

Minutes, January 7, 2013, meeting of the Marcellus Shale Safe Drilling Initiative Advisory Commission

Approved April 15, 2013

The Commission held its thirteenth meeting in the House Environmental Matters Hearing Room 251, House Office Building, Annapolis, Maryland 21401. In attendance were Chairman David Vanko and Commission members Steven Bunker, George Edwards, Jeffrey Kupfer, Clifford Mitchell, Heather Mizeur, Dominick Murray, James Raley, Paul Roberts, Nick Weber and Harry Weiss. Also in attendance were Secretary Summers, staff of state agencies and members of the public.

Chairman Vanko called the meeting to order and introduced newly appointed Commission member Clifford S. Mitchell, M.D., Director of the Environmental Health Bureau at the Maryland Department of Health and Mental Hygiene. Chairman Vanko also noted Commissioner Mitchell's appointment had been in part a response to public criticism that the Commission lacked a public health expert.

The Commission members introduced themselves.

Commissioner Weiss gave a presentation of the results from the Commission's legislative committee (Committee) meeting on Friday January 4, 2013, noting that the Committee recommended revising the draft financial assurance and bonding proposal, which was discussed and accepted at the November 2012 Commission meeting, to include a self-insurance provision. Commissioner Weber asked if all types of financial assurance would be equally liquid and available to MDE. Commissioner Weiss and Ms. Kenney said that it was the intention to approve only financial assurances that were immediately available. Commissioner Kupfer suggested that the minutes from the November meeting be adjusted to reflect that self-insurance is acceptable.

Commissioner Weiss briefly explained the concept of a Surface Owners Protection Act, adding that the Committee had agreed that a SOPA was desirable, and had reached consensus on three core principles: it should apply, at a minimum, to any surface owner who does not own the mineral rights; the person seeking the permit to drill should give advance notice to the surface owner regarding what he intends to do and where he intends to locate the well pad, access road, etc. and give the surface owner an opportunity to negotiate these matters; and the permittee must pay money damages to the surface owner for damage to the surface owner's property. The Committee had not reached agreement on other aspects of a SOPA, such as whether a SOPA should cover surface owners who are also mineral rights owners, as opposed to those who only own surface rights; and the question of what should occur if the surface owner and the lessee negotiate but fail to reach agreement.

Chairman Vanko then asked for comments from the Commissioners, also raising the issue of surface owners who claim to have entered into leases without full knowledge of the ramifications. Commissioner Weiss responded that some states have addressed

lessees' rights by mandating certain protective clauses in every lease – a consumer protection approach; other states have made the protections retroactive to a degree. Commissioner Bunker asked whether retroactivity would be an unconstitutional interference with contract. Ms. Kenney explained that legislative findings could overcome the constitutional problem. For example, the West Virginia legislature found that drilling practices had changed significantly over time, and the legislature created a rebuttable presumption that someone who sold or leased the mineral rights before a certain date did not consent to modern, more invasive drilling operation. If Maryland were to take this approach, it would need to make similar findings and establish a date.

Commissioner Edwards asked Commissioner Weiss and Ms. Kenney if they had looked at whether any parts of the SOPA concept were duplicative with the MDE permitting process, to which Commissioner Weiss responded that they had not.

Commissioner Kupfer said that he did not believe that a SOPA should have retroactive applicability.

Commissioner Weiss summarized the views of the Commission, saying that no consensus existed as to the mechanism of dispute resolution, but that consensus did exist that: a sit-down between parties should take place; surface owners should be compensated for damages; and the surface owner should have input in the locating of infrastructure and equipment. Commissioner Kupfer said that he was comfortable with the idea of compensation but not with some of the language in the draft concerning compensation, mentioning articles 9a, "lost income or expenses incurred as a result of being unable to dedicate land actually occupied by the driller's operation..." and 9c, "damage to improvements to the property constructed prior to the commencement of the permitted activity."

Commissioner Weber said that a SOPA should not deny access to mineral resources, but should ensure minimum protections to surface owners. Commissioner Kupfer agreed. Commissioner Weiss noted that the SOPA protects only surface owners on whose surface property mining activity takes place. It does not protect lessees under whose property drilling occurs. Commissioner Weiss then asked for a motion to recommend SOPA and to summarize the commission's agreement.

Ms. Kenney suggested that the commission should endorse something, but should try to reach consensus on the issue of retroactive protection for lessors, noting that West Virginia's SOPA does offer such protection; and also on the issue of what happens when negotiations fail, whether arbitration, litigation or allowing the mineral rights owner to proceed as he wishes, provided he posts bond to assure that damages to the surface owner could be paid. Commissioner Weiss said that no consensus had been reached on retroactive protection for lessors.

Commissioner Weber said that 160,000 acres in Maryland have already been leased and that those surface owners deserve the same protection as others. Commissioner Weiss pointed out that this figure had decreased because leases lapsed. Chairman Vanko asked

what the current figure is. Commissioner Weiss answered that he did not know exactly but that it had decreased by at least five figures. Commissioner Kupfer said that adding in those surface owners would be overly broad, especially after media coverage of fracking. Commissioner Mizeur said that those leases were negotiated before the surface owners fully understood the risks and many of them welcome the expiration of their leases. She pointed out that some lessors are stuck in leases they regret. Commissioner Kupfer said that regret is not a basis for voiding a contract or lease. Commissioner Mizeur stated that there is a need to protect lessors prospectively and that there should not be different classes of surface owners. Commissioner Roberts said that some lease bundling companies wrote leases that are impossible to escape from. Commissioner Weiss said the discussion did not concern whether surface owners can be released from their leases. Ms. Kenney suggested that legislation could establish a date before which there would be a rebuttable presumption that the lessor was not fully informed of the risks posed by fracking.

Commissioner Weber said that the SOPA would create two classes of surface owners, protected and unprotected. Commissioner Kupfer said that the SOPA is for surface owners who are not mineral rights owners and the class of surface owners it would not protect is surface owners who are also mineral rights owners. Commissioner Weiss agreed on this point.

Commissioner Edwards then returned to the issue of what in the SOPA might be duplicative with the permit process, in particular with regard to the placement of infrastructure. He said that the SOPA primarily addresses economic compensation, not location of infrastructure. Commissioner Weiss explained that through the permitting process, MDE approves where the drilling location can be, not where it should be. Ms. Kenney confirmed this to be the case. Commissioner Weber asked if the surface owner was part of a 3-way discussion of the permit. Ms. Kenney said that an applicant for a drilling permit needs to show MDE that it has a right of entry agreement with the surface owner, but MDE is not part of any discussion between the applicant and the surface owner. She said that if a surface owner refuses to give a right of entry, a driller could go to court to force entry. Absent a SOPA, the court would likely grant it. Ms. Kenney said that all permits go through a comment period, during which public comment is considered, but otherwise the surface owner would have to appeal the issuance of the permit if it wanted to challenge it.

Commissioner Edwards pointed out that MDE has a say in the location and reclamation of mining operations through the permit process. He gave as an example the placement of a road. Ms. Kenney responded that if there were no environmental reason not to put a road in a particular place, MDE would likely approve that permit.

Commissioner Weiss offered an example of a permitted activity a surface owner might find objectionable. In this hypothetical situation, MDE granted a permit for a well with the road in a certain location close to the surface owner's chickens, which the surface owner feared would reduce egg production. MDE would probably not consider this sufficient grounds for denying the permit. On the other hand, under a SOPA, the mineral

rights owner would have to consider selecting a different location for the road, and would be liable for economic damages if the hens stopped laying.

Commissioner Bunker asked about the arbitration process, and said that posting bond would only resolve the issue of compensation, not the dispute itself. Ms. Kenney agreed, but said that it would not be fair to allow the surface owner to tie up the process indefinitely, so it would be necessary to set time limits for arbitration. She added that some SOPAs allow the mineral rights owner to go ahead with mining operations when the time limit expires. Commissioner Bunker asked if other SOPAs set time limits on negotiations. Ms. Kenney responded that some SOPAs that include an arbitration process set time limits on arbitration.

Commissioner Roberts asked if the administration planned to propose a bill. Ms. Kenney responded that there is a process for developing Administrative bills, and that it was too late for the 2013 session. A legislator could still introduce legislation based on the Commission's recommendations, which the administration might then endorse. She added that a recommendation from the Commission did not need to be unanimous, but might be refined by a vote.

Commissioner Weiss said that the arbitration process can be borrowed from another state's SOPA, but the time period still has to be decided. He added that the Commission could recommend legislation that did not include such details. Chairman Vanko asked Commissioner Weiss what arbitration time limits he has seen in other states' SOPAs. Commissioner Weiss said that he thinks legislators are in a better position to assess a time limit and to deal with whatever hypothetical situations that assessment might entail.

Commissioner Roberts asked Secretary Summers if the administration would propose legislation next year. Secretary Summers responded that that administration would consider the recommendations of the Commission. Commissioner Roberts noted there would be more time to sit down and discuss the issue with interested parties if legislation were introduced in 2014.

Commissioner Edwards asked Secretary Summers whether MDE would oppose being responsible for the arbitration. Secretary Summers responded that MDE has not been involved in arbitration before, but that MDE has encouraged parties with permit disputes to contract with arbitrators. Commissioner Edwards suggested that someone should direct surface owners toward individuals or organizations that could conduct arbitration. Secretary Summers said that MDE often provides lists of contractors for other purposes. Commissioner Weiss said that arbitrators could submit themselves to MDE for approval for an official list. Commissioner Edwards said that MDE could present surface owners with a list of arbitrators from which they could choose.

Commissioner Raley said that the Commission does not need to work out all the details, but that it should make clear its support for a SOPA and leave the details to the legislature.

Commissioner Weiss summarized that the Commission had consensus that oil and gas exploration should not occur at the expense of the surface owner, but he added that the Commission is not in agreement about what constitutes a surface owner for the purposes of SOPA, particularly on the question of pre-existing leases. Commissioner Kupfer said that the SOPA's core concern is the surface owner who is not a mineral rights owner. Commissioner Weiss said that specifics describing "damages" should stay in the SOPA. Commissioner Mizeur said that the Commission did not need consensus, but that a vote should be taken and the legislature should be informed about its results. Commissioner Weiss suggested that the Commission could provide a checklist to enumerate areas of dispute versus consensus.

Chairman Vanko then called a vote on the following proposition: the Commission recommends a SOPA for surface owners who are not mineral rights owners; the SOPA should include a procedure for the negotiation of siting wells, roads and other infrastructure; and that the SOPA should mandate reasonable compensation for damages. The motion was made by Commissioner Weiss, seconded by Commissioner Raley, and passed unanimously. Commissioner Weiss moved that the Commission recommend that the SOPA also apply to surface owners who enter into future leases, and Commissioner Mizeur seconded. The motion carried, with Commissioner Kupfer voting no and Commissioner Mitchell abstaining. Commissioner Mizeur moved that the Commission recommend that the legislature find that there should be a rebuttable presumption that a lessor who signed a lease before a certain date was not consenting to horizontal drilling and hydraulic fracturing. Commissioner Weber seconded. Commissioners Vanko, Mizeur, Bunker, Murray, Roberts, and Weber voted yes, Commissioners Weiss, Raley and Edwards voted no; Commissioner Mitchell abstained, and Commissioner Kupfer had left the meeting. Before leaving, he asked that the Commissioners be notified in advance if voting would take place at a meeting.

Commissioner Weiss then gave a brief presentation on the Committee's discussion of legislation establishing a state severance tax. He explained that they had attained broad consensus that a state-level severance tax should be enacted, and how the money should be used, but not the rate of the tax. It was suggested that the legislature should set a reasonable rate, considering various factors. There was a discussion of factors that the legislature should consider, including: the county severance tax, the severance tax rate in other states, and how much money might be needed to satisfy the purposes of the fund. Commissioner Bunker asked how long it would take for the Natural Gas Impact Fund to build up to \$15 million. It would depend on the pace of drilling and production and the price of natural gas, as well as the tax rate, but it would be many years. Commissioner Bunker suggested a tax that would be higher in the early years to build up the fund. Ms. Kenney added that the Committee had reached consensus that the structure of the current severance tax proposal is appropriate only if the draft legislation on financial assurances is also accepted.

Commissioner Raley said that the Commission should stress that a state severance tax be "reasonable" in addition to clarifying the factors that should be considered in determining a rate. Commissioner Roberts said that the tax's reasonableness should be assessed on the

basis of its ability to provide the necessary funds to protect against the adverse impacts of gas exploration and production. He said that the State's exposure had not been estimated.

Commissioner Weber said that it is important for the tax to be directed back at the counties, particularly to protect against the adverse impacts of gas exploration and production. He added that the county severance tax should be directed to the same purpose. Commissioner Roberts asked if the high county tax rate could be an obstacle to keeping the state rate competitive. Commissioner Edwards said that it is within the counties' rights to set their own tax rate. He said that a natural gas severance tax of 7 percent was established in 1950 to fund education and healthcare, and that later the ordinance was amended to make it easier to calculate the tax and administer it, reduce the rate to 5.5 percent, and send the money to the County's general funds.

Commissioner Weiss, speaking on behalf of Commissioner Kupfer, said the Commissioner agrees that the tax should go to the counties, but that a portion should go to MDE. Commissioner Weber suggested that there could be a way to increase the Impact Account's funds to \$15 million more quickly by a graduated rate, perhaps taking part of the counties' 5.5 percent for the fund initially.

Commissioner Weiss made a motion to vote to recommend a state-level severance tax of an unspecified rate, to be determined by the legislature with consideration of factors including competitiveness and impact to the state. Chairman Vanko asked if the size of the Natural Gas Impact Account should be left blank in the Commission's recommendation. Commissioner Weiss said that it should be left up to the legislature to decide its size.

Commissioner Edwards pointed out that the Commission's recommendation of a severance tax was linked to the recommended financial assurance bill. Commissioner Weiss agreed on this point. Commissioner Raley then seconded Commissioner Weiss's motion. Commissioner Weiss restated his motion to say that the Commission recommends that the legislature enact a state severance tax for the purposes enumerated in the summary plus an amount for MDE to help finance its program, in advance of the commencement of fracking; the severance tax necessarily augments financial assurance. All commissioners present voted in favor, except Commissioner Mitchell, who abstained. The meeting then adjourned for a ten minute break.

The commission reconvened and Chairman Vanko asked Commissioner Weiss to present on the legislative Committee's landmen registration proposal. Commissioner Weiss first clarified that while he had said during the latest meeting of the legislative Committee that no other state had enacted a landmen registry, North Carolina in fact had enacted one. He then briefly explained that the draft legislation defined landmen to include those negotiating with landowners for acquisition of mineral rights, not necessarily those who work within the industry but have no direct impact on dealings between the surface owner and the oil and gas companies. He said there was no consensus on how unregistered practice should be prosecuted. Commissioner Weiss made a motion to vote

on the recommendation, which Commissioner Mizeur seconded. All commissioners present voted in favor, except Commissioner Mitchell, who abstained.

Chairman Vanko thanked the legislative Committee and called on David Bolton, Chief of the Maryland Geological Survey's Hydrogeology and Hydrology Program to present on the findings of his report, co-authored with Minh Phung T. Pham, *Dissolved-Methane Concentrations in Well Water in the Appalachian Plateau Physiographic Province of Maryland*. Mr. Bolton said the report provides data on 49 samples taken from private wells and public water supplies in Garrett County to establish baseline methane concentrations and distribution prior to natural gas development. The sampled wells were located in areas with and without coal, and in areas in valleys versus on hilltops or hillsides. Twenty out of 49 wells sampled had detectable concentrations of dissolved methane, but none of these was above 8.5 mg/L. The recommended "action level" for concentrations of dissolved methane is 10 mg/L, whereas no explosive hazard exists at concentrations below 28 mg/L. The three wells with the highest concentrations of dissolved methane were located in valleys within coal basins. Two of these wells also had detectable levels of ethane. Overall, valley wells in coal basins had the highest proportion of detections.

Mr. Bolton said that he and his co-author planned to take follow-up samples in 30 more wells, sampling at monthly intervals to investigate temporal trends and analyzing samples for isotopic compositions to attempt to determine the sources of methane. He said that this report would be submitted by September 30, 2013 and added that the report will be peer reviewed at that time.

Commissioner Weber noted that many residents of Western Maryland get water from springs and asked if the study had tested any springs. Mr. Bolton responded that they had tested only wells. Commissioner Edwards asked which public sources had been tested. Mr. Bolton responded that they had taken samples from Grantsville and would include samples from public sources in Western Alleghany County in the future. Chairman Vanko thanked Mr. Bolton

Chairman Vanko requested Commission approval of the minutes from the last two meetings. Commissioner Weiss and Commissioner Weber both provided their corrections. With these corrections, the minutes were approved.

Chairman Vanko asked Ms. Kenney to report on the status of Dr. Keith Eshleman's best management practices study and to inform the Commission of the dates of upcoming legislative briefings by MDE on Marcellus Shale. Ms. Kenney said that MDE would be presenting to the Senate Education, Health and Environmental Affairs Committee on January 22, 2013, and to the House Environmental Matters Committee on January 17, 2013. Ms. Kenney said that Dr. Eshleman submitted a draft of 10 chapters on best practices, each one corresponding to one of the 10 matrices previously submitted and shared with the Commission. MDE and DNR are currently reviewing the chapters. She expects that they can be sent to the Commission in mid-February.

Because the meeting ran late, the Commission did not take public comment, however Commissioner Mizeur asked that the Commission acknowledge members of the public present for the meeting and allow them to select a few spokespersons to explain their interest in the meeting. Chairman Vanko added that public comments could be submitted on the MDE website and would be distributed to the Commissioners.

Mike Tidwell of the Chesapeake Climate Action Network spoke briefly on behalf of members of that organization who were present at the meeting. He said that they supported a moratorium on fracking until further studies as to its public health and environmental impacts could be completed. He also explained that his red pin, which many other members of the audience also wore, read “No Studies, No Fracking.”

Barbara Gottlieb, Director of Environment and Health, Physicians for Social Responsibility, said that she was glad of Commissioner Mitchell’s appointment to the Commission and added that she thinks more public health experts should be brought to testify before the Commission in the future.

The meeting adjourned at 1:15 pm.