



SPILMAN THOMAS & BATTLE, PLLC
ATTORNEYS AT LAW

To: IOGA-WV Environment & Safety Committee
From: M. Ann Bradley, Mark D. Clark
Date: December 16, 2011
Re: Natural Gas Horizontal Well Control Act

On December 10, 2011, West Virginia Governor Earl Ray Tomblin issued a proclamation calling for a special session of the Legislature for the purpose of considering and acting upon legislation regarding horizontal natural gas well operations. The bill presented by the governor (SB 4001; HB 401) drew heavily from the draft legislation developed by the Joint Select Committee on Marcellus Shale. Over the next four days, the Legislature convened, considered and amended the bill presented by the Governor and ultimately passed Natural Gas Horizontal Well Control Act (the "Act"). Governor Tomblin signed the bill into law on December 14, 2011 and it is effective from passage.

Applicability

The Act applies to any natural gas well, other than a coalbed methane well, drilled using a horizontal method, and which disturbs 3 acres or more of surface, excluding pipelines, gathering lines and roads, or utilizes more than 210,000 gallons of water in any 30 day period.

The Act does not, however, apply to or affect any well work permitted for a horizontal well or orders issued regarding horizontal wells or permit applications pending prior to the effective date of the Act which is December 14, 2011. Moreover, the Act does not apply to or affect any rights bargained for in any agreement between a surface owner and operator made prior to the effective date of the Act.

Summary of Key Provisions

Some of the more noteworthy provisions of the legislation include:

1. Horizontal well permit fees of \$10,000 for the first well on a pad and \$5,000 for subsequent wells drilled on a single well pad; formerly, the fee for each shallow well was \$400.

2. One time payment of \$2,500 to surface owner of disturbed land as “reimbursement” for real property taxes.
3. Bond requirements are \$50,000 for single well bonds and \$250,000 for blanket bonds.
4. Horizontal well permit application requirements include:
 - (a) Water management plan that requires:
 - (i) Type of water source, county of each source and latitude and longitude;
 - (ii) Anticipated volume of each withdrawal;
 - (iii) Anticipated months when water withdrawals will be made;
 - (iv) Planned management and disposition of wastewater after completion; and
 - (v) For surface water withdrawals:
 - Identification of current designated and existing water uses, including public water intakes within 1 mile downstream of the withdrawal location
 - A demonstration, using methods acceptable to the secretary, that sufficient in-stream flow will be available immediately downstream and that sufficient in-stream flow is maintained when a pass-by flow that is protective of the identified use of the stream
 - Methods to be used for surface water withdrawal to minimize adverse impact to aquatic life
 - (b) Site construction plan certified by a registered professional engineer;
 - (c) Well site safety plan, including:
 - i. Emergency point of contact for the well operator; and
 - ii. Provide copy to local emergency point of context.
 - (d) Certification by registered professional engineer of Erosion and Sediment Control Plan; and
 - (e) List of additives to be used in fracturing a well.
 - (f) Applicant must also submit a letter of certification from the DOH that the applicant is in compliance with road use regulations of the DOH.

5. Conditions required for horizontal well permits include:
- (a) Plug all wells in accordance with rules to be promulgated by DEP;
 - (b) Dispose of cuttings and associated drilling mud in an approved solid waste facility or managed on-site in a manner approved by the secretary;
 - (c) Grade, terrace and plant, seed or sod the area disturbed that is not required in production of the horizontal well;
 - (d) Take actions in accordance with industry standards to minimize fire hazards and other conditions which constitute a hazard to health and safety of the public; and
 - (e) Protect the quantity and the quality of the water in surface and groundwater systems during and after drilling operations and reclamation by:
 - i. Withdrawing water from surface waters deemed appropriate by the secretary so as to maintain sufficient in-stream flow immediately downstream of the withdrawal location and in no case shall an operator withdraw from the ground or surface waters at volumes beyond which the waters can sustain;
 - ii. Casing, sealing or otherwise managing wells to keep returned fluids from entering ground and surface waters;
 - iii. Conducting oil and gas operations so as to prevent, to the extent possible using the best management practices, additional contributions of suspended or dissolved solids to streamflow or runoff outside the permit area;
 - iv. Registering all water supply wells drilled and operated by the operator with the Office of Oil and Gas; and
 - v. Upon request of the owner to test for flow and quality all drinking water wells within 1,500 feet of a water supply well.
6. For horizontal wells requiring the withdrawal of more than 210,000 gallons in a thirty day period:
- (a) Provide notice to the department at least 48 hours in advance of withdrawal of water the location of withdrawal by latitude and longitude;
 - (b) All water withdrawal locations and facilities identified in the water management plan must be identified with a sign that identifies the

location of a withdrawal point, the name and telephone number of the operator and the well permit number(s);

(c) Record and retain the following information:

- i. Quantity of flowback water from hydraulic fracturing;
- ii. Quantity of produced water from the well;
- iii. method of management or disposal of flowback and produced water;
- iv. quantity of water transported;
- v. collection and delivery or disposal locations of water; and
- vi. name of the water hauling company.

7. Requires application and approval by the Department of Environmental Protection for large (210,000 gallons or more) freshwater and wastewater impoundments and for regular inspection of large impoundments that are not part of well specific applications, including \$300 application fee and \$100 annual certification fee, a monitoring and emergency action plan, a maintenance plan and plans certified by a professional registered engineer; placement, construction, etc. shall be the charge of a registered professional engineer.

8. Multiple notice requirements, all of which shall be by personal service or certified mail:

(a) Prior written notice: from 7 to 45 days prior to entry onto property for any plat surveys written notice to surface owners, coal owners or lessees and any owner of minerals underlying the property, including:

- i. A statement that copies of the Erosion and Sediment Control Plan and copies of statutes and rules may be obtained from the Secretary; and
- ii. The new web page address.

(b) Newspaper publication: at least 10 days prior to filing an application – publish a Class II legal advertisement containing notice of the website and indicating the ability of the public to submit written comments on the proposed permit;

(c) Water source owners: surface owners or water purveyors having water wells or springs within 1,500 feet of the center of a well pad on forms and in a manner prescribed by the secretary which will identify the rights afforded them under § 22-6A-11 and 12 and the opportunity for testing their water well;

- (d) Surface owners compensation: at least 10 days prior to filing the permit application give written notice to surface owner of intent to enter onto land for the purpose of drilling a horizontal well and by the application filing date provide written notice of the planned operation including a copy of § 22-6A-16 and a proposed surface use and compensation agreement containing an offer of compensation for damages to the surface; and
- (e) Seismic activity: 3 days written notice prior to performing seismic activity to surface owners, coal owners and lessees, gas storage well owner and Miss Utility of West Virginia, which notice shall include a reclamation plan in accordance with the erosion and sediment control plan.

9. New well location restrictions include:

- (a) No well may be drilled within 250 feet of a water well or spring;
- (b) The center of the well pad must be at least 625 feet from an occupied dwelling or large (2,500 sq. ft. or larger) cattle or poultry barn;
- (c) Well pad and well must be
 - (i) at least 100 feet from a perennial stream, lake, pond, reservoir or wetland;
 - (ii) at least 300 feet from a naturally reproducing trout stream; and
 - (iii) at least 1,000 feet from a public water supply intake.
- (d) Distance restrictions in (a) and (b) may be waived with written consent of the surface owner or by a variance granted by DEP; restrictions in (c) may be waived by DEP. Note: DEP must report to the Legislature beginning January 1, 2013 and each year thereafter regarding the number of waivers granted.

Location restrictions do not apply to any well on a multiple well pad if at least one well was permitted prior to the effective date of the Act.

10. Expanding a presumption of liability of a gas well operator for contamination or deprivation of water supply located within 1,500 feet of a well site (prior presumption for conventional wells extended 1,000 feet) and a new obligation to provide an emergency replacement drinking water supply within 24 hours, a temporary water supply within 72 hours and establish a permanent water supply within 30 days; requiring operator to use the services of an independent certified laboratory to conduct the pre-drilling or pre-alteration water well test in order to be eligible to rebut the presumption and to pay all reasonable costs incurred by the real property owner in securing a water supply.
11. Civil and criminal penalties – Willful violations of the Act or any permit can result in a civil penalty of up to \$5,000 for each day of violation. Willful disposal of waste fluids or drill cuttings or other wastes in violation of the Act or any other state or federal statute or regulation that has a “significant adverse environmental impact on surface or groundwater subjects the violator to a civil penalty of up to \$100,000. Criminal penalties imposed for willfully violating any provisions prescribing the manner of drilling and casing or plugging and filling any well, or the methods of conserving gas from waste include a fine not exceeding \$5,000 or imprisonment not exceeding 12 months. A fine of not less than \$1,000 or more than \$10,000 may be imposed for intentionally misrepresenting any material fact in an application, record, report, plan or other document filed or required.
12. Increased casing and cementing minimum standards, plus requirement that DEP develop regulations concerning same.
13. Horizontal well production damage compensation for surface owners and procedures for determining such damages which is very similar to existing law.

Reports and Regulations Required

14. Karst Terrain study and new rules.
15. Air quality study and rulemaking.
16. Impoundment and pit safety study and rulemaking.
17. Report by the secretary by December 31, 2012, on the noise, light, dust and volatile organic compounds generated by the drilling of horizontal wells as they relate to the well location restrictions regarding occupied dwelling structures pursuant to this section and potential additional rules related thereto.
18. DEP is required to report number of waivers granted starting in 2013.
19. DEP is required to report to the Governor and publish on its website the average time between well application filings and permit issuances.