West Virginia Surface Owners' Rights Organization

Surface Owners' News

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~ December 2011 Special Session ~

Legislature Passes Weak Marcellus Bill

by Julie Archer, julie@wvsoro.org and
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As you probably know, the Legislature passed the "Natural Gas Horizontal Well Control Act" (HB 401) during a December special session, just 3 days after its introduction. It was totally the Governor's bill, with little reference to our proposed Surface Owners' Bill of Rights or to the bill proposed by the Department of Environmental Protection (DEP) under the Manchin administration. The Governor's bill was not as good as and bore little semblance to the bill recommended by the Legislature's Select Committee on Marcellus Shale.

We had several problems with the bill recommended by the Select Committee, but thought we could support it with a few changes. Unfortunately, the Governor's supposed "tweaks" made scores of major changes that the industry wanted, changes weakening the bill and taking us backward - particularly in regard to surface owners' rights. At a press conference after the passage of the bill, a lawyer for the industry was thanked for helping to write it! In addition, there are things in it that hurt surface owners that we understand the industry did not even ask for!

Following the bill's passage, statements from the Governor's office and legislative leaders have proclaimed the bill a "monumental piece of legislation" and that its passage is an "exciting achievement." The sad reality is that the bill does nothing to help surface owners have their rights recognized and respected by the drillers, and only takes baby steps to address environmental and other impacts of Marcellus Shale drilling. Most published summaries of the bill are oversimplified and ignore the fact that the DEP can issue waivers for many of the requirements. Furthermore, the few minor improvements offered by the bill apply only to horizontal wells (and not all of those). The bill does not apply to vertical Marcellus wells that disturb 3

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'M word' avoided at capitol

Bills related to drilling held off until '13

by David Beard, the Dominion Post

Charleston — What's the outlook for more Marcellus shale legislation? Think 2013.

Legislators breathed a collective sigh of relief in December after passing the Governor's Natural Gas Horizontal Well Control Act. That legislation capped off several years of negotiation and sputtered efforts at various bills.

This year's session opened on a warm, fuzzy note, as the Legislature quickly passed the tax break bill aimed at luring an ethane cracker plant to the state.

Then — nothing.

A few stalwarts introduced bills — acknowledging that the legislation would likely die. Delegate Mike Manypenny, D-Taylor, introduced more than 20 [bills], dealing with everything from mineral ownership to water pollution.

Two House members of the Select Committee on Marcellus Shale — Delegates Tim Manchin, D-Marion, and Barbara Evans Fleischauer, D-Monongalia — introduced one each.

With just a week left in the session, all are dead.

The 2011 special sessions on redistricting and Marcellus shale were enormous efforts, Fleischauer said, "I think there was a certain amount of exhaustion on everybody's part. ... Sometimes there's a pause before you see what you want to do next. ... I would like to do more."

Unless something urgent happens, [Select C]ommittee co-chair Manchin said, no bills will likely be forthcoming until the 2013 session.

A couple issues may trigger interim studies, he said.

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Marcellus Bill *(continued from page 1)*

to 5 acres and use 1 million gallons of water. The bill's notice and other provisions do not apply to conventional wells, which also cause major problems for surface owners and the environment.

We are beyond disappointed that the Governor and Legislature weren't willing to do more for surface owners. Considering the impacts of Marcellus Shale and other gas well drilling, requiring the drillers to negotiate with us and give us a say in the process was the least they could do. We wish we'd been able to get a stronger bill.

We greatly appreciate your continued support and everything you have done over the past year -- from making calls and sending e-mails, to braving the crowds to attend public hearings around the state and more.

Thank you for speaking up and speaking out!

Although the bill falls short of giving surface owners the protections they need and deserve, both the House and Senate adopted amendments that improved the bill. It's unlikely these changes would have happened if SORO and our members hadn't pointed out how terrible the Governor's bill was and how much it deviated from the bill recommended by the Select Committee.

We appreciate that the Senate made a few changes, such as restoring the public notice and comment provisions that were in the Select Committee bill. The Senate also changed the provision that made the surface estate subservient (rather than equal) to the mineral estate. However, these changes reversed only some of the most obvious and embarrassing revisions made at the request of the oil and gas industry. Scores of other pro-industry provisions remain in the bill.

Perhaps the most significant changes to the Governor's bill were two amendments adopted by the House Judiciary Committee. Both were offered by Delegate Woody Ireland (R-Ritchie). The bill now says that, for horizontal wells, drill cuttings and other drilling waste can only be buried on site if a surface owner consents. (The Governor's bill gave the Department of Environmental Protection the discretion to allow on-site burial.) Another change requires the DEP to study the noise, light, dust and volatile organic chemicals generated by the drilling of horizontal wells, as they relate to the distance gas wells can be from peoples' homes. Based on these findings, the DEP must set limits on these factors and propose methods to lessen their impact.

However, we are disappointed that other changes proposed by members of the Committee failed because leadership opposed them. This was simply because the industry and therefore, the Governor and the Senate, would not agree to the amendments. For example, an amendment offered by Delegates John Frazier (D-Mercer) and Bill Hamilton (R-Upshur) would have required that the distance from homes (625 feet) be measured from the edge of the well pad rather than the center. This amendment was not adopted, due to the leadership's objections. An amendment proposed by Delegates Mike Manypenny (D-Taylor) and Linda Longstreth (D-Marion), to increase the distance gas wells must be from water wells and springs, also failed to pass.

We are currently working on updates for our website to educate surface owners and others about the relevant changes made by the Act. In the meantime, we have prepared a summary of the bill, which outlines the changes most relevant to surface owners. We also have a marked up version of the Act that shows some, but not all, of the changes from current law. Both are available at www.wvsoro.org. Call or e-mail us to have copies of these documents sent to you. If you are directly affected, please call or e-mail us with your questions.

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One [issue] deals with an amendment Delegate Woody Ireland, R-Ritchie was able to insert into the Marcellus bill. It requires the Department of Environmental Protection (DEP) to study the effects of four pollutants — noise, light, suspended dust and volatile organic chemicals — relative to well setbacks from dwellings.

Many have said that the bill's 625-foot setback is inadequate, and if the DEP's findings suggest a different setback, [the agency is] supposed to propose a rule to that effect. …

… Another study may follow upon results of an Environmental Protection Agency review of the reason fracking chemicals were found in a Wyoming community's aquifer.

"Those are the big ones, I think," Manchin said. Another possible study could involve property values on leased and producing land. *The Dominion Post* previously reported that other states are seeing challenges in this area, and some banks either refuse to offer or think twice about mortgaging land either tied up with mineral leases or in production.

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Manchin would like to see a study producing some real numbers, including effects on market value.

Although the committee bill included surface-owner protections, the Governor's bill struck most of them, and Manchin said that needs to be revisited.

"We talked those to death. I don't know [that] any more study is needed. It's just a matter of getting the political will to go forward, and I'd like to see us get that."

Manchin remains concerned about [the] rebuttable presumption — the idea that the gas producer is liable for water supply damage within a certain radius of the well. Current law is 1,500 feet. "I don't think that's far enough." He'd like to see 2,500 feet.

Manypenny remains undaunted by the inactivity this session. "I am getting some study resolutions ready regarding the Marcellus industry," he said, and will reintroduce his 20-plus bills next year.

"I am not going to sit idle," he said. "I am going to hold the industry accountable and move forward with all of them."

Knowing he's sometimes perceived as anti-industry, he adds, "… We're not asking for anything more than accountability," to protect public health and the environment. "We want this industry to succeed and benefit the state with more jobs, more taxes."

Stakeholder outlooks

The gas industry is working under the new rules, said Charlie Burd, executive director of the Independent Oil and Gas Association of West Virginia.

"What we're seeing here is a total commitment to what the Governor and House and Senate leadership were committed to early on," he said. "We need to let the dust settle and see how it's all going to pan out before we take any steps forward to see how we tweak it."

The DEP is adding new staff to handle its permitting backlog, he said. "I think that over time, we'll see that backlog diminish" in the next few months.

Meanwhile, drilling won't be as hot and heavy in the coming months as was previously expected. There is hardly any drilling of conventional vertical wells [currently].

And with gas prices dropping well below $3 per thousand cubic feet (and apparently continuing downward below $2 into the summer), producers are curbing their drilling in the dry gas areas — such as Mon County — and turning their attention to the more profitable wet gas (containing propane, ethane and butane, in addition to methane).

Julie Archer, with the West Virginia Surface Owner's Rights Organization (SORO), noted in a newsletter that one of Manypenny's and Fleischauer's tag-team efforts — HB 2851, [which would] give surface owners first right of refusal in tax lien sales of the minerals beneath them — nearly saw some life until it got buried in a subcommittee. [*For more information about the bill see page 4.*]

SORO co-founder David McMahon, is less than optimistic about the future. "We're not expecting the Legislature or the governor to do much for surface owners."

He said he would like to see HB 2851 come back and succeed.

[McMahon is] concerned that forced pooling legislation may resurface and succeed next year.

The concept has various names — forced pooling, fair pooling, unitization, pooling and unitization, integration.

It involves combining various adjacent mineral tracts into a single unit so that it can be drilled and developed.

McMahon said about a third of SORO's members are also mineral owners, and they don't like the "forced" part of the equation. They don't want to be placed in a producing unit against their will, and don't want to be penalized financially for being forced in.

The Dominion Post previously reported that some members of the industry and mineral owner community are talking about a new approach to pooling — forcing in tracts of mineral owners who are unknown or unlocatable, and tracts that have an existing lease but no unitization agreement. The lease indicates the owners want to develop their property, industry members [say], so they should be included and paid a fair price with no increased deductions.

McMahon has an additional concern about pooling: Surface owners without mineral rights could find a well on their land that's pulling up gas from a neighboring tract, with no benefit to them. McMahon contends this is illegal, but said it hasn't yet been tested in court.

Editor's Note: *The new Natural Gas Horizontal Well Control Act directs the DEP to conduct three studies regarding impacts from horizontal well drilling activities on air quality as well as the safety of pits and impoundments in order to collect information and*

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report its findings and recommendations. The DEP is collaborating with West Virginia University (WVU) to design and implement these studies. The results of the studies may determine if more stringent regulations are required for these operations.

These legislatively mandated studies are on tight timelines, with two due by the end of 2012: the dust, volatile organic compounds, light, and noise study mentioned in this article; and a pit and impoundment safety study. Another air quality report on whether additional regulations may be necessary is due by July 1, 2013.

~ 2012 Regular Session ~

Bill Would Increase Opportunities to Rejoin Split Estates

by Julie Archer, julie@wvsoro.org and Dave McMahon, wvdavid@wvdavid.net

Nearly everyone thinks that separating ownership of the surface from ownership of the minerals was a bad idea. Surface owners have the burden of the well site, access roads and pipelines being placed on their land, but receive no royalty (or lease signing bonus if the minerals are not leased) and, as a result, have no incentive to cooperate with the drilling of gas wells.

In 2009, a lobbyist for the Independent Oil and Gas Association and the West Virginia Oil and Natural Gas Association told a legislative interim committee, "[I]t would be much easier for everybody if there was a unification of the surface and the underlying oil and gas. It would be much easier for the industry. It would be much better for the [land] owners."

HB 2851 and HB 4393 would have reversed the trend of separate ownership in one small way – by giving surface owners a chance to own any interests in the minerals under their land if any of those interests are sold for unpaid taxes. HB 2851 was placed on the agenda for a meeting of the House Committee on Energy Industry and Labor (EIL) just a few days prior the deadline for bills to be out of committee in the house of origin (House or Senate). However, rather than being taken up by the full committee the bill was placed in a subcommittee and did not re-emerge. The good news is that by getting the bill on the agenda, we were able to flush out some of the opposition's arguments against it.

Although the details of the bill are somewhat complicated, the principal behind how it would work is relatively simple. Currently, if a mineral owner does not pay the property taxes on their interest in the minerals, then their interest in the minerals is sold at a tax sale on the courthouse steps. A notice of the tax sale is published in the newspaper in the name of the mineral interest owner. The person that purchases the mineral interest at the tax sale has to check courthouse records, find out who the owner or owners of the mineral interest are, and notify them of their right to "redeem" and get their property back by paying the back due taxes and costs of the sale and title work etc. If no mineral owner redeems, after a period of time, the purchaser at the tax sale gets a deed and assumes ownership the mineral interest.

HB 2851 and HB 4393 would require the person who purchased the mineral interest at the tax sale to also check the surface tax maps available in every county, and send a notice to the name and address on the tax ticket for the surface tracts(s) above the mineral interest tracts. The surface owner would have the option of stepping into the tax sale purchaser's shoes by paying the tax sale purchaser twice the money the purchaser already has put into the purchase. This way purchasers still have incentive to bid at the tax sales, and the mineral interest owner can still redeem. However, if the minerals are not redeemed, then the bill allows the surface owner to finish the process and get a deed to the mineral interest underlying his or her surface land.

We were hoping the legislature would agree to do an interim study on how surface owners could be given first option to purchase any interests in the minerals under their land sold on the courthouse steps for non-payment of property taxes. However, to date, no such study has been approved and only a few drilling related studies have been authorized by the legislative leadership. These include studies on the following topics:

- how to best use the additional severance tax collections attributed to shale gas production and whether such funds should be used to promote "a shared prosperity" through the creation of "a Future Generations' Fund for the benefit of the general public welfare;"
- the creation of a shale research center at West Virginia University to foster scientific research and encourage partnerships between and among the university, government, and industry; and
- the relationship between increases in seismic events and hydrocarbon production and exploration.

WV-SORO Focusing on Litigation and the Courts

Following the 2011 legislative session, after four years of inaction by the legislature, WV-SORO began focusing on litigation as a means to further our goals of helping surface owners have their rights recognized and respected, and giving them more say when oil and gas development occurs on their land. We were somewhat distracted from this effort during the spring, summer, and fall as the Legislature's Select Committee on Marcellus Shale attempted to come up with special session legislation. However, after Governor Tomblin shoved through an industry friendly bill in favor of the one proposed by the Select Committee during a December special session, SORO renewed its focus on litigation.

The hope is that the Courts, which generally are less subject to political influence, will be more responsive to recognizing surface owners' rights and interests.

WV-SORO is now involved, in one way another, in four lawsuits. The following case summaries outline the issues in each case and describe how a favorable ruling could set a precedent that would benefit other surface owners who find themselves in similar situations in the future.

DEP and EQT vs. Hamblet

Mr. Hamblet owns surface in Doddridge County subject to a 1905 lease that has since by acquired by EQT. He received notice of a permit application for last horizontal well on a pad of six. The notice informed Mr. Hamblet of his 15-day right to comment on the permits (now 30 days for most horizontal wells — see article on page 1 and www.wvsoro.org for details). Because Mr. Hamblet was in and out of the hospital, he was unable to comment on the permit applications for the other wells on that pad. The work related to the drilling of the Marcellus Shale horizontal wells covered under the previously issued permits severely damaged Mr. Hamblet's land. When he received notice of the application for yet another horizontal Marcellus Shale well on the pad, he was in better health. He hired attorney Cynthia Loomis of West Union to file comments on the permit application. The DEP granted the permit with no changes and no responses to Mr. Hamblet's comments.

Mr. Hamblet then filed an appeal of the permit decision in Doddridge County Circuit Court relying on the West Virginia Supreme Court case *State ex rel Lovejoy vs. Callaghan*. In that case, the Supreme Court said that the surface owner had a right to appeal the state's decision on the driller's permit to Circuit Court. However, several circuit judges across the state have refused to follow the *Lovejoy* decision and dismissed such appeals because the Supreme Court based its decision on a section of the West Virginia Code that does not apply to surface owners. As a result, DEP and EQT moved to dismiss the Hamblet's appeal.

The Doddridge County Circuit Court judge ruled he would not dismiss the appeal, but used a procedure called a "certified question" to ask the Supreme Court if its ruling in the *Lovejoy* case was still its ruling.

Ms. Loomis, assisted by new co-counsel Isak Howell, filed briefs stating that no matter what the West Virginia Code says or does not say, Mr. Hamblet has a right to appeal because the state's action in awarding the permit affects his property rights. Therefore, the due process clauses of the West Virginia and United States Constitutions require that he have a right to appeal a state agency decision.

WV-SORO asked the Supreme Court if it could intervene in the appeal. In its request for intervener status, SORO called attention to the other cases in which Circuit Court judges had disallowed appeals of other surface owners where the State had taken a position against the surface owner. SORO highlighted the fact that it represents more than 800 surface owner members and could therefore provide a broader perspective and fuller articulation of the issues than could one individual surface owner.

The Supreme Court allowed WV-SORO to intervene.

SORO's brief made the case that surface owners were not only entitled to appeal the state agency decisions to Circuit Court, but that surface owners should also have a right to a hearing in front of the State agency before a permit is granted. Additionally, SORO raised a number of questions regarding the granting of the permit to drill on Mr. Hamblet's land.

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Litigation *(continued from page 5)*

WV-SORO's brief relied on the West Virginia Supreme Court case *Snyder vs. Callaghan*. In that case, the U.S. Army Corps of Engineers needed a permit from the state before it could build the Stonewall Jackson Dam. A group of citizens who lived downstream of where the dam was going to be built ("downstream riparian owners") opposed the dam. They requested a hearing and right to appeal the permit, but the state refused. The citizens took the case to the Supreme Court and won.

The West Virginia Oil and Natural Gas Association and the Independent Oil and Gas Association asked the Court to file amicus ("friend of the court") briefs supporting the state and EQT, and were allowed to do so.

On June 6, the Supreme Court issued an order agreeing to hear oral arguments in the case. However, a date and time for arguments has not been scheduled. All of the written documents relevant to the case are available at www.wvsoro.org/current_events/hamblet/.

Cain vs. XTO

Mr. Cain owns a 105-acre surface tract in Marion County, underlain by a 138-acre mineral tract. The ownership of the surface and the ownership of the minerals were separated by a deed made in 1907. The law implies that, in such a deed, the mineral owner has the right to do whatever is reasonably necessary to the surface to get to and develop the minerals beneath the surface tract. The mineral owners, Waco Oil & Gas, signed a lease in 1999 and later an amendment to the lease. Four conventional wells using 2.5 acre sites had already been drilled on Mr. Cain's surface. The lease is now operated by XTO. XTO proposed to put three 12.5 acre well pads on Mr. Cain's 105 acres in order to drill 18 horizontal wells. Mr. Cain understood that the mineral owner/driller could use his surface to drill wells to the 138-acre mineral tract under him. But XTO was proposing to put all the surface damage on Mr. Cain's land necessary to drill 18 horizontal wells that will drain approximately 3,000 acres! According to Mr. Cain, he told the landmen for the driller that the three sites would take the best of his land and leave him with mostly steep hillsides. One of the landmen responded, "We will leave you a little."

WV-SORO referred Mr. Cain to lawyer and SORO co-founder David McMahon, who filed a law suit in Marion County Circuit Court. Mr. Cain simultaneously filed a motion to certify to the West Virginia Supreme Court the question as to whether XTO had the right to use his surface to drill wells into neighboring mineral tracts that do not underlie his surface. His motion and brief cited West Virginia Supreme Court cases between surface owners and coal operators that hold that the right to use the surface to develop neighboring mineral tracts is not implied in a severance deed. Those cases state that the use of surface for such development must be specifically stated. Mr. Cain's brief also cited numerous treatises on the oil and gas laws that support his position. One of these treatises noted that there are not many state Supreme Court cases on this issue because the answer is so obvious!

Before the motion to certify the question could be ruled on in state Circuit Court, XTO had the case moved to federal court. Mr. Cain added Isak Howell and Joe Lovett as co-counsel, and filed a motion to have the case moved back to Marion County Circuit Court. We believe the question should ultimately be decided by the West Virginia Supreme Court and not a federal appeals court. The basis for returning the case to state court is that Waco is a West Virginia corporation. Unfortunately, the federal judge decided to keep the case and dismiss Waco as a defendant. However, the is good news is that the judge ruled that Waco's lease and amendment with XTO did not give XTO the right to use Mr. Cain's surface to explore for or produce oil and gas from neighboring tracts. We think that judge's ruling that *a general lease and amendment do not give the right to use the surface above one mineral tract to drill into neighboring tracts* is good, but we still need a ruling from the West Virginia Supreme Court to protect everyone.

In June, Mr. Cain also amended his complaint before the court, adding grounds for a suit that even if XTO has the right to use his surface to drill into neighboring tracts, the size of the well site(s), the amount of time it takes to drill a horizontal well, etc. were not "in the contemplation of the parties" at the time when the surface and minerals were separated. Thus, the mineral owner/driller does not have a right to drill more than a conventional well

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Litigation *(continued from page 6)*

on the land. The argument is similar to that used in Supreme Court cases where the Court ruled that strip mining cannot be done where the surface and coal were separated before strip mining was known and recognized as common practice. SORO hopes that a favorable ruling from the courts stating that the mineral owner/driller does not have a right to use a surface tract to drill to and develop neighboring tracts, will mean that surface owners will win. If the court issues such a ruling it will not have to address the "contemplation of the parties" issue.

We expect this case to end up either in the Fourth Circuit Court of Appeals or the West Virginia Supreme Court.

EQT vs. Doddridge County Commission/Huffs et al

The Huffs own 640 acres of surface, but only 10 acres of bottomland (meadow). The meadow is in a flood plain and has flooded three times in the last eight years. The floods have come near their home and on one occasion flooded out a neighbor who is now living in a FEMA trailer. EQT wants to build a 7-acre well pad for 12 horizontal wells in their meadow. In the process, EQT wants to place 60,000 cubic yards of fill into the meadow to raise its elevation three to eight feet. Since the meadow is in a flood plain (and since Doddridge County residents want to be able to buy flood insurance) EQT has to get a flood plain permit from the Doddridge County flood plain administrator and the County Commission. (*See related article regarding flood plain permits on page 8*)

EQT filed its 100 page application and received the flood plain permit the same day. Even though the Huffs own the surface where the fill would be placed, they did not receive any notice that EQT had applied for or been granted the permit. Months later when they found out, they complained to the County Commission that EQT's plans violated the County's flood plain ordinance and would make future floods worse. The flood plain administrator revoked the permit. EQT sued the County Commission to stop the Commission from revoking their flood plain permit on the grounds that there was no notice to EQT (even though neither EQT nor the County notified the Huffs of the original application for the permit).

The Huffs hired Buckhannon lawyer Bill Thurman. WV-SORO cofounder David McMahon is consulting on the case. The Huffs have moved to intervene to make EQT start the process over again and to require the County Commission to give the Huffs notice and a hearing on the application. This will allow the Huffs to have their expert evaluate whether EQT's plans will cause future floods to be worse.

As this goes to print, it is unclear what will happen next in the case. In May, the County Commission held a public hearing on the permit, to which EQT objected as procedurally improper. The Commission has hired a lawyer to represent them, and the judge has yet to rule, or even been asked to rule, on EQT's motion for an injunction or the Huff's motion to intervene.

Moss vs. Antero

This case is very similar to Mr. Cain's case. The Mosses own an 87-acre surface tract. Antero acquired and operates the leases to the minerals underneath. After failing to negotiate a surface use agreement with the Mosses, Antero constructed a well pad on the Mosses' land and drilled four horizontal wells 5,000 feet or so in two directions. They also built a huge impoundment/waste pit that they have used to store and process water for other horizontal wells on well pads miles away! Furthermore, they trespassed with a pipeline right-of-way and in other ways on a neighboring 17-acre tract that the Mosses own in fee (surface and minerals). The Mosses sued Antero and the company's surveyor in Harrison County Circuit Court. The Mosses have filed a motion for the judge to rule that Antero did not have the right to use their surface to drill horizontally into neighboring tracts, and they have asked the judge to make it a final order, appealable to the Supreme Court if the judge rules against them.

The Mosses complaint also has grounds for a suit based on the "contemplation of the parties" argument. As with the Cain case, WV-SORO hopes that a favorable ruling on the trespass issue and affirmation by the courts that the mineral owner/driller does not have a right to use a surface tract to drill into neighboring tracts, will mean that surface owners will win without the court having to address the "contemplation of the parties" issue.

If a proposed well pad is in a FEMA 100-year "flood hazard" zone, you may be able to block it or make the driller move it

In order for people in your county to be able to get flood insurance, the county must have a flood plain ordinance that imposes limits on construction in flood plains. This is supposed to prevent filling or obstructing the flood plain that could make future floods more severe and damaging. The flood plain ordinance also includes a permitting process that is supposed to ensure that limits on construction in these areas are observed. The driller is supposed to obtain a permit from the county flood plain administrator before the driller can begin moving dirt or filling a "flood hazard" area. The decision of the flood plain administrator can be appealed to the County Commission. (Note: This flood plain ordinance/permit is a function of COUNTY government. The STATE DEP does not issue or enforce this permit, although the State may check to be sure that the driller has at least applied for the flood plain permit before the State will issue the driller a well work permit.)

SORO believes that as the surface owner, you have a constitutional right to receive notice of the application for a flood plain permit that affects your property and property rights, as well as the right to a hearing on and right to appeal the application for and issuance of that permit. However, the flood plain ordinances we have seen do not contain those provisions! Therefore, it is important for you to be proactive and find out if the proposed drilling activity is in a flood plain. If so, get down to the county courthouse, see the flood plain administrator and let him or her know of your concerns for the increased flooding/flood risk that the driller's activity might cause.

If you think that the driller's proposed well site may be in the 100-year flood hazard area, the first thing you should do is find out if you are correct in your assumption.

To confirm this, you can go down to the county courthouse, see the flood plain administrator and ask to look at the flood plain maps. If you are not sure where to find the flood plain administrator, start by asking at the County Commission's office.

An on-line tool can also be used for a good approximation of whether the proposed pad is in a flood hazard area. You need high-speed internet to access the tool but it is easy to use. Go to www.mapwv.gov/flood/. Click on "Launch Tool." (Before that, you might want to read the information provided in the tabs under the launch button.) Once you launch the tool, you can then enter your address in the box under "Search," or zoom in on the map to where you live. If the proposed location is in red, it is in the flood hazard zone subject to the flood plain ordinance and permitting. Under "Layers," "Basemap," you can add aerial photos that may show your house, or topographical maps that show lines for elevation and some [old] structures. Under "Layers," "Reference," you can add contour lines, street names and even house numbers.

If the driller's proposed site appears to be in a flood plain MAKE SURE that your county flood plain administrator knows about your concerns. If the driller has already received a permit, you should see a lawyer and let that lawyer know that they can contact WV-SORO for information that can help them fight this for you.

Office of Oil and Gas Looking to Hire More Inspectors

The DEP Office of Oil and Gas (OO&G) is seeking applicants for inspectors to serve in the northern part of the state.

Additional inspector positions were created with the passage of the Horizontal Well Control Act. The new legislation will provide the DEP with an estimated $2.4 million. This is enough to allow the agency to fill seven vacant positions and add an additional 14 (nine to 10 inspectors and four to five office staff). However, the hiring process has not gone well and the agency is having difficulty filling those positions.

Although several applicants expressed interest in the positions when they were originally posted, finding people who meet the qualifications required for the position has limited the field of candidates.

"We are in a very challenging position," said James Martin, chief of the OO&G. "We have jobs that need to be done, but we don't have enough candidates for them because of the requirements and we are limited in the salary we can offer."

The qualifications and starting salary for an inspector are both set by statute. The starting salary for an inspector is $35,000 per year. Because the amount inspectors are paid is set in statute, the agency cannot negotiate anything higher with potential candidates.

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West Virginia Host Farms Program Launches

West Virginia Host Farms Program is a volunteer-based initiative. The goal of the program is to provide opportunities for researchers to study the impacts of Marcellus shale natural gas drilling in the state. This would include academic researchers, journalists, environmental scientists, public policy and environmental law professionals, and advocacy groups, among others who desire to learn more about the impacts of Marcellus shale drilling in West Virginia. Landowners who opt to participate in the program become volunteer "host farms." These are people who are living on or in close proximity to land where Marcellus wells are already drilled, where Marcellus drilling and hydraulic fracturing is currently taking place, or where such activity is proposed or may take place in the future. Landowners living adjacent or in close proximity to compressor stations are also participants in the program.

In West Virginia, little environmental research is being conducted on the impact of Marcellus shale drilling and how it affects the people of the state, their farms, their health, safety, and their environment. Oil and gas corporations and their lobbying groups operating in West Virginia have funded research projects through grants and other allocations, which explore the economic benefits of Marcellus shale drilling for the state and its citizens. But it is difficult to locate comparable of research projects underway that give equal attention to the environmental and other impacts of Marcellus shale drilling in West Virginia.

Hence, the opportunity to balance the oil and gas corporations' perspective came about through the WV Host Farms Program.

The intent of the program is to provide a vehicle through which environmental science faculty and students, health professionals, environmental advocacy groups, environmental law and public policy professionals, journalists, and others can easily access West Virginia to study Marcellus shale drilling.

The willingness of West Virginia landowners to make available their private properties for the benefit of promoting environmental research opportunities is what the WV Host Farms Program is all about. In much the same manner that families host a foreign exchange student in their homes during the student's study abroad, the WV Host Farms Program offers to the scientific research community a large networked group of West Virginia landowners.

Current Partnerships

WV Host Farms Program is currently working with Duke University researchers in order to provide Duke with access into West Virginia for their ongoing research on water quality in areas where hydraulic fracturing occurs. In May, Tom Darrah, Ph.D. came to Doddridge County. He collected baseline well water samples from homes along Brushy Fork Road and Porto Rico Road in New Milton, where several Marcellus wells are proposed to be drilled in the near future.

Through this partnership with the WV Host Farms Program, Duke will be able to get in on the front end of Marcellus drilling activity in West Virginia to collect water quality baseline data prior to the start of hydraulic fracturing activity near these homes. Areas in several other West Virginia counties will also be included in the baseline water assessments. These efforts are part of the ongoing research being done by Dr. Avner Vengosh, a geochemist at The Nicholas School of the Environment at Duke University. Dr. Vengosh's area of expertise includes environmental and aqueous geochemistry, isotope hydrology, water quality, salinization of water resources, naturally occurring contaminants, health, water quality and hydraulic fracturing. Dr. Darrah, also a geochemist, recently joined the Duke research team, coming from University of Massachusetts where he was a Research Assistant Professor.

In addition to the baseline water quality assessments being done by Darrah and Vengosh, additional proposed activities by Duke researchers include outreach and education efforts. These initiatives will involve graduate research students from Duke's Environmental Management program working with volunteers in our communities. They will come to visit West Virginia, hosted by our volunteer landowners in the WV Host Farms Program. These graduate students will provide field training and tools to equip area watershed volunteers who are monitoring the water quality in

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Stop the Frack Attack!
Join Us in DC July 28, 2012

Call to Action

A rush to drill is sweeping the United States. Across the country, the oil and gas industry is surging into new areas as quickly and cheaply as possible.

Oil and gas companies have been using techniques such as hydraulic fracturing ("fracking") long before we fully understood the extent of the negative impact on the health of the local people, communities, water, air, climate, and other critical resources.

Landowners and communities are struggling to cope. Existing laws are outdated and loophole-riddled, and enforcement is universally inadequate and under funded. We battle a persistent myth that gas is a "clean" energy – which is not only false, but keeps us from moving towards truly clean energy and ending our reliance on fossil fuels.

As a result, industry rakes in record profits from fracking-enabled drilling, while passing on drilling's heaviest costs to landowners, local communities and future generations. This is due to elected leaders (sometimes influenced by dirty energy money) too often refusing to hold the industry accountable for the damage oil and gas companies cause, or to require the industry to prevent this damage in the first place.

The rush to drill, and the tragic consequences that followed, made fracking a household word. In the process, it has made "fracktivists" out of thousands of ordinary citizens, including some who regard "environmentalist" as a dirty word. Some of these "fracktivists" are working to prevent fracking in their communities. Those already affected are fighting to protect their air, water, and health.

We all want to *Stop the Frack Attack* – the out-of-control rush to drill that is putting oil and gas industry profits over our health, our families, our property, our communities, and our futures.

Now is the time for us all to unite and demand that decision makers inside the Beltway hear our voice and take action to change the way the oil and gas industry operates in this country.

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WV Host Farms Program *(continued from page 9)*

outreach efforts may include providing information to local farmers via "town hall" style meetings so that the farmers can effectively evaluate the potential risk factors that
drilling activities may have on their crops, livestock, and water quality/quantity in farm communities.

Information on the project was provided by the WV Host Farms Program. To learn more or sign-up to be a host farm, visit www.wvhostfarms.org or contact Diane L. Pitcock, WV Host Farms Program Administrator at (304) 873-3764 or wvhostfarms@yahoo.com.

Inspectors *(continued from page 8)*

One of the requirements for an inspector includes two years of industry experience. However, one year of experience would be acceptable if the applicant also has one of the following:

- a bachelor of science degree in science or engineering;
- an associate degree in petroleum technology; or
- actual relevant environmental experience including, but not limited to experience in the areas of wastewater and solid waste treatment and disposal or reclamation.

In addition, candidates must have good theoretical and practical knowledge of oil and gas drilling and production methods, practices and techniques, sound safety practices and applicable water and mining laws. Eligible applicants must submit to a written and oral examination by the Division of Personnel.

For more information or to apply online, visit the Division of Personnel's (DOP) website at www.state.wv.us/admin/personnel/jobs. You can click on "Review Test Preparation Materials" at the top of this page to prepare for the Oil and Gas Inspector written and oral exams. You can also check for Oil and Gas Inspector testing dates in your area by clicking on "Testing Locations and Schedules" on the right side of the page. If you have questions on how to apply for these positions, please contact DOP at (304) 558-3950 ext. 57207.

Compiled with information available at www.dep.wv.gov and media reports.

Frack Attack (continued from page 10)

On July 28th, 2012, community members and organizations from across the country will gather in Washington, D.C. for a rally at the Capitol to demand no more drilling that harms public health, water, and air. Instead of pushing for the increased use of oil and gas, elected officials and public agencies must put communities and the environment first, beginning by the removal of special exemptions and subsidies for the oil and gas industry.

Join us on the U.S. Capitol Grounds on July 28 to demand greater government responsibility and corporate accountability for the harm that existing oil and gas development causes.

Schedule

Stop *the Frack Attack* started as a one day march and rally, but the organizers decided they want to do a little bit more (see details below). As these events get closer, more details will be available.

Wednesday, July 25
6:30-8:00PM ~ Lobbying and Marshall Training Sessions (Location TBA)

The lobby training is not required for people who are lobbying, but it is highly recommend that you attend. The training will discuss how to lobby, what we are asking of members of Congress, what to expect from lobbying meetings and how to get around the Hill.

Thursday, July 26
9:00AM - 5:00PM ~ Lobbying at the US Capitol

Friday, July 27 ~ *Stop the Frack Attack* Gathering
St. Stephens Church, 1525 Newton Street NW
Washington, DC 20006

10:00AM- Noon: Training Sessions
1:00-5:00PM: Strategy Session
6:30-8:30PM: Town hall

Saturday, July 28
Stop the Frack Attack March & Rally

2:00PM ~ Rally on the West Lawn of the Capitol
3:30PM ~ March (and special delivery to the American Petroleum Institute and American Natural Gas Association)

Buses Tickets Available to Attend Rally & March

The WV Chapter of the Sierra Club will be sending two buses to this huge rally. Both leave and return on July 28. The buses are open to everyone.

Morgantown: Board the bus at 9:00 AM at the Wal-Mart parking lot at Exit 1 on Interstate 68. Short stop at Keyser's Ridge. Return after the rally, short stop (probably) at Hagerstown. Tickets are $20 roundtrip. *Questions?* Contact Jim Sconyers at jimscon@gmail.com or (304) 698-9628

Lewisburg/Beckley: Final details TBA. Tickets are $25 roundtrip. *Questions?* Contact Beth Little at blittle@citynet.net or (304) 653-4277.

Tickets are available online at http://westvirginia.sierraclub.org/.

More information about the rally is at www.stopthefrackattack.org.

Update on EPA's Study of Hydraulic Fracturing's Potential Impact on Drinking Water

In November 2011, the U.S. Environmental Protection Agency (EPA) announced its final research plan for studying the potential impacts of hydraulic fracturing on drinking water resources. At the request of Congress, EPA is working to better understand the potential impacts of hydraulic fracturing on drinking water resources. This request came in response to escalating public concern and anticipated growth in natural gas exploration and production.

In March 2010, EPA announced its intention to conduct the study in response to the request from Congress. Since then, the agency has held a series of public meetings across the nation to receive input from states, industry, environmental and public health groups, and individual citizens. In addition, the study plan was reviewed by the Science Advisory Board (SAB), an independent panel of scientists, to ensure the agency conducted the research using a scientifically sound approach.

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EPA Study *(continued from page 11)*

The initial research results and study findings will be released to the public in 2012. The final report will be delivered in 2014. To ensure that the study is complete and results are available to the public in a timely manner, EPA initiated some activities that were supported by the SAB and that provide a foundation for the full study.

The final study plan looks at the full cycle of water in hydraulic fracturing: from the acquisition of the water, through the adding of chemicals and actual fracturing, to the post-fracturing stage, including the management of flowback and produced or used water, as well as its ultimate treatment and disposal. In June 2011, EPA announced its selection of locations for five retrospective and two prospective case studies.

The retrospective case studies will examine areas where hydraulic fracturing has occurred for any impact on drinking water resources. The sites chosen for these case studies are located in different areas around the country that have seen a significant increase in oil and gas development from shale and other unconventional sources. Sites being studied in the Marcellus Shale region are located in Bradford, Susquehanna and Washington County, PA.

At the two sites selected as prospective case studies, EPA will monitor key aspects of the hydraulic fracturing process throughout the lifecycle of a well. One of these sites in located in Washington County, PA.

The information gathered from these case studies will be part of an approach which includes literature review, collection of data and information from states, industry and communities, laboratory work and computer modeling.

The agency previously (September 2010) issued voluntary information requests to nine natural gas service companies regarding the process of hydraulic fracturing. The information requested included the chemical composition of fluids used in the hydraulic fracturing process, data on the impacts of the chemicals on human health and the environment, standard operating procedures at hydraulic fracturing sites and the locations of sites where fracturing has been conducted.

In August 2011, EPA sent another letter to the companies requesting detailed information from 350 randomly chosen well files that contain data on well construction, design, and operation practices. The agency is reviewing the files to improve its understanding of well performance during hydraulic fracturing, with a focus on the areas of well design, construction and completion.

For more information on the study visit www.epa.gov/hydraulicfracturing.

EPA Issues New Rules for Air Pollution from Natural Gas Operations

The following was compiled from the posts at the Natural Resources Defense Council (NRDC) staff blog, *Switchboard*, written by Meleah Geertsma and Amy Mall.

On April 17, 2012, the U.S. Environmental Protection Agency (EPA) issued groundbreaking new limits on the air pollution caused by natural gas production and processing. By issuing these standards, the agency took an important step to clean-up natural gas production – in particular hydraulic fracturing, or "fracking" — to protect public health. With these measures, the agency is greatly improving control of the trio of dangerous air pollutants — cancer-causing benzene, smog-forming volatile organic compounds (VOCs), and methane, a potent greenhouse gas — coming from this booming industry.

The standards fall under two Clean Air Act programs: *New Source Performance Standards (NSPS)* and *National Emission Standards for Hazardous Pollutants (NESHAPs)*. EPA's *NSPS* pollution standards are based on proven technologies that save industry money, as described in a recent NRDC report. The most important measure will curb dangerous pollution from newly fracked or refracked wells, using truck-mounted tanks to capture millions of tons of valuable gases that can be sold at a profit instead of leaked into the air. Use of this "green completion" equipment to capture natural gas that currently escapes into the air will result in most of the pollution reductions targeted by the standards.

Other required technologies will prevent leakage of hundreds of thousands of tons of pollution from other sources on the well pad, and from associated storage tanks and processing plants. As the NRDC report explains, these relatively inexpensive

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EPA Air Rules *(continued from page 12)*

technologies pay for themselves because they capture or prevent leakage of gases that operators can resell. In fact, they pay for themselves in as little as three months.

The final standards require green completions on all newly fracked and refracked wells, with the exceptions of so-called "wildcat" or "delineation" wells that are not near pipeline infrastructure for routing captured gases, and low pressure wells. EPA fended off a concerted attack by American Petroleum Institute (API) and others who attempted to open a giant loophole for wells, based on their supposedly low concentrations of VOCs. However, despite industry's attempts to paint them as trivial, these wells are huge sources of air pollution. The exemption would have swallowed the rule, leaving the pollution from most wells and other emission points uncontrolled.

Unfortunately, the standards give the industry until January 2015 to fully comply with the green completion requirements. During the next two-and-a-half years, new and refracked wells will have to flare off the escaping pollution, but flaring will still result in huge amounts of pollution and unnecessary waste of valuable natural gas. The delay responds to API claims that it doesn't currently have enough truck-mounted equipment needed to service every fracked well and building the equipment will take many years. However, this is not rocket science. As NRDC has shown, the natural gas industry has plenty of capacity and capability to weld the needed tanks and pipes and mount them on trucks and trailers.

Additionally, the standards offer only limited protections for people currently living with natural gas development next door. *Why?* Most emissions in the oil and gas production sector are from existing sources. However, the rules primarily cover emissions from new sources and there are no requirements to retrofit existing equipment. Only 5 - 8 percent of emissions come from existing sources. The remaining emissions will be from future activities.

Moreover, there are a number of other shortcomings:

- There are no restrictions on emissions of methane, a very potent greenhouse gas.

- There is a loophole that allows existing facilities to release up to one ton per year of benzene (a known carcinogen) from large glycol dehydrators--despite analysis showing that this could result in dangerous cancer risk for neighboring communities.

- The EPA relied on a heavily flawed analysis of health risks, which omitted dangerous pollutants, ignored major sources of pollution, and failed to set standards to protect the most vulnerable populations, like children.

- The rules focus on natural gas production and basically give oil production facilities a free pass. Yet, now that natural gas prices are low, many oil and gas producers are shifting their attention and ramping up their production of oil instead, so oil production will be expanding more and more near where people live and children play or go to school.

- The entire downstream portion of the oil and gas sector is exempted -- everything after the point where gas enters the transmission pipeline. Downstream sources of air pollution were included in EPA's original draft, but the final rules do not include them.

More detail on these new rules is available at http://switchboard.nrdc.org/ (search on "fracking air pollution" in the upper right-hand corner of the page) and www.epa.gov/airquality/oilandgas/actions.html.

The oil and gas sector, in particular fracking, produces a host of air and water contaminants along with valuable fuel. Millions of Americans are exposed, and national standards like these set an important baseline to protect their health and their surroundings. The air standards are an important start on delivering the pollution safeguards that communities deserve, but there is more to be done.

WV Surface Owners' Rights Organization
1500 Dixie Street
Charleston, WV 25311
www.wvsoro.org

A Marcellus well pad and impoundments in Marion County near the home of WV-SORO members Casey and Stacie Griffith. The edge of the well pad is less than 200 feet from the Griffith's home. The Horizontal Well Control Act passed in December includes new well location restrictions, but still allows these huge operations too close (625 feet measured from the center of the pad) to people's homes. Casey testified before the Select Committee on Marcellus Shale in October to urge them to adopt stricter limits. Stricter limits were also supported by SORO and allied groups. Unfortunately, our recommendations were not adopted. Learn more about the Act inside and at www.wvsoro.org. (Photo courtesy of Stacie Griffith)

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