

DAVID McMAHON • ATTORNEY AT LAW

1624 Kenwood Road, Charleston, West Virginia 25314

Phone 304-415-4288 • Fax 810-958-6143

e-mail wvdavid@wvdavid.net

November 26, 2012

[New P.S. added 5/8/2013]

To Whom it May Concern:

A member of the Sierra Club asked me for a legal opinion on the right of interested citizens to go on to the surface of land they do not own that is being used for oil or gas well drilling and related activities.

Attached is a copy of the three sections of the West Virginia Code that are relevant to the trespass question.

First in importance are West Virginia Code Section 61-3B-3(a) and West Virginia Code Section 61-3B-1(4).

West Virginia Code Section 61-3B-3(a) says that going on to land is the crime of trespass only if the land is posted, fenced or cultivated, or if a citizen is asked to leave and refuses to do so. (I think for that last phrase to apply, a citizen would have to be asked to leave by a person who owns the surface of the land – not the driller. It is only a surface owner who could do so.)

Confusingly, the specific requirements for “posting” lands in West Virginia Code §61-3B-1(4) state that land does not have to be posted if it is “not exceeding five acres in area on which there is a dwelling house or property that by its nature and use is obviously private . . .” So I would avoid going onto large yards etc.

So citizens can go on to land where drilling is being done unless the land has posted with proper “no trespassing” signs that meet the requirements of the “posting” section; unless they are going inside a fence; unless they are traveling across a cultivated field (not just a meadow); unless they are on a tract that is five acres or less that has a dwelling or other obvious indicia of privacy; or unless they are told by the surface owner to leave.

That is why I call West Virginia a “hunter state”. It is legal to hunt on someone's land unless it is posted etc. without getting permission first. It is bad manners to do so, and hunters should first get permission as a courtesy and for safety reasons, but it is not unlawful. In the Mid-West, where states have the huge wheat fields, the farmers predominate. There it is illegal to go on someone's land without asking first whether or not the land is posted, etc. Here, not so.

Second in importance is 61-3B-2 regarding structures or conveyances. You need permission first. “Farmer” rules apply to going on or under etc. “structures and conveyances” (defined in West Virginia Code §61-3B-1(1)). Citizens should not be getting on or under

drilling rigs, trucks etc. (I am not sure why you would want to except in extreme cases.)

I have not had time to research is Occupational Health and Safety Administration (OSHA) laws and regulations. I did call the local OSHA office. A gentleman there said OSHA regulation is all about worker exposure and safety and does not apply to visitors. As an example, the signs at car repair shops that do not allow visitors to go back to their cars in the shop are not an OSHA requirement. (It is probably the insurance company that wants that.) OSHA's own inspectors, just as a policy, comply with the company's safety requirements for hard hats etc. I would not recommend going on to the pad itself as a general rule because you could then be blamed for problems that occur – and there are dangers. Of course if you wanted to sample a fluid that has leaked onto the surface of an unlined pad and may be percolating down into the ground, it might be worth the risk to get on an off the land that constitutes the pad quickly to gather a sample. (Again this is the land, not the "structure or conveyance" for which you would need permission as explained above.) Get someone to video what you do and don't do, which would also be a good idea if you ever have to prove the validity of the sample.

So my advice to citizens who want to go on land upon which oil and gas well drilling and related activities are occurring is as follows. If you know who the surface owner is and that they are sympathetic, get their permission first. Best in writing, but not necessary. I suggest this only so they will not be startled or offended, and therefore less likely to allow you to remain, in case the driller reports you to the surface owner to try to get you off. If you cannot tell who owns the surface or you cannot find them, or even if you expect them to be unsympathetic anyway, then go ahead and go on the land unless you are crossing a fence etc. as explained above, and if asked by a surface owner to leave, do so.

However, if you are not on the well pad itself, and the driller tells you to leave, tell the driller "no", that you believe you have a right to be there. If the driller threatens to call the sheriff (or other law enforcement) offer them the use of your cell phone! If law enforcement arrives, just state your case. If law enforcement asks you to leave, follow law enforcement's advice.

Also, if law enforcement arrives, feel free to have your citizens call me (assuming you have service). I would be happy to state this position to any law enforcement officer that shows up. My office phone number is below. If a problem occurs when it is not office hours, my cell phone is 304-993-0468. If a particular law enforcement agency or officer is a problem, please let me know and I will be happy to talk to an appropriate person in the agency.

Sincerely,

David McMahon [Intended as signature]

David McMahon, J.D.

PS: The site safety plan of some drillers requires people coming on to the site to sign in and out. The justification for this is if there is an explosion or fire, first responders need to know who is on the site and who is not on the site in order to determine whether to attempt a rescue. If you are confronted with a request that you sign in and sign out for this limited purpose, you should do so.

WEST'S ANNOTATED CODE OF WEST VIRGINIA
CHAPTER 61. CRIMES AND THEIR PUNISHMENT
ARTICLE 3B. TRESPASS

Current with laws of the 2012 Regular Session effective through May 31, 2012

§ 61-3B-1. Definitions

As used in this article:

(1) "Structure" means any building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof.

(2) "Conveyance" means any motor vehicle, vessel, railroad car, railroad engine, trailer, aircraft or sleeping car, and "to enter a conveyance" includes taking apart any portion of the conveyance.

(3) An act is committed "in the course of committing" if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

(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.

(5) "Cultivated land" is that land which has been cleared of its natural vegetation and is presently planted with a crop, orchard, grove, pasture or trees or is fallow land as part of a crop rotation.

(6) "Fenced land" is that land which has been enclosed by a fence of substantial construction, whether with rails, logs, post and railing, iron, steel, barbed wire, other wire or other material, which stands at least three feet in height. For the purpose of this article, it shall not be necessary to fence any boundary or part of a boundary of any land which is formed by water and is posted with signs pursuant to the provisions of this article.

(7) Where lands are posted, cultivated or fenced as described herein, then such lands, for the purpose of this article, shall be considered as enclosed and posted.

(8) "Trespass" under this article is the willful unauthorized entry upon, in or under the property of another, but shall not include the following:

(a) Entry by the State, its political subdivisions or by the officers, agencies or instrumentalities thereof as authorized and provided by law.

(b) The exercise of rights in, under or upon property by virtue of rights-of-way or easements by a public utility or other person owning such right-of-way or easement whether by written or prescriptive right.

(c) Permissive entry, whether written or oral, and entry from a public road by the established private ways to reach a residence for the purpose of seeking permission shall not be trespass unless signs are posted prohibiting such entry.

(d) Entry performed in the exercise of a property right under ownership of an interest in, under or upon such property.

(e) Entry where no physical damage is done to property in the performance of surveying to ascertain property boundaries, and in the performance of necessary work of construction, maintenance and repair of a common property line fence, or buildings or appurtenances which are immediately adjacent to the property line and maintenance of which necessitates entry upon the adjoining owner's property.

§ 61-3B-2. Trespass in structure or conveyance

Any person who knowingly enters in, upon or under a structure or conveyance without being authorized, licensed or invited, or having been authorized, licensed or invited is requested to depart by the owner, tenant or the agent of such owner or tenant, and refuses to do so, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one hundred dollars.

If the offender is armed with a firearm or other dangerous weapon while in the structure or conveyance, with the unlawful and felonious intent to do bodily injury to a human being in said structure or conveyance at the time the offender knowingly trespasses, such offender shall, notwithstanding the provisions of section one, article seven, chapter sixty-one of this Code, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be confined in the county jail for a period not to exceed twelve months, or both such fine and imprisonment.

§ 61-3B-3. Trespass on property other than structure or conveyance

(a) It is an unlawful trespass for any person to knowingly, and without being authorized, licensed or invited, to enter or remain on any property, other than a structure or conveyance, as to which notice against entering or remaining is either given by actual communication to such person or by posting, fencing or cultivation.

(b) First offense conviction.--Upon a first trespassing conviction pursuant to subsection (a):

The person is guilty of a misdemeanor and shall be fined not less than \$100 nor more than \$500.

(c) Second offense conviction.--Upon a second trespassing conviction pursuant to subsection (a):

The person is guilty of a misdemeanor and shall be fined not less than \$500 nor more than \$1,000.

(d) Third offense conviction.--Upon a third and subsequent trespassing conviction pursuant to subsection (a):

The person is guilty of a misdemeanor and shall be fined not less than \$1,000 nor more than \$1,500.

(e) If the offender defies an order to leave, personally communicated to him by the owner, tenant or agent of such owner or tenant, or if the offender opens any door, fence or gate, and thereby exposes animals, crops or other property to waste, destruction or freedom, or causes any damage to property by such trespassing on property other than a structure or conveyance, he shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$100 nor more than \$500 or imprisoned in the county jail for a period not to exceed six months, or both such fine and imprisonment.

(c) If the offender is armed with a firearm or other dangerous weapon with the unlawful and felonious intent to do bodily injury to a human being during his commission of the offense of trespass on property other than a structure or conveyance, such offender shall, notwithstanding section one, article seven, chapter sixty-one of this code, be guilty of a misdemeanor and, upon conviction thereof, shall be confined in the county jail for a term not to exceed six months, or fined not more than \$100, or both such fine and imprisonment.

(d) Notwithstanding and in addition to any other penalties provided by law, any person who performs or causes damage to property in the course of a willful trespass shall be liable to the property owner in the amount of twice the amount of such damage. However, this article shall not apply in a labor dispute.