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### Comparison of Coalbed Methane Statutes in the Federal, Virginia and West Virginia Jurisdictions

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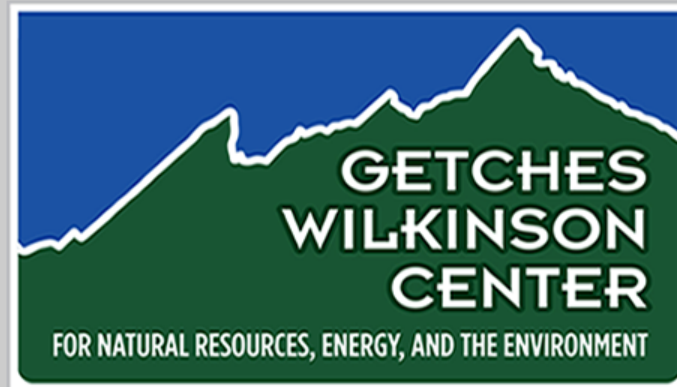
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**COMPARISON OF COALBED METHANE  
STATUTES IN THE FEDERAL, VIRGINIA  
AND WEST VIRGINIA JURISDICTIONS**

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## **COMPARISON OF COALBED METHANE STATUTES IN THE FEDERAL, VIRGINIA AND WEST VIRGINIA JURISDICTIONS**

Coalbed methane, coalseam gas, occluded natural gas, and gob gas are several names for a substance that was once viewed as a nuisance and a hazard to underground coal producers. Coalbed methane is now the object of the latest development in the energy industry. The increased production of coalbed methane and recognition of the gas as an increasingly important source of energy has generated a host of legal issues and has elicited response from Congress and state legislatures across the country. One of the most important legal issues surrounding the development of coalbed methane is the question of which estate owner actually has title to the coalbed methane. The problem arises when there is more than one owner of the coalbed methane and other minerals. Even if there is one fee owner, prior severance of certain mineral leasehold rights may also create conflicts between the coalbed methane operator and other mining operations.<sup>1</sup>

As a result, Congress and the state legislatures have enacted statutes encouraging and regulating coalbed methane development during and until the legal ownership question is resolved. The following is a comparison of three (3) of these acts which contain coalbed methane development provisions: The National Energy Policy Act of 1992 ("EPACT");<sup>2</sup> the Virginia Gas and Oil Act (the "VA ACT");<sup>3</sup> and, the West Virginia Coalbed Methane Wells and Units Article of the Environmental Resources Act (the "WV ACT").<sup>4</sup>

### **I. Public Policy**

EPACT, the VA ACT and the WV ACT statutes concerning coalbed methane gas were promulgated to facilitate coalbed methane development by creating workable solutions to the issues arising from competing or conflicting ownership claims. All three acts include: (a) commitments for venting of coalbed mines<sup>5</sup>; (b) provisions to ensure safe recovery of coalbed methane, while preserving

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<sup>1</sup> Phillip E. Norvell, Competing Uses of Coal & Oil & Gas Estates in Coalbed Methane Development, Third Annual Coalbed Methane Special Institute, E. Min. L. Found., at 1 (Nov. 1990); Jeff L. Lewin et al., Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane, 94 W. Va. L. Rev. 563 (1992); Elizabeth A. McClanahan, Competing Ownership Claims and Environmental Concerns in Coalbed Methane Gas Development in the Appalachian Basin, 7 Ky. J. Min. L. & Pol'y 189 (1991-92); 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. 631 (1994) [hereinafter Lewin, Coalbed Methane].

<sup>2</sup> 42 U.S.C.S. §§ 13201 et seq. (Law. Co-op. Supp. 1994) (coalbed methane provisions at 42 U.S.C.S. § 13368 (Law. Co-op. Supp. 1994)).

<sup>3</sup> Va. Code Ann. §§ 45.1-361.1 et seq. (Michie 1994).

<sup>4</sup> W. Va. Code §§ 22-21-1 et seq. (1994). The West Virginia statutes will be referred to as the Environmental Resources Act. The West Virginia code does not entitle this section as an act.

<sup>5</sup> 42 U.S.C.S. § 13368(n) (Law. Co-op. Supp. 1994); Va. Code Ann. § 45.1-361.1 (Michie 1994); W. Va. Code § 22-21-1(a), (b)(1) (1994).

NOTE: The VA ACT does not specifically state that venting for mine safety purposes is approved. The VA ACT's definition of waste excepts gas vented from methane drainage boreholes and coalbed methane wells for safety reasons. Va. Code Ann. § 45.1-361.1 (Michie 1994). Also, most coalbed methane unit and

the mineability of coal seams;<sup>6</sup> and, (c) provisions for preventing waste and maximizing recovery.<sup>7</sup> While the coal protective language is stronger in the WV ACT than in EPACT or the VA ACT, the general requirements for coalbed methane ventilation, future and current safe coal mining and maximization of recovery may be found in all three acts.

The weakest encouragement for coalbed methane development is found in the WV ACT. The WV ACT states that "commercial recovery and marketing of coalbed methane should in some cases be facilitated . . . ."<sup>8</sup> The use of the terms "in some cases" and "facilitated" is a watered-down version of the commitments found within EPACT and the VA ACT. The WV ACT mandates specific requirements that provide the greatest protection for coal production.

EPACT's public policy encourages coalbed methane development and aids in the resolution of competing ownership claims in states that have: (1) competing claims that impede coalbed methane development; (2) no significant coalbed methane development; and, (3) no statutory scheme to encourage development.<sup>9</sup> In administering EPACT, the Secretary of the Interior (hereinafter the "Interior Secretary") and the Secretary of Energy (hereinafter the "Energy Secretary") must: (1) consider coal mining plans; (2) preserve coal seam mineability; and, (3) prevent waste and maximize recovery.<sup>10</sup> The Interior Secretary's decisions shall be made pursuant to applicable federal and state coal mine safety laws and views.<sup>11</sup>

In the VA ACT, the policy goals specifically address oil and gas development, not coalbed methane.<sup>12</sup> These goals are broad in nature including discussion about coal production and coal owners' rights and obligations.<sup>13</sup> The VA ACT requires that it be construed to: (1) encourage and promote the safe and efficient exploration, development, production, utilization and conservation of the Commonwealth's gas and oil resources; (2) provide gas and oil conservation; (3) recognize and protect gas or oil owners' rights within the pool; (4) ensure safe coal and mineral recovery; (5) maximize coal production and recovery without substantially affecting gas or oil owners' rights to explore, produce or drill gas or oil wells; (6) protect the Commonwealth's citizens and environment from the risks associated with gas or oil development; and, (7) recognize that use of the surface shall only be that reasonably

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pooling orders provide that coalbed methane may be vented for purposes of mine safety.

<sup>6</sup> 42 U.S.C.S. § 13368(n)(B) (Law. Co-op. Supp. 1994); Va. Code Ann. §§ 45.1-361.3, -361.11(C) (Michie 1994); W. Va. Code § 22-21-1(a), (b)(1), (b)(2), (b)(4) (1994).

<sup>7</sup> 42 U.S.C.S. § 13368(d)(C) (Law. Co-op. Supp. 1994); Va. Code Ann. § 45.1-361.3(5) (Michie 1994); W. Va. Code § 22-21-1(a) (1994).

<sup>8</sup> W. Va. Code § 22-21-1(a) (1994).

<sup>9</sup> 42 U.S.C.S. § 13368(b) (Law. Co-op. Supp. 1994).

<sup>10</sup> 42 U.S.C.S. § 13368(d) (Law. Co-op. Supp. 1994).

<sup>11</sup> 42 U.S.C.S. § 13368(j)(2)(E) (Law. Co-op. Supp. 1994).

<sup>12</sup> Va. Code Ann. § 45.1-361.3 (Michie 1994).

<sup>13</sup> Id.

necessary to obtain the gas or oil.<sup>14</sup> The Virginia Gas and Oil Board (hereinafter the "Board") has the authority to issue rules, regulations or orders to provide for the maximum recovery of coal.<sup>15</sup>

The policies of the WV ACT contain strong language promoting the interest and preservation of the coal mining industry. The WV ACT states that: (1) coal value is "far greater" than that of coalbed methane; (2) coalbed methane development must protect and preserve the coal while providing for maximum coal recovery; and, (3) the fullest practical recovery of both coal and coalbed methane should be encouraged.<sup>16</sup> The overall public policy is to: (1) preserve coal seams for future safe mining; (2) encourage commercial coalbed methane development without adversely affecting mining safety and coal seam mineability; (3) safeguard and protect the correlative rights of coalbed methane well operators and royalty owners in a pool; (4) safeguard mineability of coal during coalbed methane removal; (5) create a state permitting procedure and authority to provide for and facilitate coalbed methane development as encouraged by EPACT; and, (6) remove itself from the affected state list.<sup>17</sup> Thus, the WV ACT limits coalbed methane development to situations in which development will protect and preserve safe coal mining and maximize coal recovery.

## II. Applicability

EPACT applies to lands in the "Affected States" where the United States owns the surface estate and/or the subsurface mineral estate<sup>18</sup> and all lands in any "Affected States" that do not implement a statutory or regulatory program for coalbed methane development.<sup>19</sup> As listed under EPACT, the "Affected States" are Illinois, Indiana, Kentucky, Ohio, Pennsylvania, Tennessee and West Virginia.<sup>20</sup> The following states are permanently excluded from the list of "Affected States": Colorado, Montana, New Mexico, Wyoming, Utah, Virginia, Washington, Mississippi, Louisiana and Alabama.<sup>21</sup> The VA ACT

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<sup>14</sup> Id.

<sup>15</sup> Va. Code Ann. § 45.1-351.15 (Michie 1994).

<sup>16</sup> W. Va. Code § 22-21-1(a) (1994).

<sup>17</sup> W. Va. Code § 22-21-1(b) (1994).

<sup>18</sup> 42 U.S.C.S. § 13368(a) (Law. Co-op. Supp. 1994).

<sup>19</sup> 42 U.S.C.S. § 13368(c) (Law. Co-op. Supp. 1994) applied § 13368 to any "Affected State" that has not implemented, by statute or regulation, a program for coalbed methane development (including pooling arrangements) within three (3) years after being named as an Affected State. In addition, according to the Affected States list published in 58 Fed. Reg. 21,589 (1993), "Section 1339 applies to all lands within a State on the list." The parallel citations for Section 1339 of the Energy Policy Act of 1992, Pub. L. No. 102-486 are 106 Stat. 2986 (1992) and 42 U.S.C.S. § 13368 (Law. Co-op. Supp. 1994). See also Lewin, Coalbed Methane, *supra* note 1, at 671 n.99.

<sup>20</sup> 58 Fed. Reg. 21,589 (1993). Two states, West Virginia and Ohio, petitioned for removal from the "Affected States" list. West Virginia was removed from the list on November 23, 1994. 59 Fed. Reg. 63,376 (1994). Ohio was removed from the list on February 2, 1995. 60 Fed. Reg. 7,576 (1995).

<sup>21</sup> 42 U.S.C.S. § 13368(b)(4) (Law. Co-op. Supp. 1994).



applies to all lands within the Commonwealth, whether publicly or privately owned.<sup>22</sup> The WV ACT applies to all lands located therein under which a coalbed is located, including state owned or administered lands, and any coalbed methane well.<sup>23</sup>

### III. Implementation

EPACT will be implemented by the Interior Secretary along with the Energy Secretary.<sup>24</sup> The VA ACT is administered by the Director (hereinafter the "Director") of the Department of Mines, Minerals and Energy (hereinafter the "DMME"), the Board and the Virginia Gas and Oil Inspector (hereinafter the "Inspector").<sup>25</sup> The WV ACT will be administered by the Chief of the Office of Oil and Gas of the Division of Environmental Protection (hereinafter the "Chief") and the West Virginia Coalbed Methane Review Board (hereinafter the "Review Board").<sup>26</sup>

### IV. Definitions

The definitions of coalbed methane (or coalbed methane gas) contained in the three acts are very similar. EPACT defines "coalbed methane gas" as "occluded natural gas produced (or which may be produced) from coalbeds and rock strata associated therewith."<sup>27</sup> "Coalbed methane gas", in the VA ACT, "means occluded natural gas produced from coalbeds and rock strata associated therewith."<sup>28</sup> The WV ACT defines "coalbed methane" as a "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."<sup>29</sup> The sole difference between EPACT and the VA ACT is that the EPACT definition also encompasses occluded natural gas which may be produced. The WV ACT definition is not remarkably different. It does not specifically

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<sup>22</sup> Va. Code Ann. § 45.1-361.16 (Michie 1994). However, no well commenced prior to July 1, 1990, shall be required to be plugged or abandoned solely for the purpose of complying with the VA ACT's conservation provisions. Id.

<sup>23</sup> W. Va. Code § 22-21-3(a) (1994). The WV ACT does not apply to or affect any ventilation fan, vent hole, mining apparatus, or other facility utilized solely for the purpose of venting any mine or mine area, or to the ventilation of any mine or mine area or to coal seam degasification for the mining of coal. W. Va. Code § 22-21-3(b) (1994).

<sup>24</sup> 42 U.S.C.S. § 13368(c), (d) (Law. Co-op. Supp. 1994).

<sup>25</sup> Va. Code Ann. §§ 45.1-361.4, -361.14, -361.15, -361.27 and -361.28 (Michie 1994).

<sup>26</sup> W. Va. Code §§ 22-21-4 and -5 (1994). The Review Board includes members of the West Virginia Shallow Review Board, the state geologist, a UMWA representative, a gas industry employee and the Director of the Office of Miners' Health, Safety and Training. The West Virginia Shallow Gas Review Board's chairman will also serve as the chairman of the Review Board. W. Va. Code § 22-21-2(a) (1994).

<sup>27</sup> 42 U.S.C.S. § 13368(p)(2) (Law. Co-op. Supp. 1994).

<sup>28</sup> Va. Code Ann. § 45.1-361.1 (Michie 1994).

<sup>29</sup> W. Va. Code § 22-21-2(c) (1994).

include coalbed methane that is produced, only that which can be produced. The WV ACT also includes mined-out areas and gob wells.<sup>30</sup>

The definitions for "coal seam" contained in EPACT and the VA ACT are nearly identical.<sup>31</sup> The WV ACT definition, however, is considerably broader than either EPACT or the VA ACT's definitions.<sup>32</sup> By including workable and unworkable coal seams and the noncoal roof and floor of the seams, the WV ACT provides for greater protection of mines and coal mine safety. West Virginia's definition of a workable coal seam, however, is very similar to EPACT's and the VA ACT's definitions for a coal seam.<sup>33</sup>

## V. Spacing

Each act mandates spacing requirements between coalbed methane wells and between the coalbed methane well and the surrounding property lines. Under EPACT, the Interior Secretary is charged with establishing the distance requirements within ninety (90) days of its assertion of jurisdiction over a state.<sup>34</sup>

The VA ACT and the WV ACT both offer specific distance requirements. In Virginia, the spacing between coalbed methane wells is set at 1,000 feet and for coalbed methane gob wells (hereinafter "gob wells") the distance is reduced to 500 feet.<sup>35</sup> In contrast, West Virginia sets the spacing distance between coalbed methane wells at 1,600 feet.<sup>36</sup> The WV ACT does not provide for a reduction of the spacing requirement for gob wells. The VA ACT contains the strictest requirement in regard to well distances from property lines. A coalbed methane well, in Virginia, may not be located closer than 500 feet (250 feet for a gob well) from the boundary of the acreage supporting the well, whether such acreage

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<sup>30</sup> Id.

<sup>31</sup> "The term 'coal seam' means any stratum of coal 20 inches or more in thickness, unless a stratum of less thickness is being commercially worked, or can in the judgment of the Secretary of the Interior foreseeably [sic] be commercially worked and will require protection if wells are being drilled through it (emphasis added)." 42 U.S.C.S. § 13368(p)(6) (Law. Co-op. Supp. 1994).

"Coal seam" means any stratum of coal twenty inches or more in thickness, unless a stratum of less thickness is being commercially worked, or can in the judgment of the Department foreseeably be commercially worked and will require protection if wells are drilled through it (emphasis added)." Va. Code Ann. § 45.1-361.1 (Michie 1994).

<sup>32</sup> "Coalbed" or "coal seam" means a seam of coal, whether workable or unworkable, and the noncoal roof and floor of said seam of coal." W. Va. Code § 22-21-2(b) (1994).

<sup>33</sup> "Workable coal bed" or "workable coal seam" as 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 commercially mined." W. Va. Code § 22-21-2(r) (1994).

<sup>34</sup> 42 U.S.C.S. § 13368(e) (Law. Co-op. Supp. 1994). If an Affected State has spacing requirements relating to coalbed methane wells and property lines, the Interior Secretary is relieved of this duty. Id.

<sup>35</sup> Va. Code Ann. § 45.1-361.17(B)(1) (Michie 1994).

<sup>36</sup> W. Va. Code § 22-21-20 (1994).



is a single leasehold or other tract or a contractual or statutory drilling unit.<sup>37</sup> West Virginia only requires a distance of 100 feet from the outside boundary of the coal tract from which the coalbed methane is or will be produced.<sup>38</sup> Again, the WV ACT does not distinguish between coalbed methane wells and gob wells.

The VA ACT does provide an exception to the coalbed methane well spacing requirements for coal operators. If the coal operator requests, spacing shall correspond to mine operations, including the drilling of multiple wells on each drilling unit.<sup>39</sup> West Virginia's statutory scheme also provides an exception, or more accurately, a mechanism to modify the statutory spacing. The WV ACT states that spacing shall be determined by a pooling order, a special field rules order or any Review Board order.<sup>40</sup>

## VI. Drilling Permit

EPACT, the VA ACT and the WV ACT all provide that operators must apply for and obtain drilling permits or approval prior to the commencement of drilling coalbed methane wells.<sup>41</sup> EPACT does not specify the format for a coalbed methane well permit application. It simply states that a coalbed methane well may not be drilled without the approval of the Interior Secretary.<sup>42</sup> The Interior Secretary may not approve the drilling of a coalbed methane well until all provisions regarding: (1) notices; (2) spacing requirements; (3) objections; and, (4) pooling are met.<sup>43</sup>

In Virginia, there are specific guidelines for permit applications.<sup>44</sup> The VA ACT stipulates that the Director may not issue a permit until the permit applicant provides written certification that the notice requirements,<sup>45</sup> including proof thereof, have been met and that it has the right to conduct the proposed

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<sup>37</sup> Va. Code Ann. § 45.1-361.17(B)(2) (Michie 1994).

<sup>38</sup> W. Va. Code § 22-21-20 (1994).

<sup>39</sup> Va. Code Ann. § 45.1-361.20(C) (Michie 1994).

<sup>40</sup> W. Va. Code § 22-21-20 (1994).

<sup>41</sup> 42 U.S.C.S. § 13368(i) (Law. Co-op. Supp. 1994); Va. Code Ann. § 45.1-361.29 (Michie 1994); W. Va. Code § 22-21-6 (1994).

<sup>42</sup> 42 U.S.C.S. § 13368(i) (Law. Co-op. Supp. 1994). 42 U.S.C.S. § 13368(j) (Law. Co-op. Supp. 1994) references an application for a drilling permit, however, no provisions or guidelines for the permit application are included in EPACT.

<sup>43</sup> 42 U.S.C.S. § 13368(k), (m) (Law. Co-op. Supp. 1994).

<sup>44</sup> The permitting guidelines were promulgated pursuant to and authorized by the VA ACT. Va. Code Ann. § 45.1-361.27 (Michie 1994). The regulations specifying permit application criteria are contained in VR 480-05-22.1 (1991).

<sup>45</sup> Va. Code Ann. § 45.1-361.30(A) (Michie 1994).

operations.<sup>46</sup> All applications must describe the method to be used to stimulate the well and include a signed consent from the coal operator of each coal seam located within a specified distance.<sup>47</sup>

The WV ACT also provides specific guidelines for permit applications.<sup>48</sup> The Chief shall deny the permit if the applicant has substantially violated a previously issued permit or one or more of the rules promulgated in the WV ACT; and, the applicant has failed to abate or seek review of the violation.<sup>49</sup> In addition, the Chief may not issue a permit until the applicant has filed a consent to stimulate.<sup>50</sup> No permit will be issued unless a bond is furnished as provided in the WV ACT.<sup>51</sup>

## VII. Consents to Stimulate

Each of the three acts requires that an applicant obtain a consent to stimulate a coal seam.<sup>52</sup> The acts also provide exceptions and/or alternative methods for the consent provisions.<sup>53</sup>

Under EPACT, the coalbed methane well operator must have the written consent of each entity that at the time of the drilling permit application is operating or has the right to operate a coal mine located within certain horizontal and vertical distances.<sup>54</sup> EPACT recognizes the contractual rights between the coalbed methane operator and the coal operator which pre-existed the act's effective date.<sup>55</sup>

The VA ACT also requires that coalbed methane permit applicants obtain a signed consent<sup>56</sup> from the coal operator of each coal seam which is located within 750 horizontal feet of the proposed well location that the applicant proposes to stimulate or is within 100 vertical feet above or below a coal

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<sup>46</sup> Id.

<sup>47</sup> Va. Code Ann. § 45.1-361.29(F) (Michie 1994). See also, the section titled "Consents to Stimulate" regarding the distance requirements of the VA ACT.

<sup>48</sup> W. Va. Code § 22-21-6 (1994).

<sup>49</sup> W. Va. Code § 22-21-6(g) (1994).

<sup>50</sup> W. Va. Code § 22-21-7(a) (1994).

<sup>51</sup> W. Va. Code § 22-21-7(a) (1994).

<sup>52</sup> 42 U.S.C.S. § 13368(j) (Law. Co-op. Supp. 1994); Va. Code Ann. § 45.1-361.29(F)(2) (Michie 1994); W. Va. Code § 22-21-7 (1994).

<sup>53</sup> 42 U.S.C.S. § 13368(j)(4) (Law. Co-op. Supp. 1994); Va. Code Ann. § 45.1-361.29(F)(2) (Michie 1994); W. Va. Code § 22-21-7 (1994).

<sup>54</sup> 42 U.S.C.S. § 13368(j) (Law. Co-op. Supp. 1994). The distance limitations are to be determined by the Interior Secretary pursuant to 42 U.S.C.S. § 13368(j)(3) (Law. Co-op. Supp. 1994).

<sup>55</sup> 42 U.S.C.S. § 13368(j)(4) (Law. Co-op. Supp. 1994).

<sup>56</sup> Va. Code Ann. § 45.1-361.29(F)(2) (Michie 1994). The consent may be contained in a lease or other such agreement or instrument of title. Id.

bearing stratum that the applicant proposes to stimulate.<sup>57</sup> As in EPACT, the VA ACT recognizes the existence of contractual rights or obligations arising out of a coalbed methane contract or lease entered into prior to January 1, 1990,<sup>58</sup> between the applicant and any coal operator. Such lease or contractual arrangement constitutes a waiver of the requirement for filing an additional signed consent.<sup>59</sup>

In the WV ACT, a coalbed methane well permit may not be issued until a consent and agreement is filed with the Chief for each owner and operator of a workable coal seam twenty-eight inches (28") or more in thickness which is within 750 horizontal feet of the proposed well bore that the applicant proposes to stimulate or is within 100 vertical feet above or below a coal seam that the applicant proposes to stimulate.<sup>60</sup> As in EPACT and the VA ACT, the WV ACT recognizes contractual rights or obligations arising out of a contract or lease between the applicant and any coal owner or operator. The existence of such contract or lease constitutes a waiver of the requirement to file an additional signed consent and agreement.<sup>61</sup> The WV ACT does not, however, provide that the contract or lease be in existence prior to its enactment. It does set forth certain criteria for the consent.<sup>62</sup> EPACT and the VA ACT do not specify particular requirements.

Both EPACT and the WV ACT provide for an alternate method when a coal operator refuses to grant a consent to stimulate.<sup>63</sup> The VA ACT does not provide an alternate procedure for: (1) coal operators that refuse to grant a consent; (2) unknown coal owners or operators; or, (3) unlocatable coal owners or operators.<sup>64</sup> Under EPACT, the applicant must request that the Secretary of the Interior make a determination regarding coal seam stimulation and file an affidavit.<sup>65</sup> The criteria for the Interior Secretary's determination is outlined in EPACT.<sup>66</sup>

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<sup>57</sup> Id.

<sup>58</sup> The effective date of the VA ACT was July 1, 1990. This act contained the first inclusion of coalbed methane provisions. Va. Code Ann. §§ 45.1-361.1 et seq. (Michie Supp. 1990). Since the legislature approved the VA ACT on March 6, 1990, this may explain the use of January 1, 1990, as the "cut-off" date for grandfathering leases already in existence. 1990 Va. Acts 150.

<sup>59</sup> Va. Code Ann. § 45.1-361.29(F)(2) (Michie 1994).

<sup>60</sup> W. Va. Code § 22-21-7 (1994).

<sup>61</sup> W. Va. Code § 22-21-7 (1994).

<sup>62</sup> The consent must state that the coal owner or operator has been provided with a copy of the permit application and all application plats and documents. In addition, the coal owner or operator must agree to the stimulation as described in the permit application. W. Va. Code § 22-21-7(a) (1994).

<sup>63</sup> 42 U.S.C.S. § 13368(j)(2) (Law. Co-op. Supp. 1994); W. Va. Code § 22-21-7(b) (1994).

<sup>64</sup> Va. Code Ann. §§ 45.1-361.10 and -361.29(f) (Michie 1994); See also Lewin, Coalbed Methane, supra note 1, at 675.

<sup>65</sup> 42 U.S.C.S. § 13368(j)(2) (Law. Co-op. Supp. 1994).

<sup>66</sup> The Interior Secretary's determinations shall consider the following factors:

- (1) Concurrence with all applicable coal mine safety laws.

The procedure under the WV ACT is very similar to that of EPACT. Under the WV ACT, an applicant may submit a request for a hearing before the Board of Review and file an affidavit.<sup>67</sup> The criteria for the Review Board's determination regarding coal seam stimulation is set forth in the WV ACT.<sup>68</sup> The WV ACT also places further conditions on the Review Board's authorization to stimulate.<sup>69</sup>

#### VIII. Spacing or Drilling Units

EPACT, the VA ACT and the WV ACT all provide for the establishment of drilling or spacing units.<sup>70</sup> Under EPACT, anyone claiming a coalbed methane ownership interest within a proposed drilling

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- (2) If denial was based on mine safety reasons, the Interior Secretary must seek appropriate state or federal agency views and recommendations.
  - (3) Inclusion of reasonable conditions to mitigate economic damage to the coal seam.
  - (4) Any interested party may participate in and comment on the proceedings.
  - (5) The decision approving or denying a method of stimulation is subject to appeal.

42 U.S.C.S. § 13368(j)(2)(E) (Law. Co-op. Supp. 1994).

<sup>67</sup> W. Va. Code § 22-21-7(b) (1994).

<sup>68</sup> The Review Board's determinations are to be made in consideration of the following factors:

- (1) The coal seam stimulation along with other matters relating to the application; and,
- (2) If denial was based on safety related reasons, the Chief shall submit the request and affidavit to the Review Board and submit a copy of the application to the Director of the Office of Miner's Health, Safety and Training. The Director shall review the application as to mine safety issues and within thirty (30) days submit recommendations to the Review Board.

W. Va. Code § 22-21-7(c), (d) (1994).

<sup>69</sup> Any order issuing a permit in the absence of a consent must provide that the applicant furnish evidence of financial security. W. Va. Code § 22-21-13(d)(5) (1994).

The financial security must remain in force until two years after the coal is mined, thirty years after stimulation, or until final resolution of a timely action to collect the bond, whichever occurs first. Id.

If coal seam stimulation is performed absent the consent of the coal owner or operator, the applicant and well operator are liable in tort without proof of negligence for any damage to the coal seam stimulated or any other workable coal seam within 750 horizontal feet or 100 vertical feet. The applicant and well operator are also liable for damages to any mining equipment. The applicant and well operator shall indemnify and hold the coal owner and operator harmless against liability for injury or death or property damage caused by the stimulation. W. Va. Code § 22-21-13(e) (1994).

<sup>70</sup> EPACT refers to units as spacing units. 42 U.S.C.S. § 13368(f) (Law. Co-op. Supp. 1994). The VA ACT and the WV ACT both reference units as drilling units. Va. Code Ann. § 45.1-361.20 (Michie 1994); W. Va. Code § 22-21-15 (1994). For ease of comparison, spacing and drilling units will be referenced as either drilling units or units, whether referring to EPACT, the VA ACT or the WV ACT. In addition, all references to drilling units or units shall denote a coalbed methane unit, unless otherwise specified.



unit may file an application to establish the unit.<sup>71</sup> EPACT does not require a hearing prior to the establishment of a unit. Instead, the Interior Secretary has the discretionary power to establish a unit.<sup>72</sup> The drilling unit may be established under EPACT before notice is given to the interested parties. The first notice received by potential coalbed methane owners (other than the applicant) regarding a pending unit begins with the permitting and force pooling processes.<sup>73</sup> The VA and WV ACTs do not follow this procedure.

Under the VA ACT, the Board, on its own motion or pursuant to a gas or oil owner's application, may establish a drilling unit.<sup>74</sup> In addition, any gas, oil, or royalty owner<sup>75</sup> may apply to the Board for the establishment of field rules<sup>76</sup> creating drilling units therein.<sup>77</sup> Thus, the creation of a single drilling unit or field rules to establish drilling units is limited to the Board's motion or an oil, gas or royalty owner's application. This limitation on the applicant creates problems in Virginia's drilling unit and pooling schemes. A coal owner can be a conflicting claimant;<sup>78</sup> however, it cannot file an application to establish drilling units or field rules.<sup>79</sup>

In contrast to EPACT, the VA ACT requires that all potential coalbed methane owners receive notice. It also requires a Board hearing prior to the establishment of a drilling unit or field rules.<sup>80</sup> In establishing a unit, the Board shall require that drilling units conform to the mine development plan, if

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<sup>71</sup> 42 U.S.C.S. § 13368(f) (Law. Co-op. Supp. 1994).

<sup>72</sup> "Upon receipt and approval of an application, the Secretary of the Interior shall issue an order establishing the boundaries of the coalbed methane spacing unit. Spacing units shall generally be uniform in size." *Id.*

<sup>73</sup> 42 U.S.C.S. § 13368(g), (k), (m) (Law. Co-op. Supp. 1994).

<sup>74</sup> Va. Code Ann. § 45.1-361.20(A) (Michie 1994).

<sup>75</sup> A royalty owner "means any owner of gas or oil in place, or owner of gas or oil rights, who is eligible to receive payment based on the production of gas or oil." Va. Code Ann. § 45.1-361.1 (Michie 1994).

<sup>76</sup> "[R]ules established by order of the Virginia Gas and Oil Board that define a pool, drilling units, production allowables, or other requirements for gas or oil operations within an identifiable area." *Id.*

<sup>77</sup> Va. Code Ann. § 45.1-361.20(A) (Michie 1994).

<sup>78</sup> Although a conflicting claimant is not defined by the VA ACT, the Board has treated conflicting claimants as those persons or entities claiming ownership of a common estate, the coalbed methane. Thus, the coal owner and the oil and gas owner of a particular piece of property, if not the same party, may be conflicting claimants of the coalbed methane estate. In addition, the conflict may exist between mineral lessees, i.e. a coal lessee and an oil and gas lessee. The matter may be further complicated if there is also a coalbed methane lessee.

<sup>79</sup> See also, the section titled "Pooling" for a discussion comparing the pooling provisions of EPACT, the VA ACT and the WV ACT.

<sup>80</sup> An applicant applying for a hearing to establish drilling units shall provide certified mail return receipt notice to "each gas or oil owner, coal owner, or mineral owner having an interest underlying the tract which is the subject of the hearing." Va. Code Ann. § 45.1-361.19 (Michie 1994).

any, and if requested by the coal operator, well spacing shall correspond with mine operations, including the drilling of multiple coalbed methane wells.<sup>81</sup> If a unit order will allow a coalbed methane well to be drilled into or through a coal seam, a coal owner is allowed to make specific objections to the unit formation.<sup>82</sup> After hearing the evidence, the Board may continue the hearing to allow further investigation or issue a temporary order establishing provisional drilling units and field boundaries until enough data is acquired to determine field boundaries and well spacing.<sup>83</sup> Once a drilling unit or field rules application<sup>84</sup> is filed, no additional wells will be permitted in the pool until an order is entered or the Board provides otherwise.<sup>85</sup> After field rules are established, if a permit application<sup>86</sup> will potentially extend the field, the Board may require that the well be located and drilled in compliance with the field rules order.<sup>87</sup>

The WV ACT provides that an application for a drilling unit may accompany the well permit application.<sup>88</sup> The application may also be filed as a supplement to the permit application and must contain specific information.<sup>89</sup> The WV ACT, like the VA ACT, requires that all potential owners of coalbed methane receive notice and it requires a Review Board hearing prior to the establishment of a

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<sup>81</sup> Va. Code Ann. § 45.1-361.20(C) (Michie 1994). In addition, the Board shall consider: (1) whether the proposed drilling unit is an unreasonable or arbitrary exercise of the gas or oil owner's right to explore; (2) whether the proposal would unreasonably interfere with present or future coal or other mineral mining; (3) the acreage to be included in the order and to be embraced within each drilling unit and the shape thereof; (4) the area within which wells may be drilled on each unit; and, (5) the allowable production of each well. Va. Code Ann. § 45.1-361.20(B) (Michie 1994). "The setting of maximum allowable production rates shall be only for the purpose of preventing waste and protecting correlative rights . . . . However, no maximum allowable production rate shall be set for a coalbed methane gas well." VR 480-05-22.2 § 21 (1991).

<sup>82</sup> Upon a coal owner's objection, the Board shall make its determination based on §§ 45.1-361.11 and -361.12. Va. Code Ann. § 45.1-361.20(D) (Michie 1994).

<sup>83</sup> Va. Code Ann. § 45.1-361.20(E) (Michie 1994).

<sup>84</sup> The specific guidelines and criteria for drilling unit and field rules applications are contained in the Virginia regulations promulgated pursuant to the VA ACT -- VR 480-05-22.2 (1991).

<sup>85</sup> Va. Code Ann. § 45.1-361.20(F) (Michie 1994).

<sup>86</sup> If a well permit application is adjacent to, but outside of, the field boundaries, the statute may apply. Va. Code Ann. § 45.1-361.20(G) (Michie 1994).

<sup>87</sup> Id.

<sup>88</sup> W. Va. Code § 22-21-15 (1994).

<sup>89</sup> Id.



drilling unit.<sup>90</sup> Unlike EPACT and the VA ACT, however, the WV ACT's provisions for the establishment of a drilling unit and a pooling order appear to be a simultaneous process.<sup>91</sup>

Another contrast in the acts is that the WV ACT requires that the Review Board set a time and place for a conference prior to the informal hearing.<sup>92</sup> The conference includes all coalbed methane owners or claimants identified in the application that have not entered into a voluntary agreement.<sup>93</sup> At the conference, all parties are given the opportunity to enter into voluntary agreements for unit development.<sup>94</sup> The Review Board may not issue a unit order unless the applicant submits a verified statement setting forth the conference results. In addition, if an agreement is reached at the conference, the Review Board shall find that the unit is a voluntary unit and issue an order consistent with such findings.<sup>95</sup> Thus, a drilling unit may be established separately from the pooling process; however, it appears that the unit must be a voluntary one.

Under the WV ACT, the request for a unit hearing may be made by the applicant or by a coal owner or operator.<sup>96</sup> The WV ACT, like the VA ACT, dictates criteria for the Review Board to consider in making determinations about the establishment of drilling units.<sup>97</sup> After considering the evidence,

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<sup>90</sup> At least thirty (30) days prior to a hearing on the drilling unit application, the applicant must deliver by personal service or by certified mail, return receipt requested, notice to: (1) each coal owner and operator of any coal seam underlying any tract, or portion thereof, within the proposed unit; (2) each record owner and lessee and each operator of natural gas surrounding the well bore and existing in the shallowest formation of the one: (i) above the top of the uppermost member of the "Onondaga Group"; or, (ii) at a depth of less than 6,000 feet; (3) any coalbed methane owner to the extent not otherwise named; and, (4) any other party known to the operator to have an interest in the coal or coalbed methane. W. Va. Code § 22-21-16(a) (1994).

The notice must: (1) specify a time and place for a conference and hearing on the application; (2) advise the parties notified that the applicant has filed an application for a drilling unit; (3) advise the parties that they may be present and object or offer comments to the unit; (4) include copies of the well permit application, the drilling unit application and plat. W. Va. Code § 22-21-16(b) (1994).

<sup>91</sup> W. Va. Code § 22-21-15 (1994). See also, the section titled "Pooling" comparing the pooling provisions of EPACT, the VA ACT and the WV ACT. Procedurally, a pooling order is entered when a drilling unit is established under the WV ACT.

<sup>92</sup> W. Va. Code § 22-21-17(a) (1994).

<sup>93</sup> Id. The WV ACT also recognizes the formation of voluntary drilling units pursuant to agreements between or among coalbed methane owners and operators. W. Va. Code § 22-21-19 (1994).

<sup>94</sup> W. Va. Code § 22-21-17 (1994).

<sup>95</sup> Id.

<sup>96</sup> W. Va. Code § 22-21-17(b) (1994).

<sup>97</sup> The Review Board shall consider the following: (1) the area which may be drained efficiently and economically by the proposed well(s); (2) the coal development plan, including the proper ventilation of mines or degasification of affected coal seams; (3) the coal seam's(s') nature and character affected by the well(s); (4) the unit's surface topography and the property lines of the lands underlain by the unit's coal seams; (5) evidence relevant to the drilling unit's proper boundary; (6) the nature and extent of each

comments and objections presented at the hearing, the Review Board shall: (1) enter an order denying the establishment of the unit; or, (2) enter a "pooling order" establishing the drilling unit.<sup>98</sup> The "pooling order" shall: (1) establish the unit boundary; (2) authorize the drilling, operation and production of coalbed methane well(s) from the pooled acreage; (3) establish the minimum distances for any wells in the unit and for other wells which would drain the pooled acreage;<sup>99</sup> (4) designate the well(s) and unit operator; (5) establish a reasonable operator's fee for operating costs, which shall include routine well maintenance and all accounting to pay all expenses, royalties and amounts due working interest owners; and, (6) such other findings and provisions as are appropriate.<sup>100</sup> All well operations within a drilling unit for which a pooling order has been entered, are deemed to be operations on each separately owned tract, or portion thereof, within the unit.<sup>101</sup>

#### IX. Pooling<sup>102</sup>

All three acts provide for the pooling of interests in a drilling unit.<sup>103</sup> There is only one condition for the issuance of a pooling order specifically addressed by EPACT. The Interior Secretary may not

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coalbed methane owner or claimant's interest and whether there are conflicting claims; (7) if applicant proposes to be the operator of the unit, whether it has a lease or agreement from the majority of the coalbed methane owners or claimants; (8) if disagreements exist regarding the designation of the operator, evidence to determine which operator can efficiently and economically develop the coalbed methane for the benefit of the majority; (9) if more than one party is interested in being the unit operator, the Review Board will consider the estimated well cost(s) for drilling, completing, operating and marketing the coalbed methane, submitted by such parties; and, (10) any other available geological or scientific data pertaining to the pool. Id.

<sup>98</sup> W. Va. Code § 22-21-17(c) (1994). The WV ACT's use of the term "pooling order" to establish a drilling unit is confusing. Under EPACT and the VA ACT, the orders and procedures for the establishment of a drilling unit and the pooling of interests are separate and distinct. 42 U.S.C.S. § 13368(f), (g) (Law. Co-op. Supp. 1994); Va. Code Ann. §§ 45.1-361.20, -361.21, -361.22 (Michie 1994).

<sup>99</sup> This subsection is an apparent attempt to grant authority to the Review Board to establish field rules. The establishment of field rules is not, however, specifically authorized or addressed in the WV ACT or in EPACT.

<sup>100</sup> W. Va. Code § 22-21-17(c) (1994). The provisions of W. Va. Code § 22-21-17(d), (e) (1994) appear to apply only to the pooling of interests and will be discussed in the section titled "Pooling." Based upon a review of the WV ACT, it is difficult to determine whether the order entered pursuant to an application solely for the establishment of a drilling unit would also include the provisions of § 22-21-17(d), (e). The WV ACT is not clear about the distinction between drilling units and the pooling of interests. It is difficult to determine whether the only time that a drilling unit must be established is when pooling is required.

<sup>101</sup> W. Va. Code § 22-21-18 (1994).

<sup>102</sup> "Forced pooling is the compulsory joinder of ownership rights in property within a proposed well spacing unit by exercise of the state's police power." John S. Lowe, Joint Ownership of Oil and Gas Rights, OIL AND GAS LAW IN A NUTSHELL, p. 93, (2d ed. 1988). See also Lewin, Coalbed Methane, *supra* note 1, at 669.

<sup>103</sup> 42 U.S.C.S. § 13368(g) (Law. Co-op. Supp. 1994); Va. Code Ann. §§ 45.1-361.21, -361.22 (Michie 1994); W. Va. Code § 22-21-15, -17 (1994).

approve the drilling of a coalbed methane well "[w]here conflicting interests exist, [unless] an order under subsection (g) establishing pooling requirements has been issued."<sup>104</sup> EPACT is not, however, clear whether this is the only criteria for approval of a force pooling application.<sup>105</sup> A drilling unit order must be issued before an applicant may file a pooling application<sup>106</sup> and any entity claiming a coalbed methane interest may file the application.<sup>107</sup> The Interior Secretary then holds a hearing on the application. If the criteria of this section are met, the Interior Secretary issues an order pooling the acreage in the drilling unit for production of coalbed methane.<sup>108</sup> Under EPACT, prior to the issuance of a unit pooling order, all parties claiming a coalbed methane ownership interest must receive notice. In addition, each owner so notified must be given an opportunity to appear at the hearing.<sup>109</sup>

The EPACT pooling order designates the unit operator and once issued, each coalbed methane owner or claimant must make an election.<sup>110</sup> Any coalbed methane claimant not making an election is deemed to have constructively leased its interest to the unit operator. The lease terms and conditions will be included in the order.<sup>111</sup> An escrow account will be established for the payment of conflicting claimants' proceeds.<sup>112</sup> An EPACT pooling order may not be issued if there is a unanimous voluntary agreement providing for the drilling and operation of the unit.<sup>113</sup>

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<sup>104</sup> 42 U.S.C.S. § 13368(m)(2) (Law. Co-op. Supp. 1994).

<sup>105</sup> According to the legislative history of this section, a pooling order may also be issued if the established unit consists of separately owned tracts or undivided interests in a tract. Legislative History of the 1992 National Energy Policy Act, Pub. L. No. 102-486, 1992 U.S.C.C.A.N. (106 Stat.) 2038 (hereinafter "Legislative History").

<sup>106</sup> 42 U.S.C.S. § 13368(g) (Law. Co-op. Supp. 1994).

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> An EPACT pooling order provides that claimants make one of the following elections: (1) to sell or lease its coalbed methane ownership interest to the unit operator at a rate determined by the Interior Secretary as set forth in the pooling order; (2) to become a "participating working interest owner" and bear a share of the risks and costs of drilling, completing, equipping, gathering, operating (including all disposal costs), plugging and abandoning the well, and receive a share of production from the well or, (3) to share in the operation of the well as a "nonparticipating working interest owner" and relinquish its working interest until the proceeds allocable to its share equal 300 percent of the share of such costs allocable to its interest. Thereafter, the nonparticipating owner becomes a participating owner. Id.

<sup>111</sup> Id.

<sup>112</sup> 42 U.S.C.S. § 13368(h) (Law. Co-op. Supp. 1994). See also, the section titled "Escrow" for a discussion comparing the escrow provisions of EPACT, the VA ACT and the WV ACT.

<sup>113</sup> Id.



Pooling applications, under the VA ACT, are administered by the Board.<sup>114</sup> Unlike EPACT, and as in the WV ACT, the VA ACT furnishes the Board with specific guidelines for issuing pooling orders.<sup>115</sup> No pooling order shall be entered until the notice and hearing requirements of the VA ACT are satisfied.<sup>116</sup> As in EPACT and the WV ACT, pooling orders issued pursuant to the VA ACT must include certain provisions.<sup>117</sup> In addition to the general pooling provisions of § 45.1-361.21, when there are conflicting claims to coalbed methane ownership additional conditions must be met.<sup>118</sup> A designated operator under a coalbed methane pooling order must have the right to conduct operations on, or have the written consent of the owners of, at least twenty-five percent (25%) of the unit acreage.<sup>119</sup> When conflicting coalbed methane claims exist, "any claimant" may file a pooling application with the Board.<sup>120</sup>

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<sup>114</sup> Va. Code Ann. §§ 45.1-361.21, -361.22 (Michie 1994).

<sup>115</sup> An order pooling all interests in a drilling unit shall be entered when any of the following conditions apply:

1. Two or more separately owned tracts are embraced in a drilling unit;
2. There are separately owned interests in all or part of any drilling unit and those having interests have not agreed to pool their interests; or,
3. There are separately owned tracts embraced within the minimum statewide spacing requirements prescribed in § 45.1-361.17.

Va. Code Ann. § 45.1-361.21 (Michie 1994).

If a pooling application involves a coalbed methane unit, the Board shall enter an order pooling all interests or estates in the coalbed methane drilling unit when there are conflicting claims to the coalbed methane ownership. Va. Code Ann. § 45.1-361.22 (Michie 1994).

<sup>116</sup> Va. Code Ann. § 45.1-361.21(A) (Michie 1994). The notice requirements for the pooling of units under Va. Code Ann. §§ 45.1-361.21 and -361.22 (Michie 1994) are the same as that for the establishment of drilling units. See note 80.

<sup>117</sup> Va. Code Ann. § 45.1-361.21 (Michie 1994).

<sup>118</sup> Va. Code Ann. § 45.1-361.22 (Michie 1994).

The following coalbed methane well or unit provision presents an interesting issue: "Any party not making an election under the pooling order is deemed, subject to a final legal determination of ownership, to have leased its gas or oil interest to the coalbed methane gas well operator as provided in the order." *Id.* Note that the VA ACT does not include a coal owner in this statute. In practice, however, the Board has deemed conflicting claimant coal owners to be leased pursuant to the Board's pooling order. Pooling of Interests in Drilling Unit No. O-40, Docket No. VGOB-93/04/20-0361, June 23, 1993; Pooling of Interests in Drilling Unit No. L-40, Docket No. VGOB-93/04/20-0357, June 23, 1993; Pooling of Interests in Drilling Unit No. L-41, Docket No. VGOB-93/03/16-0338, June 23, 1993; Pooling of Interests in Drilling Unit SLW11, Docket No. VGOB-92/08/18-0248, October 1, 1992.

<sup>119</sup> Va. Code Ann. § 45.1-361.21(C)(3) (Michie 1994).

<sup>120</sup> "When there are conflicting claims . . . upon application from any claimant, [the Board] shall enter an order pooling all interests . . . (emphasis added)." Va. Code Ann. § 45.1-361.22(A) (Michie 1994). "Claimant" is not defined in the VA ACT. Therefore, under this statute it appears that a coal owner, as a coalbed methane claimant, could file a pooling application. The statute is, however, ambiguous and

After a pooling order is issued, a coalbed methane owner or claimant either consents to be a participating operator<sup>121</sup> or is afforded certain elections.<sup>122</sup>

As noted previously, under the WV ACT, the establishment of a drilling unit and a pooling order appear to be a simultaneous process.<sup>123</sup> There are, however, provisions that appear to apply only to the pooling of interests.<sup>124</sup>

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perhaps inconsistent. In the next subsection, the statute states, "[s]imultaneously with the filing of such application, the gas or oil owner applying for the order (emphasis added) . . . ." Va. Code Ann. § 45.1-361.22(A)(1) (Michie 1994). This subsection would appear to limit application filings to gas or oil owners.

The statute regarding the establishment of a unit makes it clear, however, that the coal owner may not file a unit application. "[T]he Board on its own motion or upon application of the gas or oil owner shall have the power to establish or modify drilling units (emphasis added)." Va. Code Ann. § 45.1-361.20(A) (Michie 1994). A coal owner may not file an application to pool interests in a unit where conflicting claims do not exist. "The Board, upon application from any gas or oil owner, shall enter an order pooling all interests in a drilling unit . . . ." Va. Code Ann. § 45.1-361.21(A) (Michie 1994).

As noted in the section titled "Drilling Units", the drilling unit and force pooling limitations to specific applicants create several critical issues. A conflicting claimant, a coal owner, may file an application to force pool the interests in a unit which has been previously established. This same coal owner conflicting claimant, is unable to form a drilling unit for coalbed methane production. In addition, if conflicting ownership claims do not exist, a coal owner may not file a force pooling application.

These idiosyncracies and inconsistencies in the drilling unit and force pooling schemes stem from the inclusion of coalbed methane in the 1990 revisions to the VA ACT, that, to this point, had only addressed conventional oil and gas production and regulation. Prior to 1990, coalbed methane was not defined in the VA ACT, nor included in the statutes relating to the formation of drilling units nor in the pooling statutes. Va. Code Ann. §§ 45-286 *et seq.* (Michie 1986, Supp. 1988 & 1989); Va. Code Ann. §§ 45.1-361.1 *et seq.* (Michie Supp. 1990); 1990 Va. Acts 150.

<sup>121</sup> The order must prescribe the conditions under which an owner becomes a participating operator. Va. Code Ann. § 45.1-361.21(C)(4) (Michie 1994). A participating operator shares in all reasonable operating costs, including a supervision fee. Each participating operator pays the percentage of such costs as their acreage bears to the total unit acreage. Va. Code Ann. § 45.1-361.21(C)(5) (Michie 1994).

<sup>122</sup> The order must establish a procedure for "a gas or oil owner . . . who does not decide to become a participating operator may elect either to (i) sell or lease his gas or oil ownership to a participating operator, (ii) enter into a voluntary agreement to share in the operation of the well at a rate of payment to be mutually agreed to . . . or (iii) share in the operation of the well as a nonparticipating operator on a carried basis . . . ." Va. Code Ann. § 45.1-361.21(C)(7) (Michie 1994).

<sup>123</sup> W. Va. Code § 22-21-17(c) (1994).

<sup>124</sup> The operator designated in the "pooling order" is responsible for drilling, completing, equipping, operating, plugging and abandoning the well. W. Va. Code § 22-21-17(d) (1994). The operator must also market the well's production and distribute proceeds in accordance with the Review Board's division order. *Id.*

Once a pooling order is issued, coalbed methane owners, claimants and lessees may make one of the following elections within thirty (30) days after the order is issued:

## X. Escrow

The establishment of escrow accounts for competing ownership claims is mandated by each act.<sup>125</sup> Under EPACT, to safeguard the conflicting claimants' monetary interests, each pooling order must establish an escrow account into which the conflicting interests' costs and proceeds are deposited and held.<sup>126</sup> Pursuant to the pooling order, each participating working interest owner ("PWIO"), except the unit operator, deposits in the escrow account its proportionate share of the costs allocable to its interest.<sup>127</sup> In turn, the unit operator deposits all conflicting interests' proceeds, plus all proceeds in excess of ongoing operational expenses (including reasonable overhead) attributable to the conflicting interests.<sup>128</sup> The funds are kept in the escrow account until legal title is determined (by the legal system or by mutual agreement). Upon resolution of the competing claims, and within thirty (30) days of notice of same, the Interior Secretary shall distribute the principal and accrued interest from the escrow account to the rightful owner(s).<sup>129</sup>

In the VA ACT, as in EPACT, each pooling order establishes an escrow account to protect the conflicting claimants.<sup>130</sup> The structure of the escrow account is the same as that for EPACT.<sup>131</sup> Under the VA ACT, however, the unit operator must deposit only one-eighth (1/8) of the proceeds attributable to the conflicting interests plus all proceeds in excess of ongoing operational expenses as provided in

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1. To sell or lease its interest to the operator on such terms as the parties may agree. If no agreement is reached, the parties must abide by the Review Board's terms as set forth in the order;
  2. To become a working interest owner by participating in the risk and cost of the well; or,
  3. To participate in the operation of the well as a carried interest owner.

W. Va. Code § 22-21-17(e) (1994).

In the event a coalbed methane owner, claimant or lessee does not make an election within the specified time, they will be deemed to have elected to sell or lease under the first election option set forth above. Id.

W. Va. Code § 22-21-17(f), (g) and (h) (1994) dictates the proceeds and risks to be assumed by working interest owners, royalty owners and carried interest owners.

<sup>125</sup> 42 U.S.C.S. § 13368(h) (Law. Co-op. Supp. 1994); Va. Code Ann. § 45.1-361.22(A) (Michie 1994); W. Va. Code § 22-21-17(i), (k) (1994).

<sup>126</sup> 42 U.S.C.S. § 13368(h)(1) (Law. Co-op. Supp. 1994).

<sup>127</sup> 42 U.S.C.S. § 13368(h)(1)(A) (Law. Co-op. Supp. 1994).

<sup>128</sup> 42 U.S.C.S. § 13368(h)(1)(B) (Law. Co-op. Supp. 1994).

<sup>129</sup> 42 U.S.C.S. § 13368(h)(2) (Law. Co-op. Supp. 1994).

<sup>130</sup> Va. Code Ann. § 45.1-361.22(A) (Michie 1994).

<sup>131</sup> Va. Code Ann. § 45.1-361.22(A)(2), (A)(3) (Michie 1994).



§ 45.1-361.21 and the Board's order regarding participating and nonparticipating owners.<sup>132</sup> As in EPACT, once a legal determination is made, or upon agreement of all claimants, the Board distributes the principal and accrued interest from the escrow account to the legally entitled owner(s).<sup>133</sup> Unlike EPACT, however, the Board must issue an order to that effect.<sup>134</sup> The order must be issued within thirty (30) days of receipt of notification of the legal determination or mutual agreement.<sup>135</sup>

As in the other acts, the WV ACT provides that pooling orders establish an escrow account into which the conflicting claimants' costs and proceeds are deposited and held.<sup>136</sup> Under the WV ACT, each PWIO, except for the operator, deposits its proportionate share of costs in the escrow account.<sup>137</sup> The WV ACT, like EPACT, directs that all proceeds attributable to the conflicting interests of any coalbed methane owners that are leased, or deemed to be leased, are deposited into the escrow account.<sup>138</sup> In addition, all proceeds in excess of ongoing operational expenses, as allowed in the pooling order, attributable to the conflicting interests are also deposited in the escrow account.<sup>139</sup> The WV ACT, like the VA ACT, requires that once coalbed methane ownership is judicially or voluntarily determined, the Review Board issues a revised division order distributing all amounts from the escrow account to the legally entitled owner(s).<sup>140</sup>

## XI. Plugging

EPACT and the WV ACT provide that, in certain cases, coalbed methane well operators must plug their wells to provide for safe mining through in any affected coal seam.<sup>141</sup> The VA ACT does not include this provision.

Under EPACT, all coalbed methane wells penetrating coal seams with reserves shall provide for subsequent safe mining through in accordance with the Interior Secretary's standards.<sup>142</sup> The Interior Secretary shall work in conjunction with any federal or state agencies having authority over coal mine

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<sup>132</sup> Va. Code Ann. § 45.1-361.22(A)(4) (Michie 1994).

<sup>133</sup> Va. Code Ann. § 45.1-361.22(A)(5) (Michie 1994).

<sup>134</sup> Id.

<sup>135</sup> Id.

<sup>136</sup> W. Va. Code § 22-21-17(i) (1994).

<sup>137</sup> W. Va. Code § 22-21-17(i)(1) (1994).

<sup>138</sup> W. Va. Code § 22-21-17(i)(2) (1994).

<sup>139</sup> Id.

<sup>140</sup> W. Va. Code § 22-21-17(k) (1994).

<sup>141</sup> 42 U.S.C.S. § 13368(f) (Law. Co-op. Supp. 1994); W. Va. Code § 22-21-22(c) (1994).

<sup>142</sup> 42 U.S.C.S. § 13368(i) (Law. Co-op. Supp. 1994).

safety.<sup>143</sup> The costs for well plugging are to be allocated in accordance with state law or by private agreements, if any.<sup>144</sup> EPACT, instead of the WV ACT, provides the strongest measure of protection to coal owners with regard to safe mining through of coalbed methane wells.

The VA ACT does not provide for coalbed methane well plugging to allow mining through. In fact, the VA ACT approaches this situation from a different angle. Under the VA ACT, a coal owner may object to a coalbed methane permit application if the well will be drilled into or through a coal seam.<sup>145</sup> The Board must then consider whether it is feasible to enforce a drilling moratorium for a period of not more than two (2) years in order to permit the completion of coal mining operations.<sup>146</sup>

The WV ACT, as in EPACT, provides that a coalbed methane well must be plugged in such a manner as to allow safe mining through by a coal owner or operator.<sup>147</sup> Unlike EPACT, however, the WV ACT imposes a time limitation. Under the WV ACT, whenever a coalbed methane well is located in a coal seam that will be mined within six (6) months, the well operator shall, within sixty (60) days after notice from the coal owner/operator plug the well.<sup>148</sup>

## XII. Conclusion

This comparison demonstrates that the basic premises for EPACT were borrowed from the VA ACT.<sup>149</sup> The legislators of the WV ACT then based it upon the VA ACT and EPACT requirements. As is true with most legislation and regulation, a few years of operation and application always uncover some inconsistencies and burdens not contemplated at the time of drafting. The VA ACT and the regulations promulgated thereto are no exception.<sup>150</sup> Virginia's force pooling statutes are not clear on what

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<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Va. Code Ann. § 45.1-361.20(D) (Michie 1994).

<sup>146</sup> Va. Code Ann. § 45.1-361.11(C)(3) (Michie 1994).

<sup>147</sup> W. Va. Code § 22-21-22(c) (1994).

<sup>148</sup> Id.

<sup>149</sup> Lewin, Coalbed Methane, supra note 1, at 671.

<sup>150</sup> On June 21, 1994, Virginia's Governor George Allen issued Executive Order Number Fifteen which provides that state agencies must conduct "a comprehensive review of all existing regulations, to be completed by January 1, 1997. . . . as to whether each existing regulation should be terminated, amended or retained in its current form." Exec. Order No. 15, 10 Va. Reg. 5457 (July 11, 1994). Each agency must also develop a procedure for ongoing reviews of its regulations, including evaluation and determination of the regulations' effectiveness. Id. The review schedule set forth by Order Number Fifteen provides that agencies reviewing more than ten (10) regulations "must complete their reviews and assessments for at least one-half of their regulations by July 1, 1995, and must complete their reviews of the remaining regulations by July 1, 1996. Final approval by the Secretaries of all agency reviews shall be completed by January 1, 1996, for reviews due by July 1, 1995, and by January 1, 1997, for all remaining reviews." Id. at 5458. See also, Barry McKay, CPL, Legislative and Regulatory Update, THE LANDMAN, (Sept.-Oct. 1994), at 37. Virginia's Executive Order Number Fifteen may provide the appropriate opportunity and

elections should be given to a lessee;<sup>151</sup> specifically, the statute does not appear to provide for an election to assign or farmout<sup>152</sup> the lessee's leasehold interest. This also raises an issue regarding the amount to be escrowed. The one-eighth (1/8) amount contemplated by statute<sup>153</sup> appears to be applicable to an unleased interest only. If a leased royalty interest is different, i.e. one-sixth (1/6), the statutes do not appear to be applicable. Other inconsistencies include issues involving conflicting claimants and parties entitled to relief under the VA ACT. For example, a coal owner may force pool a previously established unit where conflicting claims exist.<sup>154</sup> This same coal owner, however, may not establish a unit<sup>155</sup> or force pool a unit where conflicting claims do not exist.<sup>156</sup>

Since the VA ACT was the basis for EPACT and the WV ACT, it is important that these kinds of issues that have proven to be problematic in Virginia be addressed by the legislatures and regulatory agencies in the other "Affected States" (Illinois, Indiana, Kentucky, Pennsylvania and Tennessee) prior to EPACT's deadline for implementation, October 24, 1995.<sup>157</sup>

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timely impetus to analyze not only the regulatory issues, but the statutory issues raised herein.

<sup>151</sup> Va. Code Ann. § 45.1-361.21(C)(7) (Michie 1994). See also, note 122.

<sup>152</sup> "A farmout agreement is an agreement to assign an interest in acreage in return for drilling or testing operations on that acreage." John S. Lowe, Oil and Gas Contracts, OIL AND GAS LAW IN A NUTSHELL, p. 378, (2d ed. 1988).

<sup>153</sup> Va. Code Ann. § 45.1-361.22(A)(4) (Michie 1994). Please see section titled "Escrow" for a discussion of the interests required to be escrowed.

<sup>154</sup> "When there are conflicting claims . . . upon application from any claimant, [the Board] shall enter an order pooling all interests (emphasis added) . . ." Va. Code Ann. § 45.1-361.22(A) (Michie 1994). See also, note 120.

<sup>155</sup> "[T]he Board on its own motion or upon application of the gas or oil owner shall have the power to establish or modify drilling units (emphasis added)." Va. Code Ann. § 45.1-361.20(A) (Michie 1994). See also, note 120.

<sup>156</sup> "The Board, upon application from any gas or oil owner, shall enter an order pooling all interests in a drilling unit (emphasis added) . . ." Va. Code Ann. § 45.1-361.21(A) (Michie 1994). See also, note 120.

<sup>157</sup> The "Affected States" list published on April 19, 1993, in the Federal Register provided that "[i]f these [Affected] States have not removed themselves from this list within 3 years from the date of publication of this notice [April 19, 1996], then they will be covered by Federal regulations implementing the Act." 58 Fed. Reg. 21,589 (1993). However, David R. Stewart, Chief, Branch of Resources Planning and Protection, Bureau of Land Management, Eastern States (the "Bureau") has indicated that the Bureau now concludes that October 24, 1995, is the effective date for the implementation of EPACT's coalbed methane provisions for the "Affected States." The October 24, 1995 effective date is mandated by 42 U.S.C.S. § 13368(c) (Law. Co-op. Supp. 1994).