WEST virginia Legislature

2021 regular session

Introduced

House Bill 2132

By Delegate Fleischauer

[Introduced February 10, 2021; Referred to the Committee on Energy and Manufacturing then the Judiciary]

A BILL to amend and reenact §22-6A-8, §22-6A-10 and §22-6A-12 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto a new section, designated §22-6A-12a; and to amend and reenact §22-6B-3, §22-6B-5 and §22-6B-7 of said code, all relating generally to horizontal well control standards; changing an elective obligation to a mandatory one; requiring notice in certain instances be sent to the occupants of residential property; prohibiting the limit of disturbance of a well site to be closer than 1,500 feet of an occupied dwelling; providing that a notice include certain information; establishing standards relating to air, noise, light and dust; permitting landowners be compensated for any decrease in the values of the land for its highest and best use; requiring the notice of a claim be also provided to an occupant of residential structure on the property; and establishing a statute of limitations for claims being filed.

Be it enacted by the Legislature of West Virginia:

ARTICLE 6A. NATURAL GAS HORIZONTAL WELL CONTROL ACT.

§22-6A-8. Review of application; issuance of permit; performance standards; copy of permits to county assessor.

(a) The secretary shall review each application for a well work permit and shall determine whether or not a permit is issued.

(b) No permit may be issued less than 30 days after the filing date of the application for any well work except plugging or replugging; and no permit for plugging or replugging may be issued less than five days after the filing date of the application except a permit for plugging or replugging a dry hole:  *Provided,* That if the applicant certifies that all persons entitled to notice of the application under the provisions of §22-6A-10(b) of this code have been served in person or by certified mail, return receipt requested, with a copy of the well work application, including the erosion and sediment control plan, if required, and the well plat, and further files written statements of no objection by all such persons, the secretary may issue the well work permit at any time.

(c) Prior to the issuance of any permit, the secretary shall ascertain from the executive director of Workforce West Virginia and the Insurance Commissioner whether the applicant is in default pursuant to the provisions of §21A-2-6c of this code, and in compliance with §23-2-5 of this code, with regard to any required subscription to the Unemployment Compensation Fund or mandatory Workers’ Compensation insurance, the payment of premiums and other charges to the fund, the timely filing of payroll reports and the maintenance of adequate deposits. If the applicant is delinquent or defaulted, or has been terminated by the executive director or the Insurance Commissioner, the permit may not be issued until the applicant returns to compliance or is restored by the executive director or the Insurance Commissioner under a reinstatement agreement:  *Provided,* That in all inquiries the executive director of Workforce West Virginia and the Insurance Commissioner shall make response to the Department of Environmental Protection within 15 calendar days; otherwise, failure to respond timely is considered to indicate the applicant is in compliance and the failure will not be used to preclude issuance of the permit.

(d) The secretary may cause such inspections to be made of the proposed well work location as necessary to assure adequate review of the application. The permit may not be issued, or ~~may~~ shall be conditioned including conditions with respect to the location of the well and access roads prior to issuance if the director determines that:

(1) The proposed well work will constitute a hazard to the safety of persons;

(2) The plan for soil erosion and sediment control is not adequate or effective;

(3) Damage would occur to publicly owned lands or resources; or

(4) The proposed well work fails to protect fresh water sources or supplies.

(e) In addition to the considerations set forth in §22-6A-10(d) of this code, in determining whether a permit should be issued, issued with conditions, or denied, the secretary shall determine that:

(1) The well location restrictions of §22-6A-12 of this code have been satisfied, unless the requirements have been waived by written consent of the surface owner or the secretary has granted a variance to the restrictions, each in accordance with §22-6A-12 of this code;

(2) The water management plan submitted to the secretary, if required by ~~subdivision (e), section seven of this article~~ §22-6A-7(e) of this code, has been received and approved.

(f) The secretary shall promptly review all written comments filed by persons entitled to notice pursuant to §22-6A-10(b) of this code. If after review of the application and all written comments received from persons entitled to notice pursuant to §22-6A-10(b) of this code, the application for a well work permit is approved, and no timely objection has been filed with the secretary by the coal operator operating coal seams beneath the tract of land, or the coal seam owner or lessee, if any, if said owner or lessee is not yet operating said coal seams, or made by the secretary under the provisions of §22-6A-10, and §22-6A-11 of this code, the permit shall be issued, with conditions, if any. This section does not supersede the provisions of §22-6A-7 or §22-6A-5(a)(6) through §22-6A-5(a)(9) of this code.

(g) Each permit issued by the secretary pursuant to this article shall require the operator at a minimum to:

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

(2) With respect to disposal of cuttings at the well site, all drill cuttings and associated drilling mud generated from horizontal well sites shall be disposed of in an approved solid waste facility, or if the surface owner consents, the drill cuttings and associated drilling mud may be managed on-site in a manner approved by the secretary;

(3) Grade, terrace and plant, seed or sod the area disturbed that is not required in production of the horizontal well where necessary to bind the soil and prevent substantial erosion and sedimentation;

(4) Take action in accordance with industry standards to minimize fire hazards and other conditions which constitute a hazard to health and safety of the public;

(5) 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-steam~~ instream 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 using the best management practices, additional contributions of suspended or dissolved solids to streamflow 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 drilled and operated by the operator with the Office of Oil and Gas. All drinking water wells within 1,500 feet of a water supply well shall be flow and quality tested by the operator upon request of the drinking well owner prior to operating the water supply well. The secretary shall propose legislative rules to identify appropriate methods for testing water flow and quality.

(6) In addition to the other requirements of this subsection, an operator proposing to drill any horizontal well requiring the withdrawal of more than 210,000 gallons in a 30-day period shall have the following requirements added to its permit:

(A) Identification of water withdrawal locations. Within 48 hours prior to the withdrawal of water, the operator shall identify to the department the location of withdrawal by latitude and longitude and verify that sufficient flow exists to protect designated uses of the stream. The operator shall use methods deemed appropriate by the secretary to determine if sufficient flow exists to protect designated uses of the stream.

(B) Signage for water withdrawal locations. All water withdrawal locations and facilities identified in the water management plan shall be identified with a sign that identifies that the location is a water withdrawal point, the name and telephone number of the operator and the permit numbers(s) for which the water withdrawn will be utilized.

(C) Recordkeeping and reporting. For all water used for hydraulic fracturing of horizontal wells and for flowback water from hydraulic fracturing activities and produced water from production activities from horizontal wells, an operator shall comply with the following record keeping and reporting requirements:

(i) For production activities, the following information shall be recorded and retained by the well operator:

(I) The quantity of flowback water from hydraulic fracturing the well;

(II) The quantity of produced water from the well; and

(III) The method of management or disposal of the flowback and produced water.

(ii) For transportation activities, the following information shall be recorded and maintained by the operator:

(I) The quantity of water transported;

(II) The collection and delivery or disposal locations of water; and

(III) The name of the water hauling company.

(iii) The information maintained pursuant to this subdivision shall be available for inspection by the department along with other required permits and records and maintained for three years after the water withdrawal activity.

(iv) This subdivision is intended to be consistent with and does not supersede, revise, repeal or otherwise modify §22-11-1 *et seq.,* §22-12-1 *et seq.* or §22-26-1 *et seq.* of this code and does not revise, repeal or otherwise modify the common law doctrine of riparian rights in West Virginia law.

(h) The secretary shall mail a copy of the permit as issued or a copy of the order denying a permit to any person entitled to submit written comments pursuant to §22-6A-11(a) of this code and who requested a copy.

(i) Upon the issuance of any permit pursuant to the provisions of this article, the secretary shall transmit a copy of the permit to the office of the assessor for the county in which the well is located.

§22-6A-10. Notice to property owners.

(a) Prior to filing a permit application, the operator shall provide notice of planned entry on to the surface tract to conduct any plat surveys required pursuant to this article. Such notice shall be provided at least seven days but no more than 45 days prior to such entry to: (1) The surface owner of such tract; (2) to any owner or lessee of coal seams beneath such tract that has filed a declaration pursuant to §22-6-36 of this code; and (3) any owner of minerals underlying such tract in the county tax records. The notice shall include a statement that copies of the state Erosion and Sediment Control Manual and the statutes and rules related to oil and gas exploration and production may be obtained from the secretary, which statement shall include contact information, including the address for a web page on the secretary’s website, to enable the surface owner to obtain copies from the secretary.

(b) 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 or pit as required by this article shall deliver, by personal service or by registered mail or by any method of delivery that requires a receipt or signature confirmation, copies of the application, the erosion and sediment control plan required by §22-6A-7 of this code, and the well plat to each of the following persons:

(1) The owners of record of the surface of the tract on which the well is or is proposed to be located;

(2) The owners of record of the surface tract or tracts overlying the oil and gas leasehold being developed by the proposed well work, if the surface tract is to be used for roads or other land disturbance as described in the erosion and sediment control plan submitted pursuant to §22-6A-7(c) of this code;

(3) The coal owner, operator or lessee, in the event the tract of land on which the well proposed to be drilled is located is known to be underlain by one or more coal seams;

(4) The owners of record of the surface tract or tracts overlying the oil and gas leasehold being developed by the proposed well work, if the surface tract is to be used for the placement, construction, enlargement, alteration, repair, removal or abandonment of any impoundment or pit as described in §22-6A-9 of this code;

(5) Any surface owner or water purveyor who is known to the applicant to have a water well, spring or water supply source located within 1,500 feet of the center of the well pad which is used to provide water for consumption by humans or domestic animals; and

(6) The operator of any natural gas storage field within which the proposed well work activity is to take place.

(c) (1) If more than three tenants in common or other co-owners of interests described in §22-6A-10(b) of this code hold interests in the lands, the applicant may serve the documents required upon the person described in the records of the sheriff required to be maintained pursuant to §11A-1-8 of this code plus the occupant of any residential structure on the property.

(2) Notwithstanding any provision of this article to the contrary, notice to a lien holder is not notice to a landowner, unless the lien holder is the landowner.

(d) With respect to surface landowners identified in §22-6A-10(b) of this code or water purveyors identified in §22-6A-10(b)(5) of this code, notification shall be made on forms and in a manner prescribed by the secretary sufficient to identify, for those persons, the rights afforded them under §22-6A-11, and §22-6A-12 of this code, and the opportunity for testing their water well.

(e) Prior to filing an application for a permit for a horizontal well under this article, the applicant shall publish in the county in which the well is located or is proposed to be located a Class II legal advertisement as described in §59-3-2 of this code, containing notice of the public website required to be established and maintained pursuant to §22-6A-21 of this code and language indicating the ability of the public to submit written comments on the proposed permit, with the first publication date being at least ten days prior to the filing of the permit application. The secretary shall consider, in the same manner required by §22-6A-8(f), and §22-6A-11(c)(1) of this code, written comments submitted in response to the legal advertisement received by the secretary within 30 days following the last required publication date: *Provided,* That such parties submitting written comments pursuant to this subsection are not entitled to participate in the processes and proceedings that exist under §22-6-15, §22-6-17 or §22-6-40 of this code, as applicable and incorporated into this article by §22-6A-5 of this code.

(f) Materials served upon persons described in §22-6A-10(b) of this code shall contain a statement of the time limits for filing written comments, who may file written comments, the name and address of the secretary for the purpose of filing the comments and obtaining additional information, and a statement that the persons may request, at the time of submitting written comments, notice of the permit decision and a list of persons qualified to test water.

(g) Any person entitled to submit written comments to the secretary pursuant to §22-6A-11(a) of this code, shall also be entitled to receive from the secretary a copy of the permit as issued or a copy of the order modifying or denying the permit if the person requests receipt of them as a part of the written comments submitted concerning the permit application.

(h) The surface owners described in §22-6A-10(b)(1), §22-6A-10(b)(2), and §22-6A-10(b)(4) of this code, and the coal owner, operator or lessee described in §22-6A-10(b)(3) of this code ~~is~~ are also entitled to receive notice within seven days but no less than two days before commencement that well work or site preparation work that involves any disturbance of land is expected to commence.

(i) Persons entitled to notice pursuant to §22-6A-10(b) of this code may contact the department to ascertain the names and locations of water testing laboratories in the subject area capable and qualified to test water supplies in accordance with standard accepted methods. In compiling that list of names the department shall consult with the state Bureau for Public Health and local health departments.

(j) (1) Prior to conducting any seismic activity for seismic exploration for natural gas to be extracted using horizontal drilling methods, the company or person performing the activity shall provide notice to Miss Utility of West Virginia Inc. and to all surface owners, coal owners and lessees, and natural gas storage field operators on whose property blasting, percussion or other seismic-related activities will occur.

(2) The notice shall be provided at least three days prior to commencement of the seismic activity.

(3) The notice shall also include a reclamation plan in accordance with the erosion and sediment control manual that provides for the reclamation of any areas disturbed as a result of the seismic activity, including filling of shotholes used for blasting.

(4) Nothing in this subsection decides questions as to whether seismic activity may be secured by mineral owners, surface owners or other ownership interests.

§22-6A-12. Well location restrictions.

(a) Wells may not be drilled within 250 feet measured horizontally from any existing water well or developed spring used for human or domestic animal consumption. ~~The center of well pads may not be located within six hundred twenty-five~~ The limit of disturbance of a well site may not be closer than 1,500 feet of an occupied dwelling structure, or a building 2,500 square feet or larger used to house or shelter dairy cattle or poultry husbandry. This limitation is applicable to those wells, developed springs, dwellings or agricultural buildings that existed on the date a notice to the surface owner of planned entry for surveying or staking as provided in §22-6A-10 of this code was provided or a notice of intent to drill a horizontal well as provided in §22-6A-16(b) of this code if the notice includes the same statement required for the notice in §22-6A-10 of this code that copies of the state Erosion and Sediment Control Manual and the statutes and rules related to oil and gas exploration and production may be obtained from the secretary was provided, whichever occurs first, and to any dwelling under construction prior to that date. This limitation may be waived by written consent of the surface owner transmitted to the department and recorded in the real property records maintained by the clerk of the county commission for the county in which such property is located. Furthermore, the well operator may be granted a variance by the secretary from these distance restrictions upon submission of a plan which identifies the sufficient measures, facilities or practices to be employed during well site construction, drilling and operations. The variance, if granted, shall include terms and conditions the department requires to ensure the safety and protection of affected persons and property. The terms and conditions may include insurance, bonding and indemnification, as well as technical requirements.

(b) No well pad may be prepared or well drilled within 100 feet measured horizontally from any perennial stream, natural or artificial lake, pond or reservoir, or a wetland, or within 300 feet of a naturally reproducing trout stream. No well pad may be located within 1,000 feet of a surface or ground water intake of a public water supply. The distance from the public water supply as identified by the department shall be measured as follows:

(1) For a surface water intake on a lake or reservoir, the distance shall be measured from the boundary of the lake or reservoir.

(2) For a surface water intake on a flowing stream, the distance shall be measured from a semicircular radius extending upstream of the surface water intake.

(3) For a groundwater source, the distance shall be measured from the wellhead or spring. The department may, in its discretion, waive these distance restrictions upon submission of a plan identifying sufficient measures, facilities or practices to be employed during well site construction, drilling and operations to protect the waters of the state. A waiver, if granted, shall impose any permit conditions as the secretary considers necessary.

(c) Notwithstanding the foregoing provisions of this section, nothing contained in this section prevents an operator from conducting the activities permitted or authorized by a Clean Water Act Section 404 permit or other approval from the United States Army Corps of Engineers within any waters of the state or within the restricted areas referenced in this section.

(d) The well location restrictions set forth in this section shall not apply to any well on a multiple well pad if at least one of the wells was permitted or has an application pending prior to the effective date of this article.

(e) The secretary shall, by December 31, 2012, report to the Legislature on the noise, light, dust and volatile organic compounds generated by the drilling of horizontal wells as they relate to the well location restrictions regarding occupied dwelling structures pursuant to this section. Upon a finding, if any, by the secretary that the well location restrictions regarding occupied dwelling structures are inadequate or otherwise require alteration to address the items examined in the study required by this subsection, the secretary shall have the authority to propose for promulgation legislative rules establishing guidelines and procedures regarding reasonable levels of noise, light, dust and volatile organic compounds relating to drilling horizontal wells, including reasonable means of mitigating such factors, if necessary.

§22-6A-12a. Air, noise, light and dust standards.

(a) This section does not apply to or affect any well work permitted for a horizontal well prior to the enactment of this section, or to permit applications pending prior to the effective date of this section. However, the secretary has the authority granted him or her pursuant to §22-6A-2(b)(5) of this code and other applicable provisions of this code.

(b) The operator shall set up continuous real-time monitoring of air, noise, dust and particulates at the residence or other point of impact that is closest or most likely to be impacted by the well work, including traffic associated with the site. The operator shall continuously monitor those parameters in real time. If there is a five percent chance or greater that the monitored levels could exceed any of the required parameters as determined by continuous process control analysis during any running 24-hour averaging period, the operator shall implement the best available control technology available to limit the levels. The monitored levels need to be continuously available by wireless or other transmission to those persons or entities within 1,500 feet of the limit of disturbance who request it. When levels exceed parameters, alerts shall be sent to those persons or entities. The data shall be available to the public for study. Unless altered by legislative rule, the parameters are:

(1) For noise during site construction, 70 dBA average an hour.

(2) For noise at all other times, 55 dBA at any time.

(3) For dust, the national ambient air quality standard level for a 24-hour period and no visible dust on residences or crops.

(4) For air, the minimal risk levels for chronic (365 days or more) exposure of organic compounds set by the Agency for Toxic Substances and Disease Registry of the Centers for Disease Control and Prevention of the United States Department of Health and Human Services.

(c) No light from artificial illumination, flares or other sources shall shine directly on any residence or livestock or structure containing livestock.

(d) Notwithstanding the provisions of §22-6A-12a(a) of this code if, after completion of well work, production or production facilities cause a violation of the standards set out in §22-6A-12a(b) of this code at a residence, then the operator shall implement the best available control technology available to limit the levels that violate the standards.

ARTICLE 6B. OIL AND GAS HORIZONTAL WELL PRODUCTION DAMAGE COMPENSATION.

§22-6B-3. Compensation of surface owners for drilling operations.

(a) The oil and gas developer is obligated to pay the surface owner compensation for:

(1) Lost income or expenses incurred as a result of being unable to dedicate land actually occupied by the driller’s operation, or to which access is prevented by the drilling operation, to the uses to which it was dedicated prior to commencement of the activity for which a permit was obtained, measured from the date the operator enters upon the land and commences drilling operations until the date reclamation is completed;

(2) The market value of crops, including timber, destroyed, damaged or prevented from reaching market;

(3) Any damage to a water supply in use prior to the commencement of the permitted activity;

(4) The cost of repair of personal property up to the value of replacement by personal property of like age, wear and quality; and

(5) The diminution in value, if any, of the ~~surface lands~~ entire surface tract and other property after completion of the surface disturbance done pursuant to the activity for which the permit was issued determined according to the market value of the ~~actual use made thereof by the surface owner~~ land for its highest and best use that could be made of the land immediately prior to the commencement of the permitted activity.

The amount of damages may be determined by any formula mutually agreeable between the surface owner and the oil and gas developer.

(b) Any reservation or assignment of the compensation provided in this section apart from the surface estate except to a tenant of the surface estate is prohibited.

(c) In the case of surface lands owned by more than one person as tenants in common, joint tenants or other co-ownership, any claim for compensation under this article shall be for the benefit of all co-owners. The resolution of a claim for compensation provided in this article operates as a bar to the assertion of additional claims under this section arising out of the same drilling operations.

§22-6B-5. Notification of claim.

Any surface owner, to receive compensation under §22-6B-3 of this code, shall notify the oil and gas developer of the damages sustained by the person within two years after the date that the oil and gas developer files notice that final reclamation is commencing under §22-6A-14 of this code. The notice of reclamation shall be given to surface owners by registered or certified mail, return receipt requested, and is complete upon mailing. If more than three tenants in common or other co-owners hold interests in the lands, the oil and gas developer may give the notice to the person described in the records of the sheriff required to be maintained pursuant to §11A-1-8 of this code or publish in the county in which the well is located ~~or to be located a Class II legal advertisement as described in section two, article three, chapter fifty-nine of this code, containing the notice and information the secretary prescribes by rule~~ plus the occupant of any residential structure on the property.

§22-6B-7. Rejection; legal action; arbitration; fees and costs.

(a) (1) Unless the oil and gas developer has paid the surface owner a negotiated settlement of compensation within 75 days after the date the notification of claim was mailed under §22-6B-5 of this code, the surface owner may either: (A) Within 80 days after the notification mail date ~~either (i) Bring~~ or within two years after the date that the oil and gas developer files notice that final reclamation is commencing under §22-6A-14 of this code bring an action for compensation in the circuit court of the county in which the well is located; or ~~(ii)~~ (B) within 80 days after the notification mail date elect instead, by written notice delivered by personal service or by certified mail, return receipt requested, to the designated agent named by the oil and gas developer under the provisions of §22-6A-7 of this code, to have his, her or its compensation finally determined by binding arbitration pursuant to §55-10-1 *et seq.* of this code.

(2) Settlement negotiations, offers and counter-offers between the surface owner and the oil and gas developer are not admissible as evidence in any arbitration or judicial proceeding authorized under this article, or in any proceeding resulting from the assertion of common law remedies.

(b) The compensation to be awarded to the surface owner shall be determined by a panel of three disinterested arbitrators. The first arbitrator shall be chosen by the surface owner in the party’s notice of election under this section to the oil and gas developer; the second arbitrator shall be chosen by the oil and gas developer within 10 days after receipt of the notice of election; and the third arbitrator shall be chosen jointly by the first two arbitrators within 20 days thereafter. If they are unable to agree upon the third arbitrator within 20 days, then the two arbitrators shall immediately submit the matter to the court under the provisions of §55-10-1 of this code, so that, among other things, the third arbitrator can be chosen by the judge of the circuit court of the county in which the surface estate lies.

(c) The following persons are considered interested and may not be appointed as arbitrators: Any person who is personally interested in the land on which horizontal drilling is being performed or has been performed, or in any interest or right therein, or in the compensation and any damages to be awarded therefor, or who is related by blood or marriage to any person having such personal interest, or who stands in the relation of guardian and ward, master and servant, principal and agent, or partner, real estate broker, or surety to any person having such personal interest, or who has enmity against or bias in favor of any person who has such personal interest or who is the owner of, or interested in, the land or the oil and gas development of the land. A person is not considered interested or incompetent to act as arbitrator by reason of being an inhabitant of the county, district or municipal corporation in which the land is located, or holding an interest in any other land therein.

(d) The panel of arbitrators shall hold hearings and take testimony and receive exhibits necessary to determine the amount of compensation to be paid to the surface owner. However, no award of compensation may be made to the surface owner unless the panel of arbitrators has first viewed the surface estate in question. A transcript of the evidence may be made but is not required.

(e) Each party shall pay the compensation of the party’s arbitrator and one half of the compensation of the third arbitrator, or each party’s own court costs as the case may be.

NOTE: The purpose of this bill is to change an elective obligation to a mandatory one. The bill requires notice in certain instances to the occupants of residential property. The bill prohibits the disturbance of a well site be no closer than 1,500 feet of an occupied dwelling. The bill provides notices include certain information. The bill establishes standards relating to air, noise, light and dust. The bill permits landowners be compensated for any decrease in the values of the land for its highest and best use. The bill requires the notice of a claim be also provided to an occupant of residential structure on the property. The bill establishes a statute of limitations for claims being filed.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.