

Comparison of DEP and Judiciary A Draft

Oil and Gas Bills

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It appears now that the West Virginia Legislature will have at least two draft bills to use when it considers legislation regulating Marcellus Shale during the 60-day 2011 Legislative Session that began on January 12.

The first is a draft bill prepared by the WV Department of Environmental Protection (DEP), and is a result of a programmatic review of the state's oil and gas regulatory program that was begun in April, 2010, and included input from a wide variety of stakeholders, including environmentalists, landowners and industry.

The DEP bill amends sections of Article 6 of Chapter 22 of West Virginia Code, the section of the code dealing with the Division of Oil and Gas, and regulating oil and gas well drilling generally. The DEP bill creates new language dealing with horizontal drilling, but also makes changes that affect conventional (shallow) drilling. The DEP bill has been filed with legislative bill drafting, and has not yet been introduced in either chamber.

The second is a draft bill prepared by legislative staff for the Interim Judiciary Subcommittee A, and is the result of more than two years of committee presentations on the subject, prepared by the same wide variety of stakeholders. The Judiciary A bill draft creates a whole new article of Chapter 22 – Article §22-6A – and it applies only to the drilling of horizontal (Marcellus) wells. This draft bill was passed by the Interim Judiciary Committee and has been introduced in both chambers. In the House it is HB 2878; in the Senate it is SB 258.

Both bill drafts are long (more than 100 pages long) and legally and technically complex.

So what's in them, what's not, and how do they compare? What follows here is a comparison of the provisions of the two draft bills:

Permits:

Both bills continue the requirement that an operator obtain a permit to drill a well. The DEP bill clarifies that a separate permit must be obtained for each well drilled, no matter the type of well. (DEP §22-6-3).

In addition to all the information that is required in a well work permit application under current law, both bills require that each application to drill a horizontal well include a water management plan. (DEP §22-6-3, Judiciary §22-6A-6).

The DEP bill requires that the erosion and sediment control plan be certified by a registered professional engineer “for sites that disturb five acres or more of surface, excluding pipelines, gathering lines, and roads,” (primarily horizontal wells). (DEP §22-6-3).

The Judiciary bill requires that a **Department of Highways Certification** be included with permit applications for horizontal wells. The certification is a letter from the Department of Highways stating that the operator has entered into an agreement and is in compliance with all laws, regulations and conditions required by the department of highways relating to use, maintenance and repair of all state and county roads to be utilized for access to a well location. (Judiciary §22-6A-6 and Judiciary §22-6A-9). The DEP bill does not address roads and highways.

The DEP bill adds new provisions for all wells requiring a well site safety plan, a reclamation plan for plugging a well, and a statement and explanation of whether the operator has ever had a permit revoked or bond forfeited. (DEP §22-6-3).

The Judiciary bill provides that for horizontal wells no well work permit application shall be submitted to the department until forty-five days after the notice has been received by the surface owner. (Judiciary §22-6A-46). In addition no permit shall be issued less than sixty days after the filing date of the application for any well work. If the applicant provides proof of all the necessary waivers, the secretary may issue the well work permit thirty days after the filing date of the application. (Judiciary §22-6A-16).

Water Management Plans:

Both drafts require that an application to drill a horizontal well include a “water management plan.” The drafts are almost identical in spelling out what is included in the water management plan, using language from HB 4315, last year’s Marcellus bill that passed in the House but not in the Senate.

Water management plan provisions are primarily reporting and record keeping requirements that list the details of planned water withdrawals for drilling and fracturing the well, including the type of water source, specific location of water withdrawals, volumes of water to be withdrawn, and anticipated months the withdrawals will occur.

The plan must contain a description of the “management and disposition of wastewater from fracturing, stimulation, and production activities,” and a listing of the anticipated additives that may be used in water used for fracturing or stimulating the well.

The water management plan must also contain “**a water resources protection plan**” that “includes documentation of measures that will be taken to allow the State to manage the quantity of its waters for present and future use and enjoyment and for the protection of the environment.”

The water resources protection plan must identify “the current designated and existing water uses, including any public water intakes within one mile downstream of the withdrawal location; must demonstrate that a “sufficient in-stream flow” will be available to maintain “a pass-by flow” that preserves the identified use of the stream immediately downstream of the point of withdrawal; and must include methods to minimize adverse impact to aquatic life.

Both bill drafts would require the operator to record and maintain information regarding the quantity of flowback water from hydraulic fracturing the well, the quantity of produced water from the well; and the method of management or disposal of the flowback and produced water.

Both bill drafts would also require the operator to record and maintain information regarding the transportation of wastewater, including the quantity of water transported, the collection and delivery or disposal locations of the water; and the name and address of the water hauler, and the company for which the hauler was hauling the water.

While neither of the draft bills require an actual water withdrawal permit, the DEP bill comes closest to doing that. It requires the operator to identify and report the location of proposed water withdrawals within forty-eight hours prior to the withdrawal. It also requires the operator to place signs at the

location that identify that the location is a water withdrawal point, the name and telephone number of the operator, and the permit number for which the water withdrawn will be utilized. (DEP bill §22-6-3 and §22-6-6, Judiciary bill §22-6A-30).

General Environmental Protection Performance Standards:

The DEP bill re-writes Section §22-6-6, which lists general environmental protection performance standards for all oil and gas operations. It directs the secretary to promulgate separate rules directed toward the surface effects of oil and gas operations.

Each permit issued by the secretary pursuant to this article and relating to oil and gas operations shall require the operation at a minimum to (the following is an excerpt):

(1) Adopt measures consistent with known technology in order to maintain the value and reasonably foreseeable use of surface lands;

(2) Adopt measures consistent with known technology in order to control fugitive particulate matter [**this is the only mention of air quality issues in either bill draft**];

(3) Plug all wells in accordance with the requirements of this article and the rules promulgated pursuant thereto when such wells become abandoned . . .

(4) With respect to surface disposal of cuttings, stabilize all waste pits, including the use of impervious materials, if necessary . . .

(5) Establish on regraded areas and all other disturbed areas a diverse and permanent vegetative cover capable of self-regeneration and plant succession and at least equal in extent of cover to the natural vegetation of the area . . .

(6) Protect off-site areas from damages that may result from such oil and gas operations;

(7) Eliminate fire hazards and otherwise eliminate conditions which constitute a hazard to health and safety of the public;

(8) Protect the quantity and the quality of water in surface and groundwater systems both during and after drilling operations and during reclamation by:

- A. Withdrawing water from surface waters of the State by methods deemed appropriate by the secretary, so as to maintain sufficient in-stream flow immediately downstream of the withdrawal location. In no case shall an operator withdraw water from ground or surface waters at volumes beyond which the waters can sustain;
- B. Casing, sealing or otherwise managing wells to keep returned fluids from entering ground and surface waters;
- C. Conducting oil and gas operations so as to prevent, to the extent possible the best technology currently available, additional contributions of suspended or dissolved solids to stream flow or runoff outside the permit area, but in no event shall the contributions be in excess of requirements set by applicable State or federal law; and
- D. Registering all water supply wells (used for drilling operations) with the Division of Oil and Gas and constructing and plugging all such wells in accordance with the standards of the Bureau for Public Health set forth in its Legislative rule entitled Water Well Regulations . . . All drinking water wells within two thousand five hundred feet of the water supply well shall be flow tested by the operator upon request of the drinking well owner prior to operating the water supply well.

(9) With respect to other surface impacts of oil and gas operations not specified in this subsection, including the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities or other property or materials on the surface . . . operate in accordance with the standards established pursuant to this article or the rules promulgated thereunder; and

(10) To the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, aquatic life, wildlife, and related environmental values and achieve enhancement of such resources where practicable.

Impoundments and Pits:

The DEP bill requires a “Certificate of Approval” before constructing impoundments with capacity of greater than five thousand barrels (210,000 gallons). It includes a \$300 application fee and a \$100 annual registration fee. The construction plans must be prepared by a registered professional engineer licensed to practice in West Virginia. It authorizes the secretary to propose rules to implement the provisions of this section. (DEP §22-6-5).

The Judiciary bill would require that all fresh water and flowback water impoundments, and all drilling pits be constructed with a dual liner system with a leak detection system installed between the two liners, to prevent seepage or leakage. (Judiciary §22-6A-25 and §22-6A-27).

Both bills will continue to allow the burial of drilling pits on site.

Casing Requirements:

The Judiciary bill requires the department to inspect each permitted well drilled in any formation using hydraulic fracturing or horizontal drilling, or both, during each phase of cementing, completing and altering. The operator may not proceed to the next phase of the drilling operation until an inspection has been performed. (Judiciary §22-6A-21).

Plat Requirements:

The DEP bill requires that plats include all mineral tract boundaries within the scope of the plat, and that the plat be prepared by a professional surveyor or registered professional engineer. (DEP §22-6-14).

Frac Fluids:

Under both bills, the water management plan must contain a listing of the anticipated additives that may be used in water used for fracturing or stimulating the well.

The DEP bill requires that upon well completion, a listing of the additives that were actually used in the fracturing or stimulating of the well be submitted as part of the completion report. (DEP §22-6-3).

The Judiciary bill is similar. It requires that within 30 days of completion of the well, “the operator must file a report with the department that includes, without limitation, the complete list of the chemicals and chemical compounds used in the fracturing fluid products, specifying the volume of fluid utilized in each separate hydraulic fracturing operation and the Chemical Abstract Service registry number for each constituent chemical.” (Judiciary §22-6A-23).

It further provides that, “In case of a medical emergency, the operator shall provide the concentration of each constituent chemical and the formula for each chemical compound to medical emergency personnel or local emergency personnel, or both; and “the well operator shall keep a copy of the report at the well site and produce it upon request by the department, local emergency personnel or surface

landowners residing within 5,500 feet of the well.” (Judiciary §22-6A-23).

The Judiciary bill also requires that the operator maintain a record of the total volume of fracturing fluids used for the operation as well as the total volume of fluids that flow back. These records must be to the department on a semi-annual basis. (Judiciary §22-6A-24).

Conditions for Denial of Permits:

The DEP bill continues current law that states that the permit will not be issued or will be conditioned, “including conditions with respect to the location of the well and access roads, prior to issuance” if:

- (1) The proposed well work will constitute a hazard to the safety of persons; or
- (2) Damage would occur to publicly owned lands or resources; or
- (3) The proposed well work fails to protect fresh water sources or supplies.

It continues the requirement that a permit can be denied if the operator is insubstantial violation of an existing permit, “or other environmental laws or rules.” (DEP §22-6-4).

The Judiciary bill states that the department may deny or condition a well permit based on the impact of the proposed well on public resources including, but not limited to:

- (1) Publicly owned parks, forests, gamelands, recreational and wildlife areas.
- (2) National or State scenic rivers.
- (3) National natural landmarks.
- (4) Habitats of rare and endangered flora and fauna and other critical communities.
- (5) Historical and archaeological sites listed on the Federal or State list of historic places.

(6) Bodies of water and watercourses, including, but not limited to, wetlands, wild trout streams and wilderness trout streams. Prior to submitting a permit application to the department for a well or well site within a wild trout stream, High Quality or Exceptional Value watershed, the applicant shall consult with the West Virginia Division of Natural Resources.

(Judiciary §22-6A-15).

Notice To Surface Owners:

The DEP bill requires that for all wells, prior to receiving a permit, the operator will provide notice to the surface owner at least seventy-two hours but no more than forty-five days prior to entering the surface tract to conduct any plat surveys. (DEP §22-6-12). The Judiciary bill provides that for horizontal wells, the operator must give the surface owner at least fifteen days notice before entering upon the surface land for surveying. (Judiciary §22-6A-45).

The Judiciary bill, as part of the notification creates a process to encourage the negotiation of “Surface Use and Compensation Agreements” as part of the permit application process and requires additional bonding by the operator if there is none.(Judiciary §22-6A-46, §22-6A-47, and §22-6A-46).

Both the DEP bill and the Judiciary bill require that, no later than the filing date of the application, the applicant for a permit for any well work or for a certificate of approval for the construction of an impoundment shall deliver, copies of the application, well plat, and erosion and sediment control plan to a long list of persons, including surface owners and mineral owners. (DEP §22-6-12 and Judiciary

§22-6A-10).

The DEP bill also requires the operator to provide notice to the surface owner “within seven days but no less than two days” before any actual disturbance of land pursuant to the permit is expected to commence, if the surface owner requests receipt of that notice as a part of his or her comments concerning the permit application. (DEP §22-6-12).

Comment Period for Surface Owners:

The Judiciary bill requires that for horizontal wells comments on the proposed well work must

be filed within 15 days after the application is filed with the secretary. (Judiciary §22-6A-11).

The DEP bill increases the current comment period from 15 days to 30 days for all well work.

(DEP §22-6-13).

Reclamation:

The DEP bill includes impoundments in the reclamation provisions, and requires that all reclamation must be completed within six months after the completion of the drilling process. For multiple well pads (horizontal wells), reclamation must be completed within six months after the completion of the drilling process for a well, “unless the operator commences drilling on a subsequent well within six months.” (DEP §22-6-31).

Section §22-6A-29 of the Judiciary bill also requires that all reclamation must be completed within six months after the completion of the drilling process. However, section §22-6A-20 of the Judiciary bill requires that all reclamation must be completed within nine months after the completion of the drilling process. This appears to be a drafting mistake, but it is not clear which time period is the actual intent of the bill.

Well Location Restrictions:

The DEP Bill continues the current provision that no oil or gas well can be drilled nearer than two hundred feet from an existing water well or dwelling without first obtaining the written consent of the owner, and adds that it cannot be nearer than one hundred feet from any surface water of the state. (DEP §22-6-23).

The Judiciary bill provides that horizontal wells may not be drilled within 1000 feet from any existing building or existing water well without the written consent of the owner. It further provides that “no well site may be prepared or well drilled” within 100 feet “from any watercourse, natural or artificial lake, pond or reservoir or within 100 feet of the boundary of a wetland or the boundary that affects the functions and values of a wetland.” In addition, “no well may be drilled using hydraulic fracturing or horizontal drilling within 2,500 feet of a surface water source, and within 1,000 feet of a groundwater source, that serves a public water system.”

(Judiciary §22-6A-15).

Water Supply Replacement:

The DEP bill retains existing language for all types of wells that requires the operator to replace damaged or lost groundwater or surface water supplies, and establishes a “rebuttable presumption” that the well drilling is the cause of the damage or loss if the supply is within one thousand feet of the well. (DEP §22-6-35).

The DEP bill contains new language requiring the operator to provide an emergency drinking water supply within twenty-four hours; provide temporary water supply within seventy-two hours; within thirty days begin activities to establish a permanent water supply or submit a proposal outlining the measures and timetables to be utilized in establishing a permanent supply. The total time allowed for establishing a permanent water supply may not exceed two years.

(DEP §22-6-35).

The Judiciary bill requires the operator to replace damaged or lost groundwater or surface water supplies caused by the drilling of horizontal wells, and gives the department 10 days to investigate claims and 45 days to make a determination. The Judiciary bill establishes a “rebuttable presumption” for horizontal wells that the well drilling is the cause of the damage or loss if the supply is within 2,500 feet of the well. The Judiciary bill also states: “In case of horizontal drilling, the presumption covers the entire length of the horizontal drilling and extends an additional 2,500 feet from the end or sides of each horizontal well bore.” (Judiciary §22-6A-22).

The Judiciary bill also requires the operator to conduct a “predrilling or prealteration” test of the water supply, upon written request “by any landowner residing within 5,500 feet but farther than 2,500 feet of a proposed gas well using hydraulic fracturing,” and send a copy of the results to the landowner. The test must be conducted by a certified lab, and provide at a minimum testing for chemicals or chemical compounds known to be commonly used for hydraulic fracturing including, but not limited to, the following: all major cations and anions, arsenic, benzene, toluene, ethylbenzene, xylenes, manganese, dissolved methane, total dissolved solids, chlorides, nutrients and radionuclides. (Judiciary §22-6A-22).

Fees:

The DEP bill establishes a horizontal well drilling permit fee of \$10,000 per well. There is no fee for plugging a well, and no increase in fees for shallow wells, deep wells, or coalbed methane wells. (DEP §22-6-2). The bill continues the Oil and Gas Reclamation Fund fee of \$150 for each application for well work activity except for plugging. (DEP §22-6-30).

The Judiciary bill establishes the following fees for horizontal wells: (Judiciary §22-6A-50).

- \$15,000 initial application fee for each well work permit.
- \$15,000 reclamation fee for each well work permit.
- \$10,000 fee for each application to modify a well work permit.
- \$5,000 annual permit renewal fee.

Well Bonds:

The DEP bill proposes no changes to the current bonding provisions of \$5,000 for an individual well bond, or \$50,000 for a blanket bond. (DEP §22-6-28).

The Judiciary bill requires a \$25,000 individual bond for each horizontal well. (Judiciary §22-6A-28).

Inspectors:

The DEP bill repeals Article 7 of Chapter 22C of state code and eliminates the Oil and Gas Inspectors' Examining Board, which has historically been dominated by industry groups. In its place, it gives the secretary the authority to hire inspectors under the civil service system, with a six-month probationary period. The Judiciary A bill does not address the issue. (DEP §22-6-2).

Violations:

The Judiciary bill requires the inspector to issue an order for the operator to cease further operations when a violation is found that presents an imminent danger to persons or a freshwater source, until the violation is abated. (Judiciary §22-6A-17).

Cessation Orders:

The DEP bill gives the oil and gas inspector the authority to issue a cessation order to an oil or gas operation when the inspector determines that a condition or exists that creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources. (DEP §22-6-10).

Seismic Exploration:

The DEP bill contains a new section, Section §22-6-40, requiring that companies performing geophysical seismic blasting exploration notify surface owners and others at least thirty (30) days prior to the blasting activity and include a seventy-two (72) hour period in whichh the blasting activity will occur. The notice shall also include a reclamation plan, including filling of shotholes. The Judiciary bill does not deal with the subject.

Shallow Well/Deep Well and Pooling and Unitization:

The DEP bill contains a new legal definition for a "shallow well" that would allow drilling up to one hundred feet below the top of the Onondaga formation in order to produce gas from the Marcellus formation, which sits right on top of the Onondaga. This would prevent Marcellus wells from being classified as "deep wells," thereby avoiding spacing provisions of the deep well statute. (DEP §22-6-1).

The Judiciary A bill draft contained a lengthy section mandating the pooling and unitization of leasehold interests for drilling horizontal wells, including the Marcellus. However, these provisions were removed from the draft bill when Judiciary Subcommittee passed out the bill.

The DEP bill that will be introduced now contains amendments to Article 9 (DEP §22C-9-1) that would allow voluntary pooling or unitization provisions for "shallow horizontal wells." This would include Marcellus wells.

Other Provisions for Surface Owners:

The DEP bill adds a provision to §22-7-3 requiring operators to compensate surface owners for the stumpage value of timber.

The DEP bill amends §22C-8-4 adding a member advocating the interests of surface owners to the Shallow Gas Well Review Board.

The DEP bill amends §22C-9-4 adding a member advocating the interests of surface owners to the Oil and Gas Conservation Commission.

