



## West Virginia Surface Owners' Rights Organization

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FOR IMMEDIATE RELEASE

September 24, 2012

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### **Court to Weigh Appeal, Hearing Rights of Landowners Faced with Drilling**

(Charleston, WV) On September 25<sup>th</sup>, the West Virginia Supreme Court will hear arguments in a case that will decide whether a surface landowner has a right to an administrative hearing on, and an appeal of, the Department of Environmental Protection's (DEP) decision to issue a permit to drill a gas well on the surface owner's land.

Under current law, the surface owner receives a copy of the driller's permit application fifteen or thirty days before the permit can be issued. This is the first time that the surface owner has to be made aware that a driller has plans for drilling a conventional gas well on the surface owner's land, and the first time that the surface owner has to be given any details of a driller's plans for drilling horizontal wells. In either case, the law only provides the surface owner with the option to send written comments to the DEP on the permit.

"The DEP approves how the well site and access road will be constructed, what kind of erosion protections will be installed, how the bore hole will be cased and cemented to prevent gas and pollution from getting into groundwater, how the drilling pit will be built and lined, whether and where the wastewater in the drilling pit will be sprayed on the land or hauled away for disposal," said Julie Archer of the WV Surface Owners' Rights Organization. "Considering the significant impacts to the land, we don't think sending in a letter provides enough input from those who will have to contend with these well sites on their land for generations."

In the case before the court, Matthew Hamblet owns surface land in Doddridge County that is subject to a 1905 lease that has since by acquired by EQT. He received notice of a permit application for the last horizontal well on a pad of six on his land. The notice informed Mr. Hamblet of his 15-day right to comment on the permits (now 30 days for most horizontal wells). Because Mr. Hamblet was in and out of the hospital, he was unable to comment on the permit applications for the earlier wells on that pad.

When Mr. Hamblet received notice of the application for this new horizontal Marcellus Shale well on the pad, he was in better health. With the help of his attorney, Cynthia Loomis of West Union, Mr. Hamblet filed written comments on the permit application. Some of the comments were that road slopes in excess of 20% allowed by the previous permit caused so many erosion problems that a 4 by 4 vehicle could not get up the road, and that the re-vegetation on the previous wells had failed also causing erosion. The new permit issued by DEP again waived the requirement that roads be no steeper than a 20% slope. DEP made no changes to the driller's application, and did not respond 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. DEP and EQT moved to dismiss the Hamblet's appeal, saying that the Supreme Court's decision was wrong because it relied on a statute that only gave coal operators the right to appeal drilling permits. The Circuit Court Judge said he was going to follow the holding of the Supreme Court's case, but offered to certify the question to the Supreme Court.

"That's when we got involved," said Archer. "After passage of the Governor's Marcellus Shale legislation in the special session in December, it became clear that surface owners were not going to get legislation giving us meaningful input into the driller's plans or requiring mediation before the driller prepares

their permit application to submit to the State,” said Archer. “So we are asking the courts to recognize surface owners constitutional right to a hearing a hearing after the driller files the permit application, and to appeal if the DEP errs in issuing the permit.” WV-SORO asked for and was granted the right intervene in the appeal to support Hamblet’s argument that surface owners have a right to appeal state agency decisions and to argue that surface owners also need a hearing before the permit is issued.

WV-SORO’s brief relies heavily on an earlier West Virginia Supreme Court case, *Snyder vs. Callaghan*. In that case, downstream riparian rights owners (people who owned land and lived downstream from the proposed location of the Stonewall Jackson Dam) were seeking a right to a hearing and appeal of the State’s decision that it was OK for the Federal Government to build the dam. The West Virginia Supreme Court said that the State’s decision was a “state action” and that the citizens were affected directly enough that they had a due process right to a pre-decision hearing and an appeal.

Friend of the Court briefs have been filed by the West Virginia Oil and Natural Gas Association and the Independent Oil and Gas Association. Their briefs argue that hearings and appeals will be too costly and take too long. “This is an insult to those who own and live on the land,” Archer said. “These wells will be there for decades, if not generations, and the drillers are complaining about a couple of months’ delay necessary for surface owners to make sure that the construction of these well sites and the drilling these wells on their slice of ‘Almost Heaven’ is done right. The Marcellus Shale presents an opportunity for economic development in West Virginia, but the ultimate goal of mining and drilling should be giving all citizens quality of life on the surface, not taking it away from some so that others can profit. The State’s costs can easily be covered by the tripling of the oil and gas severance tax revenue to the State in the last ten years or so.”

“This case is about how wells are drilled, not whether the driller has the right to drill the well in the first place,” said Archer. “We are watching some other law suits about whether these huge new wells sites were contemplated by the parties in the old severance deeds and leases, and whether they can use one surface owner’s land for the disturbance required to drill horizontal wells into neighboring mineral tracts. But the DEP approves the drilling of all these wells, and if we have to have them, we should have more input than sending a letter to an address in Charleston.”

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Courtesy photo to accompany article:



Well site for multiple horizontal wells to the Marcellus Shale. Stacie and Casey Griffith built the home in the pictures themselves on Plum Run in Marion County in 2005-2006. The drilling started shortly thereafter. The picture including the Marcellus Shale horizontal well site was taken in May of 2012 just before the driller was to begin hydraulic fracturing two of the five horizontal wells drilled on the site. The family moved to a hotel for a week during the fracking. Copyright August 2012, WV-SORO.