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Oil and Gas Regulatory Considerations for Coal, Oil and Gas Operators in West Virginia: Selected Issues

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OIL AND GAS REGULATORY CONSIDERATIONS FOR COAL, OIL AND GAS OPERATORS IN WEST VIRGINIA: SELECTED ISSUES

William H. Hill, III *

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I. INTRODUCTION

When coal, oil and gas production occur near each other, there are regulatory requirements for each that can apply to the other. This Article addresses selected oil and gas regulatory requirements that, when not properly enforced, can affect coal, oil and gas producers. These selected oil and gas regulatory requirements include both coalbed methane and conventional oil and gas requirements.

The coalbed methane that can be vented from coal mine areas and

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1 For definitional purposes, the terms “regulatory” and “regulation” are used in this Article to refer to state statutes and regulations, and the orders and enforcement that arise out of them — encompassing, for example, all aspects of requirements, enforcement, inspection, identification of violations, notices, hearings, and appeals — except where reference to a specific statute, regulation, rule, order, or policy is specifically limited by its specific identification.


3 See generally W. Va. Code §§ 22-6-1 to -41, 22-10-1 to -12, 22-21-1 to -29 (1994).
degasified from coal seams is subject to oil and gas regulation. Many oil and gas wells in the state drill (and have been drilled) through coal seams. The regulatory focus on these oil and gas wells has included, *inter alia*, fostering the safety of miners, and preventing the waste of coal, oil and gas. One aspect of these wells is that, currently, there are estimated over nineteen thousand abandoned wells in West Virginia and — where they have been drilled near or through coal seams — the safety and waste concerns are susceptible to being compounded, both by lack of contemporaneous stewardship of the wells and by obfuscation of the identities with which to deal or fix responsibility.

Accordingly, this Article reviews selected oil and gas regulatory issues, with an eye towards discerning compliance within the oil and gas regulatory program. It is with that eye that Section II of this Article highlights example interfaces between coal regulation and oil and gas regulation. These interfaces are a starting point from which to examine operational and responsibility considerations, such as, *inter alia*, safety and liability.

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5 *See, e.g.*, W. VA. CODE § 22-6-18 (1994) (discussing protective devices when well penetrates workable coal bed and when gas is found beneath or between workable coal beds); *see also* H. L. Snyder & C. Lynch Christian, III, *Oil and Gas Operations Through Coal Seams in West Virginia*, 1 E. MIN. L. INST. § 5.02[1] (1980) ("West Virginia coal seams are generally closer to the surface than oil and gas horizons.").

6 *See, e.g.*, W. VA. CODE § 22-6-15 (1994); *cf.*, e.g., Snyder & Christian, *supra* note 5, at § 5.02[1][b][i].

7 *See, e.g.*, W. VA. CODE § 22-21-1.

8 *See, e.g.*, W. VA. CODE §§ 22-6-31 to -33 (1994).

9 *See generally* OFFICE OF OIL & GAS, WEST VIRGINIA DIV. OF ENVT'L. PROTECTION, THE HUNT FOR ABANDONED WELLS (1996) (stating that approximately 20% of those wells are estimated to present an imminent danger to the environment) [hereinafter cited as HUNT FOR ABANDONED WELLS].

10 This Article is limited to regulatory enforcement. *Compare, e.g.*, Shostak, *The Prosecution and Defense of a Water Well Contamination Case*, 14 E. MIN. L. INST., ch. 21 (1993) (addressing private litigation over selected safety and liability claims) *with* Donnell, *Environmental Liabilities Arising*
Section III highlights the procedural apparatus by which state regulatory oil and gas requirements are enforced. Procedural requirements are addressed with regard to identifying violations, notices, opportunities to abate, opportunities for hearing, orders, and appeals.\textsuperscript{11}

In Section IV, two separate but intertwined topics are addressed: operatorship and bona fide future use. The first topic, operatorship, forms a basis for identifying entities for regulatory responsibility and forms a basis, therefore, for enforcement. Within operatorship, three requirements — again, separate but intertwined — are addressed: (1) registration, which concerns identifying parties responsible for compliance with the regulatory program;\textsuperscript{12} (2) financial responsibility, which concerns guaranteeing performance of the regulatory requirements;\textsuperscript{13} and (3) transfer, which concerns regulatory compliance considerations necessary to obtain release of bonding responsibility.\textsuperscript{14} The second topic, bona fide future use,\textsuperscript{15} analyzes this operator application for delay, and finds that it is largely overmatched by the requirement to "produce or plug."\textsuperscript{16}

This Article, then, analyzes selected regulatory requirements that can affect selected coal, oil, and gas circumstances. Each selected circumstance in this article can be affected in a variety of ways by each selected regulatory requirement. Accordingly, each selected circumstance is analyzed separately.

\textsuperscript{11} See generally W. VA. CODE §§ 22-6-1 to -41, 22-10-1 to -12 (1994).

\textsuperscript{12} Registration, in the sense that an operator may submit information to the Office of Oil and Gas about its operations, can arise at any time an operator contacts the Office of Oil and Gas, as when, \textit{inter alia}, the operator requests a permit to drill, requests approval of its bond, or requests transfer of a property. However, the term is generally identified with an operator filing a Form OP-1. See W. VA. CODE STATE R. § 38-18-10.3 (1996) (effective date 1993). See discussion infra part IV.A.1.

\textsuperscript{13} See generally W. VA. CODE §§ 22-6-26, 22-10-4, 22-10-5, 22-21-8 (1994).

\textsuperscript{14} Transfer is a term generally under the umbrella of regulatory law. W. VA. CODE STATE R. § 18-10-3 to -5 (1996) (effective date 1993). The provision of most impact, however, is in the West Virginia Code. W. VA. CODE § 22-6-26(g) (1994) (regarding release of a transferor’s bond); see discussion infra part IV.A.3.

\textsuperscript{15} See, W. VA. CODE § 22-6-19 (1994).

\textsuperscript{16} Id.
II. SELECTED REGULATORY INTERFACES BETWEEN COAL, OIL AND GAS

A. Coal Bed Methane Regulatory Considerations

Coalbed methane venting from mine areas and degasification from coal seams "has been and continues to be approved by the State for the purpose of ensuring the safe recovery of coal."17 Two statutory enactments recognized an expansion of this purpose: the federal Energy Policy Act of 199218 and chapter 22, article 21 of the West Virginia Code. These enactments recognized both a national and state need to encourage commercial recovery and marketing of coalbed methane.19 Chapter 22, article 21 of the West Virginia Code20 sets forth a framework within which coalbed methane development is regulated in this state.21 West Virginia has embraced a forced "pooling" regulatory approach towards

17 W. VA. CODE § 22-21-1(a) (1994) (declaring public policy); see also Snyder & Christian, supra note 5, § 5.03.

18 42 U.S.C. § 13,368.

19 W. VA. CODE § 22-21-1. West Virginia encouragement to develop coalbed methane, however, is subject to the declaration and finding "that the value of coal is far greater than the value of coalbed methane and any development of coalbed methane should be undertaken in such a way as to protect and preserve coal for future safe mining and maximum recovery of the coal." See also Lewin et al., supra note 4, at 584-99 (discussing greenhouse effect and extraction-related conflicts associated with coalbed methane); Jeff L. Lewin, Coalbed Methane: Recent Court Decisions Leave Ownership "Up in the Air," but New Federal and State Legislation Should Facilitate Production, 96 W. VA. L. REV. 632, 635-36 (1994) (discussing technology of coalbed methane extraction). Cf. Lewin et al., supra note 5, at 613 (discussing history of coalbed methane legislative proposal drafting by T. Streit, Chief of the West Virginia Office of Oil and Gas, Division of Environmental Protection).

20 W. VA. CODE §§ 22-21-1 to -29 (1994).

21 See Levin, supra note 19, at 674. Levin states:

There are several reasons why the Affected States are likely to adopt their own programs in lieu of coverage under Section 1339. First, as a matter of pride, each state is likely to prefer to administer its own program. Second, state forced pooling programs can be integrated with existing regulatory systems applicable to the coal and gas industries, whereas federal regulations may conflict with particular state rules or policies. Third, regulated industries in the Affected States are likely to prefer the expansion of state regulatory authority to the creation of a new layer of regulatory bureaucracy administered from Washington, where they are likely to have less input and less political influence. All three of these reasons were factors in West Virginia's recent adoption of H.B. 4371.

Id.
ownership of coalbed methane gas.\textsuperscript{22} Otherwise, the regulatory approach for extraction and development of coalbed methane generally corresponds with the West Virginia regulatory approach for other oil and gas extraction and development.\textsuperscript{23} For example, the safeguards and pre-emption of coal mining (such as, the requirements for notice,\textsuperscript{24} plugging,\textsuperscript{25} and mining through)\textsuperscript{26} present in conventional oil and gas regulation are also present in coalbed methane gas regulation.\textsuperscript{27}

What is coalbed methane gas? Chapter 22, article 21 of the West Virginia


[i]n the absence of a voluntary agreement, an operator, owner or other party claiming an ownership interest in the coalbed methane may file an application with the chief to pool (i) separately owned interests in a single tract, (ii) separately owned tracts, (iii) separately owned interests in any tract, and (iv) any combination of (i), (ii) and (iii) to form a drilling unit for the production of coalbed methane from one or more coalbed methane wells.

W. VA. CODE § 22-21-15(a) (1994); see also Lewin, supra note 19, at 671 (discussing Virginia coalbed methane regulatory statute requiring forced pooling that dramatically increased coalbed methane production).


\textsuperscript{24} Compare W. VA. CODE § 22-6-9 (1994) and W. VA. CODE § 22-6-13 (1994) with W. VA. CODE § 22-21-22 (1994). These requirements for notice can affect both oil and gas operators and coal operators economically: coal operators may have to mine around a well, leaving large amounts of coal and using additional dangerous equipment; and an oil and gas operator may have to alter optimal spacing or be prohibited from drilling due to coal operations. See generally Snyder & Christian, supra note 5, at §§ 5.02 [1][b][ii][iv].


\textsuperscript{26} Compare W. VA. CODE § 22-6-24 with W. VA. CODE § 22-21-22. Lewin explains that:

Although provisions for delay and for compensation make sense in theory, in practice the representatives of the coal and gas industries are highly unlikely to agree to their inclusion in forced pooling legislation. The West Virginia legislation does not allow degasification to delay mining operations, for a coal operator can compel the CBM developer to plug the well within sixty days by giving notice of an intention to mine the coal within six months. In order to avoid the risk of premature plugging of their wells, potential CBM developers can be expected to negotiate with coal operators to coordinate CBM production with subsequent coal mining operations.

Lewin, supra note 19, at 681.

\textsuperscript{27} Compare, e.g., W. VA. CODE §§ 22-21-1 to -29 (1994) with 22-6-1 to -41 (1994).
Code defines coalbed methane gas as "gas which can be produced from a coal seam, the rock or other strata in communication with a coal seam, a mined-out area or a gob well."28 For the purposes of this definition, a coal seam, or coal bed is "a seam of coal, whether workable or unworkable,"29 and "the noncoal roof and floor of said seam of coal."30 A coalbed methane well is "any hole or well sunk, drilled, bored or dug into the earth for the production of coalbed methane for consumption or sale, including a gob well," but excludes those drilled "for core drilling, production of coal or water, venting of gas from a mine area, or degasification of a coal seam."31

The provisions of chapter 22, article 21 of the West Virginia Code apply to all lands under which a coalbed is located, and to any coalbed methane well.32 In contrast, chapter 22, article 21 of the West Virginia Code does not apply (1) to wells that are otherwise permitted, approved, or regulated under selected articles under chapter 22 of the West Virginia Code;33 (2) to venting apparatus used for the purpose of venting any mine or mining area, or (3) to ventilation or degasification of any coal seam for the mining of coal.34 Moreover, the article does not apply to subsurface boreholes drilled from the face of the mine, except to the extent that

28 W. VA. CODE § 22-21-2(c) (1994). A gob well is a "well drilled or vent hole converted to a well pursuant to [article 21] which produces or is capable of producing coalbed methane or other natural gas from a destressed zone created above and below a mined-out coal seam by any prior full seam extraction of the coal." W. VA CODE § 22-21-2(l)(1994); cf., e.g., Lewin et al., supra note 4, at 576-83 (discussing the technology of coalbed methane extraction).

29 W. VA. CODE § 22-21-2(b) (1994). A workable coalbed or workable coal seam is "any seam of coal twenty inches or more in thickness, or any seam of less thickness which is being commercially mined or can be shown to be capable of being commercially mined." W. VA. CODE § 22-21-2(r) (1994).

30 W. VA. CODE § 22-21-2(b) (1994).


32 W. VA. CODE § 22-21-3(a) (1994).


34 W. VA. CODE § 22-21-3(b).
pooling units may be regulated by the article.\textsuperscript{35} To the extent that coalbed methane wells are similar to oil and gas wells, and the production of coalbed methane is similar to the production of natural gas, coalbed methane gas wells and their production are subject to the pertinent regulatory provisions governing oil and gas wells under chapter 22, articles six and ten of the West Virginia Code.\textsuperscript{36} The Chief of the Office of Oil and Gas is responsible for issuing permits and otherwise supervising coalbed methane production and compliance with chapter 22, article 21 of the West Virginia Code.\textsuperscript{37}

B. \textit{Intersection with Oil and Gas Regulatory Considerations}

As discussed above, the rules governing extraction of coalbed methane closely reflect the rules governing extraction of oil and gas generally.\textsuperscript{38} Examples include the operational requirements concerning, \textit{inter alia}, surface soil and erosion,\textsuperscript{39} performance bonding,\textsuperscript{40} notice to surface owners,\textsuperscript{41} protective devices when drilling through coal beds,\textsuperscript{42} abandoned wells,\textsuperscript{43} plugging wells,\textsuperscript{44} injunctive relief,\textsuperscript{45} and penalties.\textsuperscript{46} Thus, when wells are drilled through coal, both the methane


\textsuperscript{36} See, e.g., W. VA. CODE § 22-21-3 (1994).

\textsuperscript{37} See generally W. VA. CODE § 22-21-4.

\textsuperscript{38} See generally supra note 2.

\textsuperscript{39} Compare W. VA. CODE § 22-6-30 (1994) with W. VA. CODE § 22-21-22.

\textsuperscript{40} Compare W. VA CODE § 22-6-26 (1994) with W. VA. CODE § 22-21-8 (1994).

\textsuperscript{41} Compare W. VA. CODE § 22-6-9 with W. VA. CODE § 22-21-9 (1994).

\textsuperscript{42} Compare W. VA. CODE § 22-6-18 with W. VA. CODE § 22-21-14 (1994).

\textsuperscript{43} Compare W. VA. CODE § 22-6-19 with W. VA. CODE § 22-21-21 (1994).

\textsuperscript{44} Compare W. VA. CODE § 22-6-24 with W. VA. CODE § 22-21-23.


\textsuperscript{46} Compare, e.g., W. VA. CODE § 22-6-34 (1994) with W. VA. CODE § 22-21-28 (1994).
gas regulatory program and the oil and gas regulatory program require protective measures to ensure that gas, oil, or water does not seep into the mines or water-bearing strata.47

The foregoing operational considerations raise other concomitant concerns, including private liability and expense for dangers that arise during operations,48 and public penalties for violations of state law that arise during operations.49 Economic losses can arise due to mine shutdowns, repairs, and adjustments to schedules and operations of the affected mines. The regulatory programs do not regulate economic losses, but by regulating dangers and safety considerations, enforcement of the regulatory programs can help minimize those losses. Dangers and safety considerations that can arise from gas seepage can include potential explosions and poisons.50 Dangers and safety considerations that can arise from seepage of water can include potential well leakage near the mines,51 as well as potential pollution, \textit{inter alia}, of aquifers, water sources, and surface and ground water.52 The oil and gas regulatory programs therefore require safety devices during the life of the wells

\footnotesize{47 \textit{Compare} W. VA. CODE § 22-6-18 \textit{with} W. VA. CODE § 22-21-14.}

\footnotesize{48 \textit{See generally} Snyder & Christian, \textit{supra} note 5, § 5.02[1][b][A]; Mitchell, \textit{A Duty To Plug — The Deep Pocket Theory}, 11 E. MIN. L. INST. § 20.01 (1990); Donnell, \textit{supra} note 10.}

\footnotesize{49 \textit{See, e.g.}, W. VA. CODE §§ 22-6-34 (authorizing daily penalty in excess of $2500); W. VA. CODE § 22-10-9 (1994) (setting $25,000.00 penalty per well for failure to plug within 30 days of Chief’s order); W. VA. CODE § 22-21-28 (1994) (stating that penalty not to exceed reasonable expected net profit).

\footnotesize{50 \textit{Cf, e.g.}, W. VA. CODE § 22-6-27 (1994) (providing cause of action for explosions). \textit{Compare} Levin et al., \textit{supra} note 4, at 566 (declaring that CBM has killed thousands in the mines) \textit{with} Snyder & Christian, \textit{supra} note 5, § 5.02[1][b] ("[N]o coal mine explosion has ever been known to have been caused by oil or gas leakage from a well, the possibility of encountering gas from an unknown or undiscovered well must always be considered") \textit{and} Interview with Theodore M. Streit, Chief, Office of Oil and Gas, W. Va. Division of Environmental Protection (November 6, 1996) [hereinafter Streit Interview] (stating that during the past 10 years mines have been flooded as the result of well work and an explosion occurred on the surface as crews worked on a well to plug it) \textit{and} OFFICE OF OIL AND GAS, WEST VIRGINIA DIV. OF ENVT’L. PROTECTION, 1995 STATISTICAL REPORT 165 (1995) (discussing two people burned at well sites and one person inhaled toxic gas). Therefore, regulatory enforcement with regard to coalbed methane gas production should take an increased priority due to the simultaneous working of both the coalbed methane and the coal. \textit{Cf.} Levin et al., \textit{supra} note 4, at 570 ("[V]enting of CBM has been identified as a substantial contributor to the problem of global warming, often referred to as the ‘greenhouse effect.’")

\footnotesize{51 \textit{See, e.g.}, Snyder & Christian, \textit{supra} note 5, § 5.02[1][b].}

\footnotesize{52 \textit{See, e.g.}, INTERSTATE OIL & GAS COMPACT COMMN, UNITED STATES DEPT OF ENERGY, A STUDY OF IDLE OIL AND GAS WELLS IN THE UNITED STATES 92 (1996) [hereinafter IDLE OIL AND GAS WELLS]; \textit{see also} W. VA. CODE § 22-6-21 (1994) (addressing installation of fresh water casings).}
and plugging at the end of the life of the wells to pursue preventing these problems.\textsuperscript{53} With regard to coalbed methane extraction, the risk of dangers and safety considerations should be expected to increase because the coalbed methane production and the coal mining may be expected to frequently take place simultaneously, as opposed to conventional oil and gas production. In both circumstances, specific safety devices are required when wells are drilled through workable coal seams,\textsuperscript{54} and abandoned wells are required to be plugged before mining through them.\textsuperscript{55}

A problem arising out of early wells is that many were drilled long before plugging regulation began in 1891.\textsuperscript{56} As a result, many early wells are not located, many are not plugged, many are plugged inappropriately under current standards, and many have rusting and decaying well apparatus.\textsuperscript{57} In West Virginia, over nineteen thousand wells are estimated to be abandoned and are required to be lawfully plugged.\textsuperscript{58} Coal mining through an area containing such wells is subject

\textsuperscript{53} Generally, where the oil and gas currently being developed are located below the coal seams currently being developed, plugging requirements are set forth in the West Virginia Code. W. VA. CODE §§ 22-6-23, -24 (1994); see also W. VA. CODE § 22-21-22 (addressing plugging for mine through).

\textsuperscript{54} See, e.g., W. VA. CODE § 22-6-18.

\textsuperscript{55} See, e.g., W. VA. CODE § 22-21-21 (plugging for mine through).


\textsuperscript{57} Cf. Snyder & Christian, supra note 5, § 5.04 (describing the early West Virginia requirement to place a wooden plug at the top and bottom of the well); Cf. Snyder & Christian, supra note 5, § 5.02[1][a][iv], [b][i] (stating that oil and gas community believes mine work generates a current that may be involved in well corrosion and that hazards arise when wells are not mapped, and changes in the course of the mining increases the hazards associated with increased machinery); see generally W. VA. CODE § 22-6-24(e) (1994) (setting forth replugging requirements).

\textsuperscript{58} HUNT FOR ABANDONED WELLS, supra note 9. See generally Pierce & Flanery, supra note 56, at § 19.02 (describing sample terms used when addressing abandoned wells). Pierce and Flanery define the following terms:

[a]—Orphan.

"Orphan" wells refer to that class of idle and unplugged wells or improperly plugged wells for which no existing solvent responsible entity is known or can be found . . . . [This class is a large one in states like Pennsylvania, where significant drilling activity occurred before the adoption of either plugging or permitting statutes.
to increased hazards associated with the unascertained locations, and, accordingly, unknown dangers attendant to such wells — many not located and not recorded — are susceptible to surprise.

III. BASIC OIL AND GAS REGULATORY ENFORCEMENT APPARATUS

A. Introduction

The oil and gas regulatory enforcement apparatus is relatively

[b]—Foundling.
As the common meaning of the term “foundling” suggests, this class of wells includes those idle and unplugged wells originally drilled by one entity for which a second, currently existing and solvent, entity is wittingly or unwittingly responsible. As subsequent discussion will suggest, the arrival of a foundling well at the doorstep may come as a surprise to some entities deemed responsible for their plugging.

[c]—Latchkeys, Love Children, and Home Aloners.
This third class of wells is at the heart of the Interstate Oil and Gas Compact Commission’s use of the term “idle” wells. It consists of those unplugged wells not currently producing and unproduced through the defined statutory abandonment period, either because of (1) operational emphasis on other or more economic operations (“latchkeys”); (2) the deliberate refusal of the responsible operator to acknowledge and assume the plugging liability (“love children”); or (3) the propensity of the responsible party, having acquired the fruits of the operation, simply to retreat to the condo in Boca Raton leaving the uneconomic well unplugged and unattended (“home aloners”). It is this class of wells that is most accurately referred to as “abandoned” when using terms analogous to minor children.

[d]—Wards of the State.
Depending on the regulatory scheme, this class may be large or small. It consists of any well from any of the above classes for which the state statute does or may place primary plugging responsibility on an agency of state government.

Id.; cf. WEST VIRGINIA STATE REVIEW, supra note 56, at 16. According to the Interstate Oil and Gas Compact Commission:

An abandoned well is a well for which no use has been reported for a period of 12 months. [W. VA. CODE § 22-6-19 (1994)]. This type of well is to be distinguished from the smaller category of “orphan” wells; orphaned wells are wells for which no owner can be identified. As a practical matter, orphaned wells are also abandoned wells. OOG has recently undertaken to map the location of orphaned wells. About 26,000 orphaned wells had been identified at the time of the review, and another 15,000 - 25,000 are thought to be orphaned and not yet mapped. In addition, there are approximately 14,000 wells which have responsible parties but are abandoned. Some of the operators have started plugging programs and some others have demonstrated future uses for the wells.

Id.
straightforward, simple and speedy. There is primarily one industry to regulate, and the substances involved are primarily those attendant to oil and gas operations. Compare the Resource Conservation and Recovery Act (RCRA), which regulates waste in a wide variety of industries, and regulates a wide variety of substances, including oil and gas. (However, oil and gas exploration and production wastes have been excluded from regulation as hazardous waste, under RCRA, subtitle C.) While oil and gas regulation is primarily a state regulatory program, and while there is no “cradle to grave” oil and gas entree in the federal environmental regulatory alphabet soup (such as RCRA), the oil and gas regulatory requirements arise out of both the state oil and gas program and other state and federal environmental

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60 Id.; see generally David M. Flannery, The Environmental Regulatory Dilemma of the Oil and Gas Industry, 9 E. MIN. L. INST. § 15.01 (1988). According to Flannery:

Historically, the highest priorities of federal environmental regulatory programs have been focused on the control of large, fixed industrial sources. These priorities have been defined in this manner in part, because such sources produce larger volumes of waste material and the sources are relatively few in number and are easy to identify and to regulate.

By contrast, the oil and gas industry is highly mobile and geographically diverse. Its sources generate much smaller quantities of waste over much shorter periods of time. However, the oil and gas industry has a very large number of sources with thousands of new sources being added each year. The small size of oil and gas sources and their large numbers have, until recently, caused regulatory agencies to focus their resources elsewhere.

Id.

61 See Flannery, supra note 60, §15.02; see, e.g., 42 U.S.C. § 6903(27) (1994). The United States Code defines the term “solid waste” as follows:

[any] garbage, refuse, sludge from a waste treatment plant, or air pollution control facility and other discarded material, including, solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits.

Id.


63 42 U.S.C. § 6921(b)(2)(A) (1980); see 42 U.S.C. §§ 6921-6939e. See generally Flannery & Poland, supra note 62, at 362-63 n.87 (stating that duplication between, inter alia, state oil and gas laws and state hazardous waste law to be avoided); Flannery, supra note 60, § 15.02 (discussing oil and gas exemption to RCRA, Subtitle C).
program requirements. For example, selected waste and water pollution requirements are enforced within the oil and gas regulatory program, *inter alia*, permitting and contamination of fresh water sources.\textsuperscript{64} To the extent this is done, it simplifies enforcement into one regulatory program. Finally, the oil and gas regulatory enforcement apparatus contains several specific time limits — for example, a seven day requirement to respond to notice of violation,\textsuperscript{65} and a five day requirement for delay between notice and hearing.\textsuperscript{66} The multiple time limits, when applied to the multiple opportunities to request review,\textsuperscript{67} can foster speedy resolution of issues arising out of oil and gas regulatory requirements.\textsuperscript{68} A "thumbnail" description of selected state oil and gas regulatory apparatus follows.

**B. Regulations**

1. Inspector Enforcement

An oil and gas inspector who observes a violation of the regulatory program requirements is required to post notice of the violation on the well and to send a copy to the operator and the operator’s agent.\textsuperscript{69} "[D]etailed description of the conditions which cause and constitute such violation" will also be included in the notice.\textsuperscript{70} The operator is normally given seven days to abate the violation, but the inspector may extend such period up to thirty days for good cause.\textsuperscript{71} Each violation

\begin{itemize}
  \item \textsuperscript{64} See, e.g., W. VA. CODE § 22-6-7 (1994) (providing for water pollution control permits issued by Chief); W. VA. CODE § 22-6-35 (1994) (allowing civil action presumption of contamination or deprivation of a fresh water source or supply); W. VA. CODE STATE R. §§ 38-12-1 to -4 (1996) (effective date 1993) (providing for solid waste permit issued by Chief by rule if there is compliance with W. VA. CODE STATE R. § 38-18). In cases where the operator does not obtain the requisite water pollution or waste permit from the Chief, it should be inferred that the operator is required by the pertinent water and waste regulatory requirements to obtain a permit under each respective program. See W. VA. CODE § 22-11-8 (1994) (water); W. VA CODE § 22-15-10 (1994) (waste).
  \item \textsuperscript{65} W. VA. CODE § 22-6-3(a) (1994).
  \item \textsuperscript{66} See, e.g., W. VA. CODE § 22-6-28(a) (1994).
  \item \textsuperscript{67} See, e.g., W. VA. CODE §§ 22-6-4, -5, -28 (1994).
  \item \textsuperscript{68} Cf. W. VA. CONST. art. III, § 17 ("[A]nd justice shall be administered without . . . delay.").
  \item \textsuperscript{69} W. VA. CODE §§ 22-6-3, -4 (1994).
  \item \textsuperscript{70} W. VA. CODE § 22-6-3(a) (1994).
  \item \textsuperscript{71} Id.
\end{itemize}
is directed at discrete circumstances (e.g., failure to reclaim, improper plugging, failure to post the well number). The inspector is statutorily authorized to order the operator to cease and desist operations if the violation is not abated, and the operator has fifteen days from which to appeal.

2. Chief's Complaint

The Chief or other interested party may initiate a complaint. True copies of the complaint are sent to the operator, with notice of the time and place of hearing. The operator is authorized at least five days notice prior to the hearing. This procedure is useful to augment enforcement in circumstances where an inspector’s notice of violation has not been issued, or either the Chief or other interested party identifies an unabated violation. Moreover, this procedure is also useful for violations that are generally tracked in the central Office of Oil and Gas, such as, inter alia, failure to report annual production, improper transfers, and abandoned wells. An operator may also seek a hearing before the Office of Oil and Gas via the complaint procedure.

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72 See, e.g., W. VA. CODE § 22-6-30 (providing a six month deadline, which may be extended another six months by the Chief).

73 See, e.g., W. VA. CODE § 22-6-24 (describing methods of plugging a well).

74 See, e.g., W. VA. CODE § 22-6-6(f) (1994).

75 See, e.g., W. VA. CODE §§ 22-6-3(b) to -4(a) (1994); cf. W. VA. CODE § 22-6-4(e) (1994) (allowing the operator to appeal as long as the inspector’s order is in effect).

76 W. VA. CODE § 22-6-28(a). An “interested party” is any well operator, coal operator, the director, or any aggrieved person. Id.

77 Id.

78 Id.


80 W. VA. CODE § 22-6-26(g) (requiring that before a bond may be released, the director must be satisfied that the well has fulfilled the bond conditions); W. VA. CODE § 22-6-26(b).

81 W. VA. CODE § 22-6-19.

82 W. VA. CODE § 22-6-28(a). This opportunity for hearing would appear to be in addition to the hearing available under procedures in consonance with chapter 22, article 6, section 4 of the West Virginia Code.
3. Bond Forfeiture

An operator’s bond is required to be forfeited by the Chief of the Office of Oil and Gas when an operator violates a state requirement beyond the time limit set by the violation notice. Each operator is required to submit to the Chief either a $5,000.00 single well bond or a $50,000.00 blanket bond. The bond is a “performance bond” submitted to the Chief to guarantee performance of state requirements; and when an operator is not in compliance with those requirements, the bond is forfeited in its entirety. Because the forfeiture is a result of violation of state requirements, the operator may request review as discussed below. The forfeitures are required to be deposited in the special oil and gas reclamation fund.

4. Penalties and Recompense

The Office of Oil and Gas issues assessments after receiving from an

84 W. Va. Code §§ 22-6-26(b), -10-5 (1994) (reducing the single well bond amount from $10,000.00 to $5,000.00).
86 W. Va. Code § 22-6-26(b) (cautioning that “conditioned on full compliance with all laws, rules relating to the drilling, redrilling, deepening, casing and stimulating of oil and gas wells ... and to the plugging, abandonment and reclamation of wells and for furnishing such reports ... required”).
87 W. Va. Code § 22-6-26(b).
88 See, e.g., 3A M.J. Bonds § 34 (1996) (“Where a bond is given to a public body as a condition of license or other privilege, or conditioned upon compliance with law, the full penalty of such bond may be recovered as in the nature of liquidated damages for its breach, in the absence of express or implied provisions to the contrary in the statute which prescribes the bond, or in the bond itself.”).
89 See discussion infra part III.B.5.
inspector a copy of a notice of an operator's failure to abate a violation.\textsuperscript{92} Civil penalties of $2,500.00 per day per violation may also be awarded by a state circuit court.\textsuperscript{93} Additionally, after an order by the Chief to plug a well has not been complied with for thirty days, a circuit court may award a civil penalty of $25,000.00.\textsuperscript{94} Full recompense for costs to reclaim and to plug a well by an interested party or the Chief is also authorized.\textsuperscript{95}

5. Hearings

Within fifteen days of notice of failure to abate the violation, an operator may request review,\textsuperscript{96} or, in the alternative, as in the case of a notice of complaint, the Chief may order a hearing.\textsuperscript{97} The notice of violation (or notice of hearing) is a significant event for the operator, in that the violation of the state regulatory requirements places the operator's bond at risk.\textsuperscript{98} Moreover, the Chief is authorized to order other regulatory remedies, such as shutting in a well,\textsuperscript{99} plugging a well,\textsuperscript{100} assessing penalties,\textsuperscript{101} and correcting violations.\textsuperscript{102} Additionally, an operator may


\textsuperscript{93} W. VA. CODE § 22-6-34(a) (1994) (describing willful violation); see also, e.g., W. VA. CODE § 22-6-34(b) (1994) (describing criminal punishment).

\textsuperscript{94} W. VA. CODE § 22-10-9.

\textsuperscript{95} W. VA. CODE §§ 22-6-32, -10-7 (1994).

\textsuperscript{96} W. VA. CODE § 22-6-4(a); see also W. VA. CODE STATE R. § 38-19-2.1 (1996) (effective date Oct. 30, 1987) (granting expansive authorization for hearing).

\textsuperscript{97} W. VA. CODE § 22-6-28(a).

\textsuperscript{98} W. VA. CODE § 22-6-26(i) ("If any of the requirements of this article or rules promulgated pursuant thereto or the orders of the director have not been complied with within the time limit set by the violation notice as defined in sections three, four and five [W. VA. CODE §§ 22-6-3, 22-6-4, 22-6-5] of this article, the performance bond shall then be forfeited.").

\textsuperscript{99} W. VA. CODE STATE R. § 38-18-10.6 (1996) (effective date July 1, 1993).

\textsuperscript{100} W. VA CODE § 22-6-19.

\textsuperscript{101} W. VA CODE § 22-6-34; see also supra note 92.

\textsuperscript{102} W. VA CODE §§ 22-6-3 to -4.
request hearing on any inspector’s order that is still in effect. A third opportunity for hearing that appears endless in its availability is that an interested party may file a complaint with the Chief. A final decision by the Chief after hearing may be appealed to circuit court, or a rehearing may be requested from the Chief. Finally, arbitration may be sought to obtain compensation for plugging by an interested party.

IV. SELECTED REGULATORY ENFORCEMENT CONSIDERATIONS

A. Operatorship Determinations

It is useful to determine the identity of the operator of any well when pursuing well compliance with mining safety requirements, and with counterpart oil and gas requirements. One reason is that many of the requirements affecting a determination of operatorship of an oil and gas well can also affect the coal operator. Another reason is that when a coal operator also operates a coalbed methane well, the requirements determining oil and gas operatorship can directly regulate the coalbed methane operator.

Oil and gas operatorship determinations can be examined in terms of state

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103 W. VA. CODE § 22-6-4(c).
104 W. VA. CODE § 22-6-28 (1994).
105 W. VA. CODE § 22-6-5.
106 See, e.g., W. VA. CODE §§ 22-6-4(c); see generally W. VA. CODE STATE R. § 38-19-2.13; cf. W. VA. R. CIV. P. 59, 60 (setting forth notions of equity which may be argued to the chief when requesting rehearing).
108 See, e.g., W. VA. CODE § 22-6-5 (stating notices of findings sent to operator). The aforesaid notices are sent to the operator because West Virginia’s regulatory program focuses upon well development, rather than lease development. Pierce & Fianery, supra note 56, § 19.11[b].
109 See, e.g., W. VA. CODE §§ 22-21-3(d) (1994) (identifying the oil and gas requirements that apply to coalbed methane).
requirements for registration, financial responsibility, and transfer of wells. Registration requirements are foundational to the state regulatory program, in that the wells and the parties to be regulated may be identified. Financial responsibility requirements provide a method by which operators guarantee their performance of the state regulatory requirements; the financial responsibility requirements are a focal point for operatorship determinations in the context of requests for release from bonding responsibility in conjunction with transfers, bond forfeitures, and abandoned wells. Transfer requirements are a focal point in operatorship determinations, in that operator and well compliance with state oil and gas regulatory requirements is necessary for a bond to be released from a well that another operator has purchased.

1. Registration

Registration of operators and wells in the oil and gas context serves as a means by which the state may identify (1) the parties to be regulated and (2) the wells to be regulated. Other issues related to registration include — inter alia, applications for permits, requests for transfers, submissions of bonds, and designations of agents. Registration, while similar to ownership, can be different — in that it is the operator that initiates registration (e.g., seeking permit for well work and seeking release of financial responsibility for wells it transfers), and

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10 See, e.g., supra note 12.
111 See, e.g., supra note 13; cf. Pierce & Flanery, supra note 56, § 19.12[g] (allowing that a ward of the state can be a foundling under water pollution enforcement).
112 See, e.g., supra note 14.
113 See, e.g., W. VA. CODE § 22-6-26(h).
114 See, e.g., W. VA. CODE § 22-6-26(i).
115 See, e.g., W. VA. CODE § 22-6-19.
116 See, e.g., W. VA. CODE § 22-6-26(g).
117 See, e.g., W. VA. CODE § 22-6-1(w) (1994) ("[O]perator means any person or persons, firm, partnership, partnership association or corporation that proposes to or does locate, drill, operate or abandoned any well.").
118 See generally W. VA. CODE § 22-6-6 (1994).
119 See, e.g., W. VA. CODE § 22-6-26(h) (1994).
it is primarily the operator that exercises the rights and obtains the obligations in the context of state oil and gas regulatory requirements. Thus, it is important to distinguish the operator's private rights involved with private contractual acquisitions from the operator's governmental requirements involved with registration of the operator and the well. For instance, private contractual or tortious liability for plugging a well may turn on an operator's private agreements, whereas responsibility for regulatory penalties and other regulatory requirements for a well may turn on the state record of registered operators. Of course, private agreements can be drafted to assign contractual responsibility for some economic risk of regulatory consequences, and operational regulatory responsibilities may turn on an operator's private contractual terms as well. But, regardless of private agreements, state regulatory requirements are authorized to be imposed upon regulated operators.

a. Regulatory Requirements

Chapter 22, article 6, section 6 of the West Virginia Code requires all persons, prior to beginning well work, to obtain a permit from the director. The applicant is required to provide the names and addresses of (i) the well operator, (ii) the agent who shall be the attorney-in-fact for the operator and who shall be a resident of the state of West Virginia upon whom notices, orders or other communications issued pursuant to chapter 21, article 22 of the West Virginia Code may be served and upon whom process may be served, and (iii) all other persons the applicant must notify under the law, as well as evidence and required documentation.

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120 Accord Pierce & Flanery, supra note 56, § 19.11[b].
121 See generally Tammy J. Owen, Selected Legal Issues Concerning the Transfer of Operatorship of Oil and Gas Properties, 14 E. Min. L. Inst. § 24 (1993); Donnell, supra note 10, § 20.03.
122 Cf. Pierce & Flanery, supra note 56, § 19.11[b].
123 See discussion infra part IV.A.3.b.(ii).
124 Id.
125 Well work is defined as "drilling, reddrilling, deepening, stimulating, pressuring by injection of any fluid, converting from one type of well to another, combining or physically changing to allow the migration of fluid from one formation to another, or plugging or replugging of any well." W. VA. CODE § 22-6-1(v) (1994).
126 Pursuant to the West Virginia Code, this function is delegated to the Chief of the Office of Oil and Gas. W. VA. CODE § 22-1-7(4) (1994).
of service of such notice.\textsuperscript{127} The West Virginia Code of State Regulations states:

\begin{quote}
[a]ll persons owning or operating or proposing to own or operate any well in West Virginia shall register with the Chief. In all cases an agent or attorney in fact shall be designated on Form OP-1, ‘Designation of Agent by Well Owner or Operator’... but the designation shall not be effective until it has been accepted in writing by the Designee and approved by the Office [of Oil and Gas].\textsuperscript{128}
\end{quote}

Enforcement of state regulatory requirements is substantially dependent upon registration.\textsuperscript{129} Inspectors generally initiate regulatory action by their inspection. The inspectors must be able to notify operators, agents, owners and other interested parties of the results of their inspections, and of any violations of state law.\textsuperscript{130} The notice provisions of chapter 22, article 6, sections 3 to 5 of the West Virginia Code depend upon accurate and current registration to effectuate the enforcement system of violations,\textsuperscript{131} abatements,\textsuperscript{132} penalties,\textsuperscript{133} hearings,\textsuperscript{134} and orders\textsuperscript{135} — each of which involves notice to interested parties.

Importantly, the registration requirements of the state oil and gas regulatory program place the burden upon the regulated entity to register,\textsuperscript{136} and the

\begin{footnotes}
\item[\textsuperscript{127}] W. VA. CODE § 22-6-6.
\item[\textsuperscript{128}] W. VA. CODE STATE R. § 38-18-10.3.1 (1996).
\item[\textsuperscript{129}] Cf. W. VA. CODE § 22-6-6(i) (1994) (“Any person who violates any provision of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or be imprisoned in the county jail not more than twelve months, or both fined and imprisoned.”).
\item[\textsuperscript{130}] Cf. W. VA. CODE § 22-6-6.
\item[\textsuperscript{131}] See, e.g., W. VA. CODE § 22-6-3.
\item[\textsuperscript{132}] See, e.g., W. VA. CODE § 22-6-3(b) (1994).
\item[\textsuperscript{133}] See, e.g., W. VA. CODE § 22-6-34.
\item[\textsuperscript{135}] See, e.g., W. VA. CODE §§ 22-6-3 to -5.
\item[\textsuperscript{136}] See, e.g., W. VA. CODE §§ 22-6-6, -26 (1994) (dealing with permits and bonds).
\end{footnotes}
enforcement apparatus\textsuperscript{137} is designed to penalize entities that do not comply with that burden.

b. Discussion

An unknown residual of over 125 years of oil and gas development exists (going back over fifty years before the first registry contained in the first permitting statute in 1929)\textsuperscript{138} — encompassing an unknown total number of wells and operators. The contemporary oil and gas regulatory program contains several requirements to foster registration. These requirements include not only the requirements to register,\textsuperscript{139} but also complementary requirements, for example, regarding financial responsibility,\textsuperscript{140} regarding transfer,\textsuperscript{141} and regarding enforcement.\textsuperscript{142} These complementary requirements foster registration by enhancing the timely accuracy of the Office of Oil and Gas records as each requirement is processed.

Enforcement of the registration requirements arises in several contexts. For example, those who do not register are subject to, \textit{inter alia}, criminal and civil penalties.\textsuperscript{143} Beyond the act of registration, the record of registration is important

\textsuperscript{137} See, e.g., W. VA. CODE §§ 22-6-26(i), 34 (covering bond forfeiture willful violation).

\textsuperscript{138} See generally Pierce & Flanery, supra note 56, § 19.01.

\textsuperscript{139} See, e.g., supra note 110.

\textsuperscript{140} See, e.g., supra note 111.

\textsuperscript{141} See, e.g., supra note 112.

\textsuperscript{142} See, e.g., supra notes 135 -37.

\textsuperscript{143} See, e.g., W. VA. CODE § 22-6-6(i) ("Any person who violates any provision of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or be imprisoned in the county jail not more than twelve months, or both fined and imprisoned"); W. VA. CODE § 22-6-34(a) ("Any person . . . who willfully violates any provision of this article or any rule or order promulgated hereunder shall be subject to a civil penalty not exceeding two thousand five hundred dollars. Each day a violation continues after notice by the division constitutes a separate offense."); W. VA. CODE § 22-6-34(b)). Chapter 22, article 6, section 34(b) provides:

\[\text{[a]ny person . . . willfully violating any of the provisions of this article which prescribe the manner of drilling and casing or plugging and filling any well, or which prescribe the methods of conserving gas from waste, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or imprisonment in jail for not exceeding twelve months, or both, in the discretion of the court.}\]
for identifying operators when violations are processed, such as failure to plug an abandoned well. In such case, the notice of violation may stimulate effort by an operator to update a registration that had not been previously changed. Thus, in the context of enforcement, such violations can lead not only to review by the Office of Oil and Gas, but also to review by interested operators; and the results of those reviews can affect the information contained in Office of Oil and Gas records. In another example, the opposite contexts — involving either (1) an operator seeking to register a well in which another operator has an interest or (2) an operator having a well that another operator seeks to register — can change a registration record, depending upon compliance with the regulatory requirements for transfer.144

The extensive list of wells and operators in West Virginia, active or not, is compiled in West Virginia by the Office of Oil and Gas by using a computer-based data bank to, inter alia, review wells, transfers, and compliance. The regulatory requirements for this data bank are designed to maintain contemporaneous accuracy by requiring contemporaneous input from the regulated community.145 Prior to 1993, however, experience with the data bank as it then existed revealed a need to improve the timely accuracy of the records. As a result, the procedures by which the Office of Oil and Gas now pursues timely accuracy for these records contains, essentially, preliminary notice of request to transfer to pertinent operators, followed by a fifteen-day period for comment and opportunity to request hearing.146 During this period, interested operators or other interested entities may also comment or request hearing before the Office of Oil and Gas.147 The Office of Oil and Gas will conduct its review during a period of sixty days. However, if reason to delay or deny registration arises, it is incumbent upon the interested parties to resolve the problem — e.g., by administrative processes, or by requesting hearing, or by other remedies.148

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144 See, e.g., W. VA. CODE STATE R. §§ 38-18-10.3 to -10.7 (1996) (effective date July 1, 1993).


146 Id.

147 Id.

148 Id. These remedies can arise, inter alia, in hearing, before hearing, and otherwise in discussion between the parties. Cf., e.g., L. SKEEN, OIL AND GAS LAW OF KENTUCKY, VIRGINIA AND WEST VIRGINIA, § 7:12 at 7-35 to 7-38 (2d ed. 1994) (providing practical analysis of conflict between regulatory requirements and private transactions). Compare W. VA. CODE § 22-6-19 (stating that well presumed abandoned for regulatory purposes after 12 months without use, and required to be promptly plugged) with W. VA. CODE § 36-4-9a (providing a rebuttable presumption that an operator that fails
c. Old Well Registration

As commercial production for a well winds down, the question arises as to who is going to plug the well. As discussed above, many of those wells are currently unknown and concomitantly unregistered. Therefore, registration provides a means by which to approach identification of entities required to plug these wells. The Office of Oil and Gas is currently embarked on an innovative "Hunt for Abandoned Wells" that is aimed at finding unregistered wells. Abandoned wells can involve potential and realized harm throughout the state, including, inter alia, explosions, contamination of water, injury — and a resultant "who is responsible?" question. Thus, a consequence of the "Hunt for Abandoned Wells" could involve a hunt for the operators of the old wells.

A related issue to which a registry system can bring focus is the issue of prior insufficient plugging. In a search for a responsible party, the registry records to produce for a period greater than 24 months constitutes intent to abandon the leasehold estate).

149 See, e.g., W. VA. CODE § 22-6-19; cf. SKEEN, supra note 148, at 7-34 ("Prior to this legislation, regulation of the oil and gas industry in the state was piecemeal and almost nonexistent. Many depleted wells, having no salvage value, were simply abandoned by the operators without plugging because no sanctions existed to punish such conduct or to require compliance.").

150 HUNT FOR ABANDONED WELLS, supra note 9. The "Hunt" involves, first, a contest for the public in which prizes are offered for identifying abandoned wells and, second, a recognition program for operators to likewise identify abandoned wells. Id.

151 Cf. IDLE OIL AND GAS WELLS, supra note 52, at 92 (stating that the potential for groundwater contamination can be a primary environmental concern.); Streit Interview, supra note 50 (describing explosion). But see Snyder & Christian, supra note 5, § 5.02[1][b][i] (stating that there are no known explosions from leakage from oil and gas wells, but the potential for such explosion should still be considered).

152 See, e.g., W. VA. CODE § 22-10-6 (1994) (providing a means by which the state may approach priorities to plug these abandoned wells). The fund is not nearly adequate, however, and responsible parties, to the extent that enforcement is viable, will necessarily be required under the West Virginia Code to comply with the requirement to plug. W. VA. CODE § 22-6-19. One approach may be found in the West Virginia Code involving procedures to plug and recompense. W. VA. CODE § 22-10-7; see also IDLE OIL AND GAS WELLS, supra note 52, at 73 (providing one estimate that "[a]bout 65,000 pre-regulatory wells exist in West Virginia").

153 Cf., e.g., W. VA. CODE § 22-6-24(e).
can be useful to identify responsible parties if the plug later proves insufficient.\textsuperscript{154} For the responsible party, the requirement to properly plug an abandoned well is not vitiated by prior insufficient plugging.\textsuperscript{155} Importantly, interested parties, including the Chief, are authorized to plug, or replug any previously insufficiently plugged well, then seek recompense under chapter 22, article 10, sections 7 and 8 of the West Virginia Code.

Nor should it be argued that the state assumed the civil liability for the previously plugged — but not sufficiently — wells. Although the state has created a fund to plug old wells,\textsuperscript{156} the state is authorized to seek various statutory remedies, as well as to seek recompense via traditional and axiomatic remedies from the party that failed to plug or insufficiently plugged.\textsuperscript{157}

In contrast, contemporaneous bond responsibility may be released for wells properly plugged in accordance with current law.\textsuperscript{158} However, until such release is granted by the Chief in each individual case for each individual well, the operator’s bonding responsibilities continue.\textsuperscript{159} Bonding release for a well does not, however, release an operator from the requirement to plug properly, and an operator whose plug proves insufficient continues to be required to plug properly and is required to

\textsuperscript{154} \textit{Cf.} Atkinson v. West Virginia Oil & Gas Co., 79 S.E. 647 (W. Va. 1913) (involving failure of owner of abandoned well to plug or prevent injury to neighboring well).

\textsuperscript{155} \textit{See, e.g.}, W. VA. CODE § 22-10-7 (f)(1994) ("[A]ny interested person who plugs or replugs such well pursuant to the provisions of this section may recover from the owner or operator of such well all reasonable costs incidental to such plugging or replugging, including any compensation provided for in this section."). \textit{Compare, e.g.}, W. VA. CODE §§ 22-6-23, -24 with \textit{HUNT FOR ABANDONED WELLS, supra} note 9.

\textsuperscript{156} \textit{See, e.g.}, W. VA. CODE § 22-6-29 (1994) (setting forth reclamation fund); \textit{see also} W. VA. CODE § 22-10-6 (establishing priority for expending the fund). This fund is susceptible to insufficiency, in that one estimate of wells plugged per year by the fund is 20. \textit{WEST VIRGINIA STATE REVIEW, supra} note 56, at 17.

\textsuperscript{157} \textit{E.g.}, W. VA. CODE § 22-10-7 to -9, -11 (describing various remedies). \textit{See generally} Shostak, \textit{supra} note 10; Donnell, \textit{supra} note 10; Mitchell, \textit{supra} note 48.

\textsuperscript{158} \textit{See} W. VA. CODE § 22-6-26(g) (stating that improperly plugged wells would not be released, if known, because it is a violation); W. VA. CODE § 22-6-19 (requiring proper plugging); W. VA. CODE § 22-10-4(a) (1994) (requiring bonding of all wells); W. VA. CODE § 22-6-26(b) (providing bond requirements).

\textsuperscript{159} The basis for release is the director's satisfaction that the bond conditions and oil and gas regulatory laws, orders, regulations, rules, and other requirements of the director have been fully performed. W. VA. CODE § 22-6-26(g).
demonstrate again financial responsibility and to plug again the well.\textsuperscript{160}

Another issue to which a registry can bring focus involves whether the private contracts of private parties absolve operators registered under the statutorily mandated registry from compliance with the laws dependent upon such registry. Consider an entity that registered but, since registration, sold its private rights. Should the original operator be able to argue that the state should not enforce the law against him, as opposed to the person to whom the original operator transferred the private rights? Or should the Office of Oil and Gas require the currently registered operator — even if that operator has entered into a private transaction to transfer with a subsequent operator — to be responsible for compliance with the state regulatory program? The regulatory answer to these questions is that the transferor operator is not relieved of his responsibilities until the transfer is approved by the Chief.\textsuperscript{161}

Moreover, the regulatory program requires those who transfer private operatorship rights to notify the Chief and request approval.\textsuperscript{162}

However, there is no regulatory prohibition from private parties to include in their contracts provisions for indemnity and risk financing to maintain compliance with their regulatory duties. Private parties have means to protect their interests in private contracts, and protection from liability for failure to comply with governmental regulatory requirements is an important consideration for parties that would seek to avoid effecting, on their own, compliance with the law. Of course, the private contractual remedies do not absolve regulated parties from regulatory-mandated responsibilities, but private remedies can at least allocate reimbursement responsibilities.\textsuperscript{163}


\textsuperscript{163} See also W. Va. Code §§ 22-6-31 (involving prevention of the waste of gas); W. Va. Code § 22-10-7 (stating that interested person may plug). Both provisions provide means for reimbursement; cf. Skeen, supra note 148, at 7-35 (providing practical analysis of conflict between regulatory requirements and private transactions). See generally Shostak, supra note 10; Donnell, supra note 10; Mitchell, supra note 48.
2. Financial Responsibility

a. Statutory Requirements

Chapter 22, article 6, section 26 of the West Virginia Code sets forth the requirements for performance bond or other form of financial responsibility suitable for the same purpose. "The form of the bond required by this article shall be approved by the director and may include, at the option of the operator, surety bonding . . . letters of credit, establishment of an escrow account, self-bonding or a combination of these methods." The bond will be "conditioned on full compliance with all laws, rules relating to the drilling, redrilling, deepening, casing and stimulating of oil and gas wells . . . and to the plugging, abandonment and reclamation of wells and for furnishing such reports and information as may be required by the director."

The standard for performance is that the bond is required to be forfeited "[i]f any of the requirements of this article or rules promulgated pursuant thereto or the orders of the director have not been complied with within the time limit set by the violation notice." The traditional focus of the bond requirement has been that "[n]o permit shall be issued . . . unless a bond . . . is or has been furnished," and "[i]t is unlawful for any person to commence any well work . . . without first securing from the director a well work permit." A single well bond or a blanket bond is required. Chapter 22, article 10, section 5 of the West Virginia Code reduced the single well bond requirement amount from ten thousand dollars to five thousand

164 W. VA. CODE § 22-6-26(d); see also IDLE OIL AND GAS WELLS, supra note 52, at 109 (encouraging states to adopt programs similar to that of West Virginia).

165 W. VA. CODE § 22-6-26(b).

166 W. VA. CODE § 22-6-26(i); see W. VA. CODE §§ 22-6-3 to -5 (setting forth procedure for setting the time limits). For discussion of the regulatory apparatus for issuing notices of violation, failure to abate, hearing and bond forfeiture, see supra part III.B.

167 W. VA. CODE § 22-6-26(a) (1994).

168 W. VA. CODE § 22-6-6(a). Well work includes "drilling, redrilling, deepening, stimulating, pressuring by injection of any fluid, converting from one type of well to another, combining or physically changing to allow the migration of fluid from one formation to another or plugging or replugging of any well." W. VA. CODE § 22-6-1(v).

169 W. VA. CODE § 22-6-26(b).

170 W. VA. CODE § 22-6-26(c).
dollars;\textsuperscript{171} the amount of the blanket bond requirement remained at fifty thousand dollars.\textsuperscript{172} Most importantly, chapter 22, article 10, section 4 of the West Virginia Code also added the requirement that all wells must be bonded.\textsuperscript{173} This change expanded the bonding requirement to wells previously not required to be bonded. Thus, wells that might not have been bonded previously — for instance, those that were being used by private home owners for “free gas” or were otherwise not operating — are now required by chapter 22, article 10, sections 4 and 5 of the West Virginia Code to be bonded. This enhanced performance bond requirement enhances financial responsibility for plugging wells.\textsuperscript{174}

b. Selected Financial Responsibility Considerations

i. Blanket Bonds

The requirement to bond is usually satisfied with a blanket bond.\textsuperscript{175} Blanket bonds are used by operators to cover several wells at a time and to cover several types of well work at a time.\textsuperscript{176} For instance, it is possible for an operator to have over a hundred wells in production, and all of them covered by a single blanket bond. Similarly, some operators simultaneously work at different aspects of “well work” — all requiring bond coverage (such as, one well under permit to drill,\textsuperscript{177} another well under permit for coalbed methane gas,\textsuperscript{178} another well under general

\textsuperscript{171} W. VA. CODE § 22-10-5.

\textsuperscript{172} Id.

\textsuperscript{173} W. VA. CODE §§ 22-10-4 (1994).

\textsuperscript{174} To the extent that more wells might be bonded, and therefore more likely to be able to comply with more plugging requirements of chapter 22, article 6, section 19 of the West Virginia Code, the state burden to assume plugging under chapter 22, article 10, section 6 of the West Virginia Code may be leavened.

\textsuperscript{175} See W. VA. CODE § 22-6-26(c).


\textsuperscript{177} See W. VA. CODE §§ 22-6-6, -26 (dealing with permit and bond).

\textsuperscript{178} See W. VA. CODE §§ 22-21-6, -8 (dealing with permit and bond).
operations in production,\textsuperscript{179} and another well under permit to plug).\textsuperscript{180} In order to maintain a bond on a well, or during the regulatory processing period for review and approval of transfer, one operator may find that it is operating a well with another operator's bond on the well.\textsuperscript{181} To the extent that no violations arise during the pendency of the transfer or as a result of the transfer,\textsuperscript{182} the transferor operator may not be adversely affected. However, to the extent that such violation would arise, the regulatory requirements to abate the violation place the bonding party at risk of bond forfeiture\textsuperscript{183} or other penalties\textsuperscript{184} for the other party's violations. Beyond penalties, the significance to the bonding party is not only the forfeiture of its fifty thousand dollar bond (which, possibly, could be secured by a home or other assets), but also the regulatory requirement that the loss of the bond means that all of his other well work (which performance was formerly guaranteed by the forfeited bond) may be required to cease\textsuperscript{185} because, after forfeiture, that performance is no longer guaranteed by the forfeited bond.\textsuperscript{186} Of course, the operator faces the same potential forfeiture issues when its own wells are found to be in violation of West Virginia oil and gas regulatory requirements.

The regulatory efficacy of the blanket bond authorization is useful in the context of operators that maintain profitable and expanding business. If one uses an estimate that the average cost to plug a well for the Office of Oil and Gas is approximately ten thousand dollars,\textsuperscript{187} it is a likely shortfall-in-the-making to try to

\textsuperscript{179} See W. VA. CODE § 22-10-4.

\textsuperscript{180} Id.

\textsuperscript{181} See, e.g., W. VA. CODE § 22-6-26(h) (stating that notice by transferor required no later than five days after assignment).

\textsuperscript{182} But see, e.g., W. VA. CODE § 22-10-4(a) (revealing that transfer to someone without a bond would result in an immediate violation of the bonding requirement for all wells).

\textsuperscript{183} See, e.g., W. VA. CODE § 22-6-26(i).

\textsuperscript{184} See, e.g., W. VA. CODE § 22-6-34 (covering willful violation and criminal penalties).

\textsuperscript{185} See, e.g., W. VA. CODE § 22-6-3(b) (dealing with inspector requirement to require operator "to cease further operations").

\textsuperscript{186} Compare W. VA. CODE § 22-6-4(a) (requiring a bond).

\textsuperscript{187} WEST VIRGINIA STATE REVIEW supra note 56, at 21; cf. Interview with James A. Martin, Jr., Geologist, Office of Oil and Gas, West Virginia Division of Environmental Protection (November 19, 1996) [hereinafter Martin interview] (relating that recent experience at the Office of Oil and Gas has been that the Office's plugging costs have been approximately $30,000.00 per well).
stretch a fifty thousand dollar bond, when forfeited, to plug more than five wells. On the other hand, a profitable and expanding oil and gas business may fund, by its revenues, the plugging of commercially unprofitable wells, each in its turn, as each well reaches that end point in its production life — by using the profits from the wells it operates at more profitable points in their productive lives.

The rub, however, is that the normal productive life of a well may involve a series of transfers of operatorship from operators with high production costs to succeeding operators with less production costs — until the wells that need plugging are susceptible to gather at the end of the economic chain with operators which operate on increasingly limited financial means from the income (if any) generated by the comparatively less productive wells they operate. Blanket bonds for several wells at the end of the productive life of a well are therefore susceptible to being less likely to sufficiently guarantee performance of the oil and gas regulatory requirements, particularly the increased likelihood of plugging required for nonproducing wells.\footnote{188}{See W. VA. CODE § 22-6-19; see also V. BEGHIINI, MARGINAL WELLS: A REPORT OF THE NATIONAL PETROLEUM COUNCIL 3 (1994) (cautioning that low prices can also endanger wells at the end of their productive life); Snyder & Christian, supra note 5, § 5.03[3][e] (stating that the aim of the coal production interests regarding this statutory provision was to discourage evasion of the duty to plug and to prevent numerous nonproducing wells from remaining unplugged and “therefore eliminating the possibility of mining through such wells”).}

\subsection*{ii. Single Well Bonds}

At $5,000.00 per well,\footnote{189}{W. VA. CODE § 22-10-5.} the single well bond is less expensive in the obvious circumstance where the operator has only one well. This circumstance may arise in the context of free house gas or in the context of a one-well operator.

One regulatory issue that arises in the context of the free house gas well is the question of who is responsible as the operator.\footnote{190}{See, e.g., W. VA. CODE §§ 22-6-3 to -5 (directing that notice of violations go to the operator).} This issue arises because, while a commercial operator may be willing to guarantee financial responsibility and to guarantee performance of the state requirements for a free house gas well on his bond, a commercial operator is not authorized to do so because the free house gas is not authorized as production in a commercial quantity.\footnote{191}{W. VA. CODE STATE R. § 38-21-2.14 (1996) (effective date July 1, 1993).} In essence, a well
is required to produce in a commercial quantity,\textsuperscript{192} such as for financial benefit\textsuperscript{193} in order to satisfy the state regulatory production requirement.\textsuperscript{194} Consequently, the significance of free house gas, in terms of absence of production in commercial quantities, is that a commercial operator is required by chapter 22, article 6, section 19 of the West Virginia Code to plug the well. As discussed above,\textsuperscript{195} violation of this statutory requirement to produce or plug can, if the violation is not timely abated,\textsuperscript{196} lead to forfeiture of the operator’s bond\textsuperscript{197} and require cessation of the operator’s other production.\textsuperscript{198}

On the other hand, if the operator receives economic benefit from the well — such as when the homeowner is the operator — a single well bond can be viable. For example, when the homeowner recipient of the free gas places the well under his bond, the well is not abandoned because the homeowner receives economic benefit, and the plugging requirement of chapter 22, article 6, section 19 of the West Virginia Code (and therefore the prospect of bond forfeiture for having abandoned the well) would not arise on the basis of free gas to the homeowner.

A second example of viable single well bond use arises when an operator chooses to bond each well separately. This example could arise in the following two contexts. First, an operator that operates one well would need only a single well bond. Second, bonding each well separately protects separate investors from separate problems (for instance, bond forfeiture, regulatory penalties, or other operational expenses) associated with wells other than those in which each specific investor has specifically contributed to finance.

A third example of possible single well bond use arises in the context of well transfer. When an operator desires to transfer a well that has not produced in commercial quantities in the previous twelve months, chapter 22, article 6, section 19 of the West Virginia Code requires the operator to produce or plug. Unless

\begin{itemize}
\item \textsuperscript{194} See, e.g., W. Va. Code § 22-6-19 (requiring any well not producing for 12 consecutive months to be plugged).
\item \textsuperscript{195} See discussion supra part IV.A.2.b.
\item \textsuperscript{196} W. Va. Code § 22-6-3(b) (stating that normally, “[a] reasonable time not to exceed seven days,” which may be extended to 30 days).
\item \textsuperscript{197} W. Va. Code § 22-6-26(i).
\item \textsuperscript{198} See, e.g., W. Va. Code § 22-10-4 (requiring bond for all wells).
\end{itemize}
compliance with this requirement can be achieved, the Chief is not authorized to approve transfer. The operator, to obtain the Chief's approval of a proposed transfer, is required to achieve compliance with state regulatory requirements. The operator, therefore, may consider whether (1) to produce the well, then transfer, (2) to plug the well, or (3) to enter into an agreed order with the Chief to attain compliance.

iii. Bond Forfeitures

The performance bond is required to be forfeited when "any of the requirements of this article [chapter 22, article 6 of the West Virginia Code] or rules promulgated pursuant thereto or the orders of the director have not been complied with within the time limit set by the violation notice." All forfeitures are to be deposited in the oil and gas special reclamation fund, which is used to "reclaim and properly plug wells." The full amount of the bond or other financial security

199 See, e.g., W. VA. CODE § 22-6-26(g) (requiring compliance).

200 Accord W. VA. CODE § 22-6-19.

201 Id.

202 See W. VA. CODE § 22-6-4 (granting authority to issue orders); W. VA. CODE STATE R. § 38-22-7 (1996) (effective date July 1, 1993) (providing for schedule to plug wells); see also W. VA. CODE STATE R. § 38-21-4.1.27 (1996) (effective date July 1, 1993) (authorizing escrow to plug). Another alternative may be to place the well upon a single well bond, under a demonstration of bona fide future use. Escrow of funds (such as the single well bond) is one of the factors to consider when applying for a bona fide future use, and, when presented by an operator in conjunction with other items listed in the regulatory requirements may, on a case by case basis, be proffered in request for approval for bona fide future use. W. VA. CODE STATE R. § 38-21-4.1.27 (1996) (effective date July 1, 1993). The operator may seek inactive status by applying to the Chief. This status is, however, granted by the Chief to individual applicant operators on the basis of specific representations by the applicant operator. Thus the Chief's grant of inactive status on the basis of representations of bona fide future use are not transferrable. Inactive status due to a bona fide use can delay compliance with the "produce or plug" requirement for a maximum period of five years. See generally infra part IV.B.

203 W. VA. CODE § 22-6-26(i).

204 W. VA. CODE § 22-6-26(k). One estimate is that forfeited instruments provide an annual amount of one hundred thousand to six hundred thousand dollars. WEST VIRGINIA STATE REVIEW, supra note 56, at 21.

205 W. VA. CODE § 22-6-29(b) (1994).
is forfeited. Importantly, bond forfeiture is not a substitute for statutory penalties, recompense for reclamation or plugging expenses incurred in compliance with lawful requirements under the oil and gas regulatory program, in compliance with lawful orders or in compliance with injunctive relief. Neither the bond forfeiture nor other remedy is required by the regulatory program to be reduced by the fact that another remedy is also effected; each of the foregoing regulatory components may occur either separately or in addition to the others.

Additionally, as discussed above, an operator’s assets can become susceptible to recovery efforts by the bond holder. And every well under an operator’s forfeited blanket bond is consequently no longer authorized to operate until new bond is approved by the Chief. Further consequence can be more violations and more exposure to penalties for the regulatory violations.

3. Transfer

Transfer is a concept in the regulatory program that complements the private contractual dealings and movement of title and rights and obligations between operators, other contractual parties, and the Chief. As the West Virginia Code of State Regulations state:

When title to a well or the right to operate a well is transferred from one (1) well operator to another, the Chief shall be notified in writing within five (5) days by the transferor well operator, or if he

206 W. VA. CODE § 22-6-26. Although some may argue that a total forfeiture is a penalty and is more in the nature of a penalty bond, the statute is explicit in its terminology as a performance bond. Id. Moreover, the statute is explicit in its description of the required conditions, that compliance with the oil and gas regulatory requirements is the performance that is guaranteed by the bond. Id.

207 See, e.g., W. VA. CODE §§ 22-6-34, -10-9 (1994).


209 See W. VA. CODE § 22-6-28.

210 See W. VA. CODE §§ 22-6-3 to -5, -28.

211 W. VA. CODE § 22-6-39.

212 See discussion infra part IV.A.2.b.1.

213 See generally W. VA. CODE § 22-10-4.

214 E.g., W. VA. CODE §§ 22-10-4 to -5.
no longer exists by one or more of the owners of the well, the name and address of the transferee well operator. 215

The transferee is then required to register with the Chief. 216 However, [n]o assignment or transfer by the transferor owner shall relieve the transferor well owner of any obligation and liabilities pursuant to these rules or West Virginia Code 22 or 22B unless and until the Office of Oil and Gas accepts and then notifies the transferee and transferor as outlined in Section 10.4 that they have complied with section 10. 217

Operators that enter into private contracts to transfer their rights to other operators would generally also want to remove their regulatory compliance responsibility for the wells. However, a private transfer does not necessarily mean that the Chief is authorized to approve the transfer of the well to the transferee’s bond.

Consider the following regulatory circumstances: First, the regulatory program requires that the transferor notify the Chief within five days after the sale. 218 Because the application to the Chief occurs after the sale, the transferor will retain responsibility for regulatory compliance beyond the date of sale. Moreover, the transferee is also required to notify the Chief, 219 so the transferor does not control

215 W. VA. CODE STATE R. § 38-18-10.3.2.1 (1996) (effective date July 1, 1993) (“Failure to notify the Chief of such transfer shall be a violation of this rule by said transferor and shall be punishable under W. Va. Code § 22-6-34; and, in addition, all bonds of such transferor under W. Va. Code § 22-6 shall be forfeited.”).

216 W. VA. CODE STATE R. § 38-18-10.3.2.2 (1996) (effective date July 1, 1993). The West Virginia regulations state:
The transferee well operator shall file with the Office on form OP-77 the well name and the permit number of the subject well, the county and district in which the subject well is located, the names and addresses of the transferor well owners or operator and the transferee well operator, a copy of the instrument of assignment or transfer, or a certification of such assignment or transfer acceptable to the Chief, and the applicable bond, cash, or collateral security, described in W. Va. Code § 22-6-26.

Id.


218 E.g., W. VA. CODE § 22-6-26(h).

219 Id.
all of the application requirements. Once the application is complete, the Chief is required to be satisfied that there is full compliance. Chapter 22, article 6, section 26(g) of the West Virginia Code requires that "[a]ny such bond shall remain in force until released by the director and the director shall release the same upon satisfaction that the conditions thereof have been fully performed."\(^{220}\) The conditions, set forth in chapter 22, article 6, section 26(b) of the West Virginia Code, require "full compliance with all laws, rules . . . and to the plugging, abandonment and reclamation of wells and for furnishing such reports and information as may be required by the director."\(^{221}\) Accordingly, the Chief is not authorized to release a well from the transferor’s bond until he is satisfied that there has been full compliance with all requirements of the state regulatory program.

Instead of transfer from the transferor’s bond, the Chief, in appropriate circumstances, may accept and hold bonds or other form of financial responsibility from more than one competing interest.\(^{222}\)

a. Transfer Procedures

The request for transfer starts the regulatory review process at the Office of Oil and Gas.\(^{223}\) After an application for transfer is received, the Office of Oil and Gas will conduct a review of the submitted information (and any other information available to it) within sixty (60) days, and prepare a summary report to the Chief.\(^{224}\) A file number and a determination date are assigned, and the process for notice and opportunity to be heard is begun: The transferor and transferee are sent a Periodical Circular setting forth (a) whether the initial application was complete or incomplete as received; (b) the scheduled determination date; (c) the date of determination; and, when appropriate, (d) the date on which the determination order was final.\(^{225}\)

The circular addressing any given well may be expected to be sent on at least two occasions: First, a pre-circular is sent notifying the operators that an

\(^{220}\) W. VA. CODE §22-6-26(g).

\(^{221}\) W. VA. CODE § 22-6-22(b).

\(^{222}\) W. VA. CODE STATE R. § 38-18-10.7 (1996) (effective date July 1, 1993). For practical purposes, this option would appear to be the most reasonable. Certainly, if the parties to a transfer do not trust each other to protect the other’s bond, neither should the Chief. Therefore, no bond should be released until the operators achieve lawful compliance.

\(^{223}\) See, e.g., W. VA. CODE § 22-6-26(h).


application has been received, and identifying the results of review to date. 226 Then, a thirty-day follow-up circular ensues until the final order is issued. 227 A hearing may be requested by an interested person within fifteen days from the date that the circular is published. 228

b. Selected Transfer Considerations

i. Chief's Review

The Chief's initial action, upon receipt of the application for transfer, is to "conduct a review of the submitted data along with other information available." 229 "Each application shall be on Form OP-77," 229 and "[a] separate application must be submitted for each well." 231 The first part of the application sets forth identifying information for the well and the transferor. The second part of the application sets forth identifying information for the transferee, identifying the new operator and

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226 The following codes are used in the circular to identify the status of the request for transfer:
   A - No agent registered with the Office of Oil and Gas
   B - Problem with the new Owner's bond
   F - Transfer fee was not received by the Office of Oil and Gas
   C - Well is not currently in production
   P - Permit for this well has not been released
   V - Outstanding violations on this well
   D - Transfer was denied based on administrative review of request
   O - Transfer was approved based on administrative review of request
   N - New proposed owner violation/failure to abate


228 W. VA. CODE STATE R. § 38-18-10.5.3 (1996) (effective date July 1, 1993). Hearings are processed as contested cases. Therefore, pursuant to chapter 29A, article 5, section 4 of the West Virginia Code, the Chief's decision after hearing may also be appealed to the pertinent circuit court as an administrative appeal.

229 W. VA. CODE STATE R. § 38-18-10.5.1 (1996) (effective date July 1, 1993). See generally Flannery, supra note 60. Review by the Chief would appear to be useful to review the compliance posture of the wells, considering that "the Appalachian region has a large number of wells, but those wells produce small amounts of oil and gas." Id.


agent. The Office of Oil and Gas may review its permitting files, bonding and registration files, violation files, production report files, or any other information submitted to it or available to it.

As previously discussed, the Chief's review must determine whether the well is in compliance with the State regulatory program. This review encompasses both the compliance posture for the well as it is under the transferor and the compliance posture for the well as it will be under the transferee. This procedure can therefore identify wells that may have been in compliance under, for instance, a grant of inactive status for the transferor, but would be transferred into noncompliance with the transferee because inactive status is obtained by application by an operator who sets forth his proposed "bona fide future use." Thus, inactive status is not transferable. Accordingly, the Chief's review of requested transfers is an important extension of the traditional enforcement efforts of the inspectors, in that the Chief's review can also identify violations of the state regulatory program. Because the Chief's review can have an effect upon private contractual expectations, the review encourages anticipatory compliance by the regulated community.

ii. Disputed Wells and Unloaded Wells

Two issues that arise in the context of regulatory transfer involve, essentially, either (1) wells that more than one operator wants or (2) wells that no one wants.

a.) Disputed Well Resolution

When more than one operator claims the same well, a method by which operators may seek resolution of the matter is for one of the operators to file an OP-
77 claiming transfer to it.\textsuperscript{238} If a hearing is requested by the opposing party, the Chief, the applicant, or any other interested party, a hearing may be held and the Chief may render a decision.\textsuperscript{239} This hearing procedure, however, does not preclude the Chief from declining to determine property rights.\textsuperscript{240} Whether or not the Chief resolves the matter at hearing, the Chief may accept and hold bonds or other form of financial responsibility from more than one competing interest.\textsuperscript{241} On the other hand, if there is no dispute (or the dispute can be resolved between the parties) as to a well, and the applicant presents sufficient documentation to support a transfer,\textsuperscript{242} this procedure can be effective to resolve the competing claims.\textsuperscript{243}

b.) Unloaded well resolution

The other consideration in this section involves unwanted wells. Wells may be unwanted where impediments to profits appear to exist. Examples include wells with low production and wells with violations that require abatement. Transfer considerations involving unwanted wells can arise out of selling rights to several wells — with a random mix of some profitable, some abandoned, some with other violations. When a buyer takes the abandoned wells or others that either are currently in violation or become in violation before the bond is transferred, the regulatory requirements for transfer can become obstacles to the transfer. Thus, the private agreement between the private operators can be useful in resolving potential obstacles to transfer. For the wells with violations, that can mean provision for abating the violation. Examples include, \textit{inter alia}, failure to submit a production

\textsuperscript{238} There are, of course, many private resolutions that may be reached via contractual agreements — which could be designed to preclude disputes before the regulatory agency.

\textsuperscript{239} \textit{See} W. VA. \textsc{code state r.} \textsection 38-18-10.5.3 - .4 (1996) (effective date July 1, 1993).

\textsuperscript{240} \textit{Cf.}, e.g., W. VA. \textsc{code state r.} \textsection 38-18-10.7 (1996) (effective date July 1, 1993).

\textsuperscript{241} \textit{Id.}

\textsuperscript{242} \textit{E.g.}, W. VA. \textsc{code state r.} \textsection\textsection 38-18-10.3 to -10.7 (1996) (effective date July 1, 1993).

\textsuperscript{243} Safeguards against error include administrative appeal, complaint to the Chief, or new transfer proceedings. W. VA. \textsc{code} \textsection 29-5-4 (1994); W. VA. \textsc{code} \textsection 22-6-28 (1994). The opportunity for administrative appeal is susceptible to the finality provisions of chapter 29, article 5, section 4 of the West Virginia Code, limiting appeal to 30 days after the Chief’s decision is received. W. VA. \textsc{code} \textsection 29-5-4. \textit{Cf.} \textsc{skeen, supra} note 148, \textsection 7:12 at 7-38 ("[A] suit to quiet cloud on title would be the most appropriate remedy.").
report, failure to register an agent, waste of gas and failure to reclaim. (Abandoned and inactive well issues are addressed separately in the following section.) In some circumstances, however, the transferor may perceive that he cannot work on the well due to the provisions in his contract with the person who bought it; or he may perceive that he cannot get the well off his bond. In either case, the transferor may seek remedy as an interested person via administrative complaint, via contractual remedy, or via combination of remedies.

When compliance may not be immediately attainable, but the parties to the contract nevertheless seek to transfer the noncomplying wells in consonance with their private agreement, the parties may consider the following remedies by agreement: First, the Office of Oil and Gas, pursuant to the Chief’s authority under chapter 22, article 6, section 2 of the West Virginia Code, may enter into a compliance agreement, setting forth a schedule for compliance and penalties for failure to meet the schedule. Second, the private parties may devise their own private agreement setting forth their own schedule of private contractual compliance and private contractual penalties. This second method is susceptible to regulatory penalties to the extent that compliance cannot be attained prior to regulatory deadlines. Examples include a well that does not produce during the regulatory requirement of twelve months, a well that is not reclaimed within six months of


245 W. VA. CODE § 22-6-6(e) (1994).

246 W. VA. CODE § 22-6-31 (1994).

247 W. VA. CODE § 22-6-30 (1994).

248 E.g., W. VA. CODE § 22-6-28 (stating that an interested party may complain and that the Chief is authorized to schedule a hearing into the matter).

249 It would appear that the basis of the bargain would be to transfer viable wells. However, to the extent that wells not in compliance are part of the bargain, the bargain should provide for private remedies — because the transfer of wells between operators bonds is the regulatory place where noncomplying wells may be identified and required to attain compliance. See also W. VA. CODE § 22-7-1 to -3 (1994) (covering statutory landowner remedy); cf. CSX Transp. Inc. v. PKV Ltd. Partnership, 906 F. Supp. 339 (S.D.W. Va. 1995) (holding that adjacent landowner not entitled to statutory remedy, but common law causes of action not precluded); Miller v. N.R.M. Petroleum Corp., 570 F. Supp. 28, 31 (N.D.W. Va. 1983) ("W. Va. statutory plan afford all parties in interest [on adjacent tracts within a drilling unit or pool] an opportunity to be protected."). See generally Donnell, supra note 10.


251 W. VA. CODE § 22-6-19.
completion of drilling,\textsuperscript{252} and a well that the period to abate a violation has expired.\textsuperscript{253}

c.) Abandoned Wells and Inactive Wells

This section addresses nonproducing wells that pose special problems for transfer regulation: Many of the operators of the abandoned wells are unknown;\textsuperscript{254} many wells were operated by entities that no longer exist due to death or dissolution;\textsuperscript{255} many wells supply "free gas,"\textsuperscript{256} many wells cannot now be located;\textsuperscript{257} and many wells require plugging.\textsuperscript{258}

The state regulatory definition of "abandoned well" is found in the requirement that "[a]ny well which is completed as a dry hole or which is not in use for a period of twelve consecutive months shall be presumed to have been abandoned and shall promptly be plugged by the operator in accordance with the provisions of this article, unless the operator furnishes satisfactory proof to the director that there is a bona fide future use for such well."\textsuperscript{259} The concept of "use" is defined in the code of state regulations as meaning the same as "active status," and active status is defined as "any well producing oil or gas in commercial quantities."\textsuperscript{260} The term "producing in commercial quantities" is defined to mean "production of natural gas or oil or both from a well or reservoir which is either sold or delivered to one other than the operator, or retained by the operator or any owner

\begin{footnotesize}
\item[252] W. VA. CODE § 22-6-30.
\item[253] W. VA. CODE § 22-6-3(b) (1994) (granting an inspector authority to extend the period to abate to 30 days).
\item[254] See generally supra note 138.
\item[255] See generally, e.g., supra notes 56-58.
\item[256] See, e.g., infra text accompanying note 286.
\item[257] See generally, e.g., supra notes 56-58.
\item[258] Id. See generally Mitchell, supra note 48, § 20.01 ("[B]oth the dry hole and the gusher share the same ultimate fate, sooner or later the well must be plugged.").
\item[259] W. VA. CODE § 22-6-19. See generally Mitchell, supra note 48, § 20.04[1] (citing Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) and upholding constitutionality of a plugging statute).
\end{footnotesize}
of the production at severance for beneficial economic use. Thus, "free gas" used by households would not be produced in commercial quantities for an operator because it is neither sold nor retained by the operator at severance for beneficial economic use. Conversely, "free gas" to a homeowner who is the operator of the well is produced in commercial quantities because it is retained by the operator at severance for "beneficial economic use."

Accordingly, one of the first considerations for transferring an abandoned well is to bring it into compliance. Chapter 22, article 6, section 19 of the West Virginia Code establishes the compliance requirement as "produce or plug." If the operator may believe there is difficulty in attaining compliance with "produce or plug," agreements discussed above may be considered to obtain a schedule for compliance. Additionally, in the case of abandoned wells that are not bonded, but an operator wants to add the well to its bond, the Chief, under chapter 22, article 10, section 4(a) of the West Virginia Code, may approve the addition of such a well to a bond. In contrast, an abandoned well that is already under bond, while it may be added to another bond, it may not be released from a bond until compliance is achieved.

B. Bona Fide Future Use

1. Regulatory Requirements

An operator may seek to delay plugging if "the operator furnishes satisfactory proof to the director that there is a bona fide future use for such well." The application procedure for establishing bona fide future use is set forth in the

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261 W. Va. Code State R. § 38-21-2.14 (1996) (effective date July 1, 1993); cf. Skeen, supra note 148, § 7:12, at 7-37 (citing Jolynne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994) (involving case where lease out of production in commercial quantities for more than 10 years had been abandoned despite the fact that free gas had been used during some of that period)).


code of state regulations. The information that the operator should consider in formulating his application for future use relates generally to commercial viability — for instance, information concerning production prospects, improving prior

266 W. VA. CODE STATE R. §§ 38-21-3, -4.1 (1996) (effective date July 1, 1993) (“In order to establish bona fide future use, the operator shall submit information and data sufficient to satisfy the Chief that there is a bona fide future use for the well.”).

267 Id. The Code of State Regulations states that an “operator should consider the following information:

4.1.1 The date on which the well was completed;
4.1.2 The method which the well meets the financial responsibility requirements of W. Va. Code 22B-5-4 and 22B-5-5 [22-10-4 and 22-10-5 (1994)].
4.1.3 The date on which the well first produced;
4.1.4 The results of the initial gas-ratio test;
4.1.5 The last date on which the well was producing;
4.1.6 The average monthly production at the time production ceased;
4.1.7 The formation(s) from which the well produced;
4.1.8 The estimated remaining recoverable reserves associated with the well without reworking the well;
4.1.9 Whether reworking the well to recover additional reserves is possible;
4.1.10 The estimated remaining recoverable reserves associated with the well after reworking;
4.1.11 The method used to establish reserve estimates in sections 4.1.8 and 4.1.10;
4.1.12 Whether secondary recovery is possible;
4.1.13 Whether production from other formations is possible;
4.1.14 Whether the well can be drilled deeper;
4.1.15 The estimated cost to deepen the well;
4.1.16 Whether the well is covered by a gas sales contract;
4.1.17 Whether the well is connected to a gas meter or how it is measured at the transfer of ownership or custody;
4.1.18 Other equipment connected to the well;
4.1.19 Whether the well is connected to a pipeline system;
4.1.20 A description of the line pressure of the receiving pipeline;
4.1.21 Whether a compressor is in place and whether it is in use on the well;
4.1.22 If the well is not connected to a pipeline, the distance to the nearest pipeline that would accept production from the well;
4.1.23 Whether a shut-in royalty is being paid;
4.1.24 The operator’s schedule for putting the well into production;
4.1.25 Whether the well is currently used for or capable of use for gas storage;
4.1.26 Whether the well is capable of being used as a liquid injection well;
4.1.27 Whether money has been escrowed for use to plug the well in the future; and,
4.1.28 Any other information which the operator considers relevant to establishing a bona fide future use.

W. VA. CODE STATE R. 38-21-4.1.1 to -4.1.28.
production, financial responsibility, and income generation. Thus a consistent thread of "production in commercial quantities" is woven both into the regulatory requirement to "produce or plug" and into the regulatory provision for delay based on bona fide future use.

If an operator's demonstration of bona fide future use for a well is approved by the Chief, "inactive status" may be approved by the Chief. The significance of "inactive status" is that "[a]ny well that is not in active or inactive status shall be deemed abandoned and shall be promptly plugged by the operator." The effect of "inactive status" is to delay producing a well for which there is a bona fide future use, that is:

The inactive status of any well with a designation of bona fide future use shall be valid for the time period requested by the operator, not to exceed five (5) years from the date of filing with the Chief, unless inactive status is revoked pursuant to [38 CSR § 21-5.2 of this rule], or unless the operator elects to extend the inactive status period pursuant to the provisions of [38 CSR § 21-3.3 of this rule].

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268 Id.


270 W. VA. CODE § 22-6-19; see Snyder & Christian, supra note 5, § 5.03[3][c]. The basis for this requirement is found in coal production interests:

The aim is to discourage evasion of the duty to plug; but postponement is possible if the operator furnishes "satisfactory proof ... that there is a bona fide future use for such well." From the standpoint of the coal representatives on the Technical Committee, specifications for what constituted "satisfactory proof" should have been included to prevent numerous nonproducing capped wells from remaining unplugged and therefore eliminating the possibility of mining through such wells.

Id.


274 W. VA. CODE STATE R. § 38-21-5.4 (1996) (effective date July 1, 1993); cf. infra text accompanying notes 275-78. The Chief's approval is required, and the Chief is authorized to revoke, so the statement in the cited regulation should not be misconstrued — in that, properly construed, when an "operator elects to extend," his "election" is subject to the Chief's review and approval or disapproval.
Because the regulatory requirements governing application for inactive status involve two separate determinations, — *in seriatim*, bona fide future use and inactive status — and approval of inactive status must follow approval of bona fide future use.\(^{275}\) The West Virginia Code of State Regulations states:

Upon submittal [by the operator] of a completed Designation of Bona Fide Future Use to the Chief, any permitted well which satisfies the following requirements shall be deemed to be in inactive status:

5.11 The condition of the well is sufficient to prevent waste of oil or gas;
5.12 The condition of the well is sufficient to prevent pollution of waters of the State; and
5.13 The operator satisfies the bonding requirements of W. Va. Code § 22-6-26 (1994), et seq.\(^{276}\)

These three requirements may be misunderstood if taken out of context, in that the requirement for the Chief's approval is found in the next provision, and an operator may not, by its own determination, attain lawful inactive status: “The Chief shall determine whether sufficient data and information have been provided to make a determination that the well has a bona fide future use and is properly deemed in inactive status.”\(^{277}\) The Chief may, in addition, revoke the inactive status of any well.\(^{278}\)

2. Discussion: Tensions Arising Out of the Requirement to “Produce or Plug”

There are some wells for which there may be basis to believe they can

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\(^{278}\) W. VA. CODE STATE R. § 38-21-5.5 (1996) (effective date July 1, 1993). See also W. Va. Code State R. § 38-21-5.5.1 to -5.5.4 (addressing situations where:

5.5.1 The operator has failed to comply with the provisions of W. Va. Code 22-6-1, et seq.
5.5.2 The operator has failed to comply with the provisions of this rule;
5.5.3 The well does not satisfy the requirements of this rule; or
5.5.4 The well does not have a bonafide future use).

*Id.*
produce profitably at a later time.\footnote{Cf. BEGHINI, supra note 188.} The interest in delaying the plugging of wells not contemporaneously producing commercial quantities can be grounded in price swings, technological advances, operators own swings in economic viability, and operators varying operating costs (possibly reflecting, \textit{inter alia}, the scale of differing operators’ businesses, the production levels of their other wells, and other costs of doing business).\footnote{See \textit{id. at 7}; IDLE OIL AND GAS WELLS, supra note 52, at 89 ("Premature abandonment of such wells would eliminate access to these resources.").} These wells can raise a tension between the interests to retain, to buy, and to sell wells that are presently not producing in commercial quantities, and the regulatory requirement to “produce or plug.”\footnote{W. VA. CODE § 22-6-19; cf. SKEEN, supra note 148.}

An additional basis for tension between an interest to retain wells not currently producing and the requirement to “produce or plug” may arise to the extent that the cost to plug a well may be avoided.\footnote{Cf. Flannery & Beckett, supra note 176, § 20.01. According to some commentators: At least three regulatory interests arise in the development of abandoned well regulatory programs. These sometimes competing interests include: (1) Conservation of the resource—for years states have sought to protect oil and gas resources from premature depletion. By addressing the circumstances under which wells are required to be plugged, states have sought to take this objective a step further by assuring the continued access, where appropriate, to reserves that would otherwise be lost to plugging. (2) Revenue implications—The premature plugging of abandoned wells will, in many states, have a direct impact on revenues received by a state. (3) Environmental concerns—While abandoned wells can be a conduit through which contamination can reach water supplies, abandoned well plugging programs have developed in a way that recognizes when this potential exists. \textit{Id.; cf. W. VA. CODE § 22-6-19; see generally Mitchell, supra note 48, § 20.03 ("Historically, in terms of costs, a well could be plugged for an amount roughly equal to the value of the casing pulled from the well."); id. at § 20.05 (detailing consequences of failing to plug).} While abandoned wells without approved bona fide requirement to plug,\footnote{W. VA. CODE § 22-6-19.} questions nevertheless arise as to when in the life of a well should the well be abandoned and plugged,\footnote{See generally BEGHINI, supra note 188.} and who
should bear the cost? The current practice of transferring wells as well production decreases to successive operators with less overhead also successively transfers increasingly viable wells to operators with decreasing ability to carry the expense of plugging with their decreasing production. The final resting place of a depleted well can become the source of “free gas” to a household that is susceptible to the costs of plugging a well for which it has insufficient additional operational wells from which to finance the plugging of the depleted well, and such well cannot generate sufficient economic benefit to cover the cost to plug.

The current “blanket bond” transfer authority for wells therefore authorizes operators to remove the state’s natural resources under a scheme whereby plugging the wells is susceptible to being unfunded — especially by the operators that benefit most from the depletion of the greatest benefit of the resource. Meanwhile, the operators at the end of the well’s productive life are susceptible to being left with relatively insignificant benefits in comparison to relatively significant plugging costs.

The regulatory funding mechanisms designed to guarantee compliance with West Virginia regulatory requirements are primarily an intertwining of the blanket performance bond (and its corollary financial responsibility methods) and the efficacy of ongoing operations being able to cover the compliance of bonded wells. Assuming that it may be estimated to cost ten thousand dollars for the state to plug a well, the fifty thousand dollar blanket bond may be expected to cover only five of any given operator’s plugging responsibilities. Accordingly, marginal operators may be susceptible to being unable to meet their plugging requirements beyond five wells, and “free gas” recipients may be susceptible to not having operated the wells

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285 See also Donnell, supra note 10; cf. W. VA. CODE §§ 22-6-29, -32, -10-7 (1994); Mitchell, supra note 48, §20.04[1] (analyzing Houser v. Brown, 505 N.E.2d 1021 (Ohio Ct. App. 1986) and stating that “[t]he ultimate cost may well be borne as a matter of private contract between the parties, but the public interest demands the wells be plugged by anyone within the prescribed statutory definition”).

286 While free house gas recipients may not invest money up front as in a “pyramid scheme,” the comparison might not be lost — because they could be susceptible to plugging expense that could leave them with similar losses.

287 See W. VA. CODE § 22-6-26(d).

288 See WEST VIRGINIA STATE REVIEW, supra note 56, at 21; cf. Martin Interview, supra note 187 (relating recent experience at the Office of Oil and Gas has been that the Office’s plugging costs have been approximately thirty thousand dollars per well).
and to not having bonds.\textsuperscript{289} Interestingly, the statutory requirement for single well bonds is $5,000.00\textsuperscript{290} — not enough, of itself, generally to cover the cost to plug.

Moreover, the Abandoned Well Act\textsuperscript{291} expanded the bonding requirements to all wells\textsuperscript{292} and established authority for prioritizing use of the special oil and gas reclamation fund for plugging.\textsuperscript{293} However, the fund\textsuperscript{294} — which is funded by bond forfeiture,\textsuperscript{295} plugging penalties,\textsuperscript{296} and a special fee applicable at the time of application for drilling permit\textsuperscript{297} — to date, has been able to finance an estimated five to ten pluggings per year.\textsuperscript{298}

Given the severe limits of the special oil and gas reclamation fund, the requirement to “produce or plug” — which may also arise in the complementary

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\textsuperscript{289} They may become operators and they may obtain bonds pursuant to chapter 22, article 6, section 26 of the West Virginia Code. Additionally, private contractual remedies may be entered into. To emphasize the problem, the Office of Oil and Gas has taken an “Oil and Gas Game” on the road to various small groups of citizens. The essence of the game is that each person is assigned a role in an oil and gas operator’s business life. Thus, there are several operators, a tax collector, a regulatory inspector, assessor, other people in an operator’s life, and a moderator. Each operator is given a starting allocation of wells, and each operator may buy, sell, and plug according to their own lights in quest of making more money than the other operators. Cards are then picked up in turn by the operators as they are inspected, assessed, taxed, hit dry holes, hit gushers, watch the commodity prices fluctuate, buy, sell, and plug as necessary. The game imitates life, in that the players wheel and deal until some get out early and rich and others get stuck with depleted wells and plugging costs that result in debt.

\textsuperscript{290} W. VA. CODE § 22-10-5.

\textsuperscript{291} W. VA. CODE §§ 22-10-1 to -12 (1994).

\textsuperscript{292} W. VA. CODE § 22-10-4.

\textsuperscript{293} W. VA. CODE § 22-10-6.

\textsuperscript{294} W. VA. CODE § 22-6-29.

\textsuperscript{295} W. VA. CODE § 22-6-26(k) (1994).

\textsuperscript{296} W. VA. CODE § 22-10-9.

\textsuperscript{297} W. VA. CODE § 22-6-29(b) (1994).

\textsuperscript{298} Interview with James A. Martin, Jr., Geologist, Office of Oil and Gas, West Virginia Division of Environmental Protection (Oct. 31, 1996); cf. WEST VIRGINIA STATE REVIEW, supra note 56, at n.53 (giving optimistic estimate of 20 wells plugged per year).
contexts of annual production reports, regulatory violations, and transfer applications — can be an important means to foster regulation of abandoned wells. However, the concept of bona fide future use can be problematic — due to the “production in commercial quantities” influence upon the suggestion that a well not now producing might produce in the future. The effect of the “production in commercial quantities” requirement is that contemporaneous unprofitable wells, unless profitable commercial production can be reliably projected (or, in the case of putting up an escrow, guaranteed), are required to be plugged by operators, rather than allowing them to remain idle. An effect of the requirement to produce or plug may be to preserve the state natural resources for bona fide development — rather than fostering waste, susceptible with idle wells. Indeed, should leaks develop, well operators of nonproducing wells can become susceptible to violation, inter alia, of the regulatory requirements not to waste gas. Inactive status, as codified in the regulations, addresses the tension between operator concerns for future development and state requirements to produce or plug; but inactive status, as examined here, is based on a projection of commercial quantities in the future, which sounds in notions of future profit — notions that are susceptible to failure at the end of a well life.

IV. CONCLUSION

This Article examines selected issues arising in the nexus between coal, oil and gas regulation. For coal, oil and gas operators, it is significant that — in addition to the traditional safety and operational requirements associated with oil and gas work near coal — private and public agreements concerning bonds, transfers, and rights to develop are also affected by state oil and gas regulatory requirements. The requirement to “produce or plug” arises, for instance, in the context of bond forfeiture, transfer efficacy, and responsibility for well work. In the context of abandoned wells, delay in compliance with the requirement to “produce or plug” represented by a proffered bona fide future use, may turn upon a showing


300 See, e.g., W. VA. CODE § 22-6-3.

301 See, e.g., W. VA. CODE § 22-6-26(h) (1994).

302 See W. VA. CODE § 38-21-4.1.24, 4.1.27 (effective date July 1, 1993).

303 See W. VA. CODE §§ 22-6-31 (1994).

304 See generally W. VA. CODE §§ 38-21-1 to -6 (effective date July 1, 1993).
of future commercial profitability, or, at least, a showing of a willingness to guarantee plugging. Accordingly, the operator's regulatory considerations bring focus back to what is likely one of the operator's initial considerations — the prospects for profitable production.