West Virginia Surface Owners' Rights Organization

Surface Owners' News

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WV-SORO's 2017 Legislative Priorities

Implementation of 2013 Study Recommendations Still Needed

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

As we have in years past, our WV Surface Owners' Rights Organization (WV SORO) will again be pushing for legislation to have the property rights of surface owners recognized and respected, to increase their chances of owning some of the minerals under them, and to deal with orphaned wells and other environmental problems. We will also be actively opposing legislation the industry introduces (out of its sense of entitlement) that will harm the interests of surface owners (including some fortunate few of whom are also small mineral interest owners).

Some think that the recent election results will hurt our chances on those fronts. We disagree. WV SORO has always tried to be non-partisan. Rural Republican legislators have generally been supporters of our positions. Our issues are in essence property rights issues favored by many of those just elected.

Most of our success is a result of the actions taken by members of WV SORO and allied organizations expressing their concerns and making their voices heard by their legislators. As always, we'll be sending out alerts and updates once we the legislative session starts and we have actual bill numbers. However, feel free to start contacting your legislators now to urge their support.

Here is a more detailed look at our 2017 legislative priorities:

Pass a bill to implement the recommendations of the studies required by the Horizontal Well Control Act.

When the Horizontal Well Control Act was passed in 2011, surface owners did not get many protections. Instead the Act required the Department of Environmental Protection (DEP) to conduct studies on various impacts of horizontal drilling on surface owners, and safeguards were supposed to be enacted if the studies showed the need. When the results of the studies were released in 2013, the DEP reported to the Legislature that additional protections were needed "to reduce potential exposures" and" to provide for a more consistent and protective safeguard for residents

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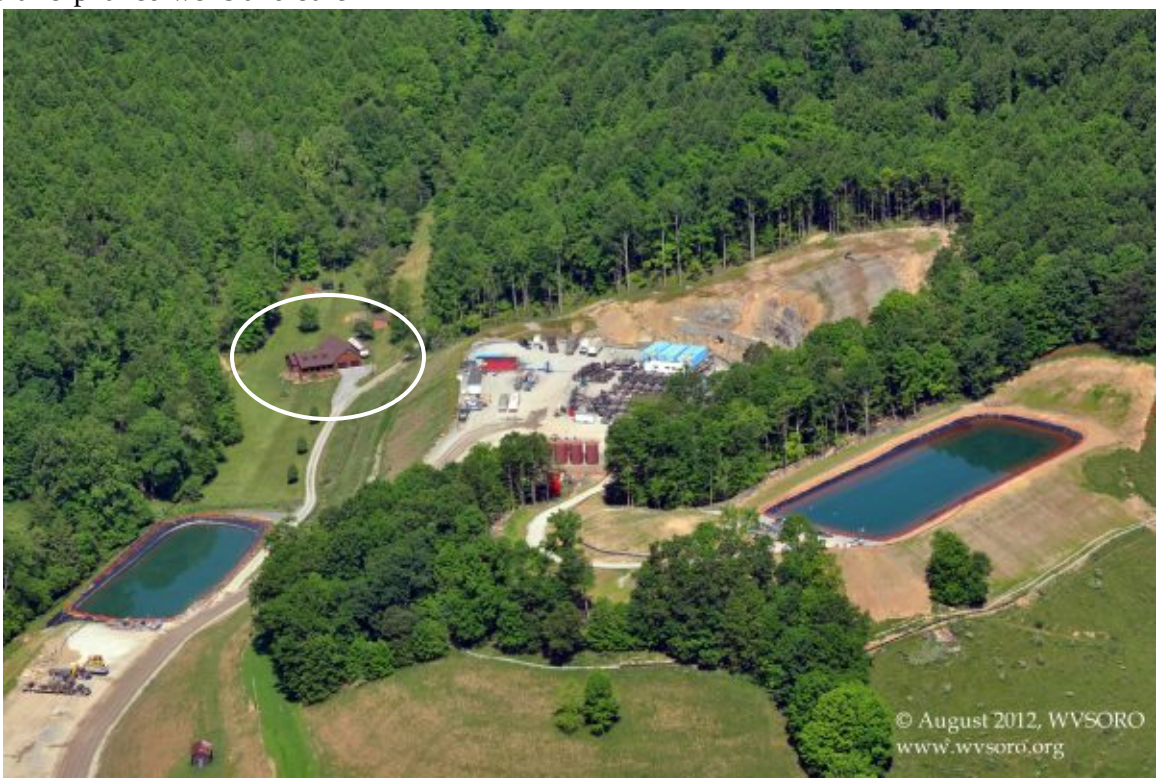

Horizontal drilling site near a home in Marion County. *Increased setbacks and monitoring for noise, dust, and other air emissions are needed to protect the health and property values of those living nearby.*

2017 Legislative Priorities *(continued from page 1)*

in affected areas." However, these safeguards and other recommendations from the studies, which include fence-line monitoring for noise, dust, and other air emissions from horizontal drilling sites, were never implemented.

Pass a "land reunion" bill to let surface owners step into the shoes of the high bidder if an interest in the minerals under their land is sold at a tax sale/auction.

Ownership of the surface and ownership of the minerals should never have been separated. Almost everyone agrees this was a bad idea. WV SORO supports a "West Virginia Land Reunion", and we have even recorded a song about it for you to listen to at www.wvsoro.org/west-virginia-land-reunion-song/.

This session, the Legislature should pass a bill that begins to reverse the trend of separate ownership by giving surface owners a first chance to own any interest in the minerals under their land that are sold for non-payment of property taxes.

Pass a bill that uses funds owed to missing and unknown mineral owners to plug orphaned wells.

The "Oil and Gas Reclamation Fund" was established to plug the thousands of oil and gas wells that have been orphaned over the last century by oil and gas drillers who went out of business without plugging them. As development of the Marcellus Shale and other shale formations continues to drive smaller drilling companies out of business the problem is likely to get worse. From 2010 to 2014, there was only enough money in the fund to plug six wells a year. However, the increase in Marcellus Shale and other unconventional drilling has also resulted in many more suits being filed to partition mineral tracts owned by multiple heirs, and lots of money being held by special receivers for heirs who cannot be found. If the heirs do not turn up in 5 years the money goes to the state Treasurer to be deposited into the General Revenue fund. Our bill would send that money to the Oil and Gas Reclamation Fund instead, making it available to plug orphaned wells.

Pass a bill to require a forfeited bond to fix the problem on the land that caused the forfeiture.

The money that goes into the Oil and Gas Reclamation Fund comes from two sources. One of these is a small fee drillers pay when they apply for new drilling permits. Money also goes into the fund when the DEP forfeits the bond of a driller who has not plugged a well that should be plugged or causes some other problem. This does not happen very often.

Currently, the DEP keeps a list of orphaned wells and prioritizes them according to how much of a problem they are, and DEP has to plug them in that order. This is generally not a bad way to prioritize the limited amount of funding available to plug the thousands of orphaned wells in West Virginia. However, when a landowner goes to the trouble to get the DEP to forfeit a drillers' bond because of a problem well on their land, we believe that the the money should be used first to fix the problem on landowner's land that caused the bond to be forfeited.

For more on these issues and proposals, and to listen to "the West Virginia Land Reunion Song", visit www.wvsoro.org.

Zombie Bills?

Bills to Aid Drillers Could Be Back in 2017

by Julie Archer, julie@wvsoro.org

The following is a summary of various bad bills that were working their way through the Legislature during the 2016 session. Fortunately all of these proposals were either soundly defeated or stalled a different points in the legislative process — in large part due to citizen outrage and opposition.

Thank you to those of you who contacted your legislators about these terrible bills and for making your voices heard. Your calls, emails, and personal letters made a difference.

Unfortunately, due to the ongoing mass litigation nuisance suits and outcomes in other court cases, the industry is likely to be emboldened to bring back some of these proposals, which would further erode the limited rights surface owners have and eliminate laws that surface owners and others living with oil and gas drilling in their communities are using to seek relief from drilling related impacts that are not regulated by the DEP.

Anti-Nuisance Suit Bill

The most egregious of these proposals was SB 508, which would take away citizens' ability to bring "nuisance" suits against oil and gas drillers or others who engage in activities that harm their property values or interfere with the enjoyment and use of their property. Although much of the discussion around the bill focused on oil and gas drilling, the effects would not be limited to suits over oil and gas related activities. The bill would have given businesses virtual immunity from nuisance suits as long as

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Zombie Bills? *(continued from page 2)*

the terms of their license or permit. Drillers and other businesses could use this "permit shield" as a defense, even if the activity causing the nuisance isn't covered or regulated under the license or permit.

After passing the Senate, the bill stalled in the House due to concerns expressed by House Speaker Tim Armstead that the bill was too broadly written and one-sided. With only a week left in the session, Armstead said it would be difficult to sort through all of the issues and concerns raised about the bill. He said if the House moves forward with the legislation they want it to be something that protects property rights.

If SB 508 had passed, property owners would have no legal recourse to hold irresponsible neighbors accountable for their actions. We can't let the Legislature take this right away.

"Right to Trespass" for Survey Access

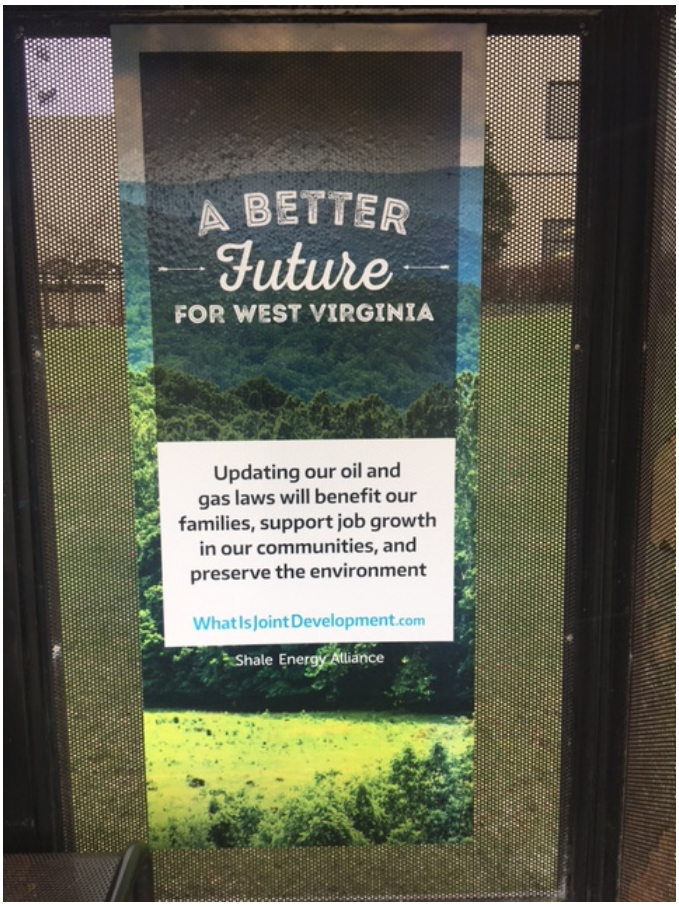
Last year the Senate Judiciary Committee passed out SB 596, which would give pipeline companies planning the interstate pipeline projects the right to access private property for the purpose of surveying without getting landowner permission. Currently, there are several such pipeline projects at various stages of development that will cross portions of West Virginia. The bill effectively reversed a Monroe County circuit court decision regarding survey access for these pipeline projects — a decision that was recently upheld by the West Virginia Supreme Court.

The pipeline companies had been relying on and citing West Virginia's eminent domain statute saying it gave them survey access before an eminent domain proceeding has been initiated. That statute says eminent domain can only be for a "public purpose".

In the Monroe County case, the judge ruled that the Mountain Valley pipeline was not for a public purpose and therefore the pipeline company didn't have a right to survey people's land without their permission.

SB 596 gave pipeline companies who have made application and been assigned a docket number by FERC the right to enter for survey activities. The bill required notice to all owners and occupants 15-60 days before entry, requirements that do not currently exist. The bill also limited surveyors to the use of hand tools, and prevents driving or parking motor vehicle on the property without permission.

This "right to trespass" bill was soundly defeated on the Senate floor, with only 11 Senators voting in favor and 23 opposed.



Ad by the Shale Energy Alliance promoting "joint development" or rebranded forced pooling.

(Simple) Majority Rules & "Invisible Ink" (AKA Joint Development)

There were also two bad bills that negatively affect both surface and mineral owners. The House Energy Committee approved a bill (HB 4639) that would allow drillers to lease jointly owned or heirship mineral tracts if a simple majority of owners agree to sign – changing existing common law that currently requires all owners with an interest in tract to sign before a company can execute a lease.

Our biggest concern with the bill, as our co-founder and attorney Dave McMahon told members of the committee, is that there are many surface owners who only control a small portion of the minerals under their property. Under HB 4639, the wishes of those surface owners to be ignored if a little more than 50 percent of their co-owners in the mineral tract make a deal with the gas company. For years, SORO has advised surface owners to buy an interest in the minerals under their property if they want to have a say in how the minerals and their surface property are developed. HB 4639 would

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Zombie Bills? *(continued from page 3)*

largely eliminate any leverage surface owners with partial ownership of the minerals have in negotiations with gas companies.

HB 4639 appeared to be on the fast track, but was later declared dead by Delegate Woody Ireland, whose committee had originated the bill. Afterward, an even worse version of this forced leasing legislation began moving in the Senate. In addition to ignoring the wishes of these surface owners if a little more than 50 percent of their co-owners in the mineral tract make a deal with the gas company, SB 646 would allow tracts to be pooled into units without surface or mineral owner agreement, and allow a surface owner's land to be used for one of those monster pads for horizontal drilling even if there was a "no surface use" lease. The bill says, "The operator's use of any surface tract overlying the jointly developed leases shall be permissible for that joint development."

As the WV Royalty Owners said in a statement, "This isn't just forced pooling, this is forced pooling on steroids. [In 2015,] some [legislators] were concerned that forced pooling would force 20 percent to lease. [SB 646] forces 49.9 percent to lease with no prohibition of deductions, no depth or target formation limitations, no surface protection, and no recourse against the driller."

These proposals are one-sided pooling bills (the industry gets what it wants, but protections for surface and mineral owners are left out) and a shameful attempt to take away the property rights of West Virginians.

Stay Tuned

Look for this "invisible ink" bill and other bad bills to come back this legislative session, and get ready to make those calls.

In Court: WV-SORO Litigation Update

Here is a brief update on some court cases we've been involved in or monitoring that affect West Virginia surface owners. Because one-third of WV-SORO members also own an interest in their underlying minerals, so we are including updates on cases that affect some mineral owners.

Surface Use Trespass

Although a driller might have the right to "reasonable use" of a surface tract in order to develop and produce the minerals underneath, WV-SORO takes the position that a driller cannot use a surface tract for a well pad, horizontal wells, etc. to develop neighboring mineral tracts without getting the surface owners' consent. Although there are rulings in West Virginia Supreme Court cases dealing with coal that agree with us, and all the general legal treatises on oil and gas agree with us, there is not a binding state Supreme Court case on point establishing "precedent" that all Circuit Court judges would have to follow. As a result, drillers continue – pursuant to their sense of entitlement – to tell surface owners that they (the drillers) can come on to a surface owners land without permission.

In our last newsletter, we reported that one case headed to the state Supreme Court had been settled, but that WV-SORO co-founder David McMahon, together with David Grubb and Kris Whiteaker of the Grubb Law Group, had filed another case (Crowder and Wentz v. EQT Production Company). The good news is that Judge Sweeney in Doddridge County agreed with the plaintiffs, based on the merits of the case, that WV-SORO's position is the law. Judge Sweeney "certified the question" to the Supreme Court since there currently is no controlling legal precedent in the state. Unfortunately, to everyone's amazement, the Supreme Court turned down the certified question and refused to hear the case. In response, Judge Sweeney declared that his ruling still stands in this case, and that is very likely the way he will rule in other cases in his judicial circuit/district (Doddridge, Ritchie and Pleasants Counties). Judge Sweeney's ruling can be found at www.wvsoro.org under the heading "You probably can refuse (or maybe block) a horizontal well on your land".

One issue still to be decided in the Crowder case, which is scheduled for trial in April, is the amount of damages. After that, it could be appealed to the state Supreme Court. In the meantime, we are aware of several other active surface trespass cases that could make it to the state Supreme Court, and we will be assisting on those cases as we can by filing friend of the court briefs etc. Until the Supreme Court takes a case and issues a final ruling on the surface use question, WV-SORO will be looking for cases in other judicial circuits to get judges in those circuits to rule in favor of our position. If you know of any current or potential cases, please let us know.

The issue of compensation for damages, and how the compensation is calculated, are other matters for the courts to decide. Drillers are saying compensation

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In Court *(continued from page 4)*

should only be for what the acreage they take away from the surface owner was worth to the surface owner before the driller showed up. However, WV-SORO thinks that the surface owner's damages should be based on what the use of the surface owner's land is worth to the driller – measured as a percentage of the value of the gas produced or the profits of the driller. We'll keep you posted on this as well. If you are involved in a surface damage case and want help with that issue, please let us know.

Eminent Domain/Survey Access for Interstate Pipelines

Our last newsletter included an article about pipeline companies suing landowners in order to conduct surveys on their lands. The surveys were being conducted for the companies' applications to the Federal Energy Regulatory Commission (FERC). Once a pipeline company's application is approved by FERC, the company has the right to use eminent

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domain to bring condemnation proceedings against, and put pipelines across the lands of, surface owners who do not willingly sign a right-of-way agreement.

In West Virginia, eminent domain can only be used for private enterprise projects if the property taken will be put to "public use". Last year, the builders of the Mountain Valley Pipeline (MVP) took legal action against several landowners in West Virginia in order to gain access to their property to conduct surveys. However, some of the landowners fought back, arguing that the pipeline wasn't for a public purpose because no West Virginians would have access to or otherwise use the gas carried by the pipeline.

There is good news on this front. First, Judge Irons in Monroe County ruled that the property owners could keep the pipeline company off of their land because all of the gas was being piped out of West Virginia and was not available for public use in West Virginia. Then, the pipeline company appealed the case to the West Virginia Supreme Court and the court agreed with Judge Irons, upholding his decision.

Despite the good news, there is likely to be an effort to get a bill through the Legislature on this subject during the 2017 session, similar to a bill that was defeated in the Senate during the 2016 session.

Mass Litigation on Nuisance

More than 200 West Virginia residents in at lease seven counties have filed nuisance suits related to excessive noise, light, dust, and traffic, and well as other problems, caused by horizontal drilling activities near their homes, which have interfered with their use and enjoyment of their land. (Frankly, we are surprised at the small number of nuisance suits filed.) The lawyers for the landowners, who first brought those cases in October 2013, moved in 2014 to have all of the cases decided by a panel of circuit court judges (called a "mass litigation panel") instead of having them being tried separately by different judges in all the different counties.

These suits before the mass litigation panel are ongoing but suffered a setback. The judges ruled that surface owners above pooled mineral tracts being developed by horizontal wells on neighboring surface tracts couldn't sue for nuisance. If the drillers are producing from the mineral tracts under the surface owners, the drillers have the right to do what is reasonably necessary on the surface tract in order to produce the underlying minerals. Those surface owners would still have claims if the driller was doing more than reasonably necessary to their land in order to get the gas under them out. This could be unreasonable noise or air pollution, or roads that are more disturbing or have more traffic than if it was only the mineral tract under their land being developed.

Flat Rate Leases and Royalty Deductions

Many old leases from early last century say the driller will pay a 1/8th royalty for oil. However, those leases were signed before pipeline infrastructure was around, at a time when gas was of little value. These leases said that the driller would only pay a flat rate, usually $100 or $300 a year, if gas was produced no matter how much gas was produced or what it got to be worth over time. This became grossly unfair over the years, but many of these old leases are still in effect "held by production".

In the 1980s the Legislature passed a law often called the "flat rate royalty statute" that said if the driller drilled a new well under an old flat rate lease, or reworked an existing well, then the driller had to start paying 1/8th of the value of the gas "at the wellhead". So drillers began doing this, although many of the drillers would take deductions from the 1/8th royalty for transportation, marketing, or "line loss". ("Line loss" means if the driller does not maintain the lines and mineral owner's gas leaks out, the driller does not have to reimburse the landowner

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In Court *(continued from page 5)*

for losing their gas – or it may mean that the driller's various meters have not been maintained.)

The West Virginia Supreme Court has now applied its ruling in the Tawney v Columbia Natural Resources case to new wells drilled under flat rate leases. In Tawney, the Court ruled in favor of the plaintiffs, that the gas company had wrongfully deducted production costs and expenses from the royalty payments owed to the mineral owners. In the more recent case (Leggett v. EQT), EQT has filed for a rehearing before the Supreme Court. The ruling was a close 3 to 2 vote by the Justices and the company is no doubt hoping that newly elected Justice Beth Walker will tip the vote in their favor.

Who Owns Coalbed Methane?

In 2003, the West Virginia Supreme Court ruled in Energy Development Corporation v. Moss that leases and deeds that granted or reserved rights to "oil and gas" or "natural gas" did not give or reserve rights to coalbed methane (CBM) found in coal seams unless: 1.) the lease or deed specifically mentioned it or 2.) unless there was enough commercial CBM production in the area that it was contemplated by the parties. The issue is important to surface owners because under Moss surface owners can end up owning the CBM and the right to use or grant use of the surface to produce it, and because CBM wells have a greater impact on the surface than conventional vertical.

WV-SORO believes that the Court got it right in the Moss, even though it can lead to uncertainty in some situations. In the cases that have been brought in some of those situations, some of the parties have tried to argue that CBM should always belong to the coal owner or always belong to the gas owners whether it was contemplated by the parties or not at the time of the lease or deed.

The most recent case to reach the Supreme Court, Paulos v. LBR Holdings, the coal owner and the gas owner wanted the CBM. WV-SORO filed a friend of the court brief pointing out that the ruling had implications for surface use and surface owners.

Fortunately, the Court once again upheld Moss. Our brief was mentioned in footnotes 2 and 13 of the Court's decision, which is available on our website.

Can Drillers Pool Leases That Do Not Have Pooling Clauses?

We say, "No." Unfortunately, because of a recent ruling by one Circuit Court judge in Tyler County, some drillers may be telling people that drillers do not have to have a pooling provision or pooling amendment to put leased tracts into a unit with other leased tracts. The drillers will say that the judge ruled that there is an "implied covenant" in all leases, even old ones, to do so. A driller may tell you this to get you to sign one of their unfair pooling provisions in a lease or an amendment. Don't believe them! The judge's ruling is wrong.

The thoroughness of the reasoning and the legal sophistry contained in the Circuit Court judge's decision must be admired. However, the result is pure alchemy. Lead cannot be turned into gold, and the law and the questionable facts relied upon by the ruling do not, and should not, lead to the conclusion that there is an implied covenant to pool in all leases. In the words of a Farm Bureau lobbyist, there is no invisible ink in a lease.

WV-SORO has posted on its website eleven reasons why this ruling is bad and wrong, and other judges should not follow it. Do not let a driller intimidate you with this opinion.

Court Approves Settlement for EPA Rules on Drilling and Fracking Waste

Consent decree requires EPA to review oil & gas waste rules for first time in three decades

Press release from the Environmental Integrity Project and the Natural Resources Defense Council

WASHINGTON, D.C. (December 29, 2016) – Late Wednesday, the U.S. District Court for the District of Columbia formally approved a consent decree between the U.S. Environmental Protection Agency and a coalition of community and environmental organizations. The consent decree requires the agency to review and, if necessary, revise its rules for the disposal and handling of dangerous and harmful oil and gas wastes, such as those that result from drilling and fracking. The organizations had filed a federal lawsuit against EPA in May due to the agency's failure to review these rules for nearly thirty years.

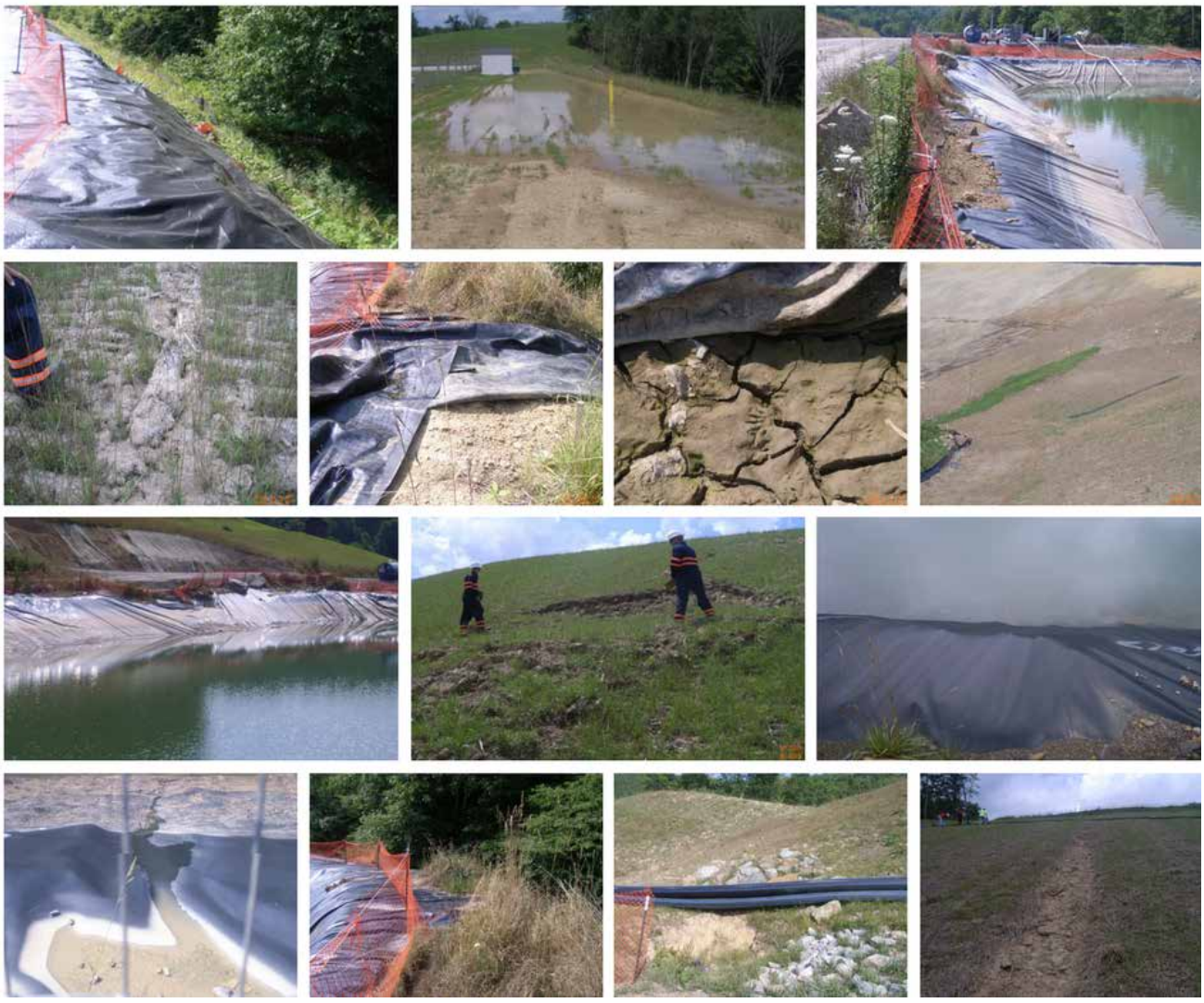
The organizations on the lawsuit—captioned Environmental Integrity Project et al. v. McCarthy, No. 1:16-cv-00842—include the Environmental Integrity Project, Natural Resources Defense Council, Earthworks, Responsible Drilling Alliance, San Juan Citizens Alliance, the West Virginia Surface Owners' Rights Organization, and the Center for Health, Environment and Justice. *(continued on page 7)*

EPA Settlement *(continued from page 6)*

"This consent decree is a step in the right direction toward fulfilling EPA's duty to the public," said Adam Kron, senior attorney at the Environmental Integrity Project. "EPA has known since 1988 that its rules for oil and gas wastes aren't up to par, and the fracking boom has made them even more outdated. Our communities deserve the best possible protections for their health and the environment."

In their lawsuit, the organizations raised a number of different wastes and industry practices that new rules should address, including the disposal of fracking wastewater in underground injection wells, which accept hundreds of millions of gallons of oil and gas wastewater and have been linked to numerous earthquakes in Arkansas, Colorado, Kansas, New Mexico, Ohio, Oklahoma, and Texas The organizations also urged EPA to ban the practice of spreading fracking wastewater onto roads or fields, which allows toxic pollutants to runoff and contaminate streams, and to require landfills and pits to be built with adequate liners and structural integrity to prevent spills and leaks into groundwater and streams.

"We are pleased that the Court approved the parties' agreement," said Amy Mall, senior policy analyst at the Natural Resources Defense Council. "EPA is long overdue to take a closer look at the unique risks posed by oil and gas waste. We will hold the incoming administration accountable for heeding this call, and we will continue to fight to ensure communities get the protection they need from this toxic mess."



Documented problems with pit identified during a study conducted by WVU.
(Source: Pits and Impoundments Final Report Assessing Environmental Impacts of Horizontal Well Drilling Operaations, WVU Department of Civil and Environmental Engineering, December 17, 2012.)

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

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Dear SORO Members,

We know it's been a while since you've heard from us. As the 2017 legislative session gets underway, we wanted to let you know what we've been up to and what we'll be focusing on for the next 60 days.

We recently updated our website and have switched to a new email system to help us communicate with our members more effectively. We hope you approve.

Your support keeps us going. Please renew your membership or send in a donation. ***Thank You!***

I want to support WV-SORO's work by renewing my membership.

Name: _____

Street: _____

City, State, Zip: _____

Telephone: _____ Fax: _____

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Enclosed is: [ ]$30 annual WV SORO membership [ ]$_____ as an extra donation

(Contributions, large & small, are welcome and appreciated!)

Please mail this form with your membership dues to:
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