



West Virginia Enacts Comprehensive Horizontal Gas Wells Statute

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Allowing West Virginia Governor Earl Ray Tomblin to hold true to a campaign pledge, on December 14, 2011, the Legislature passed (in Special Session) House Bill 401, encompassing the "Natural Gas Horizontal Well Control Act" as well as amendments to several existing laws that together establish a comprehensive, detailed system for permitting and regulation of horizontal natural gas wells. The new statute, given the short title of "Horizontal Well Act," applies to any proposed natural gas well (other than coalbed methane wells) that would employ a horizontal drilling method that (a) will disturb three acres or more of surface land or use more than 210,000 gallons of water in a 30-day period; and (b) was not permitted or the subject of an order relating to a permit application filed prior to its effective date.

The Horizontal Well Act may finally provide the certainty that many have called for, as a means of promoting the development of West Virginia's Marcellus Shale gas reserves. However, the certainty of definitive standards was provided in the form of far more detailed permitting and regulatory requirements than the natural gas industry has ever faced. Moreover, the Act requires further study and authorizes potential rulemaking by the West Virginia Department of Environmental Protection (DEP) on several fronts, including a report to the Legislature due by December 31, 2012 on the noise, light, dust, and volatile organic compounds generated by horizontal drilling operations; a report due by January 1, 2013 on the safety of pits and impoundments, and need for new regulatory requirements for such structures; a study due by July 1, 2013 on the need for rulemaking establishing additional requirements for the control of air pollution from horizontal well sites; rules regarding drilling in karst terrain; and regulations establishing casing and cementing standards.

Though it is difficult to summarize all of the new procedural and substantive requirements that will apply to Marcellus Gas horizontal well permits (and the many legal issues that are likely to arise), some of the major provisions of the new legislation are as follows:

- ▶ \$10,000 permit application fee for the first horizontal well at a particular location, and \$5,000 application fee for each additional well drilled from the same pad;
- ▶ Permit-blocking for permit applicants who have committed substantial violations of previously-issued permits or regulations at previous sites, and suspension of permits for substantial violations that are not abated or timely appealed;
- ▶ New public notice requirements (Class II legal advertisements), and specific individual notice delivered to all surface owners, mineral owners, nearby water purveyors, and gas storage field operators, of the intent to file a well permit application, and of the proposed applicant's intent to enter property to conduct plat surveys;
- ▶ If not permitted as part of a well work application, certificates of approval required for all large capacity (210,00 gallons or more) impoundments and pits, renewable

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annually;

- ▶ Each permit application to include a proposed erosion and sediment control plan; well site safety plan; site construction plan; and (if more than 210,000 gallons of water will be withdrawn during any 30-day period), a detailed water management plan (to include estimates of volume and timing of each water withdrawal, the management and disposition of all wastewater, and listing of anticipated and actual additives used in fracturing or stimulating the well);
- ▶ Detailed surface owner compensation requirements, including a proposed surface use and compensation agreement containing an offer of compensation to be included as a part of the pre-filing notice given to surface owners;
- ▶ Performance standards applicable to: disposal of drilling cuttings and associated drilling mud (in an approved solid waste facility, or (with surface owner approval) managed on-site); protection of quantity and quality of surface and groundwater systems; advance designation of water withdrawal locations to the DEP (including signs posted at all such locations), and recordkeeping and reporting for all flowback and produced water;
- ▶ Prohibiting any well from being drilled within 100' of a perennial stream or other waterbody (including wetland), or within 300' of a "naturally reproducing trout stream," and prohibiting any well pad within 1000' of a surface or groundwater intake for a public drinking water supply;
- ▶ Restricting location of wells (prohibited within 250' from any existing drinking water well or developed spring) and well pads (prohibited within 625' of an occupied dwelling or farm building of a size of 2500 square feet or greater), subject to waiver and/or DEP approval of specific plans allowing for closer locations that are sufficiently protective; and
- ▶ Rebuttable presumption of causation for contamination or loss of a drinking water source located within 1500' of a well pad, subject to certain delineated defenses (including pre-drilling water quality analyses performed by an independent certified laboratory showing that the problem existed prior to drilling), and upon DEP order, mandatory temporary and permanent replacement of water supplies to persons whose use of water for domestic, agricultural, industrial or "other legitimate use" was adversely affected by the gas well operation (unless waived in writing by the owner).