Ohio House Rule 8:
Modifications to the Unitization Process for Oil and Gas Drilling

The Ohio House recently passed Ohio House Rule 8 (HB 8) by a vote of 96-0. The bill mandates the unitization of political subdivision property if included in the unitization application and modifies the process for obtaining approval from Ohio Department of Natural Resources (ODNR) to "unitize" the mineral rights for property not otherwise agreed to by the landowner. The bill is now in front of the Ohio Senate and a vote could take place soon.

Background

The ability to legally "unitize" property in the State of Ohio has been allowed under Ohio law since 1965. The law allows an applicant, sometimes an oil and gas company and sometimes one or more landowners, to request that ODNR approve a designated drilling unit, even if it means including land within that drilling unit against some landowners' wishes. Ohio property owners' land can thus be "unitized" against their will. All it takes is for ODNR to grant the applicant's unitization request. If the agency does that, the operator is allowed to drill beneath the dissenting property owner's land. The rationale for this was that it prevents a "hold-out" landowner from blocking other landowners or mineral rights holders from developing the oil and gas beneath their land.

Still, since enacted in 1965, the law was only used for unitization twice through 2011. Since 2011, with the introduction of horizontal fracturing in this state, drilling companies have filed at least 55 applications for unitization with ODNR.

The Current Process for "Unitization"

The current process for obtaining approval to "unitize" property (before passage of HB 8) is as follows:

- The oil and gas company must first obtain the consent to drill from the owners of oil and gas development rights of at least 65% of the acres being targeted for drilling. Note that consent of those rights may have already been agreed to by many if not most of the owners of property where shallow-well gas drilling has taken place in Northeast Ohio.
- With the consent of 65% or more, the oil and gas company can then submit an application (at a cost of $10,000) asking ODNR to "unitize" the remaining acreage that the driller desires, but for which the applicant has failed to secure agreement. The driller must show that the additional property to be "unitized" is predicted to yield substantially more oil and gas from the pool than would be produced without access to that land and the added value of that extra oil and gas makes the whole operation cost effective. There are many experts who view the ways in which cost effectiveness is calculated as suspect at best, in part because it tends to rely on information held entirely by the drilling companies.
- Prior to issuing a unitization order, ODNR must notify all un-leased landowners and hold a public hearing. If a landowner wants to object to their mineral rights being "unitized", they can voice their concerns and reasons during the public hearing. The track record to date of ODNR siding with the objecting landowner is not favorable.
- When ODNR issues the unitization order, the affected landowner then loses the right to decide what's done beneath their land. The landowner will be paid a percentage for their portion of the value of oil or gas being extracted, but that landowner would not be able to negotiate that percentage. Note that under current law drilling cannot take place on the surface of the "unitized" property.
- Once ODNR issues a unitization order, a landowner who wants to object to their mineral rights being "unitized" can appeal ODNR's decision to the Ohio Oil and Gas Commission, but the drilling process is not stayed during this appeal period unless done so by the Commission, and the track record for the appeal process is, again, not favorable.
- The timeframe for ODNR to review and decide on applications to "unitize" currently is not stipulated in the Ohio Revised Code or in the Ohio Administrative Code. This has led to some oil and gas companies waiting a year or more for a decision from ODNR.

The Major Changes Proposed in HB 8

While the language is lengthy, HB 8 essentially changes two things about the process for obtaining approval to "unitize" as described above:

1) The bill now mandates that ODNR grant unitization requests pertaining to mineral rights owned by the state or a political subdivision* of the state (other than a state park). Further, a unitization application can now be made up entirely of political subdivision property, forgoing the rule that 65% of the unit must be by consent. While there is some confusion about the language, many lawyers believe this change also enables ODNR to mandate that **drilling can now take place on political subdivision property without the consent of the governing body of such property.**
2) It creates a clear, quick timetable for requiring ODNR to review, hold hearings and issue a final decision. The specific timetable is:
    - Within 5 days of submission, ODNR needs to determine if the application is complete;
    - Within 45 days of submission of a complete application, hold a hearing;
    - Within 30 days after the hearing date, ODNR must issue an order approving or denying the "unitization" request.

Issues and Concerns Regarding HB 8

- HB 8 is a further erosion of the rights of property owners. It creates a very short window (in reality much less than 45 days) for property owners to build the rationale for opposing the unitization request. Note that drilling companies control much of the information a landowner would need to challenge a unitization application and have the resources and experience to establish a comprehensive and likely persuasive rationale for "unitizing" property. By establishing short time-frames in which the agency must make decisions, this bill makes it nearly impossible for under-resourced landowners to learn enough about the process, problems and issues to mount a credible defense to a unitization order.
- The mandate requirement that ODNR now must unitize "political subdivision" property included in a "unitization" application greatly eases the process for an oil and gas company to establish a suitable drilling "unit". According to industry best practices, the deep-well drilling process for horizontal drilling and hydraulic fracturing requires at least one square-mile of land to be viable, so being able to include "political subdivision" property as all or part of the "unitization" proposal is likely to make it much easier to establish the drilling "unit".
- It is highly unlikely that the governing bodies of "political subdivision" property are aware that their mineral rights are being taken away from them with this legislation. Even their ability to challenge the unitization of public lands will be taken away because the proposed law mandates that ODNR grant requests to unitize public lands other than state parks. While some "political subdivision" property owners may not care, governing bodies of parks, school districts, or cities or towns may be opposed to drilling in their area or particularly on their property. The ability of these "political subdivision" property owners to prevent or control drilling in their area is eliminated with this legislation and there is risk with the language as written that drilling could take place on their property.

What To Do

- Contact your state senator and voice your concerns.
- Alert the governing bodies of the "political subdivisions" in your area about this proposed ability to "unitize" their property for drilling purposes.
- Recommend that HB 8 be voted down or at a minimum, changes along the following lines:
    - Lengthen the timeframe requirements for ODNR to consider the application;
    - Require the "unitization" applicant to notify all affected parties at the same time as the filing of the application with ODNR; and
    - Eliminate the provision, added to the legislation at the last minute, that mandates that ODNR grant unitization requests pertaining to "political subdivision" properties, or at least exclude all park land and conservancy land in the state, not just state parks.

* "Political subdivision" means any county, township, municipal corporation, school district, conservancy district, township park district, park district created under Chapter 1545 of the Revised Code, regional transit authority, regional airport authority, regional water and sewer district, or port authority.