Summary of the Provisions of Horizontal Well Control Act

The passage of the Horizontal Well Control Act (HB 401) has made some mostly modest changes in the rights of West Virginia surface owners. The following is a brief summary of the most relevant and important changes.

Unfortunately, none of the bill's provisions apply to conventional wells or even to vertical Marcellus Shale wells that disturb 3 to 5 acres and use 1 million gallons of water. These new regulations apply only to well sites that will disturb 3 acres or more (excluding pipelines and access roads), or that will use more than 210,000 gallons of water, where the well (or wells) will be drilled using a horizontal drilling method.

A Few Good Points:
Drill cuttings and other pit waste can only be buried on-site if the surface owner consents. While the driller may be willing to pay the surface owner for the privilege of burying the waste on the surface owners land, this should not be done. Surface owners should insist that this waste "be disposed of in an approved solid waste facility," in accordance with the law.

A small number of additional inspectors and other office staff will be funded by the increased permit fees approved in the new law. Although the bill eliminated the industry-dominated Oil and Gas Inspectors Examining Board, applicants are still required to have "at least two years of actual relevant experience in the oil and gas industry" to be eligible to serve as an inspector. These provisions make it difficult to find qualified applicants for the job.

There are various studies mandated by the Act that may lead to regulations that are more stringent. One mandate 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. DEP must also study air pollution from well sites, including the possible health impacts, the need for air quality inspections during drilling, the need for inspections of drilling and production related facilities (such as compressors, pits and impoundments), and any other potential air quality impacts that could harm human health or the environment. A third study, will look at the safety of pits and impoundments and evaluate whether testing and special regulations are needed for radioactivity or other toxins held in the pits and impoundments.

The bill includes provisions that give the DEP the authority to regulate and supervise the siting and construction of high-volume (more than 210,000 gallons) pits and impoundments not associated with or authorized by an individual well work or drilling permit. Although, it is not specified in statute, the driller must have a signed agreement with the surface owner for these "centralized" (off-site) pits and impoundments. (See www.dep.wv.gov/oil-and-gas/Impoundments/ for more information.)

Additionally, the bill requires that a professional engineer certify the soil erosion and sediment control plan and the site construction plan for well sites that disturb three acres or more. "Plans and specifications for the placement, construction, erosion and sediment control, enlargement,

alteration, repair or removal and reclamation" of centralized pits and impoundments must also be approved by an engineer.

Finally, drillers are now required to pay the surface owner $2,500 "to compensate for payment of property taxes for surface and surrounding lands that are encumbered or disturbed by construction or operation" of a horizontal well pad. This is in addition to compensation owed for damages and is a "one-time payment" … "regardless of how many wells are drilled on a single pad or how many permits are issued for the pad." It is not much, but the law says the driller is supposed to pay you, so you should make sure you get what you are entitled to.

Notices of Planned Activity:

Beyond the provisions described above, most of the improvements offered by the bill are in the area of notice before surveyors and bulldozers show up on your land. However, the bill provides precious little help in negotiating a fair use or value for your land when they drill. There are no incentives for the driller to work with the surface owner, either in recognizing the surface owner's rights to have his surface use accommodated **or** in working with the surface owner on planning where and how well sites and access roads will be built, maintained and reclaimed. Our request to provide mandatory mediation, increased bonding in the absence of a surface use agreement, and attorney fees for making unfair or unreasonably low offers for surface damages were all rejected.

The following limited notices of planned activity, etc. were included:

The driller must notify the surface owner at least 3 days before they come on to the land to conduct seismic (geophysical) testing.

The driller must notify the surface owner 7 to 45 days before they come on to the land to do any surveying for well sites, access roads or centralized pits or impoundments, etc. That notice must inform the surface owner that copies of the *Erosion and Sediment Control Manual* and statutes and rules related to oil and gas exploration and production can be obtained from the DEP.

The driller must send a copy of their application for a well work permit or for a certificate of approval for the construction of a centralized pit or impoundment to the surface owner on or before the day the application is filed with the DEP. For permit applications, the notice must indicate the time limit for filing written comments (30-days) and include details on how to file comments and where to get more information. The permit or certificate can be issued 30 days after the notice is served. (For conventional wells, the notice and comment period is still 15 days.) (Note: If there are more than three owners of a surface tract, then notices only have to be sent to the owner who receives the tax ticket for the property. However, there is no requirement in the statute to inform this individual that he/she is the only one receiving the notice and that he/she should inform the other owners.)

The driller must send a proposed surface use and compensation agreement containing an offer of compensation to the surface owner on or before the day the permit application is filed. However, the notice only has to be sent to the person/address listed on the tax ticket(s), and that can run some time behind. The notice has to include a copy of the code section that requires the notice,

but not a copy of the compensation act itself. Also the law only requires that the offer be for damages covered under the new Horizontal Well Production Damage Compensation Act. The damages covered under the Act are very limited and there are no other specifics in the bill about what should or should not be included in the agreement. So don't sign an agreement for a horizontal well on your land unless you are paid extremely well for it and you get other concessions and things you want in the agreement. Even then, see a lawyer before you sign to make sure you understand what you are signing and what you might be giving up by signing.

The driller must publish notice of their application for a well work permit in the paper two times, starting 10 days before filing the permit. The notice must indicate that the public has the right to submit written comments on the permit application and refer the public to the Office of Oil and Gas "Horizontal Drilling Permit Page" (www.dep.wv.gov/oil-and-gas/Horizontal-Permits/Pages/default.aspx). Unfortunately, there is no requirement that the public notice include a map showing the location of the proposed well. However, the notices do include coordinates that can be entered into the "Coordinate Conversion and Mapping" tool on the website mentioned above.

The driller must notify the surface owner 2 to 7 days before actually coming on to the land to begin well work or site preparation that involves any surface disturbance.

Bad Points:
The bill changed the definition of "deep" and "shallow" wells so that it is no longer possible to claim that a vertical Marcellus well is a statutory deep well, subject to the surface owner's consent requirement.

The bill also appears to give DEP the authority to override zoning regulations of cities and counties. However, this is a general provision of law, and it may be that the more specific provisions of law regarding zoning powers, as well as any location restrictions mandated by federal law, would not be overridden. The provisions states that "***the secretary has sole and exclusive authority to regulate*** the permitting, ***location***, spacing, drilling, fracturing, stimulation, well completion activities, operation, any and all other drilling and production processes, plugging and reclamation of oil and gas wells and production operations within the state."

Although the bill provides for public notice, there is no requirement for direct notice to neighboring surface owners whose property is next to the surface tract where the driller is proposing to drill, and who will likely have to contend with the noise, increased truck traffic, etc. associated with the drilling activity.

New horizontal gas wells only have to be 250 feet from a water well or developed spring, and the distance requirement applies only to water wells and springs used for human or domestic animal consumption. For that reason, when drilling water wells to protect a future home site or pasture, etc., it is probably best to get some government approval for or recognition of water wells or other development plans for your property. Additionally, the well location restriction only applies to water wells or springs in existence prior to receiving notice that a surveyor is coming, so surface owners will have to drill wells in advance rather than waiting until drilling is imminent.

The distance wells and well pads must be from homes is 625 feet, as measured from the center of the pad. This is only a modest increase from the requirement (which still applies to conventional wells) that gas wells be 200 feet from a home. This is especially true when one considers the size of the pads and the fact that there are multiple wells on a pad, with no requirement that they be in the center of the pad. Furthermore, there are no restrictions on where storage tanks and other sources of air pollution can be placed on the pad.

An important issue that surface owners need to be aware of regarding these well location restrictions is that they can be waived with your consent, but they can also be waived by the DEP at the drillers request. So here is our advice: If the driller asks for your consent, don't give it to him! The wells can be too close to homes and water supplies without a waiver or variance. If the driller is seeking a variance from the DEP, insist that the DEP put additional terms and conditions on the permit, such as insurance or bonding, to ensure against loss or damage.

Before a driller can obtain a well work permit, the driller is required to enter into an agreement with the Division of Highways (DOH) regarding the use of state road(s) associated with the purposed well work. However, if the driller violates the agreement with DOH, his/her well work permit is not revoked.

While the bill requires drillers to post higher bond amounts than for conventional wells, "blanket bonds" are still allowed. As a result, the cost of plugging these wells will quickly exceed the bond coverage.

The distance from gas wells that requires that drillers conduct pre-drilling testing of water wells and developed springs, and at which they are presumed liable for "contamination or deprivation" was extended to 1,500 feet. However, the presumption of liability is limited to six months after completion of the well. Although there was no expansion of pre-drilling testing parameters in the Act, the DEP proposed new testing parameters that went into effect July 1, 2013. Now, for horizontal wells, drillers must offer to test any water wells or developed springs with 1,500 feet of a proposed horizontal well and test for the following parameters:

- Petroleum Hydrocarbons (GRO, DRO, ORO)
- BTEX
- Chloride
- Sodium
- Total Dissolved Solids (TDS)
- Aluminum
- Arsenic
- Barium
- Iron
- Manganese
- pH
- Calcium
- Sulfate
- Detergents (MBAS)
- Dissolved Methane
- Dissolved Ethane
- Dissolved Butane
- Dissolved Propane
- Bacteria (total coliform), plus
- Any others parameters determined by the operator or the Chief.

The damage compensation provisions were weakened by eliminating findings that surface owners have relied upon in lawsuits. Additionally, problems with the current law regarding statute of limitation traps, and not being able to receive market value were not fixed.

Conclusion:

With the passage of the Horizontal Well Control and Production Damage Compensation Acts, it is important for surface owners to be aware the they may be asked to sign papers or documents that will result in giving up rights that you have or consenting to allow things to take place on your land that you could prevent and might come to regret. These include, but are not limited to:

- Giving up the right to notice of entry onto your land.
- Giving up the right to comment on the permit application.
- Consenting to or giving up the right to refuse the burial of pit waste on your land.
- Agreeing to allow the center of the well pad to be closer than 625 feet from your house.
- Agreeing to allow a gas well to be drilled closer than 250 feet from your water well or developed spring.
- Giving up the right to additional damages you were not expecting from fires, landslides, etc. if the agreement they want you to sign does not include them.

Thus, it is important for surface owner to remember the following:

- Don't be rushed into signing anything.
- Don't sign anything until you understand what is says and its significance.
- Once you understand what it says, don't sign anything unless you agree with it and unless you have gotten, in exchange, concessions and other things that you want from the company.
- Even then, we strongly recommend that you see a lawyer before you sign anything.

Overall, the few provisions surface owners wanted that were included in the bill were weak, and many other provisions were left out entirely. As a result, there is much work left to be done, until surface owners have the rights and protections they need and deserve.