

**MINUTES
ENVIRONMENTAL REVIEW COMMISSION
April 26, 2012**

The Environmental Review Commission (ERC or Commission) met on Wednesday, April 26, 2012, at 9:30 AM in Room 544 of the Legislative Office Building. Representative Gillespie presided.

The following members were present: Representative Mitch Gillespie, Co-Chair; Representative Ruth Samuelson, Co-Chair; Senators Stan Bingham, Fletcher Hartsell, Brent Jackson; Representatives Joe Hackney, Chuck McGrady, and Roger West. Also present were: Mr. Jeff Hudson, Ms. Jennifer McGinnis, Commission Counsels; Ms. Jennifer Mundt, Commission Analyst; Ms. Mariah Matheson, Research Assistant; Ms. Cindy Hobbs, Commission Clerk (Attachment #1); and Sergeants-at-Arms Garland Shephard, Wayne Davis, Martha Gadison, Steve Wilson, and Ronald Spann (Attachment #2).

On April 4, 2012, a notice was sent to members and interested parties via e-mail. A copy of the notice is included as Attachment #3. Copies of the agenda for the meeting and visitor registration sheets are included as Attachment #4 and Attachment #5, respectively.

Call to order and introductory remarks

Representative Gillespie called the meeting to order and welcomed members, staff, and visitors in attendance. He recognized his Co-Chair, Representative Ruth Samuelson who had no remarks. Representative Gillespie called for the approval of the minutes for the January 26, February 23, and March 22, 2012 meetings, included as Attachment #6, #7, and #8 respectively. There being no changes, Representative Ruth Samuelson moved for approval.

Presentation by representatives from the Attorney General's Office

Representative Gillespie then recognized Mr. Kevin Anderson, Senior Deputy Attorney General, Consumer Protection Division, Department of Justice. Mr. Anderson gave opening remarks and presented the Attorney General Office's report on the North Carolina Oil and Gas Study under S.L. 2011-276: Impacts on Landowners and Consumer Protection Issues, Attachment #9. Mr. Anderson introduced Ms. Lynn Weaver, Assistant Attorney General, Consumer Protection Division, who then explained the report.

Ms. Weaver stated that strong protections should be in place for landowners before the State moves forward with hydraulic fracturing. Ms. Weaver said that normal drilling activities could cause disruption in the surface of the land, which could affect farming activities, which would then have to be taken out of production. Thus, this could cause a decrease in land values.

According to Ms. Weaver, there could be financial impacts in addition to the environmental impacts. Many consumers are not aware of these impacts. If a landowner enters into an oil and gas lease and has a mortgage loan on the referenced property, they could be in violation of the terms of their mortgage.

The bank prohibits the borrower from assigning or conveying an interest in the land without the lender's prior approval. If the owner does that, they can be declared in default of their mortgage. A "due-on-sale clause" is a clause in a loan or promissory note that stipulates that the full balance may be called due upon sale or transfer of ownership of the property used to secure the note. The lender has the right, but not the obligation, to call the note due in such a circumstance.

Additionally, all residential mortgages have a hazardous substance clause. It prohibits the borrower from using hazardous substances or engaging in activities that may require environmental cleanup. Some lenders have refused to make mortgage loans on oil and gas leased properties, such as the North Carolina State Employees Credit Union and the North Carolina Homeowners Credit Agency.

This is an emerging issue. Lenders in other parts of the country have looked at these risks, but since this is new to North Carolina, there are no procedures in place to address these risks. In order to take these risks into account there needs to be subordination and indemnity agreements in place. Some oil and gas companies have refused to enter into subordination and indemnity agreements. As a result, they wouldn't make the mortgage loan. Landowners need to understand that before entering into an oil and gas lease, they need to talk with their lender. There needs to be full disclosure of potential risks.

Ms. Weaver also discussed split estates. Most people own the entire estate, which includes the surface and subsurface underneath (i.e. minerals). However, it's not uncommon for those mineral rights to have been severed. There was quite a bit of coal mining in Lee County. So when land was sold, some owners held on to the mineral rights. Lee County tax officials identified 38 parcels consisting of 5,800 acres in which the person who owns the surface rights does not own the mineral rights. It's a complex process, however, landowners can go to the tax office and determine if they own the mineral rights.

Homebuilder D.R. Horton began to hold on to mineral rights in 2007, as there's no requirement that the seller disclose that the mineral rights do not convey. The severance of mineral rights would only come up at closing during a title search. There is no mandate to make that information known when an offer of sale is made. Ms. Weaver said that the homebuyers need to know this information before they make an offer.

When mineral rights have been severed the mineral rights owner has an implied easement and has a right to access that property, to explore, use roads, drill, and use water on that property. That surface owner cannot prohibit access. Courts have found that if the owner does not grant access, then that property is considered to have been taken.

Fifteen states have adopted Surface Damage Acts. Surface Damage Acts generally require notice to the surface owner and require that oil and gas companies use "good faith" negotiations with landowners to determine and pay for the amount of damage that will likely occur to property as a result of oil and gas operations. The Attorney General's Office recommends that North Carolina go further to ensure greater protection for landowners.

Without a Surface Damage Act, land owners are only entitled to damages as a result of negligence, such as irresponsible conduct. [G.S. 113-421](#) provides that an operator pay a surface

owner for damages to personal property, which covers items like fencing. The statute does not include real property, such as a house, timber, or value for the land.

Ms. Weaver noted that water supply was also critical. New session law provides for damages to new water supply, however, other states have gone further. The Pennsylvania Department of Environmental Conservation can mandate the restoration of a water supply when it is found to have been damaged as a result of oil and gas operations.

Ms. Weaver went on to discuss in-person solicitation by brokers or "landmen," such as the [American Association of Professional Landmen](#). Once an area has been identified to have oil and gas, the landmen determine who owns mineral rights. The landmen show up on the person's doorstep and encourage them to sign leases. Some landmen are independent, some work for oil and gas companies. Their job is to sign on as many people as they can, for the lowest price, and as quickly as possible.

Ms. Weavers said that homeowners need time to speak with their lender and understand the potential impacts of these leases. Landowners need to have some sort of cancellation period (perhaps 15 to 30 days), so they can review the lease properly. These leases are very complicated. Most landowners are not familiar with oil and gas leases, because it's new to North Carolina. The Attorney General's Office recommends that North Carolina establish a Surface Owner Protection Act, similar to other states. A Surface Owner Protection Act would require that landmen be brokered and provide landowners with some form of information sheet prepared by a State agency. Landowners should also be provided resources through the Attorney General's Office, the Department of Environment and Natural Resources (DENR), and other state cooperatives. The Attorney General's office also recommends that landmen be registered with the Secretary of State or DENR, so there is some measure of accountability and identification.

Ms. Weaver noted that in other states some oil and gas companies have also backed out of their leases and failed to make the bonus payments. With the decline of the price of natural gas, there have been lawsuits when oil and gas companies backed out. Oil and gas companies typically include a provision, which allows them time to conduct a 90 to 180 day title search. Thus, once some of these leases were signed, those payments were never made. It's important to require bonus payments be made within a short period of time. If they're not made within that time, the landowners should be able to cancel, so they can lease with someone else.

In conclusion Ms. Weaver said that there i's no law requiring oil and gas leases be recorded. It's important that these leases be recorded somewhere. The lease will last as long as production lasts. Memoranda are being recorded, but not the entire lease. Other states have required the release of a lease be recorded and mandate notices of assignment. The oil and gas companies will sell those leases to other companies and the leases give them a right to sell. However, the lessees are not required to be notified if their lease has been sold.

Commission consideration of its report and legislative recommendations

Representative Gillespie recognized Mr. Jeff Hudson, Commission Counsel, to present the Commission's 2012 report, included as Attachment # 10. Mr. Hudson explained the non-legislative portions of the report. No comments were made by any member and the report was

accepted. Mr. Hudson explained the following proposed legislation, as recommended by the Commission:

- State Air Toxics Program Reforms, included as Attachment #11. Mr. Hudson described the air toxics proposal. There were no comments by members. Representative West moved for a favorable report, which passed on a voice vote.
- Protect DENR from Co-Applicant Liability, included as Attachment #12. Mr. Hudson explained that the bill, which protects DENR and the State from a potential liability associated with becoming a co-applicant with a regional water supply system on the federal approvals needed for the establishment or expansion of a water supply reservoir. Representative McGrady moved for favorite report, which passed on a voice vote.
- Environmental Technical Corrections, included as Attachment #13. There being no comments from members, Representative Samuelson moved for a favorable report, which passed on a voice vote.
- ENR Reports Consolidation, included as Attachment #14. There being no comments from members, Senator Hartsell moved for a favorable report, which passed on a voice vote.

Representative Gillespie opened the floor for questions. Senator Hartsell inquired about a follow-up on Randleman Dam. Staff indicated that it would be answered before session began. Representative McGrady asked about the email that Representative McElraft circulated regarding the Coastal Area Management Act, in relation to the State Environmental Policy Act (SEPA). Representative McGrady asked if this issue would be taken up by the Commission. Representative Gillespie said that this issue could be discussed in one of the environmental committees.

Representative Gillespie made closing comments and thanked the Commission for its work. Representative McGrady moved to approve the entire report. The motion passed on a voice vote. Representative Hackney asked that he be recorded as voting "no."

There being no further business, the meeting was adjourned at 10:35 AM.

Co-Chair Senator David Rouzer

Co-Chair Representative Mitch Gillespie

Co-Chair Representative Ruth Samuelson

Attest:

Cindy Hobbs, Commission Clerk