replacement water, in addition to the monetary settlement provided, the landowner who relied on a private drinking source must agree that, within the agreed upon period of time following the signing of a full release and confidentiality agreement, they will notify the Pennsylvania Department of Environmental Protection that they desire to dismiss their water quality complaint against the Operator and will provide the Operator with confirmation that the complaint was dropped.



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- ▶ “Citizens contend, because of its disparate notice requirements, *Section 3218.1* incongruously does not extend the equivalent safeguards to owners and operators of private water supplies.”

Robinson Twp. v. Com., 2016 WL 5597310 at *31; ___A.3d ___ (Pa. 2016).

In finding § 3218.1 unconstitutional, the PA Supreme Court held that:

- ▶ “Two of the expressed purposes of Act 13, as statutorily codified, are to ‘protect the safety and property rights of persons residing in areas where mining, exploitation, development, storage, and production occurs.’ 58 Pa.C.S. § 3202(1), (3).”

Robinson Twp. v. Com., 2016 WL 5597310 at *33; ___A.3d ___ (Pa. 2016).

- ▶ “Consequently, we do not conceive how *Section 3218.1*’s exclusion of notice to over three million of our Commonwealth’s residents who receive their drinking water from wells – roughly a quarter of our population – that their health, or even their property, may be at risk as the result of a spill that has potentially jeopardized the safety of the water they consume, bears any fair and substantial relationship to this objective. The residents of the Commonwealth who receive their water from private wells depend on the safety of the water they draw from those wells to the very same extent as individuals who receive their water from public water facilities; yet, this vital safety interest is left wholly unprotected by Section 3218’s exclusion of this large class of Commonwealth residents from receiving mandatory warnings of a serious public health danger posed by the potential contamination of their water. Their need for warning in such circumstances is no less than those who receive their water from public water facilities.”

Robinson Twp. v. Com., 2016 WL 5597310 at *33; ___A.3d ___ (Pa. 2016).

Section 3218

- ▶ “Such notice is an integral predicate to private well owners requesting, and ultimately obtaining, the remedial relief guaranteed to them by the statute [restoration or replacement of the affected supplies with an alternative source].”
- ▶ “We conclude that *Section 3218.1*’s requirement that only public water facilities must be informed in the event of a spill is unsupportable under Article III, Section 32 of our Constitution.”
- ▶ *Robinson Twp. v. Com.*, 2016 WL 5597310 at *34; ___A.3d ___ (Pa. 2016).

The Court was obligated to strike 3218.1 in its entirety

- ▶ “Nevertheless, we are sensitive to the DEP’s concern that, as a practical matter, the striking of this statute, in its entirety, will mean that it no longer has a formal statutory obligation to provide notice to a public water supplier in the event of a spill. Given the significant public health ramifications of striking this mandate, we will stay our mandate as to this section for 180 days in order to allow the General Assembly sufficient time to devise a legislative solution. Neiman; PAGE. Thus, the DEP must continue to provide notice, as before, to public water suppliers during the pendency of this stay.”

Robinson Twp. v. Com., 2016 WL 5597310 at *34; ___A.3d ___ (Pa. 2016).

The location of private water sources is in the DEP's possession

- ▶ **§ 3211 Well Permits**

- ▶ (b) Plat.—

- ▶ **(1)** The permit shall be accompanied by a plat prepared by a competent engineer or a competent surveyor, on forms furnished by the department, showing the political subdivision and county in which the tract of land upon which the well to be drilled, operated or altered is located; a list of municipalities adjacent to the well site; the name of the surface landowner of record and lessor; the name of all surface landowners and water purveyors whose water supplies are within 1,000 feet of the proposed well location or, in the case of an unconventional well, within 3,000 feet from the vertical well bore...

§ 3211 Well Permits

- ▶ **(2)** The applicant shall forward by certified mail a copy of the plat to the surface landowner; the municipality of which the tract of land upon which the well to be drilled is located; each municipality within 3,000 feet of the proposed unconventional vertical well bore; the municipalities adjacent to the well; all surface landowners and water purveyors, whose water supplies are within 1,000 feet of the proposed well location or, in the case of an unconventional well, within 3,000 feet of the proposed unconventional vertical well bore; storage operators within 3,000 feet of the proposed unconventional vertical well bore; the owner and lessee of any coal seams; and each coal operator required to be identified on the well permit application.

§ 3211 Well Permits

- ▶ **(b.1) Notification**– The applicant shall submit proof of notification with the well permit application. Notification of surface owners shall be performed by sending notice to those persons to whom the tax notices for the surface property are sent, as indicated in the assessment books in the county in which the property is located. Notification of surface landowners or water purveyors shall be on forms, and in a manner prescribed by the department, sufficient to identify the rights afforded those persons under *Section 3218* (relating to protection of water supplies) and to advise them of the advantages of taking their own predrilling or pre-alteration survey.