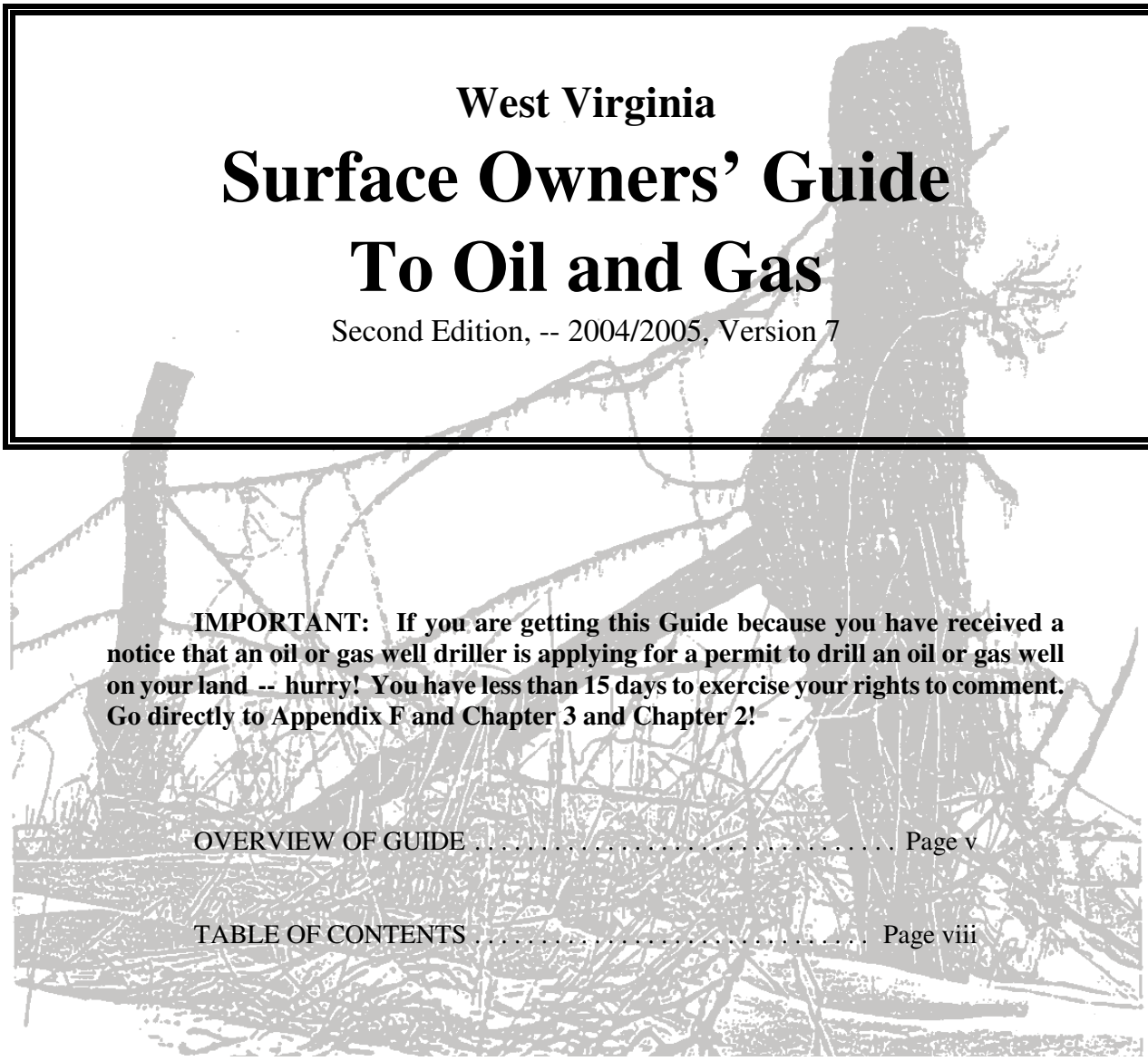

West Virginia
Surface Owners' Guide To Oil and Gas

Second Edition, -- 2004/2005, Version 7

IMPORTANT: If you are getting this Guide because you have received a notice that an oil or gas well driller is applying for a permit to drill an oil or gas well on your land -- hurry! You have less than 15 days to exercise your rights to comment. Go directly to Appendix F and Chapter 3 and Chapter 2!

Prepared by: David B. McMahon • Attorney at Law
Legal Aid of West Virginia
Voice/VoiceMail 304-415-4288
Secretary 304-343-4481 • Fax 810-958-6143
E-mail: wvdavid@wvdavid.net
And by: David Richardson and Justin Collin
Public Interest Advocate Students • West Virginia University College of Law

If you want to receive notice updates, corrections or future editions of this Guide that we decide to send out, please register by e-mailing your name, mailing address, e-mail address, county, and reason for interest (surface owner, library, driller etc.) to the author of this Guide or Legal Aid of West Virginia, Inc.

PREFACE TO THE 2ND EDITION

2004/2005

OilGasSurfaceOwnerGuide2004v7.wpd

Note to 2nd Edition: *If you have not seen or used the first edition of this Guide, then you will probably want to skip on to "Overview of the Guide" after this Preface. This preface only explains the differences between this edition and the earlier edition.*

Note to Version 7: *As new copies of this Guide are reproduced, some small changes are added. This note is being made to Version 7, updated in October of 2008. This version updates the web sites in Appendix A. It makes an important note regarding issues with appeals of permit decision to Circuit Court in Appendix G. It guides the reader to information on gathering pipelines at the end of Chapter 4. And it adds a nice watermark image to the front page.*

The first edition of this Guide was released in August, 2001. Hundreds of electronic and hard copies of the Guide have been requested.

Because the Guide was a completely new work covering a wide spectrum of relevant law, the copyright required anyone who wanted a copy to request it from the author (who provided copies at cost). This was to make sure that corrections of any errors that might be found in the Guide could be sent out to those who had received it.

Despite soliciting comments from knowledgeable people, only one small substantive error was found. For that reason the copyright on this 2nd Edition of the Guide allows copying and further distributions (without changes) by anyone so long as this is done at cost. However, recipients are encouraged to register with the author by e-mail (see front page) in case further editions are published or errors are found in the new material added in this edition.

The major impetus for the 2nd Edition of the Guide was the West Virginia Supreme Court of Appeals decision of *Lovejoy v. Callahan*, 576 S.E.2d 46(W.Va, 2002) which established a right to appeal the oil and gas drilling/well work permit issuance decision of the Office of Oil and Gas to a Circuit Court. This in effect gave the surface owner the right to appeal the State agency's actions on the surface owner's comment to the oil or

gas well permit application. To respond to this Supreme Court case, the Guide has an amended the "What Happens Next?" and "Can I appeal" sections in Chapter 3. These tell briefly what to do after the permit is issued if the surface owner is unhappy with the decisions made by the state agency when it issued the permit, and lead to further, new material in this Guide on doing that appeal. In addition, new Appendix G is a form for filing an appeal to the Circuit Court with an extensive explanation of how that new appeal process it is expected to work.

Since an appeal of the decision of the Office of Oil and Gas on the surface owner's comments on the well permit has not previously been authorized, the forms and instructions are a researched and educated guess of how the process will work. It is not known for sure that the process will work as anticipated in these forms and instructions. If you have experiences with this, whether the instructions and forms work or do not work, please inform the author. (See the front page for contact information.) If you are going to file one of these appeals, you might want to contact the author to see if there is any more or new information on the process before you start. And if major, reliable changes do occur, those who are registered will be informed. This is yet another incentive to register.

There are other important changes in the second edition.

•Coal bed methane wells were not discussed in the first edition. A whole chapter on coal bed methane wells has been added, Chapter 8.

•Appendix F is new. It is a new form for surface owners to use to exercise their rights to comment on the driller's application for a well work permit. Use of this form is not necessary to file the appeal. However, some advocates for surface owners thought having a form would be helpful to surface owners, and that the form might get more widely distributed, read and used than the entire Guide. It is still recommended that the people filing comments read the Guide and not just the form and its instructions.

•The Soil Erosion and Sediment Control Field Manual that the state uses when issuing permits and when enforcing construction and reclamation of well sites is now available on the web. That is pointed out at relevant places in the Appendix with a reference to the web site where the Manual can be viewed or downloaded.

•People who are considering buying a piece of land in a part of the state that has oil and gas activity often call the author and ask whether they should buy the land. There is no easy answer to that question, but Chapter 9 has been added to the Guide to help

people in that situation assess the risks of objectionable oil and gas activity on the particular piece of land they are thinking about buying.

•Recently there has been in increase the drilling of "deep wells". Deeps wells have dramatically different impact on the surface than do shallow wells. The Chapter on that subject was reviewed and updated.

•Another common question asked of the author relates to "thumper trucks," "shot holes," and other seismic activity that can go on in areas of the state that have or are thought to have oil and gas. A new "question and answer" was added on this subject to the question and answer section in Chapter 1.

•In another "question and answer" in Chapter 1, an answer was changed to include a newly discovered section of the West Virginia Code which sets out another way in which surface owners might be able to get ownership of a part of the minerals under their land. Not all surface owners will want to try this new method since it will probably result in an oil or gas well being drilled on the land.

•Web sites for the state and other resources and have been updated, though the URLs frequently change so you may have to do a browser search to find them or start with the West Virginia web site and work your way down.

•The Guide recommends "no trespassing" signs in one place. One reader pointed out that there are statutory requirements for "no trespassing" signs those requirements were added in the text at the appropriate place.

•The Guide contains a new tip about using new water wells to exclude drillers from drilling in certain areas because they are not allowed to drill within 200 feet of a water well.

The author's goal is to continue to improve the Guide. If any reader finds errors or has suggestions for changes or additions, please contact the author. Using the email address on the cover is probably the easiest way to communicate.

Many thanks to Eleanor Spohr for editing this second edition.

OVERVIEW OF GUIDE

Introduction.

This Guide was prepared for the benefit of low income surface owners unable to afford to pay a lawyer to advise or represent them in this area. Other surface owners will find this Guide equally helpful.

The authors have attempted to base the statements in this Guide on sound legal theory warranted by existing law. Some statements in this Guide may be based on a non-frivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law. There is no guarantee that courts would agree with the statements in this Guide or that a driller would not be able to persuade a Court to accept a different rule, statute or common law theory.

At least one person who reviewed this Guide before the publication of the first edition thought the Guide was too harsh in its characterization of drillers. There are many drillers who are very considerate and work with surface owners (though none so good they would give surface owners a cut of the royalty or profits). In places, this Guide recognizes these cooperative drillers, and advises surface owners on how to work with them. On the other hand, there are many drillers who are very uncooperative, and who ignore surface owners or are even antagonistic toward surface owners. The surface owners dealing with these uncooperative drillers are the ones who most need help from a Guide like this. So the focus of this Guide is to give surface owners all of the materials and suggestions available to surface owners to help them prepare to deal with the circumstances that uncooperative drillers can create. The surface owner can then temper his or her response to more cooperative drillers. Even with cooperative drillers it is best to start from a position of knowing all of the rights and advantages each party has.

Anyone finding errors in this Guide, or having suggestions to improve this Guide, is encouraged to report them to the author.

Chapter 1. What is your situation?

Start with this Chapter (unless you have already received a permit application, in which case you may need to hurry and start with Chapters 3 and 2). This Chapter asks you questions to determine your situation, and then refers you

deeper into the Guide to give you the answers for a surface owner in your situation.

Chapter 2. An overview of your rights at time the driller applies to the state for a permit to drill an oil or gas well on your land.

Read this Chapter to get an overview of what your strategy should be when you know that an oil or gas driller is planning to drill a well on your land.

Chapter 3. Step by step suggestions of what to do when you get a notice of an application for a permit to drill an oil or gas well on your land.

Read this Chapter for specific suggestions on what you should do when an oil or gas well is about to be drilled on your land.

Chapter 4. Step by step suggestions of what to do while the oil or gas well is being drilled.

Read this Chapter to for specific suggestions on what to do while an oil or gas well is being drilled.

Chapter 5. Step by step suggestions on what to do after the oil or gas well has been completed.

Read this Chapter for specific suggestions on what to do after the driller is done drilling an oil or gas well.

Chapter 6. Oil and Gas Surface Owner's Damage Compensation Act.

Read this Chapter for specific suggestions on how to file your claim for damages to your surface from the oil or gas well drilling. (If you have been careful not to negotiate them away when the driller first arrives.)

Chapter 7. "Deep" oil and gas wells.

Read this Chapter if the driller is proposing to drill a "deep well" on your land whether or not the driller asks for your consent to drill the deep well.

Chapter 8. Coal Bed Methane.

Read this Chapter if the driller is proposing to drill a coal bed methane well or a series of coal bed methane wells on or near your land.

Chapter 9. Should I Buy This (Surface) Land?

Read this Chapter if you are considering buying surface land just about anywhere in West Virginia. This Chapter will help you weigh the risks from old oil and gas wells and the risks of future oil and gas exploration on that land before deciding whether to buy that particular piece of land.

Endnotes (and Footnotes).

This Guide uses both footnotes and endnotes. Footnotes are indicated by asterisks (*), they are for the general reader, and they appear at the bottom of the page. Endnotes are indicated by numbers, they are directed at attorneys or others who want to look up the statutes, rules or cases themselves, and they appear in a group at the end of the text of the Guide, before the appendices.

Appendix A -- Government Agencies.

Appendix B -- Well Identification Numbers.

Appendix C -- How to Tell Whether You Own the Minerals Under Your Surface.

Appendix D -- How to Find out Who Owns the Minerals under Your Surface Land.

Appendix E -- How to File with the Sheriff So You Will Get Notice If the Minerals Under Your Land Are Sold for Taxes.

Appendix F -- Simple Form for Surface Owner's Comments on Application for Well Work Permit.

Appendix G -- Forms for Appeal of State's Decision On Issuance of Well Work/ Drilling Permit to Circuit Court.

TABLE OF CONTENTS

Note: *If the version of this Guide you are using has been transmitted electronically at any point before you received it, the page numbers indicated in this Table of Contents may not be exactly accurate. If you have an electronic file of this Guide, you may be able to again generate the table, but the table will then require some editing to achieve the same appearance of the Chapter headings. (If you do re-generate the Table of Contents, the appearance of "Index to Questions" in Chapter 1 may also then need editing.)*

CHAPTER 3.
Step by Step Suggestions of What to Do When You Get a Notice of an Application For a Permit to Drill An Oil or Gas Well On Your Land.

CHAPTER 4.
Step by Step Suggestions of What to Do
While The Oil or gas Well Is Being Drilled

CHAPTER 5.
Step by Step Suggestions on What to Do
After the Oil or gas Well Has Been Completed.

CHAPTER 6.
Step by Step Suggestions of What To Do
To Get Compensated for Damages Caused by the Driller
Under the
"West Virginia Oil and Gas Production Damages Compensation Act"

CHAPTER 7.
Deep Wells, What Difference Do They Make To Surface Owners

CHAPTER 8.
Coal Bed Methane.

CHAPTER 9
Should I Buy this (Surface) Land?

CHAPTER 1.

What Is Your Situation, and What Should You Do?

Introduction to Chapter

Read through the "Index to Questions" below to determine which questions apply to your situation. When you have figured out the questions that relate to your situation, go to the page number indicated for that question. On that page you will find the question repeated, and the answer. Note that more than one may apply!

Important: If you have just gotten a notice of an application for a permit to drill an oil or gas well on your land, skip right to Chapter 2. You have no time to lose!

Index to Questions:

Questions (Repeated) and the Answers: What I Should Do?!

Questions If You Own the Surface and the Minerals.[*]

(1) Q. •I own the surface and some or all of the minerals.
•No drilling activity has taken place on my property yet.
•What should I do?

A. Is there drilling going on around you? If so you might want to see if there are any wells close enough to you to be draining the oil or gas out from under your property. If there is, then you might want to contact a driller to see if he will drill a well on your land to "offset" the well that is close to you and get the oil or gas out before they do. If the well near you is a big producer, you might have some luck doing this. If the well near you is not a big producer, then a driller may figure there is not enough oil or gas left down there and will not be interested. You can also go to the "operator" of the well and ask the operator to enter into a "voluntary pooling and unitization agreement" in which he agrees to pay you some of the royalty in exchange for you agreeing that no offset well can be drilled on your land. The information to begin to find all this out is available from the offices and websites of the West Virginia Geological and Economic Survey and the State oil and gas regulatory agency, the State's Office of Oil and Gas of the Department of Environmental Protection.[**] But it might be wiser to try to find someone who knows the business to advise you.

Do you want to try to get some money by getting your mineral developed? You can lease to a driller. If you do you need to be careful that in the lease you sign you limit or control the damage is done to your surface. You need to find out whether it would be oil or it would be gas that would be produced from your area and decide if you would want the constant mess of an oil well on your land. But you can contact a responsible developer that has a good reputation in your area. Before signing a lease you should think very carefully about what rights you want in the lease to protect your property. It is recommended that you read this whole Guide and talk to a lawyer or someone you trust who is knowledgeable in the area.

(2) Q. •I own the surface and some or all of the minerals.
•I signed a lease of the minerals which said that the *driller had to drill a well [within a certain period of time]*, and no well has been drilled within that time.
•What should I do?

---

[*]Note: If you are not sure if you own the minerals, go to Appendix C.
[**]See Appendix A for information on how to contact these agencies.

A. It depends.

First of all, if the lease was for a storage or injection well, there are a whole separate set of rules. These are relatively rare and beyond the scope of this Guide. You may contact the author (see the cover page) for guidance on to others who may help you.

If the lease also provided you were to be getting some payments until a well is drilled, usually called "delay rental". If those payments were not made, then the lease probably expired even before the end of the period of time set out in the lease during which the driller had to drill the first well. To terminate the lease for non-payment of delay rental, a state statute requires you to go through a demand procedure.[1] You probably ought to go to a lawyer to help you with that. Once you have gone through the procedure, the lease is abandoned, and you can negotiate with another driller, or go to court to stop the driller from drilling a well, or even comment on the well permit application when it is served on you and stop the driller from getting a permit. While the termination of the lease is not strictly a reason for the State to deny a permit (so you are better off not rely on this unless you have to) the State may take your side and deny the permit.

If the lease said the first well had to be drilled within a certain period of time, and the if the first well has not been drilled within that period of time, then the lease has expired. The time limit applies even if the lease has been assigned from the original driller to another.[*] This is probably true even if the driller has kept sending you delay rental payments beyond the period of time in the lease. (You should stop accepting the delay rental payments, and expect to repay the ones you received after this "primary" term of the lease expired.) Once the term has expired with no well, you can negotiate with another driller, or go to court to stop the driller with the expired lease from drilling a well, or even comment on the well permit application when it is served on you and stop the driller from getting a permit. While this is not strictly a reason for the State to deny a permit (so you should not rely on this unless you have to) the State may take your side.

If the lease did not provide for delay rental payments and 24 months have passed, the lease may also be over as abandoned.[2] But the driller may think the lease is good, or

---

[*]If the original driller who got the lease from you then transfers the lease to another driller, the other driller is an "assignee." The lease can be transferred this way again and again through a whole series of drillers. In fact they usually are. These records of these assignments are usually, but not necessarily, recorded at the courthouse.

is trying to bluff you or persuade you to let it continue. This is an extra reason why you need to see a lawyer, whatever you want to do.

(3) Q. •I own the surface and some of the minerals, and the oil and gas have been leased.
•There is an oil or gas well on my property under the lease.
•I am not getting any royalties or other checks.
•What should I do?

A. It depends.

Is the well producing oil and/or gas? There are a number of ways to check. The operator of the well is supposed to report production from the well to the State's Office of Oil and Gas. You can contact that office to get the records, or even check the web site.[*] Get the "API" well number for the well.[**] If you have an oil well, you can use the techniques suggested in the answer to the next question addressed to people who want to check the amount of royalties. If it is a gas well, you can just go out and listen.

If the well is producing and you are not getting any payments, then you are probably entitled to some current royalty and some back money, and you could ask for interest too. You can contact the operator named on your lease (or on the records of the State's Office of Oil and Gas)[***] to get the money. Or, if you do not trust them, or you want to try to cancel the lease, see a lawyer.

If the well is *not* producing oil or gas, the most common situation is that the well is "shut in" due to market conditions. For a well to be "shut in," the well has to be capable of producing oil or gas, but not be producing now due to market conditions, etc., because it would not be profitable in the current market. If that is true, there is not much you can do about it unless the lease calls for "shut in" payments. If the lease calls for shut in payments and you have not been getting them, you should be able to get them from the driller by demanding them. You may want to see a lawyer. You could also contest their claim that the well is only really "shut in" due to market conditions and declare the well abandoned. Read more about that below. And if you are getting a "flat rate royalty too!"

---

[*]See Appendix A for information on how to contact these agencies.

[**]See Appendix B for information on how to find an oil or gas well's well number.

[***]If the original driller who got the lease from you then transfers the lease to another driller, the other driller is an "assignee." The lease can be transferred this way again and again through a whole series of drillers. In fact they usually are. These records of these assignments are usually, but not necessarily, recorded at the courthouse.

Similar to your situation when a well is "shut in", there is nothing you can do if the well is leased as a storage well, if the well is a secondary recovery well, or if the well is an injection well, a rare "flat rate" well and the flat rate is being paid. The answer is also the same where the failure to produce and sell is the direct result of the interference or action of the owner of such oil and/or gas, is the direct result of the inability to sell any oil and/or gas produced or is the direct result of the any inability to deliver or otherwise tender such oil and/or gas produced. Of course these only apply if they are true. The last exception would sound suspiciously like an excuse and should be investigated to see if it really is true.

If none of the excuses above apply, and if the driller has not produced from the well for 24 months, it may be that the driller has forfeited the well and all of its equipment back to you, the mineral owner.[3] You need to see a lawyer because the statutes require an action to be filed in Circuit Court to legally establish this. The answers above also do not apply if the well is a "storage" or "secondary recover" or "injection" well.

This is a forfeiture of the well back to you the mineral owner because the well is deemed abandoned under this statute helping mineral owners. To get a forfeiture this statute requires a law suit to be brought in Circuit Court, which means you probably need a lawyer to do it. The effects of this statute are close to, but not exactly the same as being "abandoned" under another statute, the State's Abandoned Well Act. That Act empowers the state to force the well to be plugged if it is "abandoned" under the definition in that Act.

At this point you need to read Question (6) and its Answer for surface owners who do not own any interest in the minerals. "**Q.** I do not own the minerals. There is an oil or gas well on my land. It is old and nothing is being done with it [and it is showing signs of deteriorating/I am worried that it might screw up my water well or cause other problems]. What should I do?" The answer to that question applies to a surface owner who does *not* own any of the minerals. But a surface owner who *does* own some or all of the minerals can take all of the actions that the surface owner who does *not* own minerals can take under the Abandoned Well Act as explained in that answer.

There is a difference between what happens if you use the statute discussed in this, and what happens if you use the Abandoned Well Act explained in the Answer to Question (6). Under the statute explained in this answer the well goes back to the mineral owner. So if you are a mineral owner and the well is still a producing well, you would prefer to use the statute discussed in this answer (but it is more expensive because you will probably need the help of a lawyer). If you use the Abandoned Well Act explained in answer to Question (6), the State just makes the driller plug the well and no one gets the well (with some limitations if the driller is out of business -- be sure to read the answer to Question (6)). If the well is near the end of its life, or

if you just want it off your property, this is the best thing for you as a mineral owner to do. You won't have to pay to plug it.

(4) Q. •I own the surface and some or all of the minerals.
•There is an oil or gas well on my property.
•I am getting some royalties or other money from the operator.
•What should I do?

A. You are one of the lucky ones. You are getting some compensation from the use of your surface.

You do want to make sure that whoever is "operating" the well has posted a bond to plug it when it finally stops producing. To check that, get the "API" well number off the well and check with the State's Office of Oil and Gas.* The State will tell you if the bond has been posted.

You may want to check to make sure you are getting enough royalties. One way is to check the production records at the State's Office of Oil and Gas, or on their Internet web site. Of course a really crooked operator will send false information there too. So...

If you have an oil well, you can watch the transportation trucks** and/or check the tank yourself.***

---

*See Appendix B for information on how to find an oil or gas well's well number.

**Note the name of the transportation company on their trucks. If there is no name, ask the driver whom he is working for. Remember they are coming on to your property, and you don't have to let just anyone on your property. You have a right to make sure they are the ones who have the right to come on to your property and get the oil, or work for the person who has the right to do so. Then contact the transportation company. Ask them for a monthly list of barrels of oil transported from your farm. Ask for the record number of this account for future reference. Find out if they have received a division order for your farm and try to get a copy. Find out if they have a standing purchase order for your farm and try to get a copy of that. There is no guarantee you will get these things if you ask. You may not have a legal right to them. There is a guarantee you will not get them if you do not ask.

***Start measuring from the first production if you can. There should be a strip of metal with numbers on it located at the bottom of the oil tank at the outflow. When oil is taken from the tank this strip must be cut, and then a new strip is put on the tank until the next taking. Record the number on this strip, sometimes called a "lock," each time the transportation company removes the oil, and note the date. Then keep a continuous measurement of the oil that builds up, and gets taken out of the tank. To do this, locate and remove the lid. (The oil

(continued...)

If it is a gas well, listen to gas flowing and make sure the meter is working. Check the meter regularly. This can be a problem because usually the gas meter is in a locked house of some kind. So if you suspect fraud, it will be harder to catch them. But if you are getting a 1/8th royalty, there is no reason you should not have a key to where the meter is located. You should insist on a key to the lock. If they won't give you a key, then you should get suspicious. Some people have put their own lock on the door in addition to the company lock to force them to give you a key, but it is not entirely clear that this is legal.

If you have a well that is producing both oil and gas, you will probably have to do both at the tank or series of tanks called the "separator" that will be near the well.

Questions If You Own the Surface <u>but not</u> the Minerals.

(5) Q. •I do not own any of the minerals.
•I'd like to get to own them if I could.
•What should I do?

A. There are three ways to try to get the minerals if you are the surface owner.

First, the mineral interest in land can be bought and sold just like the surface you bought, or just like a right-of-way across your land, or just like any other interest in the land. So you can find the owner or owners of the minerals and try to buy it back, but it is not easy. First you have to go down to the courthouse and use the tax records or the deed room to find who owns the minerals. See Appendix D. When you do that, you may find out that the mineral ownership of the coal, for example, is different from the mineral ownership of the oil or gas, etc. More commonly, you will find the minerals are in some kind of joint ownership, like "heirship," where a number of people share ownership of the

---

[***](...continued)
company may take the position that you are violating the law in doing this. It is their tank, although it is on your land. So if you do this, you might be taking a chance that the driller will try to have you arrested. You might talk to your local prosecutor first.) Use whatever measuring tool, or "dip stick," that the company leaves at the tank. If they have not left a measuring tool, then a steel 12-foot tape will work very well for a 100-barrel tank. You will have to know some physics and measuring to figure out the barrels etc. If the lid is locked, then you will have a tough time catching someone who is cheating you. But you should insist on a key to the lock. If they won't give you a key, then you should get suspicious. Some people have put their own lock on the lid in addition to the company lock to force them to give you a key, but it is not entirely clear that this is legal either.

same tract/acreage of minerals. This is not where one person owns five acres and another person owns the five acres next to it. This is where two or more share ownership of every acre, rock and stone on the same ten acres of minerals. Ownership sharing where one person owns as little as 1/32 interest in the whole tract of mineral interest is not uncommon, and there may be 31 other owners of the same 10 acres. This can happen to surface property too, but it is even more common with mineral property in which the pressure to consolidate ownership arises less frequently.

Nevertheless, if you can find an owner who will sell you even a fraction of a share of ownership of the minerals under your property, that gives you a lot of control! Before the minerals can be leased, developed or sold (unless that has already occurred), all of the owners have to sign on the dotted line. And you can decide that you do not want to sign at all or only with certain conditions. Of course if the minerals have already been leased or sold this will not help you now, but it may help in the future, or your children's future.

Second, if property taxes are not paid on minerals, then, just like when taxes are not paid on surface land, the minerals (or technically, the tax lien on the minerals) get sold by the sheriff for nonpayment of taxes. You can bid at the public sale. The problem is finding out when the sale will occur. Notice of the tax sales appear in the local newspaper in October or November. But you will have to check each year and almost every day! And they are listed according to who owns the minerals, not in your name, so you have to know the legal name of the person or entity who owns the minerals! Appendix D tells you how to find out, but it is time consuming, confusing and tedious work.

However, there is something you can do so that you will be notified by mail if the minerals under your land are sold for taxes, and you will not have to keep checking the papers![4] Again you first need to find out who owns the minerals now and that can be time consuming, confusing and tedious work. See Appendix D. When you find out who owns the minerals, then you need to go to the sheriff's office and get and fill out a form called "Statement of Lienholders and Other Interested Parties". This form is filled out using information available in the County Clerk's record room, the assessor's office and/or the sheriff's office (some of which you may have gotten in finding out who owns the minerals as explained in Appendix D). The form is then filed in the sherif's office (or in some counties the county clerk's office). Appendix E contains a sample of the form and some additional explanation on how to do this. Then, if the minerals are sold, you will be notified of the sale and can bid to buy the minerals.

Third, there is another way you can be awarded the mineral rights. It is complicated for you to do, and you will almost certainly need a lawyer. It could also happen when one of the owners of the minerals under your surface wants to do a lease.

Before a lease or sale of the minerals can be done, all of the owners of those minerals have to sign the lease or deed. As explained in the first paragraph of this section, many times there are tracts of minerals in which ownership of the same tract is shared by many, many people. Frequently many of these people cannot be found, even in the records of the courthouse. If they cannot be found to sign on the dotted line, then the minerals cannot be developed. Because the Legislature wants to facilitate the development of minerals, to deal with this problem they enacted an article in the West Virginia Code named "Lease And Conveyance of Mineral Interests Owned by Missing or Unknown Owners or Abandoning Owners".[5] Under this statute if a person with an ownership interest in the surface or the minerals wants to lease or otherwise develop the minerals, and if one or more mineral owners are either unknown, missing, or have abandoned their interest, and if the mineral owners who can be found agree, then they can go to court and get a lease made to produce the minerals. After seven years, if the missing owners do not show up, then the surface owners are given title to the minerals that were owned by the missing mineral owners (subject to any leases, of course)![6]

An unknown or missing owner is an owner whose "identity or location cannot be determined from records of the clerk of the county commission, the sheriff, the assessor and the clerk of the circuit court in the county in which the interest is located or by diligent inquiry."[7] So this section will work for you if there are missing owners of your minerals as defined by the Legislature. Therefore, if you check in all these places and are not able to figure out who all of the mineral owners are, you might be able get the minerals. Now this will require you to ask the court to sell a lease to develop the minerals, which you may not want in the first place. If a driller buys the lease the driller could drill wells and produce the minerals under your surface, and you won't have much control over how that is done. So there is some risk that having the court sell a mineral lease may backfire on you in that sense. But you could end up owning some of the minerals in the long run. And it may be possible that you could bid on the lease to make this all happen -- costing you money in addition to the costs of going through the whole proceeding.

To try to get the minerals using this statute, after you do what you can to find out who the mineral owners are, and which ones are missing, you will first have to petition the court to appoint a special commissioner to sell a lease of the mineral rights. There are many things which the petition must contain and it is recommended that you hire a lawyer or at least read the law carefully.[8] Immediately after filing the petition you will have to

place a legal ad in the paper and file a lis pendens notice in the county clerk's office.[9] If no one steps forward and claims ownership of the minerals, and the court is convinced that the owner is unknown, no sooner than six months after the petition is filed, the court will order the special commissioner to lease the minerals. If a driller buys the lease, the driller will have to pay the court costs. If the lease is not sold, then the petitioner (maybe you) must pay the court costs.

If the lease is sold, and if after seven years no one has come forward to claim the minerals, the mineral rights will be given to the surface owner. If there is a lease on the minerals, title to the minerals will be subject to the lease. However, the surface owner will receive the amount paid for the lease plus any accrued royalties minus all applicable fees and expenses. If there is no lease pending, the surface owner will simply take ownership of a partial interest in the minerals. If the former mineral owner shows up later than seven years after your petition, he will have lost his interest in the minerals and will not be able to take the mineral rights back from you.

(6) Q. •I do not own any of the minerals.
•There is an oil or gas well on my land.
•It is old and nothing is being done with it (and it is showing signs of deteriorating/I am worried that it might screw up my water well or cause other problems).
•What should I do?

A. Make sure you gather evidence of any problems! Take pictures, lots of them -- some from far back and some from up close. Gather water samples, etc.

You can file a complaint with the State Department of Environmental Protection. Usually the agency that will respond is the State's Office of Oil and Gas. The Inspector will come out and inspect the well and tell you if there is a problem. What he can do, and what you can do, are set out below. If you want a second opinion about whether there is a problem, you can call another agency, but you are likely to get re-referred to the State's Office of Oil and Gas unless you press pretty hard.

Under the law, the well will usually fall into one of four categories.[*] To find out which category the State believes the well is in, you need to find the records of the well in the State's Office of Oil and Gas or on its web site.[**] To do that, you have to know which well it is. The best way to do that is to get the API well number of the well.[***] Then contact the State's Office of Oil and Gas.

The first category of wells is "producing." If you can hear gas flowing from a gas well, or you see the oil pumpjack pumping and oil trucks gathering oil from an oil well, then it is a producing well. Someone out there is making money from the well and it should be relatively easy for the State inspector to get any problem fixed.

The second category of wells is "shut in" or "idle" wells. In other words, the well is capable of producing oil or gas, but it is not producing now due to market conditions. Perhaps market conditions make selling the gas or the construction of a pipeline to be able to sell the gas uneconomical. If the production records for the well on the State web site show recent or regular periodic production, then this is probably the category the well is in. As in the case of a "producing" well, if the well has problems there should be someone making money from the well whom the State should be able to make fix the problem. If the well production records show no recent production, then it is possible that the well should be placed in the next category. If there is no recent production and the well is a problem, or a potential problem, you should push the State to declare it "abandoned" see next category/paragraph. At that point the driller will have to establish that the well should not be placed in the next category. This information on the well is pubic record so you can check it.

The third category of wells is "abandoned". Is the well "abandoned"? This is a term of art in the statutes that does not mean exactly what it sounds like. For a well to be "abandoned," the well is so played out that it is no longer economically viable. If that is the case, the well should be "plugged" to protect your water and other oil or gas wells. Plugging is an expensive process. That is why the operator may be delaying an official declaration that the well is "abandoned," and avoiding getting around to plugging it. To

---

[*]Three other categories of wells are "storage wells," "disposal wells" and "secondary recovery wells." A Guide to the issues that arise with these wells is beyond the scope of this Guide though they are briefly described in the section named "Storage, Second Recovery, and Underground Injection Wells in Chapter 1. See the table of contents for page number. You may contact the government agencies listed in Appendix A or the author of this Guide for more information on those wells.

[**]See Appendix A for the web site and other information about this Office.

[***]See Appendix B for information on how to find the well number of an oil or gas well.

"plug a well" means to pull out all of the metal casing, fill the well with special clay and seal the well with concrete at several levels deep in the earth and near the surface. Plugging prevents pollution of the groundwater, migration of the oil or gas, and other environmental dangers. The longer the delay, the more likely that the casing, etc., in the well will deteriorate and make plugging even more difficult. If the well still has an operator that is in business, then the operator should plug it very soon. If the operator will not do so, complain to the State's Office of Oil and Gas, and push them to make it happen.

The fourth category of wells is "orphaned." The "operator" or "responsible party" who was supposed to be taking care of the well and who should now be plugging the well, is instead now out of business. In almost all cases, a well that has been orphaned is also "abandoned," in that it has played out and needs to be plugged. If it was still producing enough to pay for its maintenance and eventual plugging costs, the operator would still be in business producing it for the money. If there is no operator there is a chance that the operator's well bond is still around, and the money from the bond can be used to plug the well. If not, there is a fund, a very limited fund for the number of orphaned wells out there, that can pay for plugging your well. A number of factors regarding the condition of the well and its danger to people and the environment will determine how high on the fund priority list the particular well will be.

If the well is abandoned the sense that it is not profitable for sending gas to market, or if it is orphaned, you may be thinking that you want it. This is particularly true if you are getting free gas from it. BE WARY. If the well operator could not make money on it, then you probably cannot either. And free gas really is not free. The well may require an occasional "workover." More importantly, once you own the well, you are responsible for plugging the well when it is finally played out and "abandoned" so it will not ruin your and your neighbor's groundwater. You will have to post a bond until then. And then you will have to pay the $5000 to $10,000 or more that it costs to plug the well. See "free gas" issues in Chapter 3.

So a surface owner can complain to the State to get the State to make the driller plug an abandoned well. If the well is orphaned and is showing problems, the surface owner can try to get the State to plug the well itself out of the fund created by the Abandoned Well Act.

There is one additional action that a surface owner can take under the Abandoned Well Act that we believe can be taken whether or not the surface owner owns some or all of the minerals. It is not something that most surface owners are likely to do. Under the Abandoned Well Act an "interested" party has the right to go in and plug the well.[10] A

surface owner where there is an abandoned well certainly ought to be considered an interested party. But you are unlikely to do that because it costs upwards of $10,000 or $20,000 dollars to do that. If you are well off and want to be sure that the well will not be a problem, you could exercise your rights under the statute to do that. If you can afford that, you can afford to hire a lawyer to explain to you how to do it so we will not go over it here. Most surface owners will just have to wait until the well starts to go bad and then try to get on the priority list for plugging under the funds provided by the abandoned well act as explained above.

(7) Q. •I do not own any of the minerals.
•Someone has come to me and said they are going to drill a well on my land.
•They have not yet decided on the exact location.
•What should I do?

A. Start by reading Chapters 2 and 3 of this Guide. They explain what your rights will be once you get sent a copy of the notice of the well permit application.

You are in a somewhat better position than someone who first found out that the well was going to be drilled when they got the notice of the permit application. This is true for three reasons:

First, you have a driller who is interested in accommodating you or in keeping good relations with you.

Second, you have a lot more time than someone who only found out about what was happening when they got the notice of the permit application. Those folks have less than 15 days to respond to the permit application.

Third, the driller has not yet invested in a survey and/or paid for the drafting of the "soil erosion and sediment control plan" and for the preparation and filing of the permit. So the driller is much more likely to be willing to move the well site and road locations to suit you.

You have time and you can take advantage of the good will of the driller, plus what leverage you do have as explained in Chapters 2 and 3, to try to get what you want.

A state statute prohibits an oil or gas well from being drilled with two hundred feet of a dwelling or water well.[11] If you have a piece of land that you are thinking of using as a home site one day, and you are afraid that a driller will get a permit to put a well on that

site, go out and get a water well drilled on it now! If you do that, the driller cannot put the well within 200 feet of that water well.

(8) Q. •I have seen trucks "thumping" the ground in my area/on my land, or
•Someone is shooting off explosive charges in the ground around here, or
•I have been informed that a seismic survey will be conducted on my land.
•What is a seismic survey and what can I do about it?

A. A seismic survey is a way the driller tries to be more sure about whether there is oil or gas under your land before drilling a well. To conduct a seismic survey, a sound wave/vibration wave is sent down through the ground. The sound waves travel through the ground until they hit something such as a different layer of rock. Once the sound waves come into contact with something down in the ground, the waves bounce, or echo, back to the surface. The echos are then recorded on special equipment which helps the driller guess what is under the ground and whether it would make sense to drill for gas or oil. For more detailed information and several helpful pictures, visit http://www.kgs.ukans.edu/Publications/Oil/primer10.html .

There are several ways the sound waves/vibrations can be sent down into the ground. One way is for a hole to be dug, for explosives to be placed at the bottom of the hole and exploded. This is sometimes called the "shot hole method." Another way is for a large special truck or some other machine to vibrate or cause an impact with the ground which will also send sound waves/vibrations down through the ground.

Now that you have an idea of what is being done, you will probably have two questions. First, is there any danger to my land?

If the shot hole method is being used, there are several possible dangers. First, if too much explosive is used, rocks under your land may crack and possibly damage your water table. Second, if explosives are detonated too close to your foundation or your water well, your foundation may crack or a rock strata may crack and affect your water well. Third, with the shot hole method the holes (they may be 100 feet deep) need to be filled back up with special clay or cement to prevent water or contaminants from leaking down into the ground or between underground rock layers.

We have not yet heard of people having the problems above from the shot hole method being done improperly etc., but difficulties and complications are always possible.

The other way to send the sound waves/vibrations are sent down into the ground is with “thumper trucks”. These are big trucks that have a huge metal foot or other mechanism that thumps on the ground to send the sound waves/vibrations downward. This is newer. We also have not heard of any problems and the experts even on our side do not expect any. But difficulties and complications are always possible.

The second question is, what can you do about it?

To date, we know of no statutes or regulations governing seismic surveying activity in West Virginia. The common law may give you some leverage on how these surveys are done. Under the common law, only the owner of the mineral rights under your land, or their agent, is allowed to actually conduct seismic surveys on your land. Anyone else will have to get your permission first. So if you see someone doing anything like this on your land you can insist that they prove they are the people with the right to conduct seismic surveys. If they will not, call the police and ask the police to make them leave until they prove they have the right to be there. See the next question, (9), about “surveyors on your land.” Usually the person doing the seismic survey is a contractor for the driller and will leave at the first sign of trouble, but the driller will be harder to deal with.

If you think they are doing a seismic survey too close to your buildings or wells, insist they leave until you can do two things. First, you want to get pictures etc. or even a professional engineer’s report on your foundation so if something does happen you can prove what was there before they did their work. The same is true of your well. Get its quality and production tested by a professional so you can prove what it was like before they started. Second, insist they leave until they can show you a report from an independent expert, or materials, that show that what they are doing is safe, or until you have a chance to get your own expert. Such an expert may be hard for you to find, but look for a geologist or professional engineer if you can afford it.

If you see them using shot holes, you want to make sure that they fill the shot holes when they are done. Insist that you want to be there when it is done and when the holes are filled. Let the local oil and gas inspector know of your interest and ask him how the driller is supposed to fill them so you will know what to look for.

If you absolutely object to all seismic activity on your land, there is one way you might be able to keep it from occurring. Seismic surveys were first used in the late 1930's. If the mineral rights to your land were sold or leased before 1930, then you can claim that such a survey was not in the contemplation of the parties and therefore cannot occur without your express permission. In order to win on this argument you might have

to show that seismic activity will be more burdensome on your land than was contemplated at the time that ownership of your surface was severed from the minerals under it. However, it should be noted that this argument is probably a long shot and would most likely require a lawyer to file and suit and present it for you in front of a judge. A better solution may be to think of something you want from the driller and tell him if he does that for you, you will not object to any seismic activity.

Also, ask the driller what geological formation he is drilling to and how deep it is. This will let you know whether he is contemplating a deep or shallow well (if the driller is drilling to the Trenton-Black River, it will be a deep well). Chapter 7 will tell you the differences between a deep and shallow well and why you want to know which well is being drilled on your land.

If you want to make life difficult for the driller, you can post no trespassing signs on your land. If you post your land, this might give you more leverage in negotiating with the driller. If you do this, the driller will have to come to you to get permission. Or the driller might try to obtain a court order. But be careful. If the driller comes to you and shows you proof that the driller has the right to be there, and you still will not let the driller come onto your land, you risk being sued for damages you cause by unlawfully delaying the driller.

(9) Q. •I do not own any of the minerals.
•I found a surveyor stake and/or other evidence that someone is going to drill a well on my land.
•They did not contact me beforehand.
•What should I do?

A. Start by reading Chapters 2 and 3 of this Guide. The section on "People On Your Land" in Chapter 3 is particularly important to you. They explain your legal rights including your rights once you get sent a copy of the notice of the well permit application.

You are in a somewhat better position than someone who first found out that the well was going to be drilled when they got the notice of the permit application. This is true for two reasons:

First, you have a lot more time than someone who only found out about what was happening when they got the notice of the permit application. Those folks have less than 15 days to respond.

Second, the driller has not done already spent money on a survey and/or the drafting of the soil erosion and sediment control plan and on the preparation and filing of the permit. So the driller is a little more likely to be willing to move the well site and road locations to suit you.

However, you are not in as good a position as someone who was contacted by the driller before the driller surveyed the well site. A driller who contacts the surface owner before picking a well site is a driller who is more likely to be easy to work with. And your driller may have already paid for one well site survey and does not want to invest in another and wait for it to be done.

Still, you do have a little extra time to learn your rights. You have time to go to the driller NOW and try to persuade him to move the drill site or road location if that is what you want, before the driller gets any deeper into the permit application process. Read Chapters 2 and 3, and contact the driller to try to get what you want.

Also, a state statute prohibits an oil or gas well from being drilled with two hundred feet of a dwelling or water well.[12] If you have a piece of land that you are thinking of using as a home site one day, and you are afraid that a driller will get a permit to put a well on that site, go out and get a water well drilled on it now! If you do that, the driller cannot put the oil or gas well within 200 feet of that water well.

(10) Q. •I do not own any of the minerals.
•I got a Notice of Application for a Well Work Permit.
•What should I do now?

A. QUICKLY! Read Chapters 2 and 3 RIGHT NOW. You are about to have an oil or gas well drilled on you. You have a limited time, less than 15 days, to learn and exercise the rights that you have!

Questions If Oil or Gas Wells Are On Your Land, or Being Drilled On Land Next to or Near Your Land (Whether or Not You Own the Minerals).

(11) Q. •An oil or gas well is being drilled on land next to, or near to, me.
•What should I do?

A. The first thing you should do is to get your water well tested. Do this right away, before the drilling starts. That way if your water well goes bad after they drill, you will be able to prove the quality of your well water before they started drilling and they will

not be able to say that it was already bad. If your water well is within 1000 feet of the oil or gas well you may get a notice of your right to have your water well tested at the driller's expense. If you are withing 1000 feet and do not get this notice, complain to the State's Office of Oil and Gas. Make the driller start the permit application process over if you can! Although you can make the driller test your well, it may be that you do not trust the driller to do the test, and want to get one yourself. All of this is explained in more detail in Chapter 3 in the section titled "First Thing To Do #1 -- Get your water tested."

If your water well does go bad, and if you are within 1000 feet of the oil or gas well, there is a statutory presumption that the drilling of the oil or gas well caused your water well to go bad.[13] See the "Oil and Gas Well Casing" section of Chapter 2.

Even if you are not within 1000 feet you should get your well tested as explained in Chapter 3 in the section titled "First Thing To Do #1 -- Get your water tested." Get your water tested even if you have to pay for it yourself. This will give you proof that your well was good before they began drilling.

Generally it is a good idea to read this whole Guide. Some things do not apply to you because the oil or gas well is not on your land. But a lot of things do. The soil erosion and sediment control plan and the "tubing and casing program," and the General permits for pit waste disposal and brine discharge as described in Chapters 3, 4 and 5, are to protect not just the surface owner where the well is being drilled, but also the surrounding surface owners, water well users and the people downstream. You have a right to ask for enforcement of those State requirements just like the surface owner does. And you have a right to a copy of the drilling permit application and everything else in the oil or gas well file in the State's Office of Oil and Gas even though the well is not on your land.

(12) Q. •An oil or gas well is being /has been drilled on land next to, or near me.
•Since then my water well went dry or the water went bad.
•What should I do?

A. Get a sample of your water in a clear glass jar of some sort right now. Take pictures of the water in the jar. Take pictures of what is in the well or what it did to your appliances etc.

Call and get a professional water well tester to come out and test your well so you have proof of the problems. The sample you get yourself is worth something, but if the case ends up in court, the professional sample will be much, much better to have. To

learn more about getting your water tested read “First Thing To Do #1 -- Get Your Water Tested” in Chapter 3.

Contact the State's Office of Oil and Gas to send an inspector out to check your problem.

It may be that the problem was caused by nearby drilling and the inspectors can do something to stop the problem and perhaps get your well problem fixed.

If your water well is within 1000 feet of the oil or gas well, then there is a statutory presumption that you may be able to use to sue the driller for damages to your water.[14] See the “Oil and Gas Well Casing” section of Chapter 2 about suing the driller for that. Of course the operator of that well still has to be in business for you to collect money, but you still may be able to find someone who can qualify as the operator.

If the well was drilled a long time ago, it may be that the problem was caused by an old abandoned well that had its casing go bad. If that is true, then the State has a limited amount of money to pay for your well to be plugged. That will stop the problem from getting worse. It may clear up the problem. If it does not clear up the problem, then you can sue the “operator” of the well. But it is likely the operator/owner of the well is long out of business. The State's Office of Oil and Gas can help you find this out.

(13) Q. •The road the driller is using is being messed up.
•What should I do?

A. There are three ways you may be able to go to address this problem. Not all may apply to the particular road in question.

First, the Erosion and Sediment Control Field Manual of the State's Office of Oil and Gas says that “A roadway constructed to provide access to the well site, any modification or reconstruction of an existing road open to the public use or private, shall be considered part of the access road and subject to the criteria defined herein.” [15] So no matter who owns the road or the land the road is on, if the driller constructed, modified or reconstructed it, the driller has to comply with the Manual. The road has to be constructed with certain slopes and drainage features to prevent erosion and to allow passage. And it has to be maintained and “reclaimed” when the driller is done drilling. See the section entitled “Soil Erosion and Sediment Control” in Chapter 2 and “First Thing To Do #3 - Construction and Reclamation Plan” in Chapter 3. These explain a few more of the basics and tell you how to get a copy of the Filed Manual. You don’t have to

go to the work of getting the Field Manual. If you see something you think isn't right, call the State's Office of Oil and Gas or the appropriate inspector.*

Second, if the road is a privately owned road across land that is not the surface of the *mineral tract* being drilled, there may be conditions and limitations on its use set out in the document that created the road right-of-way or easement or the common law applying to such rights of way and easements. See the answer to the next question for more explanation of this. Unfortunately, any violation of the terms of the documents or the common law has to be enforced in court and you will probably need a lawyer to do that, unless what they are doing wrong also violates the Erosion and Sediment Control Field Manual. So you are better off to try to find a provision in the Erosion and Sediment Control Field Manual that they have violated, if you think that the State Inspector will be helpful and/or you cannot afford a lawyer to enforce the terms of the document or the common law.

Third, there are laws and regulations affecting the use and abuse of roads that are state roads. If the road in question is a state road (and roads commonly referred to as "county roads" are state roads) then the driller has to comply with the State's requirements.

One common problem is that the oil and gas well road drains water and dirt onto a state road. When a private road from a driller or anyone else intersects with a state road, the intersection is supposed to be constructed so as to avoid this.[16] If you see this problem, it is suggested that you call the State Police or the Department of Highways. First you might want to take pictures etc. to prove what happened.

For all of these state road issues, if they are affecting more people than just you, the more people who complain, the more likely you are to have the problems dealt with.

Another common problem is for the mud, debris etc. that the drillers' trucks etc. gather while on the well road come off the vehicles when they start traveling on the state road. This too is illegal.[17] Again if you see this problem it is suggested to call the State Police or the Department of Highways. Again, you might want to take pictures etc. to prove what happened.

---

*See Appendix A, "Government Agencies" to learn how to contact the Office of Oil and Gas. The website listed has a page with the individual inspectors phone numbers.

Yet another common problem is for an unpaved, or even paved, state road to be used by equipment that is too heavy for the road. If this does not cause problems with the road right away, it can over time and repeated violations. The law in this area is complicated.[18] Sometimes law enforcement will not do anything about complaints because they do not think they have enough evidence about just whose equipment was on the road. For that reason it is very important to get pictures of the equipment on the road if you can. And again, the place to complain is the State Police or the Department of Highways. It is possible that the weight limit problems for a driller are indeed difficult legal obstacles for them if you can get law enforcement or your local prosecutor motivated.

(14) Q. •An oil or gas well is being/has been/will be drilled on land next to, or near me.
•They want to put a road or pipeline across my land even though there is no well on my land.
•What are my rights?

A. It depends.

The driller has a right to put a road or a pipeline across your land if the minerals under your land are part of the same *mineral* tract that the well is on. It could be that when the minerals were separated from the surface a long time ago, that the surface / mineral tract was a much bigger tract. The driller has a right to put a road or pipeline across all of the surface that was above his mineral tract at the time he got his rights to the minerals. If the surface was later subdivided, your surface tract could have originally been part of the larger surface over the mineral tract. If that is the case, then the driller has the right to do what is fairly necessary to get access to the well by a road, and to get the gas out by a pipeline, even if it is over your land.

On the other hand, if the mineral tract under your land was not part of the mineral tract that the well was on at the time of the severance of the minerals and surface, then the driller has to get your permission (an "easement") to take the pipeline or well road across your land. And that is true even if the mineral tract the well is on, and the mineral tract under your land, are owned by the same person, as long as they were separate at the time of the severance. But read on about roads.

There are some extra complications with roads. Sometimes people have the right to cross your land (a "right-of-way" or "easement") to get to their land. This can be a private right-of-way, a private right-of-way open to the public, or a state, county or city road. If there is a private right-of-way, there may be limitations on what the right-of-way can be used for. If it is a right-of-way set out in a deed or other writing, the right of the

persons using the right-of-way are set out, and limited to, what it says in the writing. If it is a right-of-way based on oral permission, that permission can be withdrawn any time. Anything having to do with land has to be in writing so an oral grant of a right-of-way for anything can be withdrawn. If it is a right-of-way that people always thought they had a right to use and it has been used that way for ten years, then the people who have used it, even the public, can continue to use it. But they can only use it for what it has been used for in the past, not anything new like logging[19] or oil or gas well drilling etc. access.

Rights-of-way can get very complicated. This might be worth a couple hundred dollars to take all your deeds and leases etc., to a lawyer to have them explained to you.

If the driller is messing up such a road, see the answer to the previous question.

(15) Q. •I have seen the contents of an oil or gas well drilling pit being poured out or let out into a stream or onto the ground.
•What should I do?

A. This is against the law. [20]

First, gather evidence. Take pictures! Lots of them. Some from up close, and some from far back. Don't save money on film. Also gather water or other samples or other physical evidence. It will be good to have professional testing later. But preserve what evidence you have right away.

The State has an Emergency Spill Notification toll free line. It should be listed in your telephone book. On the date of publication of this Guide the number is 1-800-642-3074. You will probably be referred to the State's Office of Oil and Gas, which will send out an inspector. You may want to call other State agencies as well. If you are unhappy with the State's response, you can call the federal Environmental Protection Agency (EPA).[*] The EPA has usually delegated even federal environmental protections to the states, so the EPA may try to refer you back to the state. If you are calling the EPA because you are unhappy with the State's response, you will have to be clear about that, and perhaps be a squeaking wheel.

---

[*]See Appendix A, "Government Agencies".

(16) Q. •I have seen the water that comes up with the oil or gas being let out down the hill or into a stream.
•Can they do that?

A. Oil or gas coming up out of a well often brings "brine" water with it. This water is salty and also can contain dissolved heavy metals, hydrocarbons etc.

Oil and gas well operators are not allowed to just let the brine go out onto the land or into a stream. They may re-inject it down another well they own or that is owned by someone else (very expensive). They may give it to a company that uses it for some other chemical process (none are known in West Virginia). It has occasionally been considered to treat icy roads in the winter time (but usually the water has too many other pollutants in it besides the salt). Finally, for oil wells only, not gas wells, the driller may, in proper circumstances, treat the brine water and release it into streams in measured amounts.

So, if the well produces salt brine, and if it is a *gas* well, they pretty much have to re-inject the brine. If the driller is not willing to pay for or do that, then the well should not be producing. If you have such a well on your land, get pictures, samples and other evidence of what they are doing and make a complaint. If you see brine from a gas well being just dumped onto the ground or released out into a stream, do the same things that are suggested in the answer to the previous question about spills.

On the other hand, if the well produces salt brine, and if it is an *oil* well, it is a little different. The driller has to re-inject the brine etc. or, in the case of a small oil well only, the driller can have a treatment system set up as permitted by a permit explained below. You can tell if the permissible treatment is set up if you see a large long box or similar horizontal contraption that the water flows through before it flows into the stream. Also there should be a metal plaque where the brine flows into the stream that identifies the operator of the system.

If there is brine treatment going on, it should be done pursuant to a "General Permit" issued by the State Office of Water Resources pursuant to the federal NPDES program.[*] An individual operator can apply to be covered by that general permit. He may also apply for an individual permit, but that is rare.

---

[*]General National Pollutant Discharge Elimination System Water Pollution Control Permit No. WV0113506 for "Stripper Oil Well Wastes".

If the well is under the General permit, and if the horizontal box or contraption is there, it is still possible that it is not being operated right or was not constructed right in the first place. A hard copy of the General permit and its appendices can be obtained from the State Office of Oil and Gas.* The permit sets out the way the treatment should be constructed and operated. You can check what the operator is doing compared to the general permit.

The water should be treated with lime and aerated in a tank. The water takes 48 hours to flow through in order to raise the water's "ph". The raised ph will cause some of the dissolved metals to settle out in the bottom of the next tank. Also in this tank, any floating oil and grease should be gathered. Then the water goes through a sand filter before being released. The rate of release of the brine should be limited enough that the water down stream from the discharge should not be saltier than 250 milligrams per liter after mixing with the water already in the stream (and any salt content the stream already has from similar discharges up stream). The operator has to do monthly sampling and report that to the Office of Oil and Gas, and these records can be obtained from that Office.

Storage, Secondary Recovery and Underground Injection Wells.

Some gas wells, usually old gas wells in certain rock formations, are used for gas storage. Gas is pumped up from Texas all year long in smaller pipelines and is pumped down into the ground. Then when peak winter demand occurs in the Northeast, it is pumped back out and up to the Northeast through bigger, faster pipelines. There are problems that can occur with these wells, but they are relatively unusual, so they will not be discussed in this Guide. Contact the authors or other authorities if you run into such problems.

Sometimes old, big oil fields are treated with "secondary recovery" techniques. (There are gas secondary recovery methods, but they are much less commonly used.) All the oil that will flow to the wells naturally has already come out. In secondary recovery, fluids are pumped down some of the old wells to wash through the underground rocks. The fluids and any oil it washed out of the rocks are withdrawn up other old wells. More oil is recovered this way. This is a very, very dangerous process for water wells. Again, an explanation of the process and the dangers and what to do is too much for this Guide. Contact the authors or other authorities if you run into this process.

---

*See Appendix A, "Government Agencies" for information on how to contact this agency.

Underground injection wells are used to dispose of brine water or other liquid wastes. The fluids are pumped down into depleted oil or gas fields. Done right, this is a good way to get rid of these wastes. But the huge pressures necessary can cause huge problems if they pick a bad well, do it wrong or try to use an oil or gas field with other old wells that have not been plugged. Again, an explanation of the process and the dangers and what to do is too much for this Guide. Contact the authors or other authorities if you run into this process.

CHAPTER 2.

Overview of The Rights You Do Have, (and Do Not Have) When Drillers Get a Permit to Drill an Oil or Gas Well, And How to Use Your Rights.

Generally: The Kinds of Rights You Have.

You have limited rights under statutes and rules specific to oil and gas well drillers. You also have limited rights that arise out of the deeds and leases that are connected to your property-- we'll call them "common law" rights.

These common law rights, which are explained in the "Overview of Common Law Surface Owner Rights" in Chapter 2, are enforced by going to court and requesting an injunction, or a declaration of rights. This is difficult without a lawyer. If you have a really terrible case, you can pay up to several hundred dollars to a lawyer to write a letter. Or you can pay several thousand dollars for a lawyer to bring a law suit. If you can afford this then hiring a lawyer is the best thing to do. Some people might be able to bring a law suit without a lawyer, but explaining how to do that would be too much for this Guide.

Instead of dealing with these "common law rights" that probably would take a lawyer to enforce, this booklet will concentrate on the rights you have under the specific State oil and gas statutes and rules that govern the conduct of oil and gas well drilling. Unlike your common law rights, these rights are much easier for you to exercise without a lawyer -- in fact, they were drafted assuming that you do not have a lawyer -- although having a lawyer to help you exercise these rights would also be good.

There are two important sets of West Virginia statutes, plus the "rules" published by the State agency pursuant to those statutes. The first set of statutes gives you rights, mostly the "right to comment" on the permit, at the time the driller applies for a permit to drill the oil or gas well.[21] The second gives you a right (usually) to compensation for damages to your surface land after the driller has done his work.[22]

In addition to the two statutes that are for you as a surface owner, there are statutes that protect the public from pollution, etc., these are discussed in the second half of this Chapter beginning with "Enforcement and Getting What you Want" section of this Chapter.

Generally: How to Use The Rights.

Many people just do not want the oil or gas well drilled on their land at all. Neither of these statutes gives you the right to tell the oil or gas well driller not to drill on your property. Your common law rights would probably not help you there either.[23]

(Note: There is an important exception for "deep wells." If the driller wants to drill a deep well, we believe that the State statutes say that the driller has to get the surface owner's consent to the well location or the driller cannot drill the well! (West Virginia Code 22-9-7(b)(4)) The drillers and the State have followed a decision by a circuit court judge that says that the surface owner's consent is only needed for some deep wells. For more on this issue, see the Chapter 7 of this Guide on deep wells.)

If the surface owner cannot stop the well from being drilled, then most surface owners want the right to tell the driller where to put the well site and where to put the roads that the driller wants to build or use to reach the well site. Neither of these two statutes gives you the *direct* right to tell the driller to move the well site, or to move the road, to a different location. They can, however, indirectly help you influence the well site and road locations. (If you can get a lawyer and get to court, your common law rights might help you directly control these.)

This is the important part: What you have to do is exercise or be prepared to exercise your rights under the two statutes specific to oil and gas wells that govern the conduct of oil and gas well drilling. By exercising these rights, or by being prepared to exercise the rights under the first statute, you can get leverage in your negotiations with the driller to give you those things you want. In other words, in order to get what you want, use the leverage you have under the statutes, sometimes regarding issues that are not necessarily so important to you, but that will cost the driller time and/or money, to use to trade with the driller to reach an agreement with the driller to get what you want.

Usually, the most important issue to the driller is TIME. When the driller decides the time is right to drill (often because of financial issues), then the driller wants to drill NOW. Your first biggest leverage is to exercise your rights to comment under the first statute, which can slow down the process.

Your second biggest leverage is, again under this first statute, that your rights to comment may require the driller to make changes he does not want to take the time and money to make. So rather than make those changes, the driller may agree to the changes you want.

Your third leverage is under the second statute. Your leverage under the second statute, in the normal progression of things, kicks in to give you damages after the drilling is over. Your leverage is that you will claim more money from the driller under this statute if the driller uses land that is important or valuable to you, than if the driller puts the well site and road on other land where you want the driller to put it that is less valuable to you. So rather than pay you more money later, the driller will move the drill site and road to where you want them.

Using the first statute's leverage is a little complicated and needs some more explanation. The first statute does give the State the power to make some limited changes to the driller's plans based on your comments, which you have a right to make. The changes the State can force the driller to make, based upon your comments, are set out in the "Grounds to Comment" section in Chapter 3. Often, these are not the changes that are most important to you, such as moving the well site or the road location from a place on your land that is useful or valuable to you to a place that is less useful or valuable.

So what can you do if the statutes do not give the State the power to make the changes you want? Below is a longer explanation of how you use the leverage your rights under the statutes give you, indirectly, to pressure the driller for or to trade for what you want.

First, decide what changes you want. Next, tell the driller that if the driller makes the changes you want, in the well site, road location, etc., then you will agree to sign the voluntary statement of no obligation.* Note that his will give up your right to comment, so be very careful before you do so. Also, although you may be able to avoid it, you may also have to agree to a set price for compensation for the land they are taking under the second statute (See the next section of this Chapter.). Finally, if the driller will not agree in writing to what you want, then tell the driller that you are going to go ahead and file comments and maybe file an appeal of the permit if the State does not listen to your comments. And tell the driller that when it comes time to pay you for your land, you are going to go to arbitration under the second statute to get top dollar for your land and any damages the driller does.

---

*Occasionally drillers may want you to sign other documents. We have seen a "Statement by Person in Possession" for one. Probably by signing such documents you would be giving up some claim that you are not even aware of. Do not sign anything other that the voluntary statement of no objection and an agreement unless you are sure you know what you are signing, or have shown it to a lawyer.

Chapter 3 will explain the first statute to you in more detail and explain the comments you can make and how to do so. Even if the State does not have the right to make the changes you want, the State has the power to make other changes based upon your comments. Because you have the right to comment, and to ask for the State to make those changes within its power, the State will have to take time to deal with your comments, one way or another. The time taken by the State is time that the driller does not want to lose. (Of course, it would be wrong to make up false comments just for the purpose of causing a delay, so only make comments if you have legitimate comments.)

Chapter 6 will explain the second statute, how to use your right to compensation for the use of and damages to your land in arbitration to get top dollar for your land and other damages that are done.

So, if the driller does not want the delays, and if the driller does not want to deal with the effect of the comments you make on the things the State can change, and if the driller does not want to pay extra and go through the trouble of arbitration at compensation time, then the driller may make the changes you want in well site and road location etc.

The "Right to Comment" Statute and How to Use It.

The first statute mentioned above is a statute that gives you a right to comment on the permit application that the driller is required to file in order for the driller to get permission from the State (a "permit) to drill an oil or gas well. You have a right to comment to the State on the permit, unless you sign the "waiver" form or "voluntary statement of no obligation." The driller will try to get you to sign this form, but you should not do that unless you are pretty sure that you have gotten all that you can get.* Keep reading! If you comment, you also have the right to appeal the State's decision when it issues the permit if the State does not listen to your comments.

You have the right to comment on the application for the permit within 15 days of the filing of the permit application.[24] The State can deny or modify the permit based on your comments only if the State determines that (1) the proposed well work will

---

*Occasionally drillers may want you to sign other documents. We have seen a "Statement by Person in Possession" for one. Probably by signing such documents you would be giving up some claim that you are not even aware of. Do not sign anything other that the voluntary statement of no objection and an agreement unless you are sure you know what you are signing, or have shown it to a lawyer.

constitute a hazard to the safety of persons; or (2) the plan for soil erosion and sediment control is not adequate or effective; or (3) damage would occur to publicly owned lands or resources; (4) the proposed well work fails to protect fresh water sources or supplies;[25] or (5) the applicant (driller) has committed a substantial violation of a previous permit, or a substantial violation of one or more of the rules promulgated under Chapter 22 of the West Virginia Code, and has failed to abate or seek review of the violation.

Our comments must be based on one or more the five reasons listed above. Unfortunately, this list does not give the State the right to deny or change the permit because, for example, "They are putting the well site right in the middle of my most valuable cornfield/pasture, and I want them to put it on the hillside/on the other side of the creek." Also, it does not give the State the right to change the permit if you comment that they want to put the well road where it takes up your most valuable land, or that they are going to use a road you need to get to your house and you may not be able to get to your house if they make a mess of the road, either during drilling or later.

You have only 15 days from the date of the permit application to get your comments *in to* the State's Office of Oil and Gas! Once you make a comment, the State will usually send an Inspector out to look at the things you have commented on. That will take a couple days. Then the State's Office of Oil and Gas will have to decide whether or how to issue or modify the permit. That will take some time. In addition you may have the right to appeal the State's decision issuing the permit to Circuit Court and that will take at least some and maybe a lot more time. (Though it is improper to file an appeal only for the purpose of delay. You need to have a bona fide argument on the merits of your position.)

REMEMBER: Drillers are usually in a big hurry for one reason or another. They don't want the issuance of their permit to drill a well to be delayed by your comment period plus the time it will take the State's Office of Oil and Gas to deal with your comment, plus your possible appeal to Circuit Court. This, and the things you are allowed to comment on, are your leverage to get what you want!

WARNING: You should never state anything that you know is not true, particularly on a document that you send into a State agency. But any legitimate concern you can come up with can be a comment. If they won't do what you want, send a comment. Don't sign a waiver unless the driller conceded in writing to the changes you want. Maybe they will change their minds, or maybe the actions of the State will help you to put pressure on the driller to do what you want.

Chapter 3 of this Guide explains in more step by step detail what to do if you get served with a notice of permit application. That Chapter explains the process of using the comment statute in more detail.

The "Oil and Gas Production Damages Compensation Act," and How to Use It When Negotiating With the Driller.

The second statute that gives you leverage is the Oil and Gas Production Damages Compensation Act, passed by the West Virginia Legislature in 1983. (See Chapter 6 for "How to Get Compensated for Damages Caused by the Driller"). The Act officially kicks in immediately after the drilling is done. It gives most surface owners the right to compensation for the use of their surface land and damages to their other property by the drilling. If the date of the severance or lease was signed before 1960,[26] then there is an irrebuttable presumption that you have a right to damage money after they have finished drilling the well on your property. If your minerals were severed, or your lease was signed after 1960 but before June 1, 1983,[27] then this "compensation" statute gives you a rebuttable presumption that you have a right to damage money. As a practical matter, drillers rarely contest your right to these damages if the severance was between 1960 and 1983, or even after 1983.

You have a right to the following kinds of compensation / damages:[28]

1. Lost income and expenses.
2. Market value of lost crops (including timber).
3. Damages to any water supply that was in use.
4. Damages to personal property.
5. Compensation for the reduction in value of the surface lands the driller uses, which is usually their total value since you cannot use the land the well site and road is on.

Your right to damages under the second statute does not kick in until after the drillers have finished their work and are starting to reclaim it. That is the first time you will get notice of it -- and it is not much of a notice. More on that in Chapter 6.

So you have a right to this compensation / damages once the driller is done drilling the well, and you should use that to get all you can get. Unless you also own some of the interest in the oil or gas minerals that are coming out of the ground.

If the driller will negotiate with you before the drilling begins, you can also use the right to damages under this statute to get something else you want instead, like changing

the well site and well road location at the beginning. But be careful how you use your rights!

For the damages in #1. through #4. above, you should let them know early that you know of your right to these damages and will be watching. It is strongly recommended that you do NOT settle your right to these damages in section #1 thought #4 above until the reclamation is finished. You should not sign anything agreeing to the amount of compensation for those damages until *after* the driller is done drilling the well and has finished the site reclamation.

You may not appreciate what is going to happen to your land until after it happens.

In addition, if you sign away your right to damages to personal property, for example, then the driller will have no incentive to be careful not to damage your personal property while the driller is actually doing the drilling and reclamation. And once you have made a deal with them, you are stuck with it - - unless they somehow break the terms of the deal.[29]

For the compensation in #5 above for the land they use, you can use your right to damages under the Act *after* the driller is done as leverage before the drilling begins to get the well site and road locations moved, but you have to do that *before* they start drilling or probably even applying for their permit. Sometimes the driller will want you to sign an agreement to settle your right to damages under the compensation statute for a specific dollar amount or for work on your property at the time you sign the waiver of your right to comment on the permit, or some other time before the reclamation is finished. If they come to you, or if you go to them first, you should let the driller know that if he does not change the well site and road from where he may want to put it, a place valuable to you, to a place where you want him to put it, a place less valuable to you, then you are going to ask for higher damages for the value of the land they use. Use your talk with the driller to show that you will seek higher damages later if the driller does not move the well site and road where you want, to try to get the driller to put the well or road where you want it.

Again, it is not recommended that you sign away your right to compensation for the land they use under #5 until after the well is drilled. You may not really appreciate how much land is getting used, or how little value it will have to you later. However, the driller may not be willing to move the well or road unless you agree to put a dollar figure on the land compensation now, before the well site is changed and permit applied for. So a possible exception to the advice against agreeing to damages ahead of time might be to agree to the damages under item #5 if you get the well site or road moved. After all, you

will know the value of the land before the driller uses it. A driller may not move the site and road unless he knows what he is going to pay. (Be careful, sometimes they bluff!) If you are sure the driller is not bluffing, you may have to sign away the #5 damages to get the driller to move the site or road.

If you do agree to an amount of compensation for your land up front, don't sign anything until they give you the Soil Erosion and Sediment Control Plan. This way if they use more acres than the plan allows, you can prove it and could get extra damages. Even if you have to sign away your right to these damages before the well is drilled, whatever you do, don't sign away your right to other damages in #1 through #4. Also, as stated above, we strongly recommend that you consult an attorney to review the release agreement BEFORE you sign it.

Unfortunately, the compensation provided under the statute for use of your land is limited. Under #5 in the statute you only get compensated for the reduction in value of the surface the driller *actually* used. You do not get damages for the fact that the land next to it loses value by being a smaller piece, or by being next to an ugly or bothersome oil or gas well. Also, the compensation is only for the value of the land as it was used *before* the well work commenced, and not the potential uses that the land had for a home site, or commercial use, etc. So the damages only reflect the value to you for your actual uses, not its potential value to you and possible uses, not the value of the land to them for what use they want to make of it.

Again, Chapter 6 of this Guide explains the process of using the "compensation" statute. The "arbitration" procedures explained in Chapter 6 are easy for you to use without a lawyer, and are no less of a burden for the driller.

Overview of Common Law Surface Owner Rights

As explained in the beginning of this Chapter, you have common law rights. If the driller will not recognize these rights, then you will probably have to hire a lawyer to have them decided and enforced by a court. That is why this Guide has concentrated on your statutory rights. This Guide sets out your common law rights here for two reasons. If the driller knows that you know your rights, he will be more likely to respect them. And you may decide it is worth your money and effort to get a lawyer to protect them. These common law rights would include those rights a surface owner has or does not have according to the terms of the deeds and the common law interpreting deeds, if the minerals are separated from the surface. (If the surface owner also owns the minerals, and has signed a lease, then it is the terms of the lease that control. A copy of the lease is usually filed in the deed room in the courthouse just like a deed, but often in a different

book.) To be sure what those rights are, it is important to search the title to the land in the courthouse back to the "severance deed." The severance deed is the deed which first separated the ownership of the minerals from the ownership of the surface. The relative rights of the parties are usually set out in some form in the severance deed. That is the important deed! The rights set out in the deed usually favor the mineral owner, but it is always good to check. If the surface owner gets anything in the severance deed, it is usually free gas.

Where the deeds or leases are not specific as to the rights between the surface owner and the mineral owner, the common law says that the mineral estate is the "dominant" estate and the surface is the "subservient" estate.[30] However, the Oil and Gas Production Damage Compensation Act [31] changed that for severances made after June 1, 1983, when the Act became effective. For severances after that date, unless the severance deed or lease says something different, the law considers the rights of the mineral owner to develop their property equal to your rights to enjoy the surface of your land.[32]

Arguably, someone who bought the minerals after that date from a mineral owner who originally got the minerals before the Act became effective is also subject to the equal distribution of rights interpretation of the newer Act. However, the new mineral owner is sure to argue that the "dominant" and "subservient" standards in effect at the time the severance deed gave rights to the mineral owner should control.

Another way the rights given to the mineral owner in the severance deed or lease can be challenged is similar to the "broad form deed" line of cases in strip mining.[33] This principle has been applied in situations other than just coal mining. The principle is this: The method that the mineral owner wants to use to get the minerals out has to have been "within the contemplation of the parties" at the time the severance deed was made. So the Courts have held that a deed signed before strip mining was known, and that only contemplated deep mining, could not have conveyed the right to strip mine because it was not in the contemplation of the parties. This theory is the underpinning for the surface owner's right to damages under the Oil and Gas Production Compensation Act. The theory is that the current practice of "rotary drilling," for oil or gas with its pits and high pressures, was not in the contemplation of the parties in old oil and gas/surface severance deeds, like strip mining was not in the contemplation of the parties in the old severance deeds. At that time, the only method known for drilling oil or gas wells was by using "cable tools," with their rocker arm and chisel drill head.[34] Now, the same argument can be made for deep wells. See Chapter 7.

Enforcement and Getting What You Want.

The next sections of this Chapter are an overview of the enforcement powers of State and federal agencies. They can enforce soil erosion and sediment control plans, and reclamation plans. These agencies can enforce the "casing" programs of the actual oil or gas well. They can make sure any waste that results from the drilling of the well, or from producing oil or gas out of the well, does not end up where it should not end up. If brine water comes up with the oil or gas, they control the treatment of that brine and whether and what amount of brine can be put in a stream.

It is recommended that you watch the drilling activity at the well site. What to look for is explained in Chapters 4 and 5. If you see the driller not living up to the State requirements, you should report it to the appropriate State agency.

Do not in any way lead the driller to believe that you will back off from making him do these things right just because he will agree to move the well site or road location to where to where you want, etc! The well site and road location are important to you. But the enforcement of the protections this Guide talks about are not just for you. They are also for your neighbors' protection and for the environment.

In addition, if you are consciously ignoring bad things the driller is doing, and then you decide that something bad is happening that you did not expect or that you cannot stand any more, you will have lost credibility when you seek enforcement. A bad driller will have drawn you into being a scofflaw with him, and the driller and the reluctant State agencies will be able to use it against you.

However, a driller may be afraid that if he does not give you what you want, then you may be willing to make false or exaggerated complaints all the time just to get revenge. If he thinks that, let him worry. You have no duty to say you will not file frivolous complaints. But make sure that you do not say that you will file complaints unless you also say, "if you don't do it right" and don't say you will not file a complaint. Saying either one can get you into trouble.

Overview of Enforcement.

The drilling of an oil or gas well on your land can have bad effects not just on you, but on your neighbors and the people downstream from you. These are effects that can happen regardless of whether the driller puts the well site and well road where you want them.

The State has some powers of enforcement. The next sections will review them. The sections are arranged according to the type of issue and the corresponding enforcement tool the State has.

What if the state will not enforce the law?

Some of the programs that the state enforces, like water pollution permits and their enforcement, are really federal programs run by the feds, but delegated to the State. In that case you can try the federal Environmental Protection Agency, the "EPA". Since the federal agency has delegated enforcement to the State, the EPA will probably first try to send you back to the State. So you will have to push hard, asking for supervisors, maybe even writing to Congressmen, to get them to pay real attention. There is no local EPA office in the state,[*] so getting them to come take a look will be even more difficult, as will contacting them any way other than by phone or mail.[**]

In addition, if you cannot get the state agency to enforce the law, you can go to court to try to get the courts to force the state to do its job. You can file a "mandamus" action against the State in Circuit Court. This is not always successful because mandamus is limited to "non-discretionary" duties and the state will argue that what you want is "discretionary", and because Courts often defer to an agency's interpretation of the law it administers. And of course you have to find a lawyer since it is very difficult to do these kinds of cases without one.

Finally, if you cannot get the state agency to enforce the law, you can go to court to try to get the courts to give you damages because the driller did not follow the law, or even possibly to get an injunction against the driller to make the driller follow the law. It is fairly clear that you can get damages against the driller for not following the law. We have a specific statute that says you can[35] though the driller's attorney will try to narrow the scope of the statute. And there may be other theories a lawyer would know about using this statute or other law to argue for an injunction against the driller. This is not quite like common law, because you are relying on the statute, but it is similar. It is also similar in that it is almost impossible to do without a lawyer.

If you are low income, you can apply to a legal aid or other public interest law firm for free representation. But they are usually swamped with other cases. If that does not work, then you need to find a private lawyer. If your damages were really terrible and

---

[*]See Appendix A, "Government Agencies".

[**]See Appendix A, "Government Agencies".

expensive or valuable, and you have good pictures or other evidence, you may be able to convince a lawyer to represent you for a contingent fee (for instance, a % of the damages). The lawyer will take a portion of your damages as payment. If the case is not good enough for a contingent fee, you can pay the lawyer by the hour to do your case, which is expensive.

Soil Erosion and Sediment Control, and Reclamation.

The first, and most obvious, bad effect that can happen to your land is the use and disturbance to the surface of your land.

As mentioned above, the State Office of Oil and Gas will not directly help you enforce your common law rights to better well site and road placement, or even your common law rights to limit the driller to only doing what is "fairly necessary," and not more, to get the minerals out.

But the State does give you some help on soil erosion and sediment control and reclamation because that affects your neighbors and the public generally! The downstream siltation and pollution that can happen when the surface is disturbed does concern the State. The State does have its own statutes and rules about how the well site and roads have to be constructed and how they have to be reclaimed. The requirements are set out in the West Virginia Erosion & Sediment Control Field Manual. The plan "shall meet the minimum requirements of West Virginia Erosion and Sediment Control Manual."[36] This manual can now be found on the web site of Office of Oil and Gas. As this Guide is being published, it is found in several sections under "Permit Forms" on the web site.

Construction and soil erosion and sediment control requirements control things like the slope of roads, so that they are not so steep that they cannot help but erode. Reclamation requirements do not mean they have to put land back to where it was. The well and the road to it will be there until the well is depleted and plugged. But the reclamation statutes and rules do require the land to be replanted and the road culverts etc. maintained, etc.

The oil and gas well permit application you receive in the mail will have attached to it a copy of the driller's "Form WW-9" "Construction & Reclamation Plan & Site Registration Application Form" for the well site and well road on your land.[37] This plan has to comply with the Soil Erosion and Sediment Control Field Manual the State has published for oil and gas well work.[38] The construction, use and reclamation of the

surface has to be in compliance with this plan and the provisions of the Manual. To get a copy of the Manual contact the State's Office of Oil and Gas. The authors of this Guide have asked the State to put this Manual on their web site so it might also be there.

Keep track of what the driller is doing. If at any time you see that the soil erosion and sediment control manual, and/or the materials that came with the permit application on your well, are not being complied with:

•Take pictures, get witnesses and gather any other evidence!

•Call the Inspector from the Office of Oil and Gas. An appendix of numbers to call is attached. If it is out of date, call the State Office of Oil and Gas in Charleston or check the Office's Internet site.

•Insist it be done right!

The State inspector of the Office of Oil and Gas has the right to fine the driller and even shut down the operation.[39]

In addition, the state has a right to go into court and get an injunction against the driller to make him comply with the law.[40]

And see the proceeding section of this chapter, "What if the state will not enforce the law?" for the rights you can try to exercise yourself to go to court to enforce the law.

Oil and Gas Well Casing.

The second possible bad effect from the drilling of an oil or gas well can be pollution or other damage to the water in your water well or spring.

The water in your well, or coming out of your spring, is groundwater that lays in and moves through a porous or permeable layer of rock or earth under your surface land. That layer is generally horizontal or with a slight slope. Underneath your groundwater layer is a layer of rock that is not porous or permeable. The underneath layer creates a seal, a bottom to your groundwater layer, so the water cannot leak down out of your groundwater layer and disappear. Salt or iron water, and the oil or gas, also lie in the rock layers. They are deeper in the earth than the sealing layer. The sealing layer, or sometimes many such layers have kept these things from percolating up through into your groundwater layer. Finally, there is enough earth above your ground water layer that the

water that works its way down to your ground water layer has been filtered or purified enough to drink.

The drilling of an oil or gas well hole through all those layers can affect all of that!

The drilling of an oil or gas well punches a hole down from the surface to your ground water layer, down through your groundwater layer, down through the seal rock layers under your groundwater layer, and down into and through salt or ironwater bearing layers, to the oil or gas bearing layers below.

As the well is drilled, the driller is required by statute and regulations to put steel casing (or "tubing") down though these layers, and to use cement at different depths to hold and seal that casing in place.[41] [35-4-11.3-8] If this casing and tubing program is not done right, then your groundwater can disappear down through the well hole (this is usually temporary), salt or iron water can leak up into your ground water (this is a long term problem), oil or gas can leak into your ground water (this can cause explosions wherever your water comes out, whether in your pumphouse or home), or contaminated surface water from, the area where the oil or gas well was drilled, a pasture for example, can leak down into your groundwater (this can make you sick).

Here also, the State does give you some help because damage to your ground water can affect lots of people around you who rely on that ground water. The State has requirements for the casing plan.

Attached to the oil and gas well work permit application you receive is a copy of the driller's casing and tubing program (WW-2B). The bad news is that this is highly technical stuff and is difficult for you to understand or to do anything about. The good news is that the State inspectors are pretty good about keeping the drillers on their toes about making sure that the driller has a proper tubing and cementing program on paper. If problems occur, they are likely to occur at the times the driller is trying to do the tubing and cementing during the drilling.

The most important step in the casing program, as far as you are concerned, occurs when the driller "cements" the steel "surface" casing/tubing into the well. The drillers use a special cement.[42] The cement they pump down the well should end up between the outside of the steel pipe casing in the well and the inside wall of the hole in the ground. The cement should get all the way from the bottom of the surface casing pipe up to the surface. (This is sometimes called "returning to the surface".) This return to the surface is one of the two most important things. It would be good if you or someone you trust was there to watch when the driller actually pumps the cement down the hole to do this.

The driller has to let the State Inspector know when he is going to cement the surface casing in the well hole.[43] It would be a good idea for you or a friend to be there watching what happens when he cements the surface pipe in to make sure it returns to the surface. Stay out of the way and don't get hurt. But find a place to watch, and take pictures "just to show my family what you guys were doing up here." In order to find out when the cementing of the surface string of casing is happening:

- Ask the driller to let you know when it is happening, if you have not already negotiated it.
- Ask the Inspector to let you know.
- Watch for a "Haliburton" or other big funny looking tank/cement trucks driving up the road.

Then, the second most important thing is that the cement has to be allowed to dry for a certain number of hours, usually 8 hours.[44] If the driller does not wait eight hours for the cement to completely harden before starting to drill again, then the drilling operation may crack the cement or shake the cement loose in the hole. If that happens then your fresh water may not be protected. The driller rents the drilling rig by the day and it is very expensive, and he is paying his crew too! Eight hours is 1/3 of the day. Paying people to do nothing is expensive, so the driller may be very tempted to start drilling too soon!

There is a way to check on this waiting time. The State requires the driller to "make and preserve at the well location accurate records of all well work performed pursuant to the permit, *including documentation by the contractor or person performing the cementing services of the time of completion of cementing* and the volume of cement used of the cementing of the fresh water casing."[45] [Emphasis added.] This documentation is often called the "cement ticket." You should insist to see the ticket. The ticket will note when the cementing was finished. The cement ticket from the cementing company will be more reliable than any notes the driller himself makes. The cement company does not want to be liable if the job goes bad, so they have an incentive to keep accurate records on their "ticket." The driller should not start drilling again for 8 hours the completion that time on the cement ticket. You should come by 7 hours after the time on the ticket to make sure that drilling has not started yet. If it has, get a witness to what is going on, and call the Inspector.

Most drillers are responsible about this. Some are not and it is a problem that has to stop.

And if your water does go bad, get a lawyer. If your well is withing 1000 feet of the oil or gas well, there is a statutory presumption that the drilling caused your water well to go bad.[46] You may still need to prove that the driller was negligent in causing the problem, but with evidence that he started drilling again too soon, and all of the annoyance and inconvenience damages you have, and the punitive damages you might get from intentional disregard of your rights, a lawyer may not require you to pay any money up front. See the section in this Chapter named "What if the state will not enforce the law?" about how to get a lawyer. If you can't get a lawyer, be sure to read Chapter 6

Waste Disposal When and After the Well Is Drilled.

During the drilling of an oil or gas well, the "cuttings" being drilled out of the rock from the bottom of the well hole, plus other substances that have been poured down the well hole, are washed into a "drilling pit" next to the well. The drilling pit is a small pond constructed on the drilling site. For some wells, particularly deep wells, there are several ponds and they are bigger. The cuttings and other wastes settle out of the water to the bottom of the pit, and the water in the pit is re-circulated down into the hole and back to the pit again. At the end of the drilling, the water in the pit and all the stuff that settled out at the bottom of the pit are supposed to be disposed of properly.

The way the driller is supposed to dispose of this waste is set out in a "general permit" issued by the State. A copy of this general permit can be downloaded from the web site of the Office of Oil and Gas using you home or work computer, or one at your local public library.[*] However, not all the appendices are included, so if you want to make a serious study, call the Office of Oil and Gas and ask for a hard copy. When you read the permit, the most important part is section "g".

The driller is supposed to treat the water, and then land apply (spray) it. The solid waste remaining is buried on site.

---

[*]The home page website of the Office of Oil and Gas can be found at http://www.dep.state.wv.us/og/index.html. Then click on the link to "Download Oil and Gas Forms" and then look under "Permit Forms". Or you can try to go directly to the download page at http://129.71.240.41/oog/forms.ntm. The author's Netscape browser would not work on the site, so Internet Explorer had to be used.

The most common violations of the permit occur when the driller drains the pit, often without treating it, by just knocking a hole in the pit wall and letting it run down into the creek.

If you see any violations of this permit, take pictures, get names, etc., and call the Office of Oil and Gas Inspector, the statewide toll free spill line at 1-800-642-3074, or other numbers listed in your telephone book.

After the drilling of the oil or gas well is finished and the well is producing, there can also be waste disposal problems and spills. For spills, follow the advice in the previous paragraph.

Issues Arising After Drilling and During Oil or Gas Production

The most common problems that occur after the well is drilled and while oil or gas is being produced include oil spills, continuing soil erosion and sediment control problems, and improper "brine" disposal.

The soil erosion and sediment control problems are discussed in *First Thing to Do #3 - Construction and Reclamation Plan* in Chapter 3, and also in Chapters 4 and 5.

There can be leaks and spills, particularly at oil wells. If you see these problems, call an Office of Oil and Gas Inspector at the "spill hotline" in your telephone book.

The "brine" problem is the toughest. Sometimes when oil or gas is produced, salt water comes up out of the hole with the oil or gas. Not only is the water salty, but it also can be full of dissolved pollutants such as heavy metals. Salt water cannot be treated to remove the salt, though at some levels it can be diluted. The other pollutants may be susceptible to treatment.

What next?

Now that you have an overview of your rights, and lack thereof, you need some specifics. Go on to Chapters 3, 4 and 5, or whatever other information you have been directed to by the Questions in Chapter 1, or that you know that you need or want.

CHAPTER 3.

Step by Step Suggestions of What to Do When You Get a Notice of an Application For a Permit to Drill An Oil or Gas Well On Your Land.

Introduction to Chapter.

This Chapter will lead you through the actions this Guide recommends when you get a notice of a driller's application for a permit to drill an oil or gas well on your land. The first basic step is, to get ready to exercise your right to file comments on the application. Second, see if you can negotiate what you want instead of commenting. (If you have not already read Chapter 2, you should do so now so you will understand how this negotiating leverage works.) And, third, if you cannot negotiate what you want, file your comments. And remember **you only have 15 days from when the driller filed his application for the permit to file comments**, and that probably happened before you got the notice. So hurry up! Appendix F to this Guide is a simple form that you can, but do no have to use, to file comments on permits for drilling shallow and deep wells.

If the oil or gas well being proposed is a deep well, generally that is a well more than 6000 feet deep, be sure to read Chapter 7 of this Guide on deep wells. If that is the case you will most likely want to consider other comments than those discussed here. If the well being proposed is a "coal bed methane well", be extra sure to read Chapter 8 of this Guide on those wells. There are extra grounds to comment (and other things you should do) if it is a coal bed methane well that is being proposed. You have a lot more power to comment on the well locations etc. for coal bed methane wells than for other wells! If the well is a disposal well or a conversion of the well to storage, then you will need to look other places for help. Try contacting the author of this Guide.

People on Your Land

The driller is required by law to serve on you a "Notice and Application for a Well Work Permit" and a sheaf of accompanying papers. If the driller who wants to put a well on your land has decided not to come talk to you beforehand, that "Notice and Application for a Well Work Permit" is often the first time you know that something is going on. However, particularly if you live on the land, you are likely to see some people on your land, or evidence that people have been on your land, before you get the "Notice..." and other papers. So before this Guide gets into the steps to take when the

permit application gets served on you, this section will review the steps you might be able to take when people come on your land before you actually get served with the permit application.

There is one thing that the driller has to do, and some other things that might be done, in order for the driller to prepare the application for a permit to drill an oil or gas well for filing with the State and for service on you. Part of the permit application is a surveyor's "plat" or map of the exact site of the well. This is required by the State so it will be possible to find the well again fifty or a hundred years from now, even if there is a dry hole or the well is abandoned.

So before you get the official notice of the application for a well work permit delivered to you, a survey crew is going to come onto your land to put a stake where the well will be drilled and then measure distances to reference points to make it possible to exactly locate the well.

It costs the driller or operator a fair chunk of money to have the survey done. Once the survey is done, the driller is going to be very reluctant to spend more money for another survey and also delay the drilling project just because you want the well site somewhere else. The driller can only move the well ten feet from the position marked on the survey plat included in the permit application.[47] So if you can get to the driller before the survey is done, you improve your chances of negotiating a better well site. Fair-minded drillers will come out and talk to you, to negotiate the well and road locations, before they send the survey crew out. Somebody who wants to run over top of you will not do that.

If you hear rumors that someone is about to drill on your land, go talk to them now! Find out what his plans are and prevail upon his good neighbor instincts, or the leverage explained in Chapter 2, to negotiate a well site and road that is better for you.

If you are unable to do that, and the first time you know a driller is coming is when you find survey stakes indicating that the survey was already done, you will have lost some leverage as explained in Chapter 2. However, if you simply see the survey crew coming onto your land, there are some lawful things you can do to slow the process down so that you can talk to the driller before the survey gets done.

If the driller has the right to drill an oil or gas well on your land[*], he also has the necessary right to come onto the land to do a survey to stake out where he wants to drill

---

[*]See Appendix C.

the well. However, you only have to let the people come onto your land who have the right to do so. (You also have to allow the oil or gas well driller's employees and "agents" onto the land.) If someone wants to come onto your land, they have to be able to show you proof that they are the ones who have a right to come on your land. They have to have a right to come onto your land and be able to prove it. Someone coming onto your land should have to show you documents by which he claims the right to come onto your land. If a survey crew comes onto your land, or tries to, you should ask the crew to show you the documents that give it the right to do so. If they don't show these documents to you, you should ask them to leave. If they don't leave, you should call the police. Tell the police you want them off your land until they prove they are the ones that have a right to be on your land.

The survey crew may try to just tell you they have a right to be there. You do not have to take their word for it! You can ask that person to show you a copy of the lease or deed that grants them, not just someone but them, the right-of-way to come across your surface land to drill their well. A court would probably also allow you a reasonable time to check the document and make sure it is right.

Once you tell someone to leave, he has to do so or he is guilty of a misdemeanor.[48] To be sure that someone does not come on your land and do a survey without getting your permission, the best idea is to "post" it with "No Trespassing" signs. If you are sure someone is coming your way, it is a good idea to do this anyway. Under the law, a person should not come onto your land, or if he has already come onto your land, he has to leave it, if "notice against entering or remaining is either given by actual communication to such person or by posting, fencing or cultivation. . ."[49] But many people think that posting is the only way to do it. So to be most effective, and to make it easier to get police and law enforcement to help, you should "post" your land with signs saying "No Trespassing," or signs requiring them to get your permission to come on your land.

However, if you do decide to post no trespassing signs on your land, there are several laws governing these signs which you must follow if the signs are to be legally effective.[50] First, the signs must be clearly noticeable and surround your property. Second, they must be spaced out no more than 500 feet and there must be a sign at each corner of your property. Third, the signs must say "no trespassing" in letters at least two inches tall. Additionally, the owner's name (presumably your name) must be on the sign. However, if your land is less than five acres and your house is upon it and the property is enclosed by a fence and it is obvious that you live there, then you do not need to place "no trespassing" signs on your land. If you are not sure if you qualify for this exception, then go ahead and post your land, just to be safe.

If after they were told to leave, or if you have signed up, they refuse to leave and the law enforcement folks won't help you, you have the right to get a lawyer and go to court to get an injunction to keep them off the land. You can even go to court without a lawyer. Either way this course of action has its expenses, difficulties and delays, of course.

If you can't get a law enforcement officer to come out, you can also go to Magistrate Court and attempt to swear out a warrant, but your complaint will be referred to a law enforcement officer or prosecuting attorney to see whether the officer agrees with your warrant.

There is something you can do to protect a particular site on your land from being used for an oil or gas well. A state statute prohibits a well from being drilled with two hundred feet of a dwelling or water well.[51] If you have a piece of land that you are thinking of using as a home site one day, and you are afraid that a driller will get a permit to put a well on that site, go out and get a water well drilled on it now! If you do that, the driller cannot put the well within 200 feet of that water well. Better do it before they get their permit to stay our of legal questions.

General Good Advice

Whether things start off when you get served with the permit application, or when you see the surveyor, or when the driller sends someone out to talk to you, there are some things you should always do

First, you are about to enter into a process that will have you talking to a lot of different people, probably several times each, and getting lots of information. The advice you are about to get is also good anytime you are involved in dealings with people who are not on your side.

Keep a diary! Anytime you do something on this project, keep a written record of the date and time. Write down the first and last name of the person you talked to. If they do not volunteer their name, you might ask for it politely. If they still won't give it to you, the law does not say you have to be polite. (Don't threaten them with bodily harm or anything that is not in itself legal, because that would be illegal and they will use that against you at some point if you do.)

In addition to dates, times and names, your diary should include a quick summary of what you are told and/or what happened. Record days you see trucks driving by and what the sign on the side of the truck says. If there is no sign on the side of the truck, write down its license number, etc.

The second piece of advice that is good whenever you are working with a governmental or corporate bureaucracy is to go up the supervisory ladder when you run into trouble. If this driller's employee or the government worker will not give you what you want, like their name, or if they will not otherwise be cooperative, ask for their supervisor. Be insistent or even stern. But do not get mad at the employee. That will just make everyone want to protect the employee from you. You want people to focus on what that employee is not doing that you want them to do, not what you are doing that they do not want you to do.

To repeat, do not get mad, instead, ask for the supervisor! If you are dealing with a person and you are not getting anywhere with him, ask to speak to his supervisor. You don't need to be rude about it, unless you want to. Calmly ask, "You don't seem to be able to help me, maybe your supervisor can. I want to speak to your supervisor, please?" Everybody has a supervisor except the guy that owns the company, and he may have stockholders.

Asking for a supervisor can help in a number of ways. The person who you started dealing with probably has a boss who expects the person you are dealing with to deal with these situations so that the boss does not have to. So just asking to speak to a supervisor will often motivate the person you are dealing with to give you what you want. If that does not work, oftentimes the supervisor does not know that their employees are doing a poor job, so when you speak to the supervisor you will make the supervisor aware of what is going on with the employee. If the supervisor is a problem, even the supervisor has a supervisor! Even if the person you are talking to is the owner of the company, that person may have stockholders or investors who are helping pay for the well and who have a financial interest in things working smoothly. It may be hard to find who they are, but there is no harm in asking. And if asking does not work track them down some other way.

"Surface Owner Waiver" or "Voluntary Statement of No Objection" - - Whoa!

What to do if you see surveyors on your land before the permitting / notice and comment process began was explained above. Also, some general good advice was explained. Now we turn to the permitting / notice and comment process.

As explained in Chapter 2, you have a right to comment on the driller's application for the oil and gas well permit that the driller has to obtain from the State. You have that right, that is, unless you sign away those rights. The place for your signature is at the bottom of an official state form under the heading, "VOLUNTARY STATEMENT OF NO OBJECTION." The top of the form may say "Surface Owner Waiver" or "Instructions to Surface Owners Named on Page WW2-A" or something similar.*

Your right to comment gives you the right to have the State change the permit for certain reasons, not enough reasons, but certain reasons. It also gives you the leverage to get other things you want, as explained in Chapter 2. If you sign the waiver, you lose all those rights! Don't sign the waiver unless you are sure you have gotten everything you want or can get.

Never ever sign a blank form! The voluntary statement says "I have received copies of the notice and application for a well work permit, form WW2-A and attachments consisting of pages 1-____ including a work order on form WW2-D, a survey plat, a soil and erosion plan [very important!] all for proposed well work on my surface land as described therein." Don't sign the voluntary statement of no objection until you are handed a copy of all those forms all filled out with what you want or what they have agreed to do! If you get a properly filled out set of papers, hang onto your copy (insist on your own copy) and then, only when you are satisfied you have gotten everything you want or can get, sign the voluntary statement of no objection. If you sign before they hand you completed copies, the copies can get intentionally changed or filled in wrong by an unscrupulous driller, or accidently filled in wrong by a careless driller, and you may not like what gets filled in!

Check the Date!

Your comments on the application for the oil and gas well permit have to be physically in the State's Office of Oil and Gas by the end of the 15th day after the application is filed at the State's Office of Oil and Gas in Charleston, - not the 15th day after you get them, the 15th day after they were filed. It is recommended that you call the State's Office of Oil and Gas to make sure of the date that the permit was filed, and to be

---

*Occasionally drillers may want you to sign other documents. We have seen a "Statement by Person in Possession" for one. Probably by signing such documents you would be giving up some claim that you are not even aware of. Do not sign anything other that the voluntary statement of no objection and an agreement unless you are sure you know what you are signing, or have shown it to a lawyer.

sure of the last day you can get your comments to the State's Office of Oil and Gas.* This has the indirect effect of letting the State's Office of Oil and Gas know that comments may be coming. That in turn has the advantage of letting them know that it might be necessary to make changes in the permit. It has the disadvantage of giving them time to plan to deal with it, which may mean they deal with it a little quicker, but this Guide recommends that you call and check on what is the last day for your comments to be received.

The day by which you have to get your comments in is going to be either somewhat, or a whole lot, ***less than 15 days***. If you are served the permit in person, then you may have almost the full 15 days. If it was mailed to you, and it took you a couple of days to get the certified return receipt mail, all those days get subtracted from the 15 days under the law!

Find out the last day. Write it down three places. Don't forget. Don't miss it.

While the deadline is strict in the statute, if you end up a day or two or three late for some reason, send in your comment anyhow! The State has a right to make sure the permit is right even without your comment. They may be able to modify the permit even though you missed the deadline, but don't rely on this, try to get comments in on time!

What About the Other Surface Owners?

If you are the only surface owner, then there is no other surface owner entitled to official notice. If you and one or two other people own the property then each of you should have gotten a notice. (And if all three did not, then another 15 days will have to run after the last person gets notice and the driller again applies for the permit. But be careful, if they cannot find all three of you, one may have been served by a newspaper ad.). If there are more than three owners, then the driller does not have to serve everybody with a copy. Sometimes there are dozens of owners and the State does not make them go that far. If there are more than three owners, then only the person whose names are on the tax ticket will get the notice. If that is the situation and you are the person named on the tax records, you get the notice, then you should get in touch with the other owners immediately. One reason to contact the other owners is that they ought to know about it. Another reason is that the oil or gas well driller may not negotiate with you or give you things you want unless the driller knows all owners agree. If you see evidence that a well is about to be drilled on your land and you are *not* the person named

*See Appendix A for information about how to contact the State's Office of Oil and Gas.

on the tax ticket, then you should get in contact with the person named on the tax ticket and make sure that person will tell you if they get a notice of the permit application.

This permit application is a public record. The whole file at the State's Office of Oil and Gas is a public record. You can even find some information about the permit application on some Internet websites.* So you might also tell your neighbors. They may have a right to, or may want to, get their water wells tested. See "First Thing To Do #1 - - Get Your Water Tested" in the section below. Or the driller may be planning more wells on their property and it would be good for them to know in advance. And they might be helpful to you in your situation.

What to Read First, and Next, and Next

The driller is required to serve on you a copy of the driller's application for a permit to drill an oil or gas well. The State's Office of Oil and Gas calls this a "well work permit." In fact you will get a small stack of papers as part of the permit application and your notice. The headings of those papers can be very confusing. The one on top may be the "Notice and Application for a Well Work Permit, Form WW2-A." Or it may be a "Well Work Permit Application, Form WW2-B." It will may be handed to you by an individual, either a professional processor or a deputy sheriff, or more likely it will come to you by certified return receipt mail.

It is not recommended that you start off trying to read through the permit. It is very complicated and there is lots of stuff in there that is not as important to you as other stuff. First, read through Chapter 2 of this Guide, then work your way through Chapter 3. In this Chapter you will be referred to the portions of the permit, and its attachments, that are most important to you.

First Thing to Do #1 of 3- Get your water tested.

This Guide suggests three first things to do. You may need to be working on all three at the same time. So read all 3 and get started on all 3!

The first of the first three things to do has to do with your water well and any springs. For reasons explained in Chapter 2, oil or gas well drilling may affect your water well, and/or springs you use for your household, farm, etc. Lots of water wells and springs in West Virginia already have "ironwater" in them. If your water started out OK, and if the driller makes your water go bad and you complain, then the first thing you will

*See Appendix A for information about how to contact the State's Office of Oil and Gas.

hear from the driller is that your water was bad before he drilled. So it is important to get your water tested before he drill, so that you will have proof that the well was good before he started drilling.

There are two ways to have your water tested. First, there is a way to make the driller test your water. Second, you can get it tested yourself.

This Guide will first explain how to get the driller to test your water. The materials served on you with the well work permit application included a document called "Notice to Surface Owners" Form WW2-B1. Usually attached to this form is a topographic map indicating the proposed well site with a circle drawn around it, although the map is not required. This form notifies you of your right to have any water well or spring within 1000 feet of the proposed well site tested at the expense of the driller. The sampling has to be done before the drilling starts. The driller gets to select the laboratory. The laboratory should then draw the water and test it. When the results come back to the driller, the driller sends the results on to you and the State.[52]

You may have some doubts about this process. The driller picks the lab, and it can even be its own lab if it is a big company, though the lab has to be on a list pre-approved by the State.[53] The results of the test go first through the driller's hands. If the lab is reputable and does business with lots of other people or businesses besides this driller, or drillers generally, that might be O.K. On the other hand, you may not trust the driller to pick a good lab, or not to mess with the test results before you get them.

The second route is for you to get the testing done yourself. This means you will have to pay for it. How do you get your water tested?

You can call the local county health department to get your water tested. The local health department's test for "bacteria" alone can cost $20.00, more if you want a check for other contaminants. But that is really not enough. The health department normally does not test for all the problems that could be caused by drilling an oil or gas well. The State has requirements for the things that the driller has to test for, if the driller does the test. Parameters to be tested for are:[54]

- pH
- Iron
- Total dissolved solids
- Chloride

- Detergents (MBAS)[*]

You can also call a private, or "commercial" lab that tests water from wells to have the testing done. The State's Office of Oil and Gas has a list of water testing labs that are certified by the Water Resources Division to this kind of testing. This is explained in the form that came with the permit application entitled, "Instructions to Surface Owners Named on WW2-A" under the heading, "List of Water Testing Laboratories". You can contact the State to get this list[**] or you can use your home or work computer or one at your local library to download the list from the web site of the Office of Oil and Gas.[***] If the list has a problem it is that there are too many labs on it and it is confusing which parameters they test. It will take some patience and some phone calls to figure out who to use. There may be other labs. The labs on this list are probably responsible even if most of their business is with industry. They will send the results directly to you. But you can also go looking for unlisted labs.

It is also recommended that you test for parameters in addition to those required by the State. They are not particularly expensive. Those additional parameters would be:

- Sodium
- Barium
- Alkalinity
- Total hardness
- Organic carbon
- Sulfate
- Total suspended solids

Note that there may be a difference in price depending on who actually takes the sample. It is highly recommended that you do *not* personally take the sample. If you end up in court later, your water test evidence will be more credible if an independent third party did the whole thing. You might ask the person making the test to check the volume and flow too. Sometimes oil and gas well drilling can affect this.

---

[*]Detergents are chemicals the driller uses in the drilling process

[**]See Appendix A for information on how to contact the State's Office of Oil and Gas.

[***]As of August, 2001, the web site for the State's Office of Oil and Gas is http://www.dep.state.wv.us/og/index.html and a link to the certified labs is on the home page. Be sure to use the "commercial" labs list. Also you need to call the lab you choose to make sure they are certified to test for all the parameters you want tested. The link directly to the list is http://www.dep.state.wv.us/item.cfm?ssid=11&ss1id=166.

In addition you may want some way to prove how much water your well produces. The technical tests for this are very complicated. But maybe just a witness as to how long you can run water from you well, and how long it takes to fill back up, noting whether or not it is a dry or wet or medium period, might be useful.

Finally, there is the fall back technique. Get yourself a glass jar and take the water yourself and put a cap on quickly and keep it. This is better than nothing, but such a sample will be very suspect months or even years later in court. Even if it is tested by a responsible laboratory then, some of the things that you want to test for deteriorate very quickly over time. Still a clear glass jar full of clear water does make an impression, when you can hold up a clear glass jar full of rusty water to compare it to in Court. You may be accused of tampering if it is not all done by an independent third party, however.

First Thing to Do #2 of 3- Take Pictures.

You may later get in a dispute about the value of the land the driller uses, or the damage he does to your land. Again, if such a dispute gets started after the drilling, the driller is likely to downplay the quality of the land, or say that it had problems before the driller got there. A picture is worth a thousand words, and a picture is much harder to argue with. Go out and take pictures of where the site of the well is going to be and where the road is going to go. (You can find this on a map that was included in the materials. More on this later.) This is not the time to save money on film! Take lots of pictures. Take some close up. Take some from far away. Take some from different angles. You are not a professional photographer and you won't know until later which ones turn out best. Try to pick a nice day or time of year to best show the good points about your land.

When you get the pictures back, write the date the pictures were taken and sign each one on the back. You can take the pictures yourself, or you can have someone else take them. If you take them yourself, you might have someone go around with you so you will have a witness later to testify about when you took the pictures and where, but that is not necessary.

First Thing to Do #3 of 3 - Construction and Reclamation Plan.

This Guide has listed three "First things to do." This one is actually the first one you should get started on. It needs to be done in order to get ready for the comment you are going to make *(and you have less than 15 days to do that!)*. The other two need to be done before the driller starts bringing in the bulldozers and drilling the well. You might find time to do those at the same time you are doing this one.

In the packet of materials you received with the permit is a "Form WW9," which is composed of, or has attached to it, several pages. Part of the heading of that form is "Construction and Reclamation Plan" also in the heading it is called "Site Registration Application (for) General Permit for Oil and Gas Drilling Pit Waste Discharge." More on that latter part of the heading in a minute.

This is probably the document that is most important to you! Part of this document or its attachments will be a drawing or map showing where the driller intends to put things. It will show where the driller intends to place the well site, the road to the well site and the drilling pit. This is a pit the size of a small swimming pool that the driller will dig in the ground in order to collect and reuse the fluid the driller uses during the drilling process. Also, when the driller is done with drilling, this pit is where the solids that are collected at the bottom of the drilling pit will be buried. For some wells, particularly deep wells, there can be more than one pit and the pits can be enormous. This document also shows the "land application area," where the driller will squirt the fluid out of the drilling pit after the well is finished and the driller has treated it.

As the laws are written, you have a right to comment on any aspect of this plan. And you may do so. Under the statute however, the State's Office of Oil and Gas can only deny or condition (in effect "change") things on the permit, including the location of the well and the access roads, based on five factors. (For a list of the five factors look in the table of contents for the heading "The 'Right to Comment' Statute and How to Use It" in Chapter 2.)One of those five factors, maybe the most important thing for you, is that "the soil erosion and sediment control plan is not adequate or effective." You can check the adequacy and effectiveness of the soil erosion and sediment control plan that came with the permit application for the oil or gas well on your land in two ways.

First of all, look at it yourself. You know that land better than anyone else.

- Will the way they have it set up result in soil erosion or sediment running down the hill depositing itself on other land or in a stream?
- Is the road or the well site in a place where the land is always sliding?
- Is the road or the well site in a place that always gets washed away in heavy rains?
- Is the road too steep? The road cannot exceed a 20% grade.*

---

*A 20% grade is a 20 foot vertical rise in 100 feet of horizontal travel. A 100% rise would be 45 degrees since you would go up as many feet as you go forward, so a 50 % rise would be half of 45 degrees or 22.5 degrees.

- Are there long continuous erodible road grades without broad based dips etc?
- Are there enough water bars and cross drains included in the plan?*
- Does the road need gravel in order to prevent washing out, and is this included in the plan?
- Well sites can be dangerous, so is the well site too close to a house or other places where people go?
- Is the pit location where the solid waste will eventually be buried in farm field where remains may leech into the soil and work its way into crops?
- Is the land application area in a place where crops may be grown or cows or sheep may graze so there is a danger of the land application causing problems?
- Are there requirements for temporary seeding as well as permanent seeding included in the plan?
- Does the seed mixture they plan to use work with the soil type, and is it something that will actually spread itself at ground level and prevent erosion and be beneficial to farm animals or wildlife?
- Are they going to collect the top soil and spread it back on top or bury it under the clay they also dig up?
- Are they providing sediment barriers and filter strips while the work is going on before seeding occurs or can take root?
- Is there an appropriate mixture of lime, fertilizer and mulch included in the plan?
-

There is a second way to analyze the erosion and sediment control plan to see if it is correct. The erosion and sediment control plan must comply with requirements set by the State. The Oil and Gas Inspector should have already have checked to see that it does, or the inspector may be doing that the same time you are. But inspectors get busy, and you may disagree or take a stricter read of the requirements than the inspector. Those State requirements are found in the "Soil Erosion and Sediment Control Plan Field Manual." There are not many hard copies of this around. You can request one from the

---

*The Soil Erosion and Sediment Control Field Manual requires:
For a 1% grade, a water bar or cross drain every 400 feet.
For a 2% grade, a water bar or cross drain every 250 feet.
For a 5% grade, a water bar or cross drain every 135 feet.
For a 10% grade, a water bar or cross drain every 80 feet.
For a 15% grade, a water bar or cross drain every 60 feet.
For a 20% grade, a water bar or cross drain every 45 feet.

state Office of Oil and Gas, but it will take a while to et it mailed to you and you have less than 15 days to get your comments in. Fortunately the Office of Oil and Gas has now placed the Field Manual on its web site. The manual is large, so it comes in several parts, but you can look at it and down load it from there.* So you may be able to look at the manual there using your home or work computer, or one at your local library. It is a good idea to check the plan the driller has for your land against the manual to make sure they are complying with the manual. The manual also has requirements for maintenance and reclamation of the site and you should watch for problems there also -- more on that later.

Finally, after you have used the two suggested approaches to check the adequacy of the soil erosion and sediment control plan you received from the driller with the permit application on the grounds that the plan is not adequate or effective, think through it again. See if the plan or its maps raise any issues that fall under three of the other four grounds to comment? Does the plan constitute a hazard to the safety of persons, will it fail to protect fresh water sources or supplies, or will it damage publicly owned lands or resources?

These are all grounds for you to comment on the drillers application for a well work permit.

"Casing and Tubing Program"

One of the forms that came with the permit application packet is "Form WW-2B," which is one of two documents that has the words "Permit Application" in its heading. You need to take a brief moment to review that form in getting ready to comment. Make sure you get the right form number.

Just below the middle of that form is a heading that says "Casing and Tubing Program." This is the steel pipe, and the cementing of the steel pipe in the hole, that is

---

*The home page website of the Office of Oil and Gas is always moving around. You might do better just to search the web for the West Virginia Office of Oil and Gas, or the West Virginia Department of Environmental Protection and look for the Office of Oil and Gas there. As this Edition of this Guide is being prepared the Manual can be found under the "forms" link on the Office of Oil and Gas web page. It comes in five parts and you need them all. As this edition of the digest is being written the URL for the web page of forms is http://www.dep.state.wv.us/item.cfm?ssid=23&ss1id=96. If you cannot find it, call the Office to see they can help you locate what you need on their web site.

supposed to line the oil and gas well hole. This lining of the well hole is done for a number of environmental and resource conservation reasons. See the "Oil and Gas Well Casing" section in Chapter 2. One of the reasons has to do with protecting the ground water from which you get your well or spring water.

Under the "Casing and Tubing Program" heading there is a column named "Type." The first two Types, "conductor" and "fresh water," are the most important to you. There is a column to the right labeled "For Drilling" and one next to that called "Left in Well." There are numbers in those columns to represent feet in length measured down into the earth from the surface. You want to make sure that the numbers to the right on the line labeled "fresh water" is more feet down into the earth than your water well.

To do this, you should know, or measure, how deep your water well is. Then remember that the ground where the drill site is may be higher in elevation than where your water well is. If the proposed oil or gas well site is higher than your water well site, you need to add on to (or subtract from) your measurement of the depth of your water well any additional feet for the change in elevation. Use the contour interval lines on the USGS topographic map of your area for a rough estimate. If there are not enough feet in those columns for the "fresh water" casing to get below the depth of your groundwater/water table, or to get below where you know there is good fresh water, then you can comment that the "proposed well would fail to protect fresh water sources or supplies."

"Applicant Has Committed a Substantial Violation..."

A driller is not allowed to get a new permit if he is in substantial violation of an old permit or some other oil and gas or environmental law. You now know who your driller is going to be. The driller may also be "the operator." It is not important to split that hair here. Just go around to your neighbors in the area. If there are problems with work the driller/operator has done at other well sites in your area, you should report them to the State, and include them in your comments. The Inspector may just give them an oral warning to fix the problem. Push for a written violation that will block the new permit until the problem is fixed, make sure that problem gets fixed, and put the driller on notice that you are going to insist things be done right.

Grounds to Comment

You can send any objection or comment on the permit that you want to the State. However, the grounds upon which the state can change the permit based on your

comment, are limited. So try to fit your comments into those grounds if you can. Those grounds are set out on Form WW-2A either on the back or on an attachment. They are:

1. The proposed well work will constitute a hazard to the safety of persons.[55]

Look to see where the oil or gas well will be in relation to inhabited buildings, roads, and places where people gather. Gas leaks, oil leaks and even explosions are uncommon, but are a real possibility, particularly with deeper wells. The same is true with gas pipelines. There are some State rules regarding how far a well has to be from houses, etc., but they are not very protective. So make the case based on the facts of your situation.

Are their roads crossing over or under pipes or power lines or other utilities that could cause problems.

2. The plan for soil erosion and sediment control is not adequate or effective.

This has been discussed above in this chapter in the section entitled, "Things to Do First #3 -- Construction and Reclamation Plan."

3. Damage would occur to publicly owned lands or resources.

This is usually not a concern for you as an individual. However, if you are near a publicly owned forest or park etc., this is something upon which you could comment, and upon which others concerned could voice their concerns to their government officials.

4. The proposed well work fails to protect fresh water sources or supplies.[56]

Part of this has been discussed above in the "Casing and Tubing Program" section above. In addition, just proximity of an oil or gas well or its drilling its etc. to a water well or spring can cause a danger. And if the drilling pit is close to a stream that could flood and wash out a drilling pit, or close to a water well, that can be dangerous. And if your well is a hand dug or shallow well, then disposal of the drilling pit wastes on site could be a problem and you should ask them to truck the pit water and waste off site.

5. The applicant has committed a substantial violation of a previous permit or a substantial violation of one or more of the rules promulgated under (West Virginia Oil and Gas Law) Chapter 22, and has failed to abate or seek review of the violation.[57]

This was discussed in its own section above. Go find and report rule violations!

Generally, as stated above, you can make comment on about anything to the State. The comments that the State can actually consider in refusing or conditioning/changing the permit for the typical well, the ones the state is most likely to listen to, are listed above. You know your land and property and the area better than anybody. Anything you can think of should be included.

A separate statute prohibits a well from being drilled within two hundred feet of a dwelling or water well.[58] Although that is not technically a reason to comment under this provision, it is something that the State will almost certainly enforce, once it is brought to their attention. So that is something you should comment on. (And if you are reading this before you get notice of a permit application, and if you have a piece of land that you are thinking of using as a home site one day, go out and get a water well drilled on it now! If you do that, the driller cannot put the well within 200 feet of that water well.)

If the oil or gas well being proposed is a deep well, generally that is a well more than 6000 feet deep, be sure to read Chapter 7 of this Guide on deep wells. If that is the case you will most likely want to consider other comments than those discussed here. If the well being proposed is a "coal bed methane well", be extra sure to read Chapter 8 of this Guide on those wells. There are extra grounds to comment (and other things you should do) if it is a coal bed methane well that is being proposed. You have a lot more power to comment on the well locations etc. for coal bed methane wells than for other wells!

Filing Your Comments.

Where? The second page (backside?) of the notice you got gives you the two addresses where the comments have to go.

When? Your comments have to be *in the hands* of someone at the State address by the 15th day after the permit was filed. (See "Check The Date" above.) You cannot, for example, put them in the mailbox on the 15th day. That would mean they would not arrive until the 16th or 17th day. If you cannot get them in until too late, it does no harm to send them, but it may not help.

How? You can mail them (as long as they arrive on time), or you can use a courier service like FedEx. The permit does not say that, but it is permissible we are told. Or you can fax them. Again the permit does not say you can fax them, but the State's Office of

Oil and Gas has advised us that a fax will be accepted. Someday they may have a web site with a form you can fill in, but not yet as of the date this Guide was written.

What? The notice says that the comments have to be in writing. This Guide recommends complying exactly with that instruction. A fax is a writing for this purpose. Primarily this requirement is so you cannot just call on the phone and comment, or talk in person. Your comments are an important legal action and so it is recommended that you comment in writing, as any important legal action should be done. There is an argument that an electronic filing (e-mail etc.) would take the place of the written requirement (but not the delivery requirement), but that should be your last resort -- and follow it up with a fax.

On what? There is no official form or format. Appendix F is a simple form that we have developed that you can use, but you do not have to use that. You can use a letter, a memo or whatever. And you can attach maps, sketches and other documents. Your comments just have to be in writing. And your comments have to contain:

- Your name.
- Your mailing address. (Make sure its one you check regularly)
- Your telephone number, (if you have one).
- The "well operator's" name. (Is on the bottom right of the first page of the notice.)
- The oil or gas well number. (It's the "API Well No" on the top right of the first page of the notice.)
- The county, and district, if that is on the notice.

Saying what? Whatever comments you want to make. This Guide has given you some help above. It is best to focus on the things that relate to the five grounds which the state can use to make the changes as outlined above.

The Importance of Filing.

Now that there is a right to appeal the decision that the State makes on your comments, it is doubly important that you file comments and that you do so in writing. If you later try to appeal the decision to the Circuit Court and you have not commented the Court may not hear your appeal. Before you can file an appeal of such a decision, courts usually require the person making the appeal to have "exhausted their administrative remedies" and to have "made a record" below. If you have not filed comments, you have not done those things. Because it is important to "make a record", and it is possible that a

judge would rule that this is your only chance, don't worry about saving paper. Make your comments very clear and thorough.

Negotiating With The Driller

As explained in more depth in Chapter 2, this may be the time to negotiate with the driller.

Your comments could cause the permit not to be issued or for it to be changed. It will no doubt cause some time and delay in the issuance of the drilling permit even if the State does nothing based on your comments. Some of these folks are under tremendous pressure to get the well drilled in a hurry. They may be in line for a drilling rig and don't want to lose their place in line. They may have people financing their well that don't want to have limitations. They may have borrowed money and have to pay interest, so the longer it takes to drill the more interest they have to pay.

There may be changes you want that can not be made by the State. The driller may be willing to negotiate with you to give you the things that you want if you will not comment on the things upon which you have a right to comment. (Be careful! You have a lawful right to make a comment. You have a right to threaten to make a lawful comment. If you threaten to do something that you do not have a legal right to do, then you can get in trouble. Always make sure that you are threatening to do something lawful if you don't get what you want. Never threaten to do something unlawful.)

If the driller agrees to what you want, get it in writing. When you have it in writing and you have your own copy of the writing, then, and only then, is it time for you to sign the voluntary statement of no objection attached to Form WW-2A.[*]

There are a number of things that you can negotiate for in exchange for signing your voluntary statement of no objection that you would otherwise not have a right through common law rights or through what the State can give you:

---

[*]Occasionally drillers may want you to sign other documents. We have seen a "Statement by Person in Possession" for one. Probably by signing such documents you would be giving up some claim that you are not even aware of. Do not sign anything other that the voluntary statement of no objection and an agreement unless you are sure you know what you are signing, or have shown it to a lawyer.

- Moving the well location.

- Moving the road to a location that does not interfere with your planned or actual use of the land.

- Moving the road to a location so that you can use a road through an area of your land that you didn't have a road through before.

- The location of the pipeline may not be shown on the maps. Even if the location is not dangerous, you may want it placed someplace different than the driller does.

- You may have some bulldozer work you want done and the driller will have a bulldozer sitting there for awhile. Maybe there is some dozer work he can do for you, such as building a pond or grading an "access road."

- "Free gas" is something that many people want. Free gas is the most common surface owner benefit that you will find back in the severance deed. If you don't have a right to it, the drillers are more and more reluctant to give free gas. (See heading below about "Free Gas"Issues.)

- The driller has to call the Oil and Gas Inspector before he starts the road and site construction. The driller also has to call the Inspector before the he starts cementing in the surface casing. Since the driller has to make these calls anyway, have the driller agree to let you know also when these things are going to happen.

- Road improvements, such as rock and culverts

- Any thing else you can think of that is important to you.

As pointed out in Chapter 2, and as better explained in Chapter 6, you most likely have a right to damages for the land a driller is using for the well site and road,[59] etc., and for damages to personal property, etc. You have a right to damages under the West Virginia Oil and Gas Production Compensation Act.

It is strongly recommended that when negotiating with the driller to get what you want in exchange for the voluntary statement of no objection, that you do NOT also bargain away your right to damages under the Act.

However, it may be that you are forced to agree to the value of the acreage being taken as part of that deal. This Guide does not recommend it, but you may have to or they may offer you a generous amount of money and you want it. If you do agree to a set value for the land they are going to take, be sure to have a description of the exact land they are paying for and its acreage placed in the agreement before you agree to an amount. You might be able to refer to the maps that come with the permit application. If when the driller actually drills the well he ends up taking more land than the agreement said, you will be able to make a claim that the driller breached your agreement and go for more damages.

But whatever you do, it is strongly recommended you do not bargain away your rights to the other damages under the Act, such as damages to personal property. You should not bargain away your rights to those damages until the driller has finished and you can see what damages were actually caused. See the section in Chapter 2 entitled "The Oil and Gas Production Damages Compensation Act" and How to Use it When Negotiating with the Driller.

"Free Gas" Issues

Many people believe they want free gas. Be aware that free gas has its problems. It has not been cleaned by a refinery to remove impurities, and it may create soot in your house if you have the wrong kind of heating system -- and in the right kind of heating system your heating system will need cleaning/servicing more often. The odor of natural gas that comes out of a utility pipe is not the natural odor of natural gas. That odor is placed in the gas at the refinery. Unrefined gas may have a different odor, or no odor at all which can be dangerous because leaks go undetected. Unrefined gas can also have moisture that condenses inside the pipe, and collects at low places in the pipeline, and freezes up your free gas supply, and of course this happens most frequently when it is coldest. Gas pressures out of the well can vary for a variety of reasons. Nevertheless, free gas is a substantial benefit.

Note that you do not necessarily have to get the free gas from the well on your land. There may be a closer or better quality gas pipeline running near your house.

It may be hard to persuade the company to give you free gas -- much harder than in the old days. In the old days the companies used to give free gas willy nilly, often when

they really did not have to. And many people thought they had a right to it because of that practice, but they do not. Things have changed now. These days the driller and the people collecting the royalties have gotten sensitive to the amount of gas that they miss out on because someone is giving it away free. Almost no companies give away unlimited free gas any more. If the driller does agree to provide free gas, he will usually give you a right to a certain number of cubic feet of free gas per year for use in the heating of a single residence. It is usually enough for one house. Also, companies are worried about liability if they give you free gas and there is an explosion. So if you do get fee gas you will probably have to sign some waiver saying that the operator is not liable for fires, explosions, etc. due to the unreliable nature of free gas right out of the well.

And free gas really is not free. Particularly if you buy the well yourself, the well may require an occasional "workover" in which a small drilling rig comes in to clean out water, etc., that may block the free gas down inside the well. More importantly, once you own the well you are responsible for plugging the well when it is finally played out and "abandoned." You will have to post a bond until then. And then you will have to pay the $5000 to $10,000, or more, that it costs to plug the well when it is finally played out.

What happens next?

It depends on whether you signed a voluntary statement of no objection, whether you let the 15 days run without making a comment, or whether you made a comment.

What if you signed a voluntary statement of no objection? If you signed the voluntary statement of no objection instead of making a comment, then the permit can be issued by the State as soon as the State gets the statement you signed it. Or it could take a little longer -- there may be other people, like coal owners, who are objecting and they may slow the process down. Once the permit is issued, the driller can do what the permit says, and what you and the driller agreed to -- hopefully in writing. You can enforce those things. You can make the driller do what the driller promised, but you probably cannot change them unless the driller agrees. If you signed a voluntary statement of no objection, and if you then try to file an appeal of the permit issued by the state without first submitting a comment to the state, the judge will probably throw out your appeal for not making the comment. Your comment would have given the State the ability to fix what you are commenting about before issuing the permit. If you file an appeal without first having given the State the right to address your comments, the courts will probably not hear your case because it is unfair to the State to change something on appeal they did not have the opportunity to fix in the first place. (This is called "failure to exhaust administrative remedies".)

What if you did not sign a voluntary statement of no objection, but you did not file a comment either. If you let the 15 days run out without making any comment, then the permit can

be issued as soon as the 15 days have run out. (Again this time frame assumes that no coal owner etc. has made an objection.) Again, once the permit is issued, the driller can do what the permit says. You can enforce that, but you cannot change that unless the driller agrees. And, as stated in the previous paragraph, if you did not file a comment on the permit with the State, a judge will probably throw out any appeal you make for not exhausting administrative remedies. But if you had good cause, the judge may let you introduce evidence. See the numbered instructions for the petition for appeal attached to this Guide as Appendix G.

What if you filed a comment? If you filed a comment, then the State will consider your comment. An state inspector will probably come out and talk to you and the driller and look at the situation. The inspector may try to get you and the driller to come to some sort of compromise. Sometimes the inspector will tell the driller that you are right and the driller has to modify the permit application. If you and the driller do not settle your differences, and the driller is not persuaded to modify its permit application, then the State will decide whether or not to issue a permit (they almost always do) and whether to or not put any changes ("conditions")on the permit (the State will sometimes do this) based on your comments when they do issue the permit. Most often the inspector tries to mediate between you and the driller to get the driller and you to agree to things.

A copy of the permit issued by the state, with or without changes based on your comments, should be sent to you by the State if you filed a comment. Whether or not you filed a comment, it might be a good idea to send an actual letter to the State requesting a copy of the permit, just to make sure.

If you filed a comment instead of signing a voluntary statement of no objection, and if the State did not make the changes to the permit that you said you wanted in your comments, then you probably can file an appeal of the issuance of the permit. The next section explains this. And remember, if you are reading this before you received a notice of the permit from the driller, this ability to file an appeal and your willingness to file the appeal is extra leverage in negotiations before the driller files a permit application.

Can I appeal?

If the State issues the permit without denying or conditioning the permit the way that you think that you asked the State to do so in your comments, then you should have the right to appeal that decision to the Circuit Court. You probably cannot appeal if you did not file a comment. See the previous heading.

The West Virginia Supreme Court of Appeals has said in a 2002 case called *Lovejoy*[60] that you have this right to appeal the permit decision to the Circuit Court. However, until the decision, many people thought that there was no appeal right. No one

ever tried such an appeal that anyone knows about. And the Court's decision is confusing about the legal authority for the appeal. And in addition the Court's decision is confusing about how it is to be done.

On the question of whether you have the right to appeal, this Guide believes that you do. If the judge questions that, this Guide suggests that you politely but firmly ask the judge to read and follow the Lovejoy decision.

Included as Appendix G to this guide is a set of forms we have drafted to help you file an appeal. The form and the instructions with the forms included in the appendix say how we believe the appeal should be done. For example, we take position that you appeal from the papers you filed and the decision made by the State directly to the circuit court -- that there is no evidentiary "hearing" before the state agency. We are not sure the State or the driller will agree, or even the judge will agree. If the judge raises serious questions about how you are doing the appeal, or again whether you have the right to appeal, this might finally be the time you really have to get a lawyer.

So, if you want to file the appeal, go to the forms and instructions in Appendix G. Good luck. And let us know how things go so we will know how to advise the next person who contacts us.

If you lose in Circuit Court, there is a further appeal to the West Virginia Supreme Court of Appeals. Help on doing that appeal is beyond the scope of this Guide. Some people have done such appeals without lawyers, but it is very difficult, particularly in this context.

CHAPTER 4.

Step by Step Suggestions of What to Do While The Oil or gas Well Is Being Drilled.

What to Do.

- Keep taking notes in your diary.
- Keep taking pictures of any problems you may see.
- Gather samples or other evidence if you see problems.
- Keep checking on the driller. It's hard. During the actual drilling they work day and night. They say they do this because the hole might change on them if they stop. Also, they rent the drilling rig by the day.

You may have been able to negotiate an agreement where the driller calls you when he calls the Office of Oil and Gas Inspector at the start of road or well site construction. Even if you did not negotiate this, ask the driller and the Office of Oil and Gas Inspector to call you at the start of construction.

When they are putting in the road and well site, make sure they put the road where they said they would. Make sure they put the same number or more culverts in where they said they would. Make sure they put the same number or more water bars or broad dips in the road where they said they would. When they are done, make sure they seed it properly.

If the driller does not do those things, even after you ask them to, call the Office of Oil and Gas Inspector.

See the section on "Oil and Gas Well Casing" in Chapter 2 for what you should do about making sure they do the fresh water casing properly. Again, try to have the driller or the Office of Oil and Gas Inspector let you know when they start. Plan to be there or have a friend or relative to be there to watch what they are doing to make sure it is done right.

Check your water and springs regularly. While the drilling is actually going on, check it a couple times a day!

See the advice in the section on "Overview of Enforcement" in Chapter 2 about whether to report violations you see during the drilling process. You should report these violations, despite any other agreements you may have with the driller.

It may be important to you that the new road, or even an existing road, across your land not be open to anybody who wants to come across the road. If so, put up a "no trespassing" sign and ask the driller to put a gate across the road. If the driller won't do that, put a chain across the road yourself, lock it and give a key to the driller. If the driller won't keep the chain locked across the road, put a new lock on the chain and don't give the driller a key until he agrees to do so. The driller has a right to come onto your land. The driller has no right to make it possible for others to come onto your land.

During drilling the driller should keep the well site and road from causing erosion or sedimentation. That's what the Soil Erosion and Sediment Control Plan and the Soil Erosion and Sediment Control Field Manual are all about. As of August 2001 the Office of Oil and Gas was scanning the Field Manual into a .pdf file that is supposed to go on the web site.* If the driller fails to take measures to prevent that, complain to the Office of Oil and Gas Inspector.

In addition, the driller may cause problems on roads. For problems on the well road constructed on your land contact the Oil and Gas Inspector. For problems on other roads, see the fourth and Third to last questions in Chapter one. Those answers apply to you as well to the public using those roads.

[Added in Version 7 of this Guide in 2008] Note also that there are requirements for burying of gathering pipelines to your well. Look on the web site of the West Virginia Surface Owners Rights Organization (Google the name), and look on the left under "Advice for Common Situations" for a link on the subject. The driller must comply with 35 Code of State Rules 4-16.7.

---

*The home page website of the Office of Oil and Gas can be found at http://www.dep.state.wv.us/og/index.html. You will have to hunt around to find the Soil Erosion and Sediment Control Plan Field Manual if it is there yet. Or you can call the Office to see they can help you locate it on the website.

CHAPTER 5.

Step by Step Suggestions on What to Do After the Oil or gas Well Has Been Completed.

Documents

The driller files a number of documents with the State when the well has been drilled. You may find them of interest. You can get them from the State. You can also ask the driller or the State to mail them to you as they are filed. Particularly if you do that early on in the process before the well is drilled, the driller will know that you understand about the process and that should keep him on his toes to make sure he does things right.

One of the items the driller has to file is the "well log." This has the times and depths at which the driller found certain geological formations. If your water well does get screwed up, there may be some evidence in the log of what caused it. You may also just be curious what is under your land -- water, coal etc.

The driller also has to file a "Well Operator's Report of Well Work," Form WR35. This will show you where the driller found fresh water and salt water under your land. It will show you what actual casings and tubing the driller ended up using, as opposed to the plan the driller initially filed. It will also show how good the well is, and how much gas pressure there will be in the pipes if it is a gas well. It also says what kind of "stimulation" or "fracing" the driller did to the oil or gas bearing rock layers to make the oil or gas flow better. This can be a dangerous activity that can cause damage to your water well.

Drillers also file a "discharge monitoring report" where they report on the treatment they did to the water in the drilling pit before it was discharged and the results of the treatment.

Dry Hole

If the well is a dry hole, an unusual thing in West Virginia, then all the metal casing that can be pulled out of the hole will be pulled out of the hole. The well will be plugged with layers of concrete and/or special clay pumped down into the well hole. A metal marker will stick up above the ground. The driller will leave. There will be no pipeline or oil tank.

You can ask the driller to return the land to its approximate original contour. You may not want the road into your property because it will invite people to trespass on it.

But they are probably not required to return the land to its approximate original contour. The statute only requires that they remove all structures, equipment, etc. and that they fill any remaining excavations. The driller is to then grade and seed the disturbed area to bind the soil and prevent erosion. (It might be possible to argue that the "excavation" and "grade" requirements are requirements to return the site and road to approximate original contour, but that is not the way the State will be likely to interpret the statute.)

See the next section.

Reclamation

Whether the well is a dry hole or a producing well the driller has to reclaim the site. The requirement of the statutes are set out in the footnote.[*] Note that the statute refers to the Soil Erosion and Sediment Control Field Manual. The driller also has to comply with that Manual. As of August 2001 the Office of Oil and Gas was scanning the Field Manual into a .pdf file that is supposed to go on the web site.[**]

---

[*] **§ 22-6-30. Reclamation requirements.**

The operator of a well shall reclaim the land surface within the area disturbed in siting, drilling, completing or producing the well in accordance with the following requirements:

(a) Within six months after the completion of the drilling process, the operator shall fill all the pits for containing muds, cuttings, salt water and oil that are not needed for production purposes, or are not required or allowed by state or federal law or rule and remove all concrete bases, drilling supplies and drilling equipment. Within such period, the operator shall grade or terrace and plant, seed or sod the area disturbed that is not required in production of the well where necessary to bind the soil and prevent substantial erosion and sedimentation. No pit may be used for the ultimate disposal of salt water. Salt water and oil shall be periodically drained or removed, and properly disposed of, from any pit that is retained so the pit is kept reasonably free of salt water and oil.

(b) Within six months after a well that has produced oil or gas is plugged, or after the plugging of a dry hole, the operator shall remove all production and storage structures, supplies and equipment, and any oil, salt water and debris, and fill any remaining excavations. Within such period, the operator shall grade or terrace and plant, seed or sod the area disturbed where necessary to bind the soil and prevent substantial erosion and sedimentation.

The director may, upon written application by an operator showing reasonable cause, extend the period within which reclamation shall be completed, but not to exceed a further six-month period.

If the director refuses to approve a request for extension, the refusal shall be by order.

(c) It shall be the duty of an operator to commence the reclamation of the area of land disturbed in siting, drilling, completing or producing the well in accordance with soil erosion and sediment control plans approved by the director or the director's designate.

(d) The director shall promulgate rules setting forth requirements for the safe and efficient installation and burying of all production and gathering pipelines where practical and reasonable except that such rules shall not apply to those pipelines regulated by the public service commission.

[**]The home page website of the Office of Oil and Gas can be found at http://www.dep.state.wv.us/og/index.html. You will have to hunt around to find the Soil Erosion and Sediment Control Plan Field Manual. It may be on the page for forms. It is

(continued...)

After the driller hits the bottom of the oil or gas well, he has only 6 months to get the reclamation done.[61] He can get an extension for up to another 6 months. You should get a notice of the reclamation. Also, you have to make your claim for damages under the West Virginia Oil and Gas Production Damages Compensation Act as explained in Chapter 6, within two years of your receipt of that notice. Some unscrupulous drillers will just not send people the notice so they do not know about their right to make the claim. So if you are concerned, check with the State to see if one has been filed there.

Pit Waste

As part of the reclamation the driller is to properly treat and dispose of the water and other waste in the drilling pit or pits. For an explanation of that see the section on Waste Disposal When and After the Well Is Drilled in Chapter 2.

Oil

If the driller struck oil, then you are in for some annoyance and inconvenience. A gasoline or electric pump, like the teeter totter pump jack you see in all the pictures, will be placed on the well. It will run off and on. It will pump oil into a tank by the side of the well or, perhaps better, into a pipe that leads downhill to a convenient spot near a road where there will be a tank. On a regular basis, a truck will come by and drain the oil to take to market. These trucks will be a part of your life for the life of the well.

Gas

If the driller hit gas, a pipeline will be laid across your land. After that, the well tender will come by on an irregular basis, sometimes using a truck or a 4-wheeler to check on the well and to occasionally open or close the valves allowing the well to produce, etc.

Whether it is an oil or gas well the driller will have to come in every couple of years with a small rig and "swab" or "work over" the well to keep it producing. And the State oil and gas rules require someone to check on every well at least once a year.

Brine Water

[**](...continued)
in several large .pdf files. Or you can call the Office to see they can help you locate it on the website.

If “brine” water comes up with the oil or gas, then the driller has to properly dispose of the brine water. For an *oil* well, this usually requires a big long box for treatment and measured discharge of the treated water. This system requires a lot of maintenance and the well tender will be there frequently, or should be.

The driller is not allowed to do this to the brine that comes out of a *gas* well. If you see this box treatment of a gas well, call an inspector.

If brine comes out of a gas well, the driller has to either sell it or inject it back in the ground. To get more information, read question and answer #16 in Chapter 1.

Anytime you see brine water being just dumped onto the ground or into a stream, get evidence, take pictures and samples, and call an inspector or the “spill” number in your phone book and as further explained in question #15 in Chapter 1.

Road

As long as the road is being used to get to the well, the driller has the continuing duty to keep the road maintained. If the road starts to wash out, the driller has to put in new water bars and restore and repair it. If he does not, you can call the Office of Oil and Gas Inspector. Again take pictures and gather evidence and if it causes damage to your land or some problem to you, that can be part of the damages that you claim as explained in Chapter 6.

End of the Well's Life

To see what happens to the well as its production potential plays out, and how that may affect your interests, read through question and answer #6 and others in Chapter 1.

CHAPTER 6.

Step by Step Suggestions of What To Do To Get Compensated for Damages Caused by the Driller Under the "West Virginia Oil and Gas Production Damages Compensation Act".

Introduction to Chapter.

The purpose of this Chapter is to explain to you how to get money using the West Virginia Oil and Gas Production Damages Compensation Act ("the Act") for the damages that occur to your land and property when an oil or gas well is drilled on your land. The statute assumes that things will happen in a certain order and that the Act kicks in just about last after the drilling of the well is all done and the driller starts the reclamation of the site.

However, it is important to understand how the Act works before the driller starts drilling or even before the driller applies for the permit. That will help you if you are trying to negotiate with the driller before the driller prepares the permit, during the comment period, etc. If you understand your rights under the Act later, you can use those rights under this Act for leverage before the well and road sites are selected, or to trade, in order to get the oil or gas driller to give you other things you want. In order to make a settlement early, or late, it is important to know what you could get if you do not settle. The negotiating strategy is set out in Chapter 2 and will not be repeated here. If that does not work then the Act really will kick in after the driller is done drilling the well. You can file a claim for damages, and if the driller will not pay what you want, you can go to arbitration to get what you want.

General

The Act requires the driller to compensate you (pay you money) for damages done to your real and personal property (your land and your living or other things) caused by the drilling. After the drilling is done, you will get a notice Form WW-72 "Oil and Gas Reclamation Notice." It is not much of a notice. Once you get that notice, you have two years to make a claim to the driller. At the bottom of the notice it just tells you that you now have two years to make your claim. It does not tell you much about how to make your claim. When you have made the claim, if the driller will not pay you within 60 days, then you have a *VERY limited time* to go to arbitration or file a law suit.

The Act gives you the right to file a law suit in Circuit Court if the driller will not give you the damages that you think you are entitled to under the Act. If you are low income, you can apply to a legal aid or other public interest law firm for free representation. But they are usually swamped with other cases. If that does not work, then you need to find a private lawyer. If your damages were really substantial and expensive or valuable, and you have good pictures or other evidence, you may be able to convince a lawyer to represent you for a contingent fee (for instance, a % of the damages). The lawyer will take a portion of the money you get in the suit to pay himself or herself and to pay the costs of the litigation. If the case is not good enough for a contingent fee, you can pay the lawyer by the hour to do your case, which is expensive.

If you do see a lawyer to file a law suit, the lawyer will probably advise you to also sue under the common law rights of action because the driller did more than "fairly necessary"[62] or because the rotary drilling method used by the driller was "not in the contemplation of the parties"[63] at the time of severance of the oil and gas from the surface. Or, if the driller has violated an environmental protection law, this will likely give you a "cause of action," or a reason to sue, in order to collect for the damages caused by the driller's violation of the law.[64] See "Overview of Common Law Surface Owner Rights" in Chapter 2.

Since a law suit may not be practical for you if the driller will not give you what you want, the Act provides for arbitration. Arbitration is nothing to be afraid of. The arbitration process is a "dispute resolution" process that is much more user friendly than going to court. You don't need a lawyer, although, it never hurts to have one. This Chapter will try to explain the arbitration process, so you will feel that if the driller does not give you what you want, it will be worth your while to go through arbitration to get what you want.

What Happens First

As mentioned earlier, the Act formally kicks in when the driller is beginning the reclamation. Of course what really happens first is the driller does a survey, then brings a bulldozer in to construct a road and a site, then brings in a drilling rig and a collection of other equipment, then digs a pit, then drills down through all of the layers of rock under your land, then cements in the well casing, then lays a pipeline for gas or tanks for oil (unless it is a dry hole and neither of these will occur), then treats the fluid in the pit, then sprays the treated fluid from the pit over your land somewhere, then buries the pit waste, then make some temporary culverts, water bars, seeding, etc., and then does final water bars, culverts, bulldozing and seeding.

Although you cannot start the actual arbitration process under the Act until the driller starts the final reclamation, you should get busy as soon as you know where the well will be drilled and the roads built. The damage compensation process, and the amount of money you get will depend not necessarily on what damages were done, but on what damages you can *prove*. To have the best chance of getting what you want and are entitled to, you need to be gathering evidence from the very beginning to use when the Act kicks in.

As mentioned elsewhere in this Guide, take lots of pictures. Don't save money on film. Take pictures from close up and from far away. Take pictures at the very beginning before any work is done. Take pictures while work is being done. If there are particular problems, take pictures of those problems. When it is all done, take pictures again.

If you have a video camera, that is probably just as good or even better because the video camera allows you to see the pictures as you are taking them. A video can be harder to use in court unless you have a good editing system so you can pick out the important stuff and not camouflage it with unimportant film in the final presentation. But the other side may be entitled to see all of the pictures/tape you took, not just what you want to show.

Damages/Money The Driller Owes You Generally.

The kinds of damages you can get are reviewed below as well as The evidence you should be gatherings. Again, start gathering The evidence from The very beginning and continue to do this throughout The whole drilling and reclamation process.

The pictures and other evidence that has been recommended so far has been evidence to show that the damages did occur. You also need to gather evidence to show the amount of money you should receive because the damages occurred. You can gather this evidence at the same time while you are gathering the evidence that the damage has occurred, but don't take time away from, or lose opportunities to, gather evidence about what damages occurred because you are gathering the evidence of value of the damages. The evidence of value is easier to gather later.

As a general rule the dollar amount of your damages is the cost to repair your land or things (including crops). However, if the cost to repair your land or things exceeds their market value, or if it is impossible to fix them (really the same thing), then your damages are the fair market value of your land or things at the time they were damaged.

For many of the items of damages the driller may want to do the work to fix the damages himself. It will be cheaper for him to use his own labor than to contract it out. However, you may not trust him to do it right, or you may want someone with more experience doing the work. The result of arbitration is a damage award for an amount of money. You can stick to your guns that you want someone else to fix it, or you can agree to have the driller do the work. The only reason you might agree for the driller to do the work is if you are not sure how much work is necessary to fix The problem, or whether The proposed method to fix the problem will work. If, for example, the driller polluted your water well, he may say that a new well can be drilled and it will cost $X, and he may try to persuade the arbitrators to just award you that much money. If the arbitrators are leaning that way, you may want to agree to let the driller do the work, but only if he agrees that you can still get other damages to fix the problem another way if The driller cannot bring in good water with the new well.

The next five headings will individually review the five specific types of damages to which you are entitled under the Act. For each type of damages you will be given an example. You will be given some suggestions on how to arrive at the value.

The Act entitles you to five types of damages:

> (a) The oil and gas developer shall be obligated to pay the surface owner compensation for:
>
> (1) Lost income or expenses incurred as a result of being unable to dedicate land actually occupied by the driller's operation or to which access is prevented by such drilling operation to the uses to which it was dedicated prior to commencement of the activity for which a permit was obtained measured from the date the operator enters upon the land until the date reclamation is completed, (2) the market value of crops destroyed, damaged or prevented from reaching market, (3) any damage to a water supply in use prior to the commencement of the permitted activity, (4) the cost of repair of personal property up to the value of replacement by personal property of like age, wear and quality, and (5) the diminution in value, if any, of the surface lands and other property after completion of the surface disturbance done pursuant to the activity for which the permit was issued determined according to the actual use made thereof by the surface owner immediately prior to the commencement of the permitted activity.[65]

This Guide will start with the fifth type, since it is most important, and then go back through the first four.

Damage To Your Land

The Act states that,

> "(a) The oil and gas developer shall be obligated to pay the surface owner compensation for: ....(5) the diminution in value, if any, of the surface land of other property after completion of the surface disturbance done pursuant to the activity for which the permit was issued determined according to the actual use made thereof by the surface owner immediately prior to the commencement of the permitted activity."

The clearest example of reduction ("diminution") in the value of your land is the drilling site itself. After the driller is done and the oil or gas well is in place, even after the area around The well is "reclaimed", there remains an area around the well that takes up land that the driller needs for as long as the well is producing. You cannot use that land for a garden, you cannot use that to plant crops, and you cannot use that to build a house on. So the surface "disturbance" has "diminished" that land's value entirely. The same applies for the land taken for the road and the land taken for the pipeline or tanks. The driller may try to argue that the road increased the value of the land. Argue back that this might be true for some future use, but since you only get compensated for its current use, he does not get to use that argument. And it may open up your land to trespassers etc.

Note two limitations on the damages given to you by the Act for your surface land. First, if the driller takes one acre out of the middle of a twenty acre piece of flat land, you are entitled to the value of that one acre. However, the other nineteen acres are worth less because there is a hole in the middle. You get nothing for that. So fucus on making The best argument you can for the value of what is actually taken.

In addition, you only get its value for the way the land was at the time the drilling was done. So if you were using the acre as a meadow, "immediately prior to the commencement of the permitted activity,"[66] you get its value as a meadow even though you had plans to divide the twenty acres into home sites or to sell it as a site for a factory, etc. This is why if you get a lawyer and sue in Circuit Court you will be better to sue under your common law rights than under the Act.

To figure out the value of the land that was taken, you can try several things. Your opinion is admissible in court, but there is other evidence that will be stronger. The best thing would be to have a professional, certified appraiser come out and appraise the damaged property.

There are other ways to get evidence. You may have had an appraisal done if you bought the property recently. There is an appraisal for tax purposes at the courthouse, but that may be out of date. You can try to find any sales of similar property that occurred in your area recently, and find out how much per acre that sold for and go from that. The amount paid for the total sale nearby will be on the deed in the courthouse. Of course some of that acreage in the total sale may be worth more or less than other acreage.

You can try to buy replacement acreage nearby and see what you have to pay for that. You can look at "for sale" advertisements in the newspaper etc., but that evidence is a little weak because often the final sale value is often less than what the owner asked for in the ad. You can calculate how much annual income you made from that acreage and an accountant or someone will help you figure out its present value from that.

The best method is to hire a licensed appraiser, who does some of the things above and gives an expert opinion. That of course costs money and you need to decide if you will get enough extra using a licensed appraiser to justify the cost. It probably is worth it.

As stated elsewhere in this Guide*, it is generally recommended that you do not settle with the driller in advance for an amount of money for your damages under this section or the following sections. However, in negotiating road and well placement, the driller may insist that you agree to an amount of damages for your land as described in this section. If you have to, you have to. But if you settle in advance be sure that you either agree to an amount to be paid per acre or that the driller gives you the final reclamation plan map that identifies the amount of acreage to be taken. In the event the driller ends up taking more acreage, you would still have a claim for more money.

Again, as stated elsewhere in this Guide, it is **strongly** recommended that you not agree to any settlement of your damages under the following sub-headings until all the drilling is done and the reclamation is over. If you settle for an amount before the work is done, then the driller will be less careful as he does the work. Also, you may not fully appreciate what damages are going to happen until you see them.

---

*See the section entitled, The Oil and Gas Production Damages Compensation Act, and How to Use It When Negotiating With the Driller in Chapter 2.

Damages For Lost Income or Expenses

The Act says,

> "(a) the oil and gas developer shall be obligated to pay the surface owner compensation for: (1) lost income or expenses incurred as a result of being unable to dedicate the land actually occupied by the driller's operation or to which access is prevented by such drilling operation to The uses to which it was dedicated prior to the commencement of the activity for which a permit was obtained measured from the date from which the operator enters upon the land until the date reclamation is completed..."[67]

You know best what lost income or expenses might have occurred as a result of the driller occupying your land or preventing you from getting to the land. The latter is a good example. If the driller makes an impassable road and a muddy drill site that blocks your entrance to a hollow where you could have harvested hay or planted crops, and you could not do that because he was blocking your way at some crucial point, then you are entitled to the lost income that was the result of your inability to get there. If you went ahead and produced the land but had extra expenses in doing so, like paying for a temporary right-of-way across someone else's land to the place, etc., then you could get that reimbursement instead. Similarly, if the driller used the road to your house and if the driller trashed the road to your house so you could not get there and you had to stay at a motel or pay friends to stay at their house or buy meals out, etc., these are all expenses you could claim.

The same applies not only to land you are blocked from using, but also, more frequently, the land actually used by the driller. If the driller used a big wide area while drilling and you could not plant your corn there, then you are entitled to the value of the corn you could not grow. When done, the drilling site is liable to be smaller and you may be able to plant some corn. Your inability to plant corn on the reduced well site in the future is taken into consideration under damages to land under the previous heading.

Interestingly, the language quoted above from the statute does not talk about "net" income. The driller may think it is unfair to give the total "gross" income from your lost crop without subtracting the expenses necessary to generate the income. For example, if you lose an acre of corn, the statute says you should get the income from that acre of corn. It does not say you should subtract from that income the cost of the amount of gasoline you would have used if you had actually harvested the corn. If the driller says that is unfair, then you should note how you are not getting damages for the diminution in the value of the land next to the well site or for the land's true value as a home site or the

value of that land to the driller because of the money he is making off the oil or gas, and that is not fair either.

Damages For Market Value of Crops

> The Act says,
> "(a) the oil and gas developer shall be obligated to pay the surface owner compensation for ... (2) the market value of crops destroyed, damaged, or prevented from reaching market..."[68]

Examples of this kind of damages have already been dealt with in the previous heading. But this damage also applies to the crops you would have used yourself, to feed your livestock or even to put on your table. You cannot grow corn on the well site or on land you were prevented from getting to due to the drilling, so you should get the market value of the crops. (This statutory language re-enforces the argument made in the previous section about the statutory language that you should get the lost income without subtracting the expenses.) Another important "crop" is the timber that is cut down to make the well road or the drilling site.

Again, you can establish the value of these crops just by your own estimates. Your arbitrators may know values on their own and may take "notice" of that. However, other evidence is better. For bulk/fungible goods like corn, you can find out from the local co-op or another purchaser what the value of the corn was at the time you would have sold it. There may also be local or national quotes. Similarly, for timber you may be able to contact a local lumber yard, a logger or forester and get official documents of the current price for timber "on the stump." Some surface owners have successfully convinced the driller to pay for an appraisal of the timber by an impartial registered forester before the driller begins road and drill site work. Many drillers understand that this involves little cost and can help avoid disputes later on. Or you may prefer to find a forester and pay for it yourself. Get these statements in writing, or better yet, get a copy of the bill of sale or invoice someone actually paid for similar timber on the stump at that time. Of course, you have to be careful, there is a wide disparity in values depending on the kind of wood and the thickness of the tree. You may have to be very detailed about this.

Damage To a Water Supply

The Act says,

> "(a) the oil and gas developer shall be obligated to pay the surface owner compensation for .... (3) any damage to a water supply in use prior to the commencement of the permitted activity..."

Of course, the best example of this is when the water well that you used for your home or stock goes dry, turns salty or iron, or slows down. The same would apply to any spring that was being used for your home or stock. Similarly a spring up the hollow that fed a creek that came by your home or stock, etc., would count.

Here is another limitation provided in the Act that would not exist if you had a lawyer and brought a common law lawsuit. The Act limits the damages the driller is required to pay to a water well or source that was in actual use. If it is a spring or water well that is not in actual use then, under the Act, you are not entitled to damages for that, at least under this sub-section. In a common law lawsuit you probably would be. You could try to get compensation under, "Damages to Your Land," the heading a few pages earlier in this guide. It may be possible to argue that a driller ruined a spring that flows on a piece of land that you were not using for anything. Once that spring goes bad, there has been a "diminution in value" of that piece of land since land with usable springs is more valuable than land with no springs..

In Chapter 3 of this Guide are suggestions for getting your water sources tested before drilling, etc.[*] You should do this. The best way to prove damages would be to the same test afterwards, and show the difference.

Determining the amount of money damages is a problem here. If it is possible to drill a new water well to another aquifer which is not polluted, then the amount of damages would be the cost of drilling a new well etc. That may not be possible if the driller polluted the only aquifer, or the driller polluted them all. (Be sure not to enter into a final agreement for the amount of money it would cost to drill a new well before the new well is drilled. You want to make sure the new well gives you good water.) If a new well cannot be drilled, then the operator will have to pay you the cost to run a new water line from somewhere else if possible, or you may prefer a private system just for your house. If that is not possible, then the driller will need to give you enough money to get a

---

[*]See the section called "First Thing to Do #1 - Get your water tested." in Chapter 3.

water softening system and give you enough money to run the water softening system forever.

Do not forget to ask for "annoyance and inconvenience" damages for hauling water until your new source is ready. The statute does not clearly allow those kind of damages, but they are a form of damages you should be entitled to.

Damages To Things

> The Act says,
> "(a) the oil and gas developer shall be obligated to pay the surface owner compensation for ....(4) the cost of repair of personal property up to the value of replacement by personal property of like age, wear and quality..."

What is "personal property"? In common speech, "personal property" means "things." "Personal property" is property that is not land or "real property." Legal terminology for land is "real property."

The difference between personal property and real property is sometimes obvious. A car is personal property, the dirt in a meadow is real property.

But there can be a fine line between something being real property or personal property if the item of property is something that could be called a "fixture." A mobile home sitting on blocks with its wheels and tongue still attached, standing by itself, is probably still a thing or personal property. If the tongue is cut off and the wheels are gone and it is cemented onto a foundation and has a room built on that has footers dug into the ground, then the mobile home is probably no longer personal property. It is "fixed" to the land and is therefore a "fixture" and part of the land. If a mobile home has become a fixture and is damaged, then its value would be determined by the decrease in the value of the mobile home together with the land on which the mobile home sits, i.e. the difference in The value between land and a mobile home together if the land has a good mobile home affixed to it or if the land has a damaged mobile home affixed to it, instead of The difference between just The mobile home's market value it is good or damaged. This distinction is probably not all that important here. You are going to get damages under this section because personal property was wrecked or you get damages under The "Damages to Land" section because a fixture on The land was wrecked.

A clear example of damage to a thing would be a tractor was parked beside The well road that was damaged when The driller brought The drilling rig in. Other things that might be fixtures for which you might be entitled to damages for include

outbuildings, fences, gates, etc. Other more indirect damages, but still important, would be if you broke your car trying to get out of your house or to your crops because The driller did such a bad job on The road.

Again, to prove The amount of money you get for these things, you can get written estimates. If it costs more to fix then it is worth, you get its value. You can actually purchase replacements and show The bills. Note that you are not allowed to replace a 10 year old stock watering tank with a brand new one and get The value of The brand new one. You could get The value of used property from Guidebooks, like The NADA Blue Book for used cars, or someone who deals in those goods, or if you are depreciating The value on your finance books, you could get The depreciated value.

The Claim and Arbitration Process Begins

The driller is required to file a notice to The surface owner when he is beginning reclamation of The site.[69] If there are more than three co-owners of The surface land, then The driller will only send The notice of reclamation to The surface owner listed on The tax records. This is The same way The notice of The application for The permit to drill The oil or gas well, The one that got served before The well was drilled, was served. If you are The one on The tax records, make sure you tell The others. If you are not The one listed on The tax records, make sure you find out who is listed on The tax records and make sure they know to let you know when they get The notice.

Reclamation requirements are set out in The West Virginia Code,[70] The Erosion and Sediment Control Field Manual, and The rules of The State's Office of Oil and Gas.[71] The requirements of The code section are set out in The footnote in The "Reclamation" section in Chapter 5.

The driller has 6 months to complete The reclamation.[72] You have two years from The receipt of The notice of reclamation to send your written claim to The driller. Do not be in too big of a hurry to do that. Make sure you have completely prepared your evidence of what happened to your land and other property, and your evidence of The value of The damages to your land and other property etc. before you do that. You have two years to file The claim, but once you file The claim, if The driller will not go along with you, then you have very limited time to start The arbitration or go to court. So be ready before you start.

Just because you have two years' time to file a claim under The statute does not mean you have The same two years' time if you decide to file a common law suit in Circuit Court. If you decide you are going to sue, you should go see a lawyer soon after

The damages occurred, and long before two years passes. It may be that there is a two-year time period of The statute of limitation for filing your common law law suit begins earlier than The two years time you have to file a claim under the damage compensation act.

Set out your claim in writing. You might want to set out the amount you are claiming and how you calculated it in some detail. Or, you may not want to give too much detail if you are bluffing about the strength of your evidence or "asking high." If your evidence of value is strong though, you should include it.

The statute does not require your claim to be set out in any specific form or format. It just has to be in writing when you send it to the driller.* It is recommended that you send your claim to the driller in writing by certified return receipt mail. You should get the name and address of the driller from the permit application form that you already have, or from the Office of Oil and Gas

The driller then has 60 days from the date you mailed the claim to pay you the amount of money you asked for in your written claim. If the driller does that, then you are done.

In the alternative, the driller can come to you and try to settle with you for a lesser amount. Or the driller can send you a counter-offer which is not acceptable to you. The driller can also do nothing.

If any of these alternatives happen, and you do not get a satisfactory amount of money by the time 60 days is up, then you have ONLY 20 DAYS to begin binding arbitration as set out in the statute (or to file a law suit).[73] Get going, as explained in the next section. If you miss the 20 days you are in trouble.

Something else can happen also, and is actually more likely to happen. At any point before or during the claim and arbitration process, the driller can approach you and negotiate with you until the two of you agree to an amount. If you come to an agreement that is satisfactory to you, that is good. But BE SURE to get it in writing. It is recommended that you not only get it in writing before the 60 days is up, but that you get the money in your hand before the 60 days is up. If you get the money in your hand, then you are done and it will not be necessary to begin the arbitration or the lawsuit.

---

*Because West Virginia has enacted the Uniform Electronic Transactions Act it may be that the claim can be in electronic form. But there can be a complication because there is a delivery requirement in the statute. So it is recommended you use paper for this transaction.

Even if you get a written agreement in your hand within 60 days, if you do not get the money in your hand, this Guide still recommends that you begin arbitration. The written agreement will be enforceable like any contract you make, like one to buy a car or house. However, it is recommended that you begin the arbitration anyway. That will keep the pressure on to pay you and avoid problems if the driller tries to wiggle out of the written deal.

Of course, as explained in Chapters 2 and 3, one other thing could have happened long before The notice of reclamation and claim process gets started. It is possible that you agreed to a settlement with the driller even before the notice of reclamation got sent. You may have agreed to a settlement of these issues after you got The notice of The well work permit, before The drilling even started when you were negotiating The location of The well road and well etc. See Chapter 2. Or you may have agreed at least to the value of the affected real property. If you only agreed to the amount of damages for the land, then you still need to go ahead if you have any other damages allowed by the Act. If you have already agreed to a settlement for ALL the kinds of damages, then you will probably not be able to get anything more now, depending on the exact wording of what you already signed. You need to see a lawyer if you signed a settlement for all damages and now there are more than you expected.

Beginning Arbitration

If after 60 days you do not have money in your hand from The driller then you only have 20 days to begin the arbitration. (Unless you have already seen a lawyer and are prepared to file a law suit.) It is not difficult to begin the arbitration!

You have to begin the arbitration procedures before the end of the 80th day, after the day you first mailed your claim to the driller. (That is the 60 days the driller had to respond, plus the 20 days you have to begin arbitration.) Send the driller a notice that you want to submit to binding arbitration. The notice does not have to be in any particular form. It can be a letter, but it does have to be in writing and it does have to be sent by certified return receipt mail to the driller or the person the driller designated as his agent on the drilling permit. The statute is not clear about what has to be done by the end of the 80th day. It may be that you just have to put your written notice in the mail by the end of the 80th day. It is recommended that you mail it early enough that the letter (or that notice the mailman leaves if the recipient is not home that you have mail to pick up at the post office) arrives at the driller's address before the end of the 80th (60 + 20) day.

Choosing Arbitrators

In arbitration under the Act you get to pick one arbitrator. The driller gets to pick one arbitrator. Then those two arbitrators pick a Third arbitrator.

You have to pay what your arbitrator charges, if anything, and half of the Third arbitrator's charges.

Arbitrators do not have to be anyone special -- just people. Sometimes they are neighbors. Sometimes they are real estate agents or lawyers. Sometimes they are retired judges. Maybe an auctioneer or someone who is a dealer of some sort. There are a few types of people who cannot be arbitrators. See the footnote.*

Arbitrators act a little bit like a cross between a judge, a jury and your lawyer. There will be a hearing that can be formal or informal depending on how they want to do it. You will submit evidence and testimony to the arbitrators. They can ask you questions, and they have to go look at the drill site.[74]

So think of someone who will be good for you, but not so obviously in your favor that they will lose credibility with the other two arbitrators. It would be good to choose someone who knows a great deal about the kind of damages you are claiming.

It is a good idea for you to name your arbitrator in your notice letter to the driller starting the arbitration. But if you have not yet figured out who that person will be, go ahead and send the notice without naming the arbitrator. You can name the arbitrator in a separate letter sent to the same address.

The driller has 10 days after your name your arbitrator to name his arbitrator. Then the two arbitrators have 20 days to name the Third. If they cannot agree, then they go to Circuit Court and the Court names the Third.[75]

---

*There are some people who can not be arbitrators. They are:
-Any person who has an interest in the land or the damages that might get awarded or anyone related to them.
-Any person who has been your or the driller's real estate broker.
-Anyone who is has an interest in the oil or gas development.
West Virginia Code §22-7-8(c).

The Arbitration "Hearing"

The time when you get to present your testimony and evidence is called a "hearing." The arbitrators decide how it will all happen. It might seem a lot like those shows on TV where people represent themselves before a TV judge, except the arbitrators are not likely to be such big showoffs as those judges on TV.

The arbitration hearing does not have to be in a special place. It can be in a room somewhere, or it could be out in a field.

It is permissible for you or the driller to have the hearing reported by a court reporter or even recorded electronically (you may need the agreement of the other party to accept an electronic version The an official record of the testimony taken at the hearing. (If that is done, the hearing will probably have to be held in a room somewhere.) Having an actual transcript typed out is pretty expensive. Usually transcripts are prepared for purposes of appeal. It is very difficult to appeal the decision of arbitrators, so this may not be worth it. But having a tape recorder going may at least deter any outright fraud. So you may want to at least make a tape record the hearing, even when the arbitrators view the surface.

Any written or physical evidence you give the arbitrators becomes part of the arbitration record. Generally formal rules of evidence do not apply to arbitration hearings. So, for example, the "hearsay" rule does not apply and you can tell what other people told you and submit documents people have prepared for you, rather than have the people themselves at the hearing. Having something in writing is definitely better than just telling what someone said. And if the people would make good witnesses, what they have to say will probably carry a lot more weight if they are there to say it themselves and defend what they have said, rather than just submitting something in writing.

At some point the arbitrators have to view the surface where all of this occurred.[76] The hearing may even occur at the same time at the surface location. It might be easier for you that way. If you do the hearing with all of the testimony and presentation of evidence first and then do The view, seeing The surface might remind you or The arbitrators of things you wanted to bring out or ask about while The evidence is being taken at The hearing.

The Arbitration Decision

Once the arbitrators make a decision on the monetary amount of The damages, then the driller should pay you that amount of money. This arbitration is "binding"

arbitration. If you think the amount of money is too small, you probably cannot appeal it. If the driller thinks it is too much, he probably cannot appeal it either. If you really think you were taken advantage of, it is time to see a lawyer.

If the oil or gas well driller does not pay you the amount the arbitrators say, then you will need a lawyer to file the arbitration result in the Circuit Court so you can get a judgment that can be collected. The judgment can be collected by taking the driller's property and selling it, by attaching his bank accounts, by getting the money from people that owe the driller money, etc. If you do not have the money to pay the lawyer up front, the lawyer may be willing to take his fees from the money that is collected.

Conclusion

If you send the driller a claim and the driller will not pay you what you want, then it is not hard to go through an arbitration. It takes a bunch of your time, but not all that much money. It also takes the driller's time, and to a driller time is money. So, as explained in Chapter 2, you can use your ability to go to arbitration to get what you think your property and damages are worth in order to, at the time you get the notice of the well work permit, to get what your property and damages are worth or what you want in terms of well and road placement etc. In particular, point out to the driller when you get the notice of the well work permit, that if the driller does not move the well site and road location from a place you do not want it (that is valuable to you) to a place that is more acceptable to you (that is less valuable to you), then when it comes time for arbitration you are certainly going to go for the higher value. This tactic may cause the driller to be more open to what you want up front. If the driller will not give you what your damages are worth, go to arbitration! Arbitration almost never happens because people usually get things worked out. So the driller is not more experienced at arbitration than you are and may get intimidated by The prospect of having to go through arbitration.

CHAPTER 7.

Deep Wells, What Difference Do They Make To Surface Owners

Why are more deep wells being drilled now?

For a long time not many deep wells were drilled in West Virginia. They are very expensive, and not many deep well fields containing enough gas to make drilling them profitable had been found. In the year or so before this Guide was revised that changed. A couple of very, very profitable gas wells were drilled into a crack in a deep formation called the "Trenton-Black River". The gas coming out of those wells was more than 10 times the amount that comes out of a good shallow well. So the number of deep wells being drilled went up. Even if a deep well is not drilled, a lot of times drillers will get a permit for a particular location just to hold that area in case a well he knows that is being drilled near by is a hit. However, a number of the new wells drilled after the one big find were a bust because they did not find exactly the right kind of rock in the Trenton-Black River. And the wells that did nit had very high initial flows, but then the flow of gas decreased more quickly than with other types of wells. As this revision of the Guide is published, there is still more drilling of deep wells than before this all started, and there is still some exploration for these wells, so the topic of deep wells remains important.

What is a "Deep Well" - the Legal Definition?

A "deep well" is an oil or gas well, "drilled and completed in a formation at or below the top of the uppermost member of the 'Onondaga' group."[77]

The definition is only helpful of course if you know the underground geology**.** As a practical matter, shallow wells are usually drilled no deeper than 5000 feet.[*] Most deep well drilling activity is down to around 10,000 feet.

What is a "Deep Well" - the Practical Distinction?

The distinctions between deep wells and shallow wells that are important to surface owners have to do with the drilling and producing of the well. The primary problem is that the deeper a well is drilled, the more time, more work, more and bigger

---

[*]At one point it was also any well below 5000 feet, but that part of the definition was later eliminated because the formations change in depth north to south so some formations above the Onondaga were considered deep wells in some parts of the state, but were not considered deep wells in other parts of the state.

equipment, and more land etc., are necessary to drill the well. Everything expands. And the expansion is exponential. Drilling a well twice as deep does not take twice as long and twice as much equipment. It takes many times longer and much more and bigger equipment. In order to drill a shallow well, the huge drilling rig has to be actually drilling down into the ground and recycling water into its drilling pit for up to a week. To drill a 10,000 foot deep well, the even larger drilling rig has to be on the site for 6 to 12 weeks drilling into the ground and recycling water into a drilling pit that is probably twice as large, or maybe into two drilling pits.

So, for surface owners the practical distinction between what it takes to drill a deep well and what it takes to drill a shallow well is the difference the drilling process has on the surface owner's land.

For the driller, the most important distinction between a deep well and a shallow well is that it costs many times more money to drill a deep well than a shallow well. That means, of course, that the driller expects to find many times more gas or oil than with a shallow well in order to justify their investment!

What is a "Deep Well" - the Legal Effect of the Difference?

There are two legal differences between deep wells and shallow wells. The first difference, surface owners care about only indirectly. The second difference, surface owners care about very, very directly.

The first legal distinction between deep wells and shallow wells has to do with what is called "pooling and unitization." "Pooling and unitization" means that the discovered pool of oil or gas is defined and mapped; the pool is then divided up into drilling "units" -- one well per unit (the number of units is determined by figuring the smallest number of wells that can be spaced out over the area of the pool in order to get the oil or gas out of the pool); all the mineral rights owners interests are identified and measured; and each mineral owner is given a share of the royalties/profits corresponding to the amount of the area of the oil and gas pool that the mineral owners owns.

This is very different from what happens when no "pooling and unitization" occurs. What happens without pooling and unitization is that one driller finds a pool with the driller hits a good well on one mineral owner's land/tract of mineral rights. Then other drillers in the business find out about it, and they try to get leases on the surrounding mineral owners' land/tract of mineral rights. The other drillers drill wells on the surrounding mineral tracts in order to get their wells down and get the oil and gas from the pool before the original driller/ owner or someone else does. If there is a mineral

tract in between the tract of the original well, and the next one, that tract just gets drained without that mineral owners getting any royalties from the depletion of the oil or gas on their mineral tract.

This latter system is terribly inefficient because most often more wells than are necessary to get the oil and gas out of the pool get drilled into it. There is natural pressure in the pool, particularly a gas pool, that drives the oil and gas to and out of the wells. Too many wells means that too rapid depletion of this natural pressure occurs. As a result, less total oil and gas is pressured out produced from the pool. Of course more unnecessary wells also mean more problems for surface owners!

For these reasons, many of the oil and gas producing states have statutes that provide for "forced" pooling and unitization. Under these statute, the driller or any mineral owner in the pool can make everybody in the pool get into a "pooling and unitization" arrangement. (Of course "voluntary" pooling can always be done if everyone agrees without the need for a state statute.)

However, in West Virginia, the statutes only provide for "forced" pooling and unitization for *deep* wells. For shallow wells, voluntary pooling can be done, but everyone with an interest in the shallow well (except the surface owner) would have to agree to pooling and unitization.

Why is this important to surface owners? A little more explanation is needed.

Pooling and unitization starts with drilling the well or wells necessary to discover the existence of the pool in the first place. The West Virginia statute calls these exploratory wells a "discovery well"[*] in the statute and a "Test" well in the regulations and in common usage. Sometimes it takes more than one. Once the information from the drilling of this/these wells are available, the extent of the pool can be established geologically. Then pooling and unitization is established as a legally binding matter by the parties signing a voluntary agreement or one or more of the parties asking the state for "forced" pooling unitization through a "spacing" order. Then more wells are drilled to develop the rest of the pool. Deep wells that are drilled after a forced pooling and unitization order or after a voluntary agreement is signed are generally referred to as "development" wells.

So the first legal distinction for deep wells in West Virginia is that there is forced pooling and unitization for deep wells and not shallow wells. This is not directly

---

[*]West Virginia Code §22C-9-7(a)(1).

important for surface owners. However, the resulting distinction between a "discovery"/ "test" well and a "development" well is very important for surface owners because of the second legal distinction. See the next section.

Surface Owner's Consent

West Virginia Code §22C–9-7(b)(4) says:

> (4) No drilling or operation of a deep well for the production of oil and gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the *written consent and easement therefore,* duly acknowledged and placed on record in the office of the County Clerk, for valuable consideration *of all owners of the surface of such tract of land*, which consent shall describe with reasonable certainty, the location of homes of such tract, of the location of such proposed deep well, a certified copy of which consent and easement shall be submitted by the operator to the commission. [Emphasis added.]

The language seems clear. "A" deep well in the statute should mean any and every well, not "some", deep wells. Any driller who is drilling any deep well should have to come to the surface owner and get the surface owner's written consent before the driller can drill a deep well. If the surface owner does not want a deep well on his land, then the surface owner can say "No". Then no deep well should get drilled on the surface owner's land.

The problem is that the driller and the State do not agree that "A" means every! They take The position that "a" means "some". In 1982 one of the drillers brought a case which was decided by Circuit Court Judge Robert Smith in 1985.[78] Judge Smith said that because this language in the Code was placed in a long Code section dealing with forced pooling and unitization, the surface owner's consent is only required for a "development" well. The Judge ruled that the surface owner's consent is not required for a "discovery" or "test" well.

So, if The driller and The State take The position that The driller is coming to drill a "development" well on your land pursuant to a "pooling and unitization" arrangement, rather than a discovery/test well, then the driller has to come to you and ask to get your consent. What you can do in that situation is explained in the next section below.

On the other hand, if the driller and the State take the position that the well they want to drill on your land is a "discovery" or "test" well, then the driller will try to get the

State to issue the permit without your consent. What you can do in that situation is explained in the second section below.

What To Do If The Driller Needs Your Consent.

This is the one situation in which the surface owner is in the driver's seat in dealing with oil and gas drillers. All the rest of this Guide deals with the situation where the surface owner has very few rights versus the drillers, and then explains how the surface owner can use those very few rights that they have to try to get what they can.

However, if the driller needs your consent to drill a deep well, you have all the rights. You have the right to simply say, "No." If you do not want a well on your land, then just say, "No."

However, you may decide that you are willing to consent to have the deep well drilled on your land in exchange for getting something from the driller. There are the obvious small things as explained in the "Negotiating with the Driller" Section in Chapter 3. But that is not enough here.

Essentially the driller is buying a piece of your land, or the rights to do things to a piece of your land. When a buyer and seller are negotiating a price for a piece of land, the price is determined not just by the value of the land to the seller (in this case the value to you as, for example, a meadow, etc.). The value of the land to the buyer is also a factor (in this case, the value to the driller of the ability to drill a deep well.). It costs a million dollars or more to drill a deep well. the driller is paying that amount of money because he expects to get oil and gas worth much more than that! You have the leverage to get, if not the right to get, a healthy share of that.

The driller will, naturally, not want to pay you much at all. One of the driller's arguments will be that he is taking a chance. There is no guarantee that if the driller spends a million dollars he will hit oil and gas in "paying " quantities or at all. The driller is right. Deep well drilling these days is a much more risky business than shallow well drilling. Probably 90% of shallow wells are hits. The same is not true for deep wells. On the other hand, the driller thinks there is a good enough chance to hit this deep well and make enough money from it, that the driller will risk losing a million dollars if he does not hit. If the driller is willing to spend a million dollars to drill the well, then he should be willing to pay you a healthy chunk of money for the privilege of drilling on your land.

The driller will make another argument. The driller will say that he has to spend all of this money up front before he produces the first molecule of gas. The driller may in

fact be having trouble getting enough people willing to take the risk to put up enough money up front to drill a million dollar hole in the ground. If you think the driller is not having trouble raising the money, if you think he is bluffing, you should hold out for some up front money. However, you may be convinced the driller really is having trouble getting all the money together, and cannot get money to pay you up front like he is paying for the drilling casing etc. In that case you might try to come up with a payment scheme that gives you a little now and a chunk of money if the driller hits. This would be something new. Most drillers have already handed out a percentage of the profits to the people investing in the well. It might be hard to get a percentage, but you might be able to get a chunk of the money.

This is a new era and there is no hard advice on this available. We have little experience. While they may argue that it is expensive to drill the well so they do not have the money left to pay you, as much as it costs to drill the well, what you want is not that much more if they want to drill it bad enough to pay that much to drill it. Maybe the value of your entire tract of land. Maybe five figures or more. IF they are really afraid you are going to challenge the consent provision and are not bluffing, it could go higher. Get the best you can!

What to Do If The Driller Says He Does *Not* Need Your Consent.

If the driller is getting a permit to drill a deep well on you, and if the driller is taking the position that the well is discovery or test well, you are in a tough, tough situation. A huge mess is about to be made on your land. The statute says that the driller should have to get your consent to drill the well. But the driller and the State of West Virginia are following a decision by a Kanawha County Circuit Judge that says the driller does not have to get a surface owner's consent to drill a discovery or test well.

The only way out of this is for you to get a lawyer and have the lawyer bring an injunction action against the driller (and/or the State) to try to keep the driller from drilling the well. If you do this, The Circuit Judge in your county might rule in your favor. (If you sue the State you have to do so in Kanawha Circuit Court and a Kanawha County judge will decide.) If the Circuit Judge does rule in your favor, there is a good chance that the oil and gas driller will appeal to the West Virginia Supreme Court of Appeals. Such an appeal could cost you more money if you are paying your lawyer, although your lawyer may be able to contact the author of this Guide for assistance on the appeal, or even for assistance on the injunction in Circuit Court.

There are very good arguments that the Kanawha County Circuit Court decision is wrong. The Kanawha County Judge relied on the placement of the language in the

statute. the statute is entitled, “Drilling Units and The Pooling of Interest in Drilling Units in Connection with Deep Oil and Gas.” The Kanawha County Circuit Judge ruled that since the surface owner consent provision is in that section with all the provisions regarding pooling and unitization, that the surface owner's consent provision only applies to the development well that results in a pooling and unitization arrangement. West Virginia Code §2-2-10 says that, “The sectional headings or headlines of the certain sections of this code that are intended as mere catch words to indicate the contents of the section shall not be deemed or taken to be titles of such sections, or of any part of the statute...” The location of The clear language should not be taken as a way to misread the clear language to say something it does not say as the Kanawha County Circuit Judge did. In addition even the meager legislative history that the West Virginia Legislature provides in its Journal for the year 1972 shows that surface owners' consent was something that a senator amended into the bill in a hurry and placed it in the bill in the first place he could find to do it.

Finally, perhaps most importantly, there is good constitutional legal theory to justify this code provision. The damage to surface caused by the rotary drilling of deep wells is not what is in the contemplation of the parties at the time the minerals and the surface was divided. See the “Common Law” section in Chapter 2. Indeed the Oil and Gas Production Damage Compensation Act passed in 1983 by the Legislature makes a finding that rotary drilling, let alone the kind of rotary drilling capable of drilling deep wells, was not known prior to 1960. So this form of development of the resource was not within the contemplation of the parties before that.[79]

Although the oil and gas driller is certain to argue that this enactment of the surface owner's consent provision is an “unconstitutional” taking of the driller’s right to drill, the driller can get to the shallower oil and gas on your property, and the driller can get to the deep oil and gas by slant drilling from another property.

So what should you do if the driller wants to drill a deep well on your land, and call it a discovery/test well so they can drill it without your consent. If you are low income, contact the author or one of the public interest law firms in the state to see if a lawyer can be provided for you for no fee. If you are not low income, hire a lawyer and have your lawyer contact the author of this Guide to see if such a case has already been won or for the author to refer your lawyer to legal research and briefs on the subject

CHAPTER 8.
Coal Bed Methane.

What is Coal Bed Methane Gas?

"Coal bed methane" gas is natural gas "formed during the process of peat turning into coal."[80] Coal bed methane is found in coal seams and also in surrounding strata (The layers of rock, sand, etc. that earth is made of).[81] This gas is dangerous to coal miners because it is both highly toxic and explodes easily.[82] Because of this danger, coal bed methane must be vented from coal mines before or while the coal is mined.

The existence of this gas has been known for over a century. In the past, and most of the time now, coal bed methane was just vented into the atmosphere. It was not until the energy crisis in the1970's that coal bed methane began to be drilled for and sold for profit in some places.[83] It was later than that in West Virginia. There are several reasons, other than profit, why companies continue to extract Coal bed methane by wells before mining. Mines are safer and more productive, a significant energy resource is no longer wasted, and the environment is better protected when Coal bed methane is captured and not released into the atmosphere.[84] However, some coal bed methane production techniques can affect the coal and may complicate the mining of the coal or even make it unminable.

More information is available from the United States Geological Survey and other sources on the Internet.[*]

What Is the Difference Between a "Coal Bed Methane" Well and a "Gob" Well?

There really is not much difference. A coal bed methane well extracts methane from the actual coal seam before it is mined. On the other hand, a gob well extracts methane that has leaked out of the coal and into the surrounding strata after the coal has been removed. This area is called a "distressed zone." This difference between Coal bed methane and gob wells becomes important if the mineral rights to the gas and coal have been severed and are owned by different people. Some methane leaks out of the unmined coal into surrounding strata, yet another kind of coal bed methane production, that relatively unheard of here. However, the extraction process and end result remain the same for all of these from the surface owner's perspective.

---

[*]USGS fact sheet "Coal Bed Methane: Potential and Concerns" can be found at http://pubs.usgs.gov/fs/fs123-00/fs123-00.pdf. The fact sheet "Water Produced with Coal-bed Methane" can be found at http://pubs.usgs.gov/fs/fs-0156-00/fs-0156-00.pdf.

Who Owns Coal Bed Methane?

Coal bed methane is a gas, but it is found in coal seams. Many times, coal "minerals" and oil and gas "minerals" under one tract of land are owned by different owners. Sometimes one person owns all of the minerals but leases their production rights of these various resources separately to different lessees. In all states where this occurs, the gas owners or gas lessees argue that they bought all or leased all the gas under the surface, and coal bed methane is a gas, so it belongs to them if it is produced and sold rather than just released into the atmosphere during coal mining as (a "fairly necessary" imposition on the gas owner's estate) . On the other hand, the coal owners or coal lessees argue that the coal bed methane belongs to them because it came about as a result of the formation of the coal and is found in the coal. And they argue that it is necessary to vent it or otherwise remove in it in order to mine the coal so the coal bed methane is part of the coal they own or lease.

This contest between the coal and gas owners/lessees opens an interesting opportunity for surface owners. The production of coal bed methane is relatively a recent phenomenon. It is therefore likely that coal bed methane and the production of coal bed methane were not "within the contemplation of the parties" at the time of the severance of the ownership of the coal and/or the gas from the surface and from each other. There may therefore be an argument that the coal bed methane still belongs to the surface owner! If at the time of the severance, the original owner hung onto the minerals and just deeded away the surface, the argument is less strong. But if there was someone who owned it all, and who kept the surface and deeded away the coal and gas separately, then there is an argument that the coal bed methane still belongs to the surface owner. It was not within the contemplation of the parties when the coal or oil and gas owner purchased their rights from the surface owner that either of those parties was buying the right to produce and sell Coal bed methane.

This argument was strengthened recently when the West Virginia Supreme Court of Appeals decided a recent case![85] In that case all of the surface and all of the minerals were owned by the same owner(s). The owner gave a lease to an oil and gas company in 1986 for all of the oil and gas under the surface and all constituents thereof. The oil and gas company drilled a number of traditional natural gas wells on the land and still held the lease at the time of the case. Then in 2001 the owners signed another lease. This time it was a lease to a company that specialized in producing coal bed methane. The oil and gas company sued to stop the coal bed methane company from producing coal bed methane on the grounds that it was the oil and gas company that had a right to do that under the oil and gas company's lease. In deciding the case, the Court noted that it was the oil and gas company who solicited the owner to get the lease. Also it was the oil and gas company

that drafted up the lease, and the lease did not specifically mention that coal bed methane was part of the lease. Legal documents are usually construed against the person that drafted them. The Court also said that it was loath to imply coal bed methane was included in the oil and gas company's lease because producing coal bed methane out of the coal seam was such a serious imposition on the coal owner. The court said that in order for coal bed methane to be in the contemplation of the *parties*, it must be shown that the usage or custom was one generally followed at the *time* and *place* of the contract's execution. The Court found that at the time the oil and gas company got their lease, 1986, representatives of the oil and gas company may have been aware of the value of coalbed methane, but that the owners who signed the lease were not. The Court also found that no coalbed methane wells had been drilled in the area as of 1986. As a result of this reasoning, the Court held as the law that, "In the absence of specific language to the contrary or other indicia of the parties' intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor's coal seams to produce coalbed methane gas."[86]

The case the Supreme Court decided was between an owner who owned the coal and a lessee of the gas. But the owner of the coal was also the owner of the surface! And same law applies to deeds as applies to leases. So that case will help the argument/position of a surface owner where the oil and gas was deeded or leased away separately with no mention of coal bed methane. It is almost as helpful where the surface owner deeded away the coal or even all of the minerals with no mention of coal bed methane. While such a case is a little different, the principles are the same. The Supreme Court case can still be used to argue for construing a lease or deed against the party who drafted it, for not implying a right that has such an invasive effect on the surface, and to argue that the lack of coal bed methane production in the area the lease was signed means that coal bed methane was not in the contemplation of the parties on the grounds of custom and usage.

Even if the surface owner does not own the coal bed methane, the fact that it is a coal bed methane well or wells being proposed as opposed to tradition natural gas may increase surface owner rights during the drilling process.

The Extra Burden on the Surface of Drilling Wells for Coal Bed Methane.

Even if the courts decide that the coal bed methane does not belong to the surface owners because either the coal owner (or the gas owners) got it, or because all of the minerals (coal and oil and gas together) were deeded away together by someone who hung onto the surface, the surface owner still may be able to block or control the production of coal bed methane under the surface owner's property. This is because the

means of producing coal bed methane is a burden on the surface that was not in the contemplation of the parties at the time of the severance. All of the arguments using the recent West Virginia Supreme Court of Appeals case can be made here too. However it will very important to make the additional factual case that coal bed methane is greater burden on the surface -- greater than that contemplated by the leasing or conveying of the right to drill for traditional natural gas (see below). So it is probably the law that the coal bed methane owners, whoever that may be, need to obtain consent to drill a coal bed methane well from the surface owner where the well is going to be drilled before they can start drilling, though no statute or court has stated this directly.

These are not arguments that are known to have been presented to, or decided by, a court anywhere, except as noted above. If you are a surface owner and want to take on this case, you will need to find a lawyer with the time and expertise to take on this case. It will be expensive. You probably also should contact environmental groups or others. They may also be able to help you find lawyers with the expertise and time to take on this case. There is an outside chance they could find funding for it.

It is true that the production of coal bed methane places a greater burden on the surface than does production of either gas or coal. Natural gas seams are *thousands* of feet down in the ground and therefore have very high pressures of gas. For that reason, natural gas wells can be placed relatively far apart because the high pressures will force the gas long distances to and out of the wells. Coal bed methane however is found in coal, which is only *hundreds* of feet below the ground and therefore the gas pressure that would push the gas toward the well is much lower. For that reason, vertical coal bed methane wells (the kind of wells almost always used to produce traditional natural gas in West Virginia) must be placed closer together. Because they are closer together, there are many more of them. Because there are more wells, the impact on the surface, and the risks that arise from gas well drilling, are multiplied. This extra burden of production was not within the contemplation of the parties at the time of severance. So the surface owner did not sell or lease that extra burden, at the time the rights to the gas and/or coal were sold. This is similar to the arguments that were made that a “broad form deed” for deep coal mining that was made before strip-mining was done, did not convey the right to strip-mine the coal.

There is another form of drilling that can be used to get coal bed methane out of the coal seam. A well can be drilled down to the coal seam and then turned and drilled further *horizontally* for long distances through the coal seam. One technique is to couple

with a CO_2 injection well to drive the methane to the extraction horizontal wells.* The burden on the surface site where the horizontally drilled well penetrates under ground would be much greater than a traditional vertical oil or gas well because a much larger site is needed. There may be less of a case that the surface owner whose land is just being tunneled under by the well has an excess burden unless there is fracturing or other treatments of the well bore. See the next paragraph and its reference.

Another risk burden arises because the coal bed methane bearing seams of coal are close to the surface. See the third item under the heading, "What Do I Do If Coal Bed Methane Wells Are Proposed on My Land?" after the section on "dewatering" below. This extra risk of ruining water wells etc. by "fracing" at the shallower depths of coal seams compared to the depths of tradition natural gas when its formations are frac'ed is another burden.

In addition to this extra burden of extra wells on the surface as described above, and "fracing" as described below, the production of coal bed methane usually requires the removal of very large quantities of water out of the coal seam. This may well also be an extra burden on the surface that adds to the "not in the contemplation of the parties" arguments. However, it is such an important issue to surface owners that it is going to be dealt within its own heading -- next.

"De-watering."

In order to get the coal bed methane out of the coal seam, the coal seam has to be "de-watered". It is the water in the coal seam that holds the coal bed methane in/to the rock. Producing coal bed methane is almost more about pumping out the water than it is about capturing the gas. Lots more water is produced when producing coal bed methane than when producing deeper natural gas.[87]

The production of all of this water during the production of coal bed methane results in three problems. Sometimes this water is good water. In fact, some people in the Appalachians get their water from a water well that produces water out of a coal aquifer! Having all that water pumped out, if it is good water, could well be a different burden on the land than was in the contemplation of the parties at the time of the severance of the oil and gas from the minerals.

---

*http://www.coal-seq.com/Proceedings2003/Cairns.pdf

The second problem is just getting rid of the volume of water. It will make a stream where there was not one before, or drastically change the stream that this volume of water would be dumped into.

The third problem is the most difficult. Often that water contains impurities. Sometimes these impurities can be treated out of the water, thought at these volumes that is very expensive. But one of the most frequent impurities is salt. There is no treatment that removes salt (except desalination that is very, very expensive). The total dissolved solids (TDS) of Coal bed methane water ranges from fresh (200mg/L or parts per million) to saline (170,000 mg/L) and varies among and within geographic basins. For comparison, the recommended TDS limit for potable water is 500 mg/L, and for beneficial use such as stock ponds or irrigation, the limit is 1,000–2,000 mg/L. Average seawater has a TDS of about 35,000 mg/L. The TDS of the water is dependent upon the depth of the coal beds, the composition of the rocks surrounding the coal beds, the amount of time the rock and water react, and the origin of the water entering the coal beds.

So in the process of producing coal bed methane large amounts of water are going to be pumped out of the coal seam. This water is likely to be contaminated. The most likely contaminate is salt which is un-treatable. These issues on the extra burden of more wells, shallower wells and dewatering are important for arguing that the coal bed methane cannot be produced without getting new permission from the surface owner, should someone bring this novel and difficult case in court. In addition they are issues that you should pay close attention to when you get notice of a coal bed methane well permit application.

What Do I Do If Coal Bed Methane Wells Are Proposed on My Land?

What you should do when you hear a coal bed methane will is proposed for your land or when you get a notice of a permit application for such a well will be very similar to what you should do when a typical, deeper oil or natural gas well is proposed on your land. This is because the well permit application procedures and your right to comment on them are very similar. These procedures when you receive notice of a permit for traditional oil and natural ga wells are set out in previous chapters -- and there may be a short 15 day deadline involved. If you have not already done so, you should read those chapters, Chapters 2 and 3, first in order to understand the rest of this Chapter. The things that you need to talk about or do that are set out in the rest of this chapter and in addition to the things you need to do as set out in Chapters 2 and 3.

There are four significant differences in the way to respond to a proposed coal bed methane well and the way you responded to a proposed typical, deeper natural gas well.

First. There is rarely ever a single coal bed methane well proposed -- at least if the typical series of vertical wells is proposed.. Usually there is a whole pattern of coal bed methane vertical wells that will be proposed for both your land and land of all of your neighbors. It is therefore particularly important to get together with your neighbors to consolidate your resources and put together a united strategy and front.

Second. The second significant difference is that you may want to consider making the coal bed methane well proposed on your land into a test case to establish the surface owner's ownership of the coal bed methane or the surface owner's consent for placing a production well for coal bed methane on or under the surface land as explained under the previous heading. We encourage that but you may not be able or interested in doing that.

The third and fourth significant differences have to do with the surface owners right to object/comment on the permit application and on the State's response to surface owner objections/comments.

Third. For the more typical well, a typical natural gas well, the surface owner can make lots of comments, but the State only has the right to deny or condition the gas well permit for a limited number of reasons. Those are the five reasons stated in the "Grounds for Comment" heading of Chapter 3 of this guide. Read them now if you cannot remember them. They are very limited. Even though those grounds to comment are limited, the practical aspects of coal bed methane wells give you additional things to say under those limited grounds.

The fact that coal-bed methane wells cause the production of a huge amount of water, water that is frequently contaminated, gives you additional grounds to comment on the permit application under the limited grounds for traditional wells. These large amounts of discharged water can affect "the plan for soil erosion and sediment control". So you should make sure that the proposed disposal methods for these larger amounts of water will not cause soil erosion and sediment problems that are not covered by the proposed soil erosion and sediment control plan, and comment on that if you are concerned.

In addition, the large amounts of water produced by coal bed methane wells and the potential for this water to have large amounts of salt and other impurities pose different and much more severe problems for coal bed methane wells than for typical, deeper natural gas wells. For the more typical, deeper natural gas well you can comment that "The proposed well work fails to protect fresh water sources or supplies." For Coal bed methane wells, the danger to

water sources or supplies is greatly increased. So if the amount of water produced and the impurities in the water endanger fresh water sources and supplies, including streams, then you should comment on that. Making this comment may require, at least eventually, getting some expert to look at the data provided in the well permit application, or perhaps getting your own test of the water that their test holes have produced. If their data or your own tests show impurities that are treatable, and the permit application does not call for their treatment, or if the tests show large amounts of salt that cannot be treated, you should comment on that.

There may be additional "grounds for comment" on the processes of drilling coal bed methane wells as opposed to the typical deeper natural gas well on the grounds that "The proposed well work fails to protect fresh water sources or supplies." For almost all gas wells, once the driller has drilled and cased the hole to the strata where the gas is, the driller "frac's" the well -- or more correctly, frac's (meaning "fractures") the rock strata holding the gas. This is sometimes more benignly called "stimulating" the well. This is the process by which the driller pumps water, usually with various chemicals and sand or other "proppants" at extremely high pressure down into the well. The high pressure is meant to literally crack the strata bearing the gas in all directions -- hopefully horizontally along the strata. Once the crack cracks open and the frac fluids flow into the crack, chemicals may treat the rock, and, when the frac is over and the fluid drains back out, the sand or other "proppants" hold the crack open.

In order to crack the strata, the pressure has to be enough to literally lift upward all of the hundreds and thousands of feet of rock and earth between the bottom of the well and the surface forcefully enough to overcome the weight of the rock above and the natural proclivity of the rock not to come apart so the crack can open up. Once the strata is cracked, the gas will flow more readily to the gas well along the cracks than it would if it was just pushing through the pores of the rock itself.

However, the fracing does not necessarily run exactly where they want it to -- horizontally through the gas bearing strata. It can go up and down too. At the thousands of feet of depth where the more typical natural gas is found, a little vertical cracking still does not get near the surface. So damage to anything the surface owner cares about is unusual -- though not unheard of. When it does happen, it is more likely caused by a bad casing job nearer the surface, than by vertical cracks reaching up from thousands of feet in the ground. However, for a coal bed methane well, the fracing is being done on a strata of coal that is only a few hundreds of feet down. If the fracing causes cracks that go up and down, they can cause lots of damage to the ground water table. New cracks made by the process can cause the good ground water to leak down, or bad deeper water to percolate up to the good groundwater table. If there are pre-existing cracks up and down, then the fluids being used to frac can push up through those and cause problems.

So if the strata from which the driller is proposing to produce coal bed methane is very close to the surface, or if you know of cracks, or if you just plain have concerns about fracing being done so near to your surface, comment on it. Ask for changes in the proposed permit that will lessen the danger. Say that even if you don't know what the changes are. If you can find a

geologist who understand the geology of the water table or someone who knows the drilling process who can help you, so much the better. It may even be that the State Geological Survey or other state agencies or state colleges or university can tell you about the geology of your area and help you out.

You might be able to persuade the State that coal bed methane production just cannot be done in your area because of the geological nature of the area. If you get together with others in your area who may be affected by the coal bed methane wells, then you might be able to afford a lawyer or an expert on geology to help you put together these arguments.

Fourth. The fourth difference between commenting permit applications for traditional, deeper naturel gas wells and coal bed methane wells may be the most important for surface owners. The West Virginia State Code provides that for a coal bed methane well, the State can deny or condition the coal bed methane well permit for a number of reasons that are in addition to those for the more typical, deeper natural gas well. Some of those additional reasons upon which the State can deny or condition the permit are the primary concerns of surface owners! So the surface owner can make comments pointed toward those new grounds, and the State can deny or condition the permit on those new grounds.

Those additional grounds to comment upon and deny or condition a permit include, "The methods proposed for the recovery of coal and coal bed methane," "The practicality of locating the well on a uniform pattern of wells," and, very importantly, "*Surface topography and use*. . ."[88]

This last one is obviously very, very important to you as a surface owner. For a typical, deeper natural gas well, you may have a common law right to sue if you think the driller should move their well from a place on your land that is useful/valuable to you to a less place that is useful/valuable to you. For traditional, deeper natural gas wells the state does not have a right to deny or condition the well permit (by moving the well) if you comment only on those grounds. But for coal bed methane wells, the State DOES have that power to move the wells etc. only on those grounds. So comment away on the concerns that you have about the location of the proposed well or the roads or pipelines, or water disposal plans using your more useful land and ask that the permit be denied or conditions on these things. The State has the power to do it.

Coal bed Methane Commenting Process.

You should first read about the commenting process for the more typical, deeper natural gas wells. This is set out in Chapters 3 and 2. The commenting process for coal bed methane wells is very similar to that for these typical, deeper natural gas wells, but has some ad-ons which will be explained here.

When a driller wants to drill a coal bed methane well, the driller has to apply for a permit from the State. The driller has to send notice of the application to surface owners. The driller sends a copy of the application for the permit to the surface owners. The surface owners also get a "statement" of the methods and time limits for filing comments and objections etc. to the permit as sought in the application.[89] If there are more than three fractional owners of the surface, then the surface owner's notice/copy of the permit application is only required to go to the surface owner listed on the tax records in the sheriffs office and those actually occupying the land.

So far, this process is the same as that for applications for permits to drill the typical, deeper natural gas wells as set out in Chapters 3 and 2.

In addition, unlike a typical, deeper natural gas well, notice of the drillers permit application is published is the paper. (This is good for you if you are one of many fractional owners and do not get the tax bills from the sheriffs office, and it is good to see what may be about to happen on your neighbor's land.) However, as in the case of the typical, deeper natural gas well, the surface owner only has about 15 days to file comments as described in the copy given to the surface owner, not as per the newspaper publication. (But file comments anyway even if you are late. See the earlier chapters.)

Once the comments have been filed, the State Office of Oil and Gas reviews the permit. If everyone entitled to notice (surface owners, coal owners etc.) has signed a "voluntary statement of no objection" that is filed with the permit, then the State can issue the permit right away without the15 day wait. (Be sure and read Chapters 3 and 2 about this!)

If no comments have been filed by surface owners (or other coal owners etc. who also have comment rights) then the State reviews the permit application for its own judgement of whether the permit should be denied or conditioned. The reviewers us the same grounds upon which surface owners can comment on any well permit application -- even if the surface owner did not comment. (This is one reason to send in your comments, even if you are late. You might give them ideas.)

There is an additional procedure in the coal bed methane well permit process that surface owners who comment on typical, deeper natural gas wells do not get. If comments have been filed by a surface owner or others, then the permit application, the comments etc. are sent to the "Coal Bed Methane Review Board". The Board sets a hearing within 30 days after the deadline for filing comments. Everyone who filed a comment, or who was entitled to get a copy of the permit application, is given 15 days' notice of the hearing. "At such hearing the review board shall consider the matters raised

in any objection or comment, including surface topography and use. . .”[90] After the hearing the Board, “[S]hall issue and file with the chief a written order directing him to: (1) Refuse a drilling permit; or (2) Issue a drilling permit for the proposed drilling location; or (3) Issue a drilling permit for an alternate drilling location different from that requested by the applicant; or (4) Issue a drilling permit either for the proposed drilling location or for an alternative drilling location different from that requested by the applicant, provided such alternate location is covered by the agreement and consent required by section seven of this article, but not allow the drilling of the well for a period of not more than one year from the date of issuance of such permit; . . .”

So unlike the surface owner comment process for the typical, deeper natural gas well, in the case of a permit application for coal bed methane well there is a state Board that considers the comments and decides how the permit is to be issued.

The Coal Bed Methane Review Board is made up of the head of the Office of Oil and Gas, the Commissioner of the Oil and Gas Conservation Commission, the official state geologist, a representative of the United Mine Workers of America, an employee of the gas industry, and the director of the Office of Miners' Health, Safety and Training. So there is no direct surface owner representative on the Board. This is because the surface owner comment provision was a late add onto this legislation. The Board mostly deals with conflicts between the owners of the coal and the owner of the gas. But for a state board it is relatively professional.

As soon as you get your comments in, begin preparing to make your presentation to the Board. You can show them documents, like pictures and maps etc. Pictures are hard to argue with! You may want to hire a lawyer to give you advice for an hour just to help you get ready. It is very important to make to make all your points at that hearing in front of the Board. There will be a recording or transcript made during the hearing. If you do not get your points into that recording or transcript, then they will not be considered at any further appeals of the decision the Board makes. It is OK to be pushy to get all of your points heard, but try to stay polite. Don’t assume anyone is out to get you or biased against you. If they are, saying so will not change their mind. And if they are not, then accusing them of bias will just motivate them to get you back, and lessen your credibility with the Board.

If you don’t like the outcome of the hearing in front of the Coal Bed Methane Review Board, you can do an appeal to Circuit Court.[91] This appeal is different from the one set out in earlier chapters for the typical, deeper natural gas well. It will be based on a transcript of, and other evidence from, the hearing and you cannot bring in new issues for the first time in the appeal. That is why it is important to raise all of your comments

and objections during the hearing, because you cannot raise them for the first time in Circuit Court.

The procedure for a Circuit Court appeal of a decision of the Coal Bed Methane Review Board is very similar to that for typical, deeper natural gas wells. However, these wells and these appeals are unusual enough and different enough that a further explanation of this appeal will be beyond the scope of this Guide. If you decide you want to do one of these appeals, it is recommended that you contact a lawyer. In fact, if you anticipate losing in front of the Board and know you will hire a lawyer to do the appeal it is a good idea to hire the lawyer to do the hearing in front of the Board to make sure the appeal is property "set up" during the Board hearing. These appeals are hard to win because the law makes the judge give great deference to the agency in these "administrative appeals".

CHAPTER 9
Should I Buy this (Surface) Land?

Introduction to Chapter.

This is one of the most frequently-asked questions. It is also one of the most difficult to answer. This question raises a series of further questions, with a variety of possible answers to each of those questions. And rarely is an answer an absolute. There are risks to surface land associated with the production of oil and gas from under surface land, and that risk goes up and down depending on market factors, new discoveries, ageing existing wells, new production techniques, etc. Total up the risk to the answers for all the questions for the piece of land you are thinking of buying, and you can estimate how much risk you are going to have for now and in the future, but you will rarely know for sure.

There are generally two risks a buyer is concerned about in relation to the development of oil and gas from under the surface land. First, will someone come along and drill a new oil or gas well on this land? Second, will the wells already on this land (or those that may be drilled in the future) pollute the ground water or cause other problems?

You will probably have to endure some risk if you are looking at land in the oil and gas production areas of West Virginia or elsewhere. It is about impossible to buy land in rural West Virginia in the counties in which there has traditionally been an oil and gas industry and have no risk of new wells being drilled on the land. And most often there is already a well on the land. The only "no risk" land would be surface land which includes ownership of all the minerals under all of the surface land that has no active lease of the minerals, which has no existing wells on the land (and the minerals under your land are not part of a larger mineral tract), etc. And then there would still be a risk of well drilling on, or ground water pollution from, neighboring lands.

Read this guide from cover to cover, learn the questions to ask, ask around about how much drilling takes place in your area and the risks involved with the land you are thinking of buying, and take your best shot. The following headings are some of the most important questions to which you want answers in order to evaluate the risks of oil and gas well drilling and groundwater pollution on the land.

(Note that this is a guide to Surface Owners Guide to Oil and Gas. The authors make no pretense of expertise on coal issues. If there is coal under your land, you need to look further for help. Some of the principles are probably the same, but they may apply differently. And there are lots more state and federal legislation controlling various kinds of coal mining then there is oil and gas drilling, and those statutes could really change things.)

Would you be getting sole ownership or a fraction of ownership of some or all of the minerals at the same time you buy the surface land?

The ownership of land, surface or minerals, can be divided in two ways. It can be divided physically/geographically. As an example, assume we are talking about 10 acres of surface or mineral land. One person can own 5 acres, and another person can own the other 5 acres. That is a physical/geographic division.

But there can also be fractional ownership of the same acres. It can also be that one person owns a division or a fraction of a legal interest in all 10 acres, and another person, or other persons, own the other fractions of legal ownership of the same 10 acres.

The most common example occurs when the generation that originally owned the land dies without a will and without deeding it to anyone. The heirs will all share fractions of ownership of the legal interest in every stone on the 10 acres. If mom and dad had five children and then die, each child owns a 1/5 fractional interest in all 10 acres of the land. They do not each own 2 acres. Each owns 1/5 interest in every bit of every acre, every stone, of the 10 acres of land. This particular form of "co-tenancy" is often called "heirship."

A lawsuit, referred to later, can be brought to "partition" the land so each of the 5 kids own all of 2 acres. But until the law suit is brought or the heirs can agree to a partition, or to someone buying out the others, all 5 own 1/5th of everything.

Most often there is no question that you will get full ownership of the surface. The question is whether you get all or some of a fraction of some or all of the acres of minerals under your land.

The risk of new wells being drilled on your land depends on who owns the minerals. If you own the minerals, or even if you just own some geographical or fractional ownership of the minerals, then the risk goes down.

If you get full ownership of all the acres of minerals under your land, then your risk of problems is obviously much less. (See the questions below.) In this situation, before the minerals on your land can be leased to a drilling operator or sold to someone who would develop them themselves or lease them to someone else, your signature has to go on the dotted line. You have complete control. However, it is important to make sure that there is no lease existing on the minerals under your land that was signed by the previous owner, and that there are no existing wells on your land. Keep reading.

It's almost as good if you only own a fractional legal interest of the minerals under your land. (See questions below). Under West Virginia law, as long as your name is on record somewhere as owning a fraction of interest in the minerals, then it is almost as good as owning the whole thing. Before the minerals on your land can be leased to a drilling operator or sold to someone who would develop them themselves or lease them to someone else, the signature of

every owner of every fraction of every acre has to go on the dotted line. Again this is subject to whether there was a lease signed before you owned your interest in the land. Keep reading.

If you own the entire legal interest in all the minerals under your land, or just a fractional interest, you can block any new sale or lease, or you could dictate some conditions for any new sale or lease. If you want to develop the minerals and get some income, you can at least make sure that you have the right to sign off on the location and you can require increased protections for the surface land. It is whatever you want or can negotiate. If they won't do what you want, you don't have to sign.

All of the above is subject to the further exception that someone can bring a "partition" suit. A partition suit can be brought to get the land all back in the name of one person, or to divide up the ownership in the land from a fractional ownership of all 10 acres, to 5 people owning all of 2 acres each. The later result is called, "partition in kind". But if that is not done, then the land is just sold and the proceeds divided. However, this partition suit is expensive, and fractional owners can have some defenses. And drillers who want to own the land will have to pay for all of this up front before they drill their wells, tying up their money for years. So it is not used all that often.

Would you be getting no ownership of the minerals at the same time you buy the surface land?

If you are getting the surface only and no legal interest at all in the minerals under the land, this is obviously much riskier. You have no control over when the minerals will be leased or sold and to whom. You cannot make conditions on where the well etc. will be located. You only have the most fundamental rights as a surface owners and citizen. (Read the rest of this Guide)

Things can be worse if you would own no legal interest in any of the acres of minerals under your land, and if at the time the ownership of the surface and the minerals of your land was divided the minerals came from a much larger tract of land. If that is true, not only do you have the risks of oil and gas wells and their attendant roads etc. put on your land, you have the risk of roads being put across your land to get to oil and gas wells drilled on surface land that does not belong to you, but which was part of same surface tract of land at the time the surface and minerals were severed.

If you will be buying all or a fraction of the minerals at the same time you buy the surface, are there any exiting leases already signed for the minerals?

Even if you are getting ownership of all of the mineral under you land, or a fraction of an interest, you still could be subject to leases that will allow a driller to come in and drill new wells etc. If a previous owner (or all the fractional owners) of the minerals have already signed a lease

with a driller, then even if you buy the land from the previous owner(s) the lease the previous owner(s) signed is still in effect.

If there is a lease pending and wells have been drilled under that lease, then you are pretty much in the same situation as if you don't own the minerals at all, at least with regard to the current wells. Perhaps you can get the control of being an owner back when those wells are played out and plugged and the old lease expires. However, that will be many, many years down the line, and you may have trouble getting the driller/lease owner(s) to plug the wells and end their lease. [See elsewhere in this Guide.]

There are a rare exceptions to what was said in the previous paragraph. If, yes, there is a signed lease, but, no, no wells have been drilled pursuant to the lease, there may be an out. Almost all oil and gas leases have a "primary term." The driller with the lease has a certain number of years, usually 2 or 3, in which to drill a well. If the driller does not drill a well in that period years (and perhaps pay delay rentals then the lease expires and has no more effect. In addition, if there is a lease and a well has been drilled, then the lease usually has a "secondary term". The secondary term lasts as long as the well is there -- until it is played out and plugged. The usual language is, as long as the well is "producing in paying quantities". (And in the meantime the driller can often drill new wells during the secondary term and extend it for the life of the lease for the length of the life of that new well too.) IF the well is no longer "producing in paying quantities" or if the state determines it has no "bona fide future use") it should be plugged, and if plugged properly it should not be a problem. The driller does not want to do that, both to save money and to hang on to the lease. See Questions 2, 3 and 6, and perhaps others in the first chapter of this Guide for further information on these issues.

If the lease is in effect, then you are bound by the terms. Get it. Read it. Take advantage of whatever rights may be in there. There probably aren't many. If you have real questions about the lease and whether you can do something to end it, then you need to see a lawyer.

However, because you often do not have a choice to get a piece of land that does not have a lease on it, you may want to evaluate the risks of this leased land. If there is a lease signed and if there are wells on the land, what are the risks of buying this surface land that has this particular lease on it? The answer to that question, you have to answer the three sub-questions. Do you trust the driller who presently owns the lease and operates the wells? How likely is that person to sell his ownership of the wells? And what condition are the wells in? See the next headings.

How old are the wells on the land and what shape are they in?

You need to know the answers to these questions if there are wells on the land you are considering buying, whether you do not own any of the minerals, or whether you own the minerals and there is an existing lease.

Look at the wells. Get the "API" number from the wells. [See Section/Question on API numbers.] Find out all you can about the wells and the owner of the wells from the files of the Office of Oil & Gas in Charleston or its web site. If there is no API number on the well, call an oil and gas inspector. See Appendix B.

If a review of the well shows it to be a relatively new well, then it probably has better steel casing, and a better cementing-in of the steel casing, than earlier wells. Casing and cementing techniques improved beginning about 1960. If the records, or a view, show that it is a much older well, then the casing system may not be as good.

Enforcement and professionalism of the Office of Oil and Gas improved in the 80's. So there would be fewer short cuts from the improved casing and cementing techniques taken (like not allowing the casing cement to "dry" before starting drilling deeper again.).

The "casing" and "cementing of the casing" are linings of the oil or gas well that protect the ground water from pollution. "Ground water" is the water down in the ground, sometimes called the "water table" that is the source of water for water wells and springs. If it once gets polluted, it can take many, many years to clear even after the source of pollution is eliminated. Pollution due to an oil or gas well can come from several sources. It can come from surface run off, from mixing with other polluted water tables that are deeper than the ground water used for water wells, and from invasion by the deeper oil or gas itself. If the casing goes bad, or when it goes bad (and most often at some point in time it will go bad), this *can* cause pollution of the ground water. This pollution can come from surface run-off (from pastures etc.) going down around the bad casing from the surface into the ground water. It can come from deeper salt or iron polluted water migrating up into the ground water. It can even come by leakage of gas and oil through or around bad casing and into the ground water. This leakage of gas has been known to cause explosions by leaking out of the gas well, into the ground water, into a water well, and detonating when the water pump sparks to life. And finally, if the casing is or goes bad, the groundwater used for wells and springs can just run down the hole and disappear further underground so there is no water for a water well.

There is a third risk that the well will cause some pollution on the surface. Wells in such a bad condition that they will cause ground water pollution are also a greater risk of these problems. But the risk of surface pollution is not the major concern that groundwater pollution is. When surface pollution occurs, you will see it right away. It will not have time to cause the kind of long term, land devaluing pollution that ground water pollution does. It will not be going on unnoticed at the time you are buying the surface land. And because its effects show themselves sooner rather than later, there is more likely to be a driller around to clean it up.

What kind of company owns the well now?

It the well is currently in production from a company that has a record of plugging wells as they reach the end of their working lives, then you have less risk. As the well gets played out, it

is likely to be plugged before the casing becomes a problem. One way to tell this is to contact the State Office of Oil & Gas and ask if the driller is in compliance with "bona fide use" requirements, and with any plans entered into with the State to plug the driller's old wells. Also, the larger company they are, the more likely they are to be a responsible company with enough cash flow to plug the old wells based on money they are making on new wells. If they are large enough to be a publicly traded company or have other concerned investors, they are more likely not to let their liability for unplugged wells increase. (As oil or gas wells reach the end of their useful life, they rarely make enough money then to pay for plugging themselves, though they may continue to make enough money to justify their continued operation.)

If the company that operates the wells is not well financed and has a bad record with the state, you run the risk that when the well is played out, the company will delay plugging the well, and may even go out of business without plugging it. When this happens the well is referred to as an "orphan" well. Drillers are required to have bonds to pay for plugging in the event the driller goes out of business, but the amount required by state law is only large enough to plug a tiny fraction of the wells owned by a company if the company goes out of business. So if the company goes out of business, the well will not get plugged. It costs $10,000.00 and up to plug. So you are unlikely to be able to pay for that. The State may pay to plug it. But the state has very limited funds for this purpose and there are tens of thousands of wells out there that have already been "orphaned" by oil and gas operators that have gone out of business. So the state only plugs the ones that are a priority. To be a priority, most likely the well will already be causing pollution of the ground water or some other problem. In other words, the state will only help plug the well once it becomes a problem.

If the surface land has wells on it, and the company that "operated" them has already gotten out of business and orphaned the wells, the surface owner would already be in the worst possible situation. The wells will be orphaned and not plugged, all as explained in the immediately preceding paragraph.

Note that if the wells have a good owner right now, there is still a risk that a bad owner could own them some day. Oil and gas well drillers, and lease owners, can sell their interests to other driller and lessors. This is a very common practice. So even if you have a good owner now, that may not last forever. A local successful, established family company is unlikely to sell. A big, long term producer is unlikely to sell. Those in the middle, and some at both ends, like to trade them around as the market dictates or even speculate on what the market will do and "position" themselves accordingly. Do the best you can, but do not rely too heavily on a good owner now, particularly if the wells are older or not in good shape.

"Free Gas."

Many people view having "free gas" as a huge benefit. But there are a couple cautions. See the heading "'Free Gas' Issues", in Chapter 3.

Conclusion?

Try to buy land that comes with all of the interest in all of the acres of minerals under it, or at least some fraction of ownership of all of the acres of minerals under it -- and that has no current leases of the minerals and no orphaned wells on it. If you are in the part of the State where there is or was an active oil and gas industry, this will be hard. So read this Guide. Evaluate your risks. Buy the land that has the least risk of having new wells and the least risk of having ground water pollution from old wells. And if you get a notice that a well is going to be drilled on your land, or if you get ground water pollution or other problems, enforce your rights as explained in this Guide.

ENDNOTES

*(Note these **end**notes are referenced from the numbers in the text. Asterisks (*) in the text refer to the **foot**notes as the bottom of the page.)*

1.West Virginia Code §36-4-9a. You may be required to send a notice as required by this statute and give the driller 60 days to do something, but not if there is an automatic termination clause in the lease. *Warner v. Haught*, 174 W.Va. 722, 329 S.E.2d 88 (1985).
2.West Virginia Code §36-4-9a.
3.West Virginia Code §36-4-9a.
4.West Virginia Code §11A-3-2(b)(4).
5.West Virginia Code § 55-12A.
6.West Virginia Code § 55-12A-9
7.West Virginia Code § 55-12A-2(5)
8.West Virginia Code § 55-12A-5.
9.West Virginia Code § 55-12A-5(c).
10.West Virginia Code § 22-10-7.
11. West Virginia Code §22-6-21.
12. West Virginia Code §22-6-21.
13.West Virginia Code §22B-1-35.
14.West Virginia Code §22B-1-35.
15.Section II, A, 1.
16.West Virginia Code §17-16-1 and 9; 157 Code of State Rules 6-1 et seq.
17.West Virginia Code §17C-16-6.
18.

Highway Restrictions on Drilling and Mineral Transportation Equipment

Vehicles		
17C-17-4	Height:	13 ½ feet
17C-17-2	Width:	8 ½ feet
		Vehicle 8 ½ feet wide can only travel on highway lanes 10 feet wide, or those highways designated by Dept of Highways.
17C-17-4	Length:	40 feet maximum, including bumpers
17C-17-9	Weight	*See chart*
Loads		
17C-17-6	*Diggers and Derricks*	
	(a)	40 feet maximum
		Can not extend more than 6 feet in front of truck
		Can not extend more than 9 feet in rear of truck
		Can only be operated between sunrise - sunset
	(b)	limitations in (a) do not apply if pole/pipe can not be dismembered, but more than 80 feet then need permit
Permits		
17C-17-11	(a)	permit required whenever vehicle or load exceeds limits allowed in statute
	B.	application for permit must include description of
		A. Vehicle and loads

B. Particular highway to be used

C. permit may limit

A. # of trips that may be made under the permit

B. Time or seasonal limitations

D. permit must be with vehicle and available for inspection by authorities

Local authorities right to restrict use of highways

17C-17-12 (c) Local authorities may prohibit operation of, or place limitations on, use of highways under their jurisdiction by commercial vehicles

Liability for Damage

17C-17-3 Strict liability only to State for illegal operation of vehicle, or for a vehicle operating under a permit.

19. Grist Lumber, Inc. v. Paul R. Brown Jr., W.V.S.C., January, 2001, Term; No. 28722

20. West Virginia Code §22-6-7; §22-11-1 et seq., 35 CSR 1

21. West Virginia Code §22-6-9, 10 and 11.

22. West Virginia Code §22-7-1 through 7.

23. West Virginia Code §22-9-7(b)(4), old cite now recodified.

24. West Virginia Code §22-6-10(a)

25. West Virginia Code §22-6-11(i)(4).

26. West Virginia Code §22-7-1.

27. West Virginia Code §22-7-1.

28. West Virginia Code §22-7-3(a)(1).

29. West Virginia Code §22-7-3(c).

30. Adkins v. United Fuel Gas Company, 134 W.Va. 719, 61 S.E.2D 633.

31. West Virginia Code §22-7-1 et seq.

32. West Virginia Code §22-7-1(a)(1)

33. Cogar v. Sommerville, 379 S.E.2D 764 (1989) Syl. pt 3 and Russell v. Island Creek, 389 S.E.2D 194, 203, (1989). But if damage is in contemplation, then ruination of water source is damnum absque injuria.

34. West Virginia Code §22-7-1(a)(2)

35. § 55-7-9. "Violation of statutes." "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."

36. West Virginia Code of State Rules §35-4-16.2 - 16.3 (Secretary of State's web site.)

37. West Virginia Code §22-6-6(d)

38. West Virginia Code §22-6-6(d)

39. West Virginia Code §22-6-3(a).

40. West Virginia Code § 22-6-39

41. West Virginia Code §22-6-21

42. 35 C.S.R. 11.5.

43. See the permit itself perhaps 35 C.S.R. 11.3.

44. 35 C.S.R. 11.4.

45. 35 C.S.R. 4-12.1
46. West Virginia Code §22B-1-35
47. 35 C.S.R. 9.2.6
48. West Virginia Code §61-3B-3
49. *Ibid.*
50. W.Va. Code 63-3B-1(4) says:

> (4) "Posted land" is that land upon which reasonably maintained signs are placed not more than five hundred feet apart along and at each corner of the boundaries of the land, upon which signs there appears prominently in letters of not less than two inches in height the words "no trespassing" and in addition thereto the name of the owner, lessee or occupant of the land. The signs shall be placed along the boundary line of posted land in a manner and in a position as to be clearly noticeable from outside of the boundary line. It shall not be necessary to give notice by posting on any enclosed land or place not exceeding five acres in area on which there is a dwelling house or property that by its nature and use is obviously private in order to obtain the benefits of this article pertaining to trespass on enclosed lands.

51. West Virginia Code §22-6-21.
52. 35 C.S.R. 19.3.D. "Distribution of Results."
53. 35 C.S.R. 19.3.C.
54. 35 C.S.R. 19.3.D.
55. West Virginia Code §22-6-11(1)(4).
56. West Virginia Code §22-6-11.
57. West Virginia Code §22-6-6(h).
58. West Virginia Code §22-6-21.
59. 35-4-12.1
60. State ex rel. Lovejoy v. Callaghan, 576 S.E.2nd 246 (W.Va. 2002)
61. West Virginia Code §22-6-30.
62. Adkins v. United Fuel Gas Company, 134 W.Va. 719, 61 S.E.2D 633, 634 (1950). *Syllabus by the Court* "The owner of the mineral underlying land possesses as incident to this ownership the right to use the surface in such manner and with such means as would be *fairly necessary* for the enjoyment of the mineral estate *(emphasis added).*"
63. West Virginia Code §22-7-1(a)(2).
64. West Virginia Code §55-7-9, *Violation of statutes*. Cited in Jenkins v. J.C. Penney Casualty Ins. Co., 208 S.E.2d 252, 254 (1981). Court affirms four-part test for when violation of statute gives rise to private cause of action, and also affirms intent of statute as established in England v. Central Pocahontas Coal Co., 104 S.E.2d 46 (1920).
65. West Virginia Code §22-7-3(a)
66. West Virginia Code §22-7-3(a)(5).
67. West Virginia Code §22-7-3.
68. West Virginia Code §22-7-3.

69.West Virginia Code §22-7-5. Driller must notify surface owner via Form WW-72 "Oil and Gas Reclamation Notice" per §22-7-5 and §22-6-30.
70.West Virginia Code §22-6-30
71.35 C.S.R. 4-10.
72.West Virginia Code §22-6-30(a)
73.West Virginia Code §22-7-7 and §55-10-1 et. seq.
74.West Virginia Code §22-7-7(d).
75.West Virginia Code §22-7-7(b).
76.West Virginia Code §22-7-7(d).
77.West Virginia Code §22-6-1(g). See also §22C-9-2(a)(12) (Oil and Gas Conservation Commission), and West Virginia Code §22C-8-2(8) (Shallow Gas Well Review Board).
78. *Ashland Exploration, Inc., v. Walter N. Miller, Director of the West Virginia Department of Mines; Theodore Streit, Administrator of the Office of Oil and Gas Division of West Virginia Department of mines; and Thomas E. Huzzey, Commissioner , Oil and Gas Conservation commissioner of West Virginia,* Robert Smith, Judge, Circuit Court of Kanawha County, West Virginia, Civil Action No. Misc. 82-715, May 10, 1985.
79.West Virginia Code §22-7-1(a).
80.Baldwin 673.
81.Baldwin 673.
82.Lewin 632.
83.Baldwin 673; Lewin 632.
84.Lewin 632
85.*Energy Development Corporation, V. Nancy Louise Moss, et Al., West Virginia Coalbed Methane Review Board, West Virginia Supreme Court of Appeals*, No. l 31238, November 20, 2003.
86. *Ibid.* Syllabus Point 8.
87."Water Produced with Coal-Bed Methane" United States Geological Survey Fact Sheet FS-156-00, November 2000, http://pubs.usgs.gov/fs/fs-0156-00/fs-0156-00.pdf.
88.West Virginia Code §22-21-13(b).
89.West Virginia Code §22-21-9(a)(1).
90.West Virginia Code §22-21-13(b).
91.West Virginia Code § 22-21-25.

TABLE OF APPENDICES

Appendix A.
Government Agencies.

Below is listed the contact information for the principal government agencies that are related to oil and gas. Note however that this Edition of the Guide was written in 2004. It is possible, or even likely, that if you are looking at this Guide several years after its publication the contact information will have changed. The agencies could move, change phone numbers or URL's or, as the Legislature is wont to do, be reorganized and renamed.

WVDEP – Office of Oil & Gas,

601 57th Street SE
Charleston, West Virginia 25304,
Phone: (304) 558-6075 558-6076,
Fax: (304) 558-6047.

State Office of Oil and Gas Internet Homepage:
http://www.dep.state.wv.us/item.cfm?ssid=23

Oil & gas well database search page:
http://www.dep.state.wv.us/item.cfm?ssid=23&ss1id=97

Personnel and inspector contact list:
http://www.dep.state.wv.us/webapp/_dep/search/oog/contact.cfm

West Virginia Geological & Economic Survey,

Mont Chateau Research Center,
Cheat Lake exit off I-68,
P.O. Box 879, Morgantown, West Virginia 26507-0879,
Telephone: 1-800-WV-GEOLOGY (1-800-984-3656) or 304-594-2331,
Fax: 304-594-2575.

Homepage and link to WVDES data --
http://www.wvgs.wvnet.edu/

Summary of significant oil and gas data in 2001:
http://www.wvgs.wvnet.edu/www/datastat/datastat.htm

United States
Environmental Protection Agency ["EPA"]

West Virginia is in EPA's Region 3 based in Philadelphia:
US EPA Region III
1650 Arch St.
Philadelphia, PA 19103

To report an emergency to the EPA:
Region 3 Response Center: 215.814.9016
National Response Center: 800.424.8802

For general questions or assistance call the "Citizens' Hotline" during weekday business hours:
800.438.2474

The EPA also has a large web site, as does the Region 3 Philadelphia Office:
http://www.epa.gov/
http://www.epa.gov/region03/

You can file a complaint or a tip on the EPA web site:
http://www.epa.gov/reg3ecej/enforcement/complaint.htm

The EPA web site has data bases that may have information about your area:
http://www.epa.gov/reg3rcei/neighbor/data.htm

Timber and Forestry

WV Division of Forestry
1900 Kanawha Blvd E.
State Capitol
Charleston, WV 25305

Request stumpage reports and other information from: 304.558.2788

Appalachian Hardwood Center
West Virginia University
College of Agriculture and Forestry
205 Percival Hall
P.O. Box 6125
Morgantown, WV 26506-6125
Phone: (304) 293-7550/Fax: (304) 293-7553

Web page:
http://www.wvu.edu/~exten/depts/af/ahc/ahc.htm

WVU Extension Service:
Center for Agricultural and Natural Resources Development
What Is My Timber Worth?:
http://www.wvu.edu/~agexten/forestry/timbwort.htm

Appendix B.
Well Identification Numbers.

Every oil or gas well in the State should have a State well identification number. The State's well number will look something like "API 47-000-0000."* Note that drillers often have their own numbers for the same wells. In addition some wells have a "farm name" and number that was assigned by some landman when the mineral rights were first acquired. The API/State number is the best way to identify a well and they all should have one.

In 1929 the API numbers began getting assigned to new oil or gas wells as they were drilled. So all wells drilled since then have an API number. In addition, any time an old well comes to the attention of the State, if the old well has not yet been assigned an API number, the State gives it one. So all oil or gas wells should have API numbers, except for wells that have not had any real work done on them since 1929

The number of the well is required by regulation to be displayed on the well somewhere. Probably stamped on a metal tag that is wired or otherwise attached to the well.

When contacting the State's Office of Oil and Gas about a well, it will move things along much, much faster if you have the API well number. Also, if you have the number you can find information about the well on the DEP website.

If the API number is not on the well and you cannot get it any other way:

Wells are often known by "farm name" and number. The farm name is usually the name of the owner of the mineral tract, or the owner of the surface tract, at the time of the severance. If there was more than one well on a farm, the well might be called "Jones, W.L #3" on documents such as leases and the driller's records. But look closely at the document to see if there is also an API number since this is better. If you know the county, and have the "farm name" and number, that may help the State locate the API number and identify the well.

---

*"API" stands for "American Petroleum Institute." The API set up this numbering system that has been adopted now by all of the States as the State numbering system. The first two numbers identify the State. So in West Virginia, the first two numbers will always be 47. The next numbers indicate the county. The last four numbers identify the particular well.

If you can get a topographic map of the area and indicate on the topo map exactly where the well is, then this may help the State's Office of Oil and Gas locate the well on their maps, which would give them the API number and an exact identification for the well. However, there are an amazing number of oil or gas wells in some areas. So you need to be precise as possible and this method may not work in every case.

There is one more alternative. State rules require each oil or gas well to display the API well number as explained above. So, particularly if you are in a hurry because there is a problem, you can call the State's Office of Oil and Gas and report that the well has no number on it and ask them to send out an Inspector to help you find out who the well belongs to and cite the owners for not having a number on the well.

There is another number that may be located near a well if it is discharging brine water into the stream pursuant to a State "general" permit. See the last question and answer in Chapter 1.

Appendix C.
How to Tell Whether You Own the Minerals Under Your Surface.

You probably own your property because someone gave you a "deed" transferring ownership of the property to you when you purchased it. The language in this deed will almost always tell you whether you own the minerals under your surface.

You may also own the property because your parent or another member of your family died and you inherited the property, or it was given to you in a will. If that is what happened, then at some point someone gave a deed to your parent or other family member transferring ownership of the property to them. (Sometimes your parent etc. from whom you got the property also came to own the property by inheritance or a will. If that is true, then you have to go back a generation or so, but eventually someone received a deed to the property when they came to own it.) If there is no deed directly to you then this deed will almost always tell you whether you own the minerals under your surface.

If you don't have the actual deed itself, then it is very likely that a copy of that deed was copied and "recorded" in the office of the Clerk of the County Court in the county courthouse of the county where the property is located. Each county's deed records are organized a little differently. So this Guide cannot give you complete instructions. You probably need to look up your name (or the name of the person from whom you inherited the property) in the "grantee index" book. You need to look in the grantee index book that covers the year in which the deed was made, and if you don't know, you may need to look back and back through all the index books for all years until you find it. This can get pretty complicated. Usually the staff of the County Clerk's office will offer you enough assistance to find it. But remember they are helping *you* find it. They are not lawyers and are not guaranteeing their work like a lawyer doing a title search does.

Once you have the deed you need to read it *very carefully*. There is no legally required particular word or words that is used. The deed could say several things that will indicate that you do not own the minerals.

If the deed says something like "surface only," then you don't own the minerals, only the surface. Somewhere in the past ("chain of title") someone who did own the surface and minerals together either hung on to the surface and deeded away the minerals, or hung on to the minerals and deeded away the surface.

If the deed says the minerals are “reserved” then again, you only own the surface and someone else owns the minerals/. The language may read something like, “. . .there is hereby reserved from this conveyance all of the minerals underlying said surface together with the rights to use the surface to produce the said minerals . . .”

If you have a question, take the deed, or a copy, to a lawyer. The lawyer will only charge you a minimal fee to explain the deed to you.

Appendix D.
How to Find Out Who Owns the Minerals Under Your Surface Land.

Why?

There are at least three reasons that a surface owner who does not own the minerals under the surface owner's land would want to find out who does own the minerals.

First, if the surface owner is even a partial owner of the minerals under the surface owner's land, then the minerals cannot be developed without the surface owner's signature on the lease (usually) of the mineral interest for development. This gives the surface owner control over whether and/or how the minerals will be developed. Unfortunately this will only be true if there has not yet been a lease of the mineral interest to a driller or other mineral developer. If a lease was signed before the surface owner buys some of the mineral interest, then the lease is still good for its life. That could be years or decades. Even if there is a lease in effect now, it is still good in the long run for the surface owner to obtain some ownership of the minerals. The lease will end sometime, and then the surface owners, or the surface owner's successor, will have control.*

The second reason for the surface owner to find out who the mineral owner (or owners) are, is to try to build a relationship with the mineral owner. If the surface owner befriends a mineral owner, the surface owner may be able to persuade the mineral owner to help make sure the surface owner is protected when development occurs. On the other hand, if the mineral owner is not sympathetic, the surface owner may be able to use a harder line to persuade the mineral owner to help make sure the surface owner is protected. The surface owner may find it necessary to make clear that if the surface owner's interests are not protected, then the surface owner will be as difficult as legally possible when the minerals are to be developed, and the mineral owner's 1/8 royalty, or the amount of it, might be affected.

The Third reason for the surface owner to find out who the mineral owner or owners are is so the surface owner can file a "Statement of Lienholders and Other Interested Parties" in the Sheriff's Office. Once this is filed, if an interest in the

---

*For information on how long the life of the lease is, please see the appropriate questions 2, 6 and perhaps others in Chapter 1.

ownership of the minerals is ever sold for non-payment of taxes, the surface owner will be notified. The surface owner can then show up at the tax sale and bid to get the minerals.

Introduction.

About the only official way to find out who owns the minerals under your surface is by using the records in the various offices in your county courthouse. Using the records at the courthouse to find out who owns your minerals is a difficult, complex, confusing and frustrating task. Be advised. If there is some informal way to find out who owns your minerals, it is worth your time to try that first. Ask your neighbors. If you know someone in the industry, or you know a company that owns the land nearby, they may know and be willing to tell you. Sometimes in a small county the people in the record room of the clerk of the county commission may just know from recent transactions or from their work in doing the recording of deeds, leases and estates.

This appendix is the first time someone has tried to instruct non-professionals in using these records. The information was gathered from a little personal experience. It was also gathered by asking questions from those who work with these records for a living, but who often did not quite understand what the heck we were trying to do, since most people are using the courthouse records for other purposes. So this is our best effort. If you find mistakes or have better/easier suggestions, please let us know!

The employees in the offices of the clerk of the county commission, the assessor, and the sheriff may be helpful, but their primary job is to keep these records. Helping people use them is something extra they do to be nice or for good public relations, since the county officials run for office. So, ask nicely, thank profusely, and understand if they can't help you all the way through because they have their primary duties to do, and because they do not want exposed to liability if they are wrong.

There are generally two ways to use the records in the county courthouse to find out who owns your minerals. The first is by using the tax maps and tax records. The second is by using the deed books, estate records, and their indexes.

Note that you should not rely on your own work pursuant to this appendix, neither using the deed records, and particularly not using the tax map records, to do any kind of "title search" when buying property. There is lots more to making sure that property is owned by the seller, and without any liens on it, than what is described here!

Finding the Owner of Your Minerals Using Tax Maps and Other Records.

This system only works where the state has prepared coal/mineral tax maps. (They are usually called coal maps, but they often, though not always, include the oil and gas mineral interests on the maps.) At the time of the publication of this edition of the Guide, we have been told that the maps only have been prepared for the counties listed in the footnote.* Sometimes the officials in those counties disagree with the person who gave us the list. If your county is not listed in the footnote, this system will not work for you.

Using the tax records at the courthouse to find out who owns your minerals will sometimes take you back and forth between the Sheriff's office and the Assessor's office, and even the county clerk's record room of deeds and estates etc. Prepare to be frustrated. It is going to take some work and some patience. And even then this system is far from foolproof. It is a shortcut from the next method, but it is not as sure of a thing.

To start, take your deed and tax ticket to the courthouse. Start in the assessor's office. Some of the numbers on your tax ticket should lead you to a numbered tax map of surface property and to a specific numbered parcel on that map. In your county the number on your surface tax ticket may first lead you through some other book, index or card system in order to give you the number of the surface tax map, and the parcel number on that map.

Once you have found your property on the surface tax map, then ask to see the coal/mineral map for that same area. What you are going to try to do is use the few physical features, like roads and streams on the two maps, to do an eyeball comparison of the surface tax map showing your parcel with the coal/mineral tax map to figure out the parcel on the coal/mineral tax maps that is under your land. This is not easy. The surface and coal/miner tax maps are computer generated estimates from deed and lease description, often old descriptions, that many times do not "close" or match up well with the descriptions of neighboring tracts of land. So they are very approximate and often the computer software guesstimated things into place. In addition, the scales of the two maps may be different. The "scale" is how inches on the map equals how many feet or miles

---

*These are the counties which have that information: Barbour, Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Fayette, Gilmer, Grant, Greenbrier, Hancock, Harrison, Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mason, McDowell, Mercer, Mineral, Mingo, Monongalia, Nicholas, Ohio, Pocahontas, Preston, Raleigh, Randolph, Roane, Summers, Taylor, Tucker, Tyler, Upshur, Wayne, Webster, Wetzel, Wirt, Wyoming

out on the ground. Line them up as best you can side by side, and try to use the few roads and streams indicated on the maps to try to figure out the parcel on the coal/mineral tax map when compared with the surface tax map that is under your property.

Once you have figured out where the specific parcel of minerals that is under your land is located on the coal/mineral map, the map will have a designated number for that parcel. And the map has a number itself. Make a note of those. If you are really lucky, your county has a cross index from the map and parcel number to the current tax ticket. If so, go straight to the current year tax ticket. If that does not work, try the idea in the next paragraph.

There should also be an index to the coal/mineral map. Using the parcel number, look on the index to the map. The index should give you the name of a mineral owner. Note, that these maps are often 10 or 20 years behind! (The map should have a date, and maybe a revision date on it somewhere to show you how far behind the particular map is.) So the name you have may be the name of the person who owned the minerals on the date of the map. But that person could have sold or leased the mineral interest, or could have died so someone else inherited it.

Take the name from the index to the coal/mineral tax map and go to the current year's land book. See if you can find that name in the current land book. Be careful, the land book may be divided into tax districts of your county. If that person is listed as the owner in the current land book then the land book will refer you to the tax ticket. Look up the tax ticket and the information that is available there will often be an address or other information that can help you find the warm body, or corporate body, of the owners of the minerals.

If the person's name on the map index is not the current owner, then you need to go to the land book for the year of the tax map, or maybe the year after. Look up that name. Unless the person in your sheriff or assessors office knows a short cut, you then go to the county clerk's record room. Look up that person's name in the "grantor indexes" starting with the year of the tax ticket. Look forward through all of the indexes until you find that person's name listed as a grantor of a deed of property with that same description to someone else, someone the indexes call the "grantee". If the name never shows up, then look up the name in the estate record indexes to see if the owner whose name you have died and the land was inherited by, or willed to, someone else. If the person's estate was "administered" through the courthouse records, those indexes will lead you to the will or estate records and tell you who inherited the land.

Once you have found a deed or estate record that shows you who took title from the original owners, check that new person's, or persons', name in the current land book. If that person is not there, you need to start back and the grantor indexes again with these new names and go forward until you find current living owners whose name appear on this year's land book.

Finding Who Owns the Minerals Using the Deeds, Estate Records and Their Indexes.

We were not able to prepare a complete explanation of the use of the deed books and estate records and their indices. Even with a thorough explanation of how to do this tricky work, mineral property ownership is particularly tough even for the professionals that do this for a living. Good luck.

Here is a quick summary of how the system works. If you have a relatively simple ownership history, and if the people in your county courthouse are particularly helpful, this may be enough to get you the information you are looking for. Remember, the people in the courthouse are supposed to keep the books and indexes, not do title work for private individuals. So be particularly thankful if you get help from them, and don't expect them to do the whole job.

It all starts with your deed. If you don't have it, it should be recorded and on file in the court house in the records room of the office of the clerk of the county commission. Read your deed, the deed that transfers the land from someone else to you, very carefully. Read everything on it. The name of the person who deeded the property to you in your deed, often called the "party of the first party", is the "grantor" of the land/deed in the county record indexes to deeds. You are the person to whom the land was deeded, and so you are the "grantee" in the county records index to deeds, sometimes named as the "party of the second part". Read Appendix C to be able to tell whether your deed gave you the mineral rights or not, and then read your deed again.

Somewhere on your deed the deed book and page number from the county clerk's records where your deed was recorded will probably be stamped or written. The names on deeds and the deed book and page numbers of deed are recorded on several different indexes in the courthouse. You can use the indexes and their references to the deed book and page numbers to read back through the deeds in the "chain of title" of your land until you find the "severance deed" that separated the ownership of the minerals from the ownership of the surface. Once you have done that you can reverse the process and, using the first owner of the severed minerals, go forward through the indexes to find the current owner(s).

The severance deed is where the ownership and the minerals got divided (severed) from each other. The severance deed is the most important deed in your chain of title for two reasons. First it tells you what your existing rights are as a surface owner. If you have a right to free gas etc., it will be stated here. The mineral owners rights will also be state other, such as, the mineral owner has the right to put pipelines across your land to a well on a different *mineral* tract, etc. You may have additional rights than are stated in the deed, as may the mineral owners, but you and the mineral owner definitely have the rights stated in the severance deed.

The severance deed will usually be a deed where the persons who owned all of the property, both the minerals and the surface, either deeded away the surface and kept the minerals, or deeded away the minerals and kept the surface. So the grantor in the deed either uses words like conveying only the surface, or the reverse, uses words like "excepts" or "reserves" from the conveyance the minerals or oil or gas etc.

Keep reading back deeds until you find that dead that for the first time says that the surface was reserved from the mineral grant, or the minerals were reserved from the surface grant, and that is the severance deed. From that deed you can read your rights, and start working down the mineral chain of title to find out who owns the minerals now. If the deed only refers to previous reservation or severance, then you don't have the severance deed. You need to go further back the "chain of title" to find it. It is a good idea even if you think you have the severance deed to go back the chain of title at least one more deed to make sure you are right and no separation or severance of the minerals is mentioned in the previous deed.

So you now have your severance deed, and you know what rights it gives you and the mineral owners.

The above was an overview of how to find your severance deed, and find out your rights there, and to begin to find out who the mineral owner is. Below are more detailed steps, starting with your deed.

Step 1. Take your deed and go to the record room of the clerk of the county court/commission in the county courthouse of the county where your land is located. In your deed carefully read the description of the land. In order for the grantor to have the land to grant it to you, the grantor has to have deeded it to him, or they could have inherited it from someone who got it from someone else in a deed. The property description in your deed will probably contain the deed book and page number where the deed to your grantor can be found. This is not the deed book and page number where

your deed is copied and recorded that is also somewhere on you deed. This is a deed book and page number of the deed to the person who owned the property *before* you did.

Step 2. Find that deed at the deed book and page in the county deed book records.

Step 3. Read your grantor's deed carefully. See whether that deed was the "severance deed". If it is not the severance deed (or if you are not sure it is the severance deed) you need to go back another link in the chain of title to see if the deed to your grantor's grantor was the severance deed. To do this, do the same thing you did when you started with your deed. Read your grantor's deed's property description. See if the deed book and page of *his* grantor's deed is there. (If at any step before you reach the severance deed there is no deed book and page number, you will either have to hire a lawyer or perhaps the employees in the county clerk's office will help you use the "grantor indexes" to work your way back through the chain of title to the severance deed.)

Step 4 and more. Read that deed carefully. See if it is the severance deed. If it is not, go through the process again. Read the property description to see if the deed book and page number or other record by which the grantor of that deed obtained the property is there. If it is, look it up, and over and over until you find the severance deed.

Step 5. Once you have found the severance deed you will know the name of at least one owner in the chain of title of the *minerals*. That may not be the current owner. You can check this year's land book as explained in the previous section to see if they are still the mineral owner. If not then you need to get help from the folks in the record room of the county clerk. You need to look up the name of the owner of the severed minerals beginning with the "grantor indexes" for the year in which that owner was deeded or reserved the minerals. When/if you find that mineral owners name in the grantor indexes, the index will also list the "grantee" and the deed book and page. Again, these indexes are very hard to use. Usually there is a set of indexes for a certain set of years, and then a new set takes up for future years. In the older indexes, the names are only in partial alphabetical order. In addition, that mineral owner may have owned and deeded away a bunch of other mineral tracts, and so you will have to read the description in the indexes, and maybe even the deeds, in order to be sure you have the right tract of mineral land.

Step 6. If you got lucky and found the first mineral owner's name in the grantor index, the grantor index will give you the name of the grantee. You then look up that grantee the grantor indexes from that date forward to see if he deeded the minerals to anyone. If so you then look up the that grantee in the grantor indexes after date of that grantee's

deed, and so on and so on, until the last grantee that you find does not show up as the grantor of that property anywhere in the indexes. That should be the current owners of the minerals. Of course, along the way if a grantee died without making a deed, then you need to look in the indexes of the estates to see who the grantee heirs were. Then you can look all of them up in the grantor index. If the grantor's estate was never filed for some reason, then you are probably stuck and it is time to get a lawyer.

When you find the most recent grantee in the chain of title, then you probably have found the current owners of the minerals. Their address may or may not be on the deed as the place to which the clerk has to send the deed after recording. If not, try the phone book, or go back to the land book and try to use that to find the tax ticket which may have the address on it.

Be aware that you have not done a “title search” like is done when you buy land. You have not looked for liens on the property and lots of other things that have been recorded. What has been described is just a way to try to find out who probably owns the minerals.

Appendix E
How to File with the Sheriff
So You Will Get Notice If the Minerals under Your Land Are Sold for Taxes.

If property taxes are not paid on minerals, then just like when taxes are not paid on surface land, the minerals (or technically, the tax lien on the minerals) get sold by the sheriff for nonpayment of taxes. You can bid at the public sale. The problem is finding out when the sale will occur. Notice of the tax sale gets posted in the paper. The notices of tax sales appear in the local newspaper in October or November. You will have to check every day. And they are listed according to who owns the minerals, not in your name, so you have to know the legal name of the person or entity who owns the minerals. Appendix D tells you how to find out, but it is time consuming, confusing and tedious work.

However, there is something you can do so that you will be notified by mail if the minerals under your land are sold for taxes! (See West Virginia Code §11A-3-2(b)(4).) Again you first need to find out who owns the minerals now and that can be time consuming, confusing and tedious work. See Appendix D. Then you need to go to the sheriff's office and fill out a form called "Statement of Lienholders and Other Interested Parties". Note that the folks in the county offices are much more used to dealing with a form called "Sales Listing Form" which also has some lienholder information. So make sure they give you the right form. A sample of the form is on the last page of this appendix. If the sheriff's office is not familiar with it, tell them it can be found in the "Operating Procedures Manual Of West Virginia Sheriffs in Their Capacity as ex Officio County Treasurer" published by the State Tax Commissioner as revised 01/97.

This form is filled out using information available in the County Clerk's record room, the assessor's office and/or the sheriff's office. You may already have some of the information from finding out who owns the minerals as explained in Appendix D). The form is then filed in the sheriff's office (or in some counties the county clerk's office first).

The authors do not have extensive experience using this form. The information in this index was gained from talking to people in the State Tax Commissioner's Office Real Property Section and the employees in the Kanawha County Courthouse. Your county may operate somewhat differently. We did find that you can get the best information on how this works in your county by talking to the person in the sheriff's office who is in charge of preparing the notices that get mailed out when taxes are delinquent on property.

A sample of the form is located at the end of this appendix.

The information directly under “Taxes Listed As” is the information for the mineral interest, not your surface interest.

You need to know the name of the mineral owner before you get started filling out this form. Appendix D attempts to explain how to do find that name.

If you have not gotten the “Map” number and “Parcel No” information already while finding out who owns the minerals, then you need to look in the “Land Book” under the name of the mineral owner and the property description. In some counties the land books are kept in the county clerk’s record room, but the assessor may also have them. The State Tax Department’s property tax division tells us that mineral maps usually have the number 9999. Note also that not all counties have mineral tax maps and even then not all mineral interests may appear on the maps. So there may not be a map and parcel number to put in those blanks.

The “Assessor’s Account Number” is very important and the form will probably not be accepted with out it. It should be in the Land Book under the mineral owner’s name and property description.

The “Description of the Property can be very brief -- whatever is listed in the Land Book.

Note the instructions on the sample form on how to fill in your name and address. Be sure to sign the form also.

Finally, check the “Surface Owner’s Rights” box and fill in the Deed Book and Page Number where your deed to your surface interest is recorded in the county clerk’s recorded room.

The sample form is on the next page.

(SAMPLE)

STATEMENT OF LIENHOLDERS AND OTHER INTERESTED PARTIES

(Your Property's) , County, *(Your Property's)* District, West Virginia

E-1

West Virginia Code § 11A-3-2 & § 11A-3-3 (Amended 7/1/94) CID Created 5/94

Any person claiming a lien against real property shall be deemed to have waived any right to notice provided by sections two, twenty-two and fifty-five of article three, chapter eleven A, of the West Virginia Code, unless he has filed this statement declaring such interest with the Sheriff of the county in which the said real estate is located.

TAXES LISTED AS:

Map: *9999 (usually)* Parcel No: *(from tax ticket or land book)*

Name: *(From land book or tax ticket)*

Address: *(If available on land book or tax ticket)*

Description of Property: Assessor's Account Number: *(From Assessor)*

(Example: "161.5 acres oil and gas on Laurel Fork in Jefferson District")

Sheriff's Use Only
Date Received:
Effective dates of lien:
Date Entered:
Entered by:

LIENHOLDER INFORMATION ☐ Check if change of n name and/or address

Name: *(Your Name)*

Address for Notice: *(Your address. Use an address on the land if possible so in the event you sell the land, the future surface owner will get the notice. If you use an address on the land add "or Occupant" after your name in the "Name" space.)*

Filed By: *(Sign Your Name)*

Signature

INTEREST IN PROPERTY:

CCC. Surface Owner's Rights Deed Book: *1307* Page Number: *492*

DDD. Fiduciary Interest Relationship to Owner: _____

EEE. Lienholder Deed Book: _____ Page Number: _____
Date of Lien: _____ Length of Lien: _____

FFF. Other _____

RELEASE OF LIEN

Complete this section if you are releasing this lien:

Date Lien is released: _____

Signature of Lienholder: _____

_____

Appendix F.
Simple Form for
Surface Owner's Comments on Application for Well Work Permit.

The next two pages are a simple form for filing comments on the usual permit for drilling a shallow or deep well. As described on that form, if the well permit application you received is an application for a permit for drilling a coal bed methane well, a storage well, an injection well, etc. then this form is almost certainly going to be too simple. For coal bed methane wells, read Chapter 8. For storage, secondary recovery and underground injection wells, read the last section in Chapter 1. You may still be able to start with this form, but it is better to do something separate, and you will probably need more help than this Guide provides.

This simple form being provided is not a government form. It was created by the authors of this Guide. We did run it by officials at the Office of Oil and Gas for suggestions in order to try to pave the way for its use, but it is not in any way approved by the State or anyone else.

The form was designed to be two sided, with both pages of print on the same piece of paper. When copied that way, *both pages,* can be distributed separately from this Guide. However, we strongly recommend that someone read the Guide, particularly Chapters 3 and 2 before filing comments.

Surface Owner's Comments on Application for Well Work Permit.

(Material in italics is not part of the surface owner's comments.)

This form is not a government form. It was prepared by the Legal Aid of West Virginia to assist low income surface owners making comments, though it is usable by all surface owners. See "Instructions to Surface Owner" on the back of this form for assistance. A booklet entitled West Virginia Surface Owners' Guide to Oil and Gas is also available. The purpose of the Guide is to give assistance to surface owners making comments and dealing with the other aspects of oil and gas operations on surface land. To get a copy of the Guide (or if you do not have it, the back page of this form) please contact the Legal Aid office in Charleston or your local office, or e-mail wvdavid@wvdavid.net.

To:[1]	Chief, Office of Oil and Gas[2] Department of Environmental Protection 601 57th Street SE Charleston, West Virginia, 25304	From:	Name: Address Phones:

Well Operator Name[3]_____ API Well Number 47 -____-_____

Well Location:_____ *County*:_____ *District*:_____

•If a "driller" (officially, a proposed operator/permittee) is planning to drill an oil or gas well or do other "well work" on your surface land, then you, or one of your co-owners, should have received papers delivered in person or through the mail. You have a right to comment to the State on the papers and what they propose. This form can be used to make those comments.

•The State can deny or condition the permit based on comments you are entitled to make. If you believe that an oil and gas well may be drilled on your surface property, but you have not received those papers, check with the state Office of Oil and Gas in Charleston. If no permit application has been filed, make sure your name is on the county real estate property tax records for your land so that you will get a copy of the papers if a driller applies for a permit.

•The papers a surface owner receives should include the "NOTICE AND APPLICATION FOR A WELL WORK PERMIT", the "WELL WORK PERMIT APPLICATION", a "PLAT [MAP]" of the well site and, importantly the "CONSTRUCTION AND RECLAMATION PLAN" which is often combined with the "SITE REGISTRATION APPLICATION GENERAL PERMIT FOR OIL AND GAS DRILLING PIT WASTE DISCHARGE". You have a right to comment on all of those.

•You can make any comments you want. However, the comments are most likely to be effective in getting the State to deny or condition the well work permit if your comments relate to safety hazards to people, damage which would occur to publicly owned lands or resources, failure to protect fresh water supplies, inadequate or ineffective soil erosion and sediment control plans including deviations from the State's Soil Erosion and Sediment Control Field Manual, or to the driller's violations of previous permits.

•You may add additional pages if you need to. In fact you probably will want to. You may also want to attach documents or pictures.

[ ]Additional pages or documents are attached. Signed:_____

Back side of "Surface Owner's Comments on Application for Well Work Permit".
(This side of the page is not a part of the comments.)

OilGasSurfaceOwnerGuide2004v7.wpd

General Instructions for Filing Comments.

•The state can deny or condition the permit based on your comments -- but only if you file comments in writing with the State.

•You do not need to use this particular form for comments. You can comment in any written/faxed form, but not orally.

•If you have time, get a copy of the West Virginia Surface Owner's Guide to Oil and Gas, and read it before filing your comments. To get a copy of the guide contact wvdavid@wvdavid.net or the local or Charleston office of Legal Aid of West Virginia Office, or search for it by name on the Internet. In particular read Chapter 3 and Chapter 2.

•This form is designed for commenting on the typical permit to drill a production well. If the notice you got is for a "coal bed methane", "storage", "injection" or "disposal well" be sure to read the Guide and seek other help. You may be able to make/should make additional or different comments on those wells.

•*The time deadlines are strict.* The driller has to serve you personally with the papers, or put them in the mail to you, no later than the filing date of the permit application. The surface owner's comments (made on the front side of this document, or in some other written or faxed form) have to be *into the hands of the agency* (not just dropped in the mail) by the end of the 15th day after the permit application was filed. You can call the State's Office of Oil and Gas to be sure you know the permit filing date. If you are late getting the comments in, be sure to send them in anyway! The State may still use them in making its own permit determinations.

•*Comments are more likely to be taken into account by the state to deny or condition the permit if* they relate to safety hazards to people, damage which would occur to publicly owned lands or resources, failure to protect fresh water supplies, inadequate or ineffective soil erosion and sediment control plans including deviations from the State's Soil Erosion and Sediment Control Field Manual, or the driller's violations of previous permits.

•To find out if any provisions of the permit for your land do not comply with the State's Soil Erosion and Sediment Control Field Manual get this Manual and compare your permit to the Manual requirements. The Manual can be obtained at the Office of Oil and Gas in Charleston or on the that agency's web site.

•If the permit for your land is a "coalbed methane well"permit, then you have addition comment rights. Send in the comments referred to above and on the front of this form if that is all you can do, but try to get hold of the Guide mentioned on the front or other sources of information in order to find out and exercise your additional comment rights for coalbed methane wells.

•If you have commented or complained directly to the driller before and the driller has paid no attention to you, then it is particularly important to comment to the State. Be sure to comment to get the driller or the State to pay attention to you.

•After the permit is issued, you may be able to file an appeal. However, your appeal will probably be denied unless you file comments now, before the permit is issued.

•The driller may come to you and try to get you to agree to certain locations or a certain amount of damages or a calculation of damages. If you sign any "Voluntary Statement of No Objection" you are giving up your right to comment. You are probably giving up your right to additional damages. So do not sign this unless you completely understand and are satisfied with what the driller has agreed to do.

•After the drilling is over and the site is reclaimed, you may have the right to seek compensation for damages to your land caused by the drilling pursuant to the Surface Owners Damage Compensation Act in West Virginia law. If you and the driller cannot agree on those damages, then you can go to arbitration without a lawyer.

•If the driller wants you to sign a written agreement or a "Voluntary Statement of No Objection, be sure to determine whether the written agreement waives your right to seek damages under the Act noted in the previous bullet point. You don't have to sign this, but if you decide to sign it, make sure you are getting adequate compensation for the temporary and final damage done to your land. If you sign the agreement and then suffer additional damages during the drilling that are not in the agreement you signed before the drilling began, then the driller will try to say that what you agreed to in the agreement is still all you get. So make sure every possible damages is taken into account. Be especially cautious about signing an agreement that waives your right to compensation under the Act for damages that are not set out in/contemplated in some form in the agreement.

•If you make an agreement with the driller, make sure that what the driller has agreed to do is in writing somewhere and make sure that whatever is in writing is signed *by the driller*. Having everything in writing makes sure that everyone is clear on what is agreed to (and no one can say something different later).

Further instructions for surface owners using this form for comments: (Numbers of the instructions below correspond to the "endnote" numbers on the front of this form).

[1] These comments should be actually in the hands of the Office of Oil and Gas within 15 days of the permit application filing date. Just putting them in the mail box on time may not be enough. Call the Office of Oil and Gas to find out the deadline on this permit. However, if you are late, file them anyway.

[2] As this form is being prepared, the DEP is building new offices in Charleston. Call the state Office of Oil and Gas in Charleston to make sure you have the right fax number or street address (in case the driller is using an old form).

[3] Obtain the information for this and the next line from the "NOTICE AND APPLICATION FOR A WELL WORK PERMIT" you received or the papers that came with it. At this point the "Well Operator" is really a "proposed" well operator/permittee, but the name you want to put here is the "well operator" on the papers you got. We call this person the, "driller" in this form and its instructions.

(End. of Instructions.)

Appendix G.
Forms for Appeal of State's Decision On Issuance of Well Work/Drilling Permit To Circuit Court.

Important Note to Version 7 of the 2004/2005 edition.
See the update on the following page.

The next pages are a form for appealing the State's decision on the issuance of a permit to drill an oil or gas well when the surface owner thinks did not sufficiently take into consideration the surface owner's comments. See "What Happens Next?" and "Can I Appeal?" at the end of Chapter 3 of this Guide.

This is not a government form. It was created by the author of this Guide. As explained in the sections of the Guide referenced in the previous paragraph, this availability of an appeal to the Circuit Court was not always something surface owners could do. The Supreme Court case that established it in case law is not ultra clear. We believe that Circuit Courts will allow these appeals, and we think this is paperwork that the Circuit Court Judges will accept. However, since this appeal has never been done before, the forms and instructions are only a researched and educated guess of how the process will work. It is known for sure that the process will work as anticipated in the forms and instructions.

If you have experiences with this, whether the instructions and forms work or do not work, please inform the author. If you are going to file one of these appeals, you might want to contact the author to see if there is any more information on the process before you start. And if major, reliable changes do occur, those who register their ownership of this Guide will be informed. This is yet another incentive to register as indicated on the title page of this Guide.

Note that there a two separate documents attached. Following the documents are some general instructions. The documents themselves have superscripted numbers that look like this [99]. Those are endnote numbers. The text for those endnotes follows the general instructions. Following that are copies of the code sections in effect on the date of publication of this guide. **You also must file a new "Administrative Appeal Docketing Statement" that can be found on the web site of the Supreme Court or at the Circuit Clerk's office. It is a little complicated so don't wait until the last minute.**

Important Note to Version 7 of the 2004/2005 edition.

As new copies of this Guide are reproduced, some small changes are added. This note is being made to Version 7, updated in October of 2008.

We believe we are correct that the surface owner has a right to appeal the granting of a permit to a driller over, or not considering, the surface owner's objections. We believe that the Supreme Court clearly stated that in the *Lovejoy* case cited in these materials. We also believe that the surface owner should have a right to do that in the County in which the permit was granted.

However, the DEP Office of Oil and Gas takes the position that the West Virginia Supreme Court's reading of the statutes cited is wrong, that since there was no hearing before the OOG, there is no appeal under the Administrative Procedures Act. So it will file a motion to dismiss and make an argument to the Judge on that. Some Circuit Court Judge's are agreeing with the DEP/OOG and dismissing those appeals. The only recourse then is another appeal to the W.Va. Supreme Court citing the *Lovejoy* case and Constitutional Due Process theories. As this is being prepared we know of one petition for appeal, but we do not know if it will be accepted for a full appeal. Knowledge by the driller that you are willing to try such an appeal should be some leverage before the appeal. But be forewarned that the appeal set out here is not a sure thing.

In addition, the DEP Office of Oil and Gas takes the position that the case has to be brought in Kanawha County. They cite W.Va. Code 14-2-2. Surface owners say the Administrative Procedures Act venue statute, W.Va. Code 29A-5-4(b), says the suit may be brought "[A]t the election of the petitioner, in either the circuit court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business . . .". However, if they persuade the judge that there is no right to an administrative appeal, then 29A-5-4 does not apply. It may be that the surface owner can bring something called a "Mandamus action" against the DEP/OOG to require a hearing. It may be that a "Writ of Certiori" can be brought to appeal the permit decision, even if it is not fall under the Administrative Procedures Act. However, "venue" for both of those would be in the Circuit Court of Kanawha County. See W.Va. Code 14-2-2 and 53-3-2. If you are represented by a lawyer, it might be best to try there, unless you know that your Circuit judge has ruled in the past that he or she will hear these appeals.

You may want to check the WVSORO web site under "Advice for Common Situations in the left panel for any updates, or check WVSORO directly for further news!

IN THE CIRCUIT COURT OF _____ [1] COUNTY, WEST VIRGINIA

_____ [2]
_____
_____,

Petitioner,

vs. No._____

_____, Director
Office of Oil and Gas, DEP
_____
_____ [3]

_____
_____
_____, [4]

Respondents.

PETITION FOR APPEAL OF ISSUANCE OF OIL/GAS WELL PERMIT

Comes now the petitioner, pursuant to 29A-5-4 [5] and West Virginia Code §22-6-41 and *State ex rel. Lovejoy v. Callaghan*, 576 S.E. 2d 246, at 249 (W.Va. 2002) or West Virginia Code §22-6-40 and files a contested case administrative appeal of the issuance by the State of a permit to drill/operate an oil or gas well on the petitioner's property, and says:

1. Petitioner is filing this petition in:

   - ❑ Kanawha County.
   - ❑ The County the petitioner lives in.
   - ❑ The County in which the petitioner does business or owns land.

2. Petitioner is adversely affected by a decision of the Director of the Office of Oil and Gas of the Department of Environmental Protection granting a permit to the Respondent operator to drill/operate an oil or gas well.

3. Petitioner has exhausted administrative remedies in that there is no provision for an evidentiary hearing below, the decision below to issue the permit was made pursuant to documents filed and activities of the agency, and this appeal is so allowed as provided in the authorities cited in the introduction to this petition.

3. The decision issuing the permit was received by the petitioner on the ___ day of _____ , 20___so this appeal is filed within 30 days and is therefore timely filed. [6]

4. The substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions and decisions or order are: [7]

- ❑ (a) In violation of constitutional or statutory provisions; or
- ❑ (b) In excess of the statutory authority or jurisdiction of the agency; or
- ❑ (c) Made upon unlawful procedures; or
- ❑ (d) Affected by other error of law; or
- ❑ (e) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- ❑ (f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

5. The reasons the decision violates the standards set out in paragraph 4 are set forth in the brief/attachments to this petition.[8]

WHEREFORE the Petitioner prays that the Court:

A. Order the State agency, pursuant to W.Va. Code 29A-5-4-(d), to transmit to the Court the original or a certified copy of the entire record including the permit application, the petitioner's comments, any inspection reports, any further communications among the parties, any written decisions, and the order or letter granting the permit, and all other papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case and a statement of matters officially noted;

B. Order the appeal to be filed and proceed without bond pursuant to W.Va. Code § 29A-5-4(b).[9]

❑[10] C. Issue an order in the nature of a writ of supersedeas upon such terms as it deems proper staying the well from being drilled/operated pending this Court's action on this appeal pursuant to § 29A-5-4(c).

D. Fix a date and time for the hearing on the petition not to be held sooner than ten days after the filing of the petition pursuant to §29A-5-4-(e) unless the parties agree to an earlier date;

❑[11] E. Because of irregularities in the procedure before the agency not shown in the record and stated in the brief attached to this petition take testimony before the Court;

F. Make a decision on the record made before the agency, on this petition and the documents attached to it and filed with it, and on oral argument to be heard at the hearing requested above pursuant to 29-5-4-(f);

G. Order the permit to drill the oil or gas well to be vacated, or to be modified, or to be conditioned in accordance with the comments made by the petitioner during the well permit application process, and the records and the arguments of the parties or errors consider and decided which were not assigned or argued, all pursuant to §29-5-4(e), or remand the case to the agency for further consideration pursuant to 29-5-4-(g);[12] and

H. Grant such other and further relief as the court may deem just.

_____
Petitioner

_____
Date

IN THE CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

_____[13]
_____
_____,

Petitioner,

vs. No._____

_____,Director
Office of Oil and Gas, DEP
_____
_____

_____
_____
_____,

Respondents.

NOTICE [14]

TO: THE RESPONDENTS WHOSE NAMES APPEAR ABOVE.

You are hereby notified that a hearing on

[ ] the petitioner's motion for an order staying drilling or other operations under the permit which is the subject of this appeal

[ ] the relief sought in this petition

will occur on the _____ day of _____, 200__, in the Courthouse for the county named above before Judge _____ of the Circuit Court named above at ____ o'clock ___. m. or as soon thereafter as may be heard.

You have the right to appear at that hearing in order to protect your interests although you are not required to do so.

_____
Petitioner

_____
Date

Instructions for Filling out the Appeal Forms.

General

Be sure to read all the way through the petition and its instructions before you decide to file the petition and before you start getting it ready. It is important to note that in addition to this "petition" and the "notice" that goes with it which are required to get the appeal filed, you need to file a "brief" with the petition that explains your position. That will take more time to prepare and get right. No particular form for the brief is suggested here. Probably the Judge would accept something in the form of a letter. It just needs to explain your side to the judge, relying as much as possible on the comments you have already filed with the agency and the documents you attached to that.

First, fill out this petition following the instructions below, write your "brief" to attach to the petition, and gather your documents and photos etc. to attach to the petition.

Second, select the County Circuit Court in which you want to file the appeal. The Courts from which you can choose are set out in the "Instructions for filling out the Petition" below.

Third, decide whether you want to ask the Judge to stay the issuance of the permit, or the drilling under the permit.

Fourth, file the petition in the Circuit Clerk's office for that County on time (See "Instructions for filling out the Petition", below.)

Fifth, go to the Judge's secretary. If you want to get a stay, ask the Judge's secretary how you can get a hearing date from the judge for that. Whether or not you get a hearing date on your request for a stay, ask the secretary how to get a date for the final hearing on your petition.

Sixth, ask the Circuit Clerk to send copies of your entire Petition, the notice of hearing and the attachments by certified mail to the Respondents. If the judge's secretary or judge gave you a final hearing date or a hearing date on your request for a stay, include a notice of the hearing. A form is provided in these forms.

The last numbered endnote for the forms contains copy of the code sections upon which the appeal documents are based.[15]

Instructions Relating to Numbered Endnotes in the "Petition" and "Notice".

1. You can choose the County where you want to file this petition from among these options listed in this paragraph on the form. It can be in Kanawha County, the County where you live, or the County where you "do business," -- in this case, probably where the well is going to be drilled. W.Va. Code § 29A-5-4(b). **But see the new note to Appendix G of Version 7 of the Surface Owners' Guide to Oil and gas for an update on this issue.**

2. Insert your name and address here.

3. Insert the address of the Office of Oil and Gas from the permit or call it to get the correct address. This office moves from time to time so be sure you have the most recent address.

4. Get the name and address of the "operator" from the permit or the permit application.

5. The last endnote for these forms contains a copy of these two code sections.

6. The appeal has to be "filed" within 30 days after the date upon which you received the permit or notice of the issuance of the permit by the Office of Oil and Gas/DEP. "Filed" probably means actually stamped in at the Circuit Clerk's office If you just drop it in the mailbox to the Clerk on the 30th day, the Court might accept it, but it might not. (To count the 30 days, start counting with 1 being the day *after* you got the permit or notice of the decision to issue the permit. The 30th day you count is the day the petition has to be filed. If it was mailed to you, it is best to get it in within 30 days of the postmark so no one can distract the Court with arguments that you did not get it filed within 30 days. But you need to be in a bigger hurry than that really, particularly if you want to stay the drilling/operation of the oil or gas well during the appeal. The driller can start any day unless and until you ask the court for a "stay", even if you filed the appeal. See the directions on that issue below.

7.Check all the boxes you think apply. Better to check too many than miss the important one. So when it doubt, check the box.

8. Make your arguments in a kind of letter to the court called a "brief". Attach that to this petition. Also attach any documents, photos etc. and other proof that you want to argue. Even if you already attached it to your comment on the permit application, you can attach it again for emphasis and clarity. You might have another chance to file a brief later, but best to do it now.

9. You can file the appeal without posting a bond. But see the next numbered instruction.

10. Check this box if you want to ask the court for a "stay" as described in the paragraph. You have to ask the judge for a stay. It does not happened automatically. If you do not ask for a stay, then the driller can go ahead and drill/operate the well. Follow the instructions the two paragraphs above that start with "Third" and "Fifth".

The judge does not have to grant the stay! You should be prepared to give the judge good reasons to do so. You might argue that you are only "maintaining the status quo" while the appeal happens. You might point out why you think you have a good case and will probably win. And you might argue that allowing the drilling to go ahead before your appeal is heard will cause "irreparable" damage to your property.

The judge can make conditions on granting a stay "upon such terms as it deems proper". This appeal procedure is brand new, so we do not have any experience with what a judge may require. Some drillers might argue that you should post a bond for what it will cost them to delay drilling. If they do just renew your arguments about the irreparable harm to your land, and point out that their damages are "speculative" note that their financing and costs could very possibly go down if they wait, and there is no guarantee they will hit oil and gas and make money on the well in the first place.

11. Check this box if something went wrong that was the agency's or someone[else]'s fault and you were not able to get in the comments or other things you wanted to when the permit application was pending.

12. It is important to state very clearly in the brief you file with the petition exactly what you want the court to say in its order if you win -- any specific change or condition in the permit. You can ask for alternative things, like "vacate and deny the permit, or in the alternative, make them move the well site to the place I marked on their map. . ." It is OK to ask for a little too much now (as long as you do not appear really greedy) because during the appeal you can decide to drop something you asked for here, but sometimes the judge will not let you add new stuff to ask for later.

13. Fill out the blanks at the top of this page the same way you fill out the top of the first page of the petition.

14. Once you get a date from the court for the hearing on your petition or on your request for a stay, YOU have to have this notice form filled out served on the Respondents. If you have not served the petition yet, you can ask the clerk to send it with the petition to be served.

Use the same names and addresses here as you did at the top of the petition.

15.

West Virginia Code
(updated through November 2003)

§§29A-5-4. Judicial review of contested cases.

(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.

(b) Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha County, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency. A copy of the petition shall be served upon the agency and all other parties of record by registered or certified mail. The petition shall state whether the appeal is taken on questions of law or questions of fact, or both. No appeal bond shall be required to effect any such appeal.

(c) The filing of the petition shall not stay enforcement of the agency order or decision or act as a supersedeas thereto, but the agency may stay such enforcement, and the appellant, at any time after the filing of his petition, may apply to such circuit court for a stay of or supersedeas to such final order or decision. Pending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper.

(d) Within fifteen days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened. The expense of preparing such record shall be taxed as a part of the costs of the appeal. The appellant shall provide security for costs satisfactory to the court. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved. Upon demand by any party to the appeal, the agency shall furnish, at the cost of the party requesting same, a copy of such record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and the court shall order such record filed.
(e) Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.
(f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.
(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
(1) In violation of constitutional or statutory provisions; or
(2) In excess of the statutory authority or jurisdiction of the agency; or
(3) Made upon unlawful procedures; or
(4) Affected by other error of law; or
(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one, article six of this chapter.

§§22-6-41. Appeal from order of issuance or refusal of permit for drilling location for introduction of liquids or waste or from conditions of converting procedure.

Any party to the proceedings under section sixteen of this article adversely affected by the order of issuance of a drilling permit or to the issuance of a fracturing permit or the refusal of the director to grant a drilling permit or fracturing permit is entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code shall apply to and govern such judicial review with like effect as if the provisions of section four were set forth in extenso in this section.

The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code.