Minutes, November 30, 2012, meeting of the Marcellus Shale Safe Drilling Initiative Advisory Commission

Approved, January 7, 2013

The Commission held its twelfth meeting at the hall of the Eastern Garrett Volunteer Fire Department, 401 Finzel Road, Frostburg Maryland 21532. In attendance were Chairman David Vanko and Commission members James Raley, William Valentine, Peggy Jamison, Paul Roberts, Jeff Kupfer, Dominick Murray, Steven Bunker, Senator George Edwards, Shawn Bender and Harry Weiss. Also in attendance were staff of state agencies and members of the public.

Harry Weiss reported on the work of the legislative committee and lead a discussion of its recommendations on two principal topics: financial assurances and a surface owners' protection act. The committee had suggested changes to the existing law that would remove the cap on the reclamation bond and institute a requirement for pollution insurance.

The Commission members discussed whether they should endorse general principles or concepts, or actually develop bill language. The consensus was that the Commission should be as specific as it can to guide the bill drafters, but that the Commission should not try to agree on the actual wording of the bills. It was also confirmed that the Commission was not dropping any of the recommendations it had made in December 2011.

The Commissioners recognized that it may be necessary to adjust the amount of the bonding, but there was little support for linking the bond amount to the inflation rate. Instead, the Commissioners thought that the Maryland Department of the Environment (MDE) should set the amount of the bond, perhaps as a function of both the vertical and horizontal extent of the well, in regulations which would be reviewed periodically and adjusted as necessary. The bond should not be released without public notice of the closure and inspection by MDE.

Commissioner Weiss explained that comprehensive general liability insurance once covered damages caused by the release of pollutants, but that insurance companies had revised the policies to exclude coverage for those damages in response to the federal Superfund law. Pollution insurance, sometimes called Environmental Impairment Liability Insurance, was developed by insurance companies to plug the gap left by the "pollution exclusion." It was not developed specifically for any industry, but at least three insurance companies are currently writing pollution insurance policies for gas exploration and production involving hydraulic fracturing, and another is considering it. It was noted that pollution insurance would assure that money would be available in the event that the release of pollutants from drilling, fracking, or surface spills caused damage or made cleanup necessary, provided the responsible entity could be identified. The Commission noted that contractors, subcontractors, and the surface owner, should be named as insured parties.

There was further discussion about alternative means to provide financial assurance for the closure and liability. The Commission agreed that bonds and insurance did not have to be the only ways of satisfying a financial assurance requirement, and that the bill should not limit it to those types of instruments. For example, a letter of credit or proof of sufficient assets to self-insure could also be used.

Commissioner Weiss moved that the Commission endorse the financial assurance recommendations of the legislative committee. Commissioner Valentine seconded the motion, which passed unanimously. Ms. Kenney was directed to summarize the consensus and circulate the summary. (The summary circulated is attached as Attachment 1.)

The discussion of the surface owner's protection act was more general, because the committee had not formulated a specific recommendation. Commissioner Weiss explained that the traditional common law rule is that the mineral rights owner has the right to make any reasonable use of the surface to extract those minerals, and does not have to compensate the surface owner for damages he causes to the surface. In some states, courts have adopted a somewhat modified common law rule called the "accommodation doctrine." This doctrine holds that the mineral rights owner must accommodate the needs of the surface owner if there is a less intrusive way to extract the minerals. For example, if the surface owner uses an irrigation system that requires a certain amount of clearance, and the surface owner can show that the well can be installed in a manner that affords that clearance, a court could require the mineral owner to accommodate the surface owner in this respect. The burden is generally on the surface owner, however, to show that there is a less intrusive way.

A statute could establish a rule different from the common law. For example, it could shift the burden of proof or establish a requirement that the mineral rights owner compensate the surface owner for any damage caused by the extraction of the minerals. An important question that the legislative committee had not settled is whether the law should be designed to protect only those who have no control over the mineral rights, or if it should be extended to protect persons who own both the surface and subsurface rights, but who lease those rights.

Senator Edwards suggested that permittees would locate its well pad on the property of a "friendly" surface owner and drill under the property of "unfriendly" surface owners, and that MDE could arbitrate any dispute. Ms. Kenney said that MDE would not want to be involved in such a dispute.

Commissioner Kupfer said that it made sense to establish a reasonable accommodation standard, with notice to the surface owner, a process for accommodation of the surface owner's reasonable wishes, and compensation for damage to the surface. He was concerned, however, that the Commission not recommend something that would prevent the mineral owner from accessing the minerals. He was also concerned that a surface

owner could cause endless delay by tying the matter up in court. He also thought that the statute should set forth the types of damage for which compensation would be paid.

Senator Edwards expressed concern about who would set the dollar amount of damages. Ms. Kenney said that some surface owner protection acts provided for arbitration or resolution of the amount by a court.

Commissioner Bender asked if a surface owners protection act would cover only oil and gas, or all mining, including coal. Also, would the financial assurances requirements cover new wells installed in the storage field? Ms. Kenney answered that the current discussions were limited to oil and gas, and that the existing bonding and insurance requirements would apply to new storage wells, so presumably the new financial assurance requirements also would.

Ms. Kenney gave an update on the progress of the Best Practices work. Dr. Eshleman was completing a draft of his recommended Best Practices for Maryland. The Commission would have an opportunity to discuss it and to review the draft report on Best Practices before it would be put out for public comment.

Commissioner Vanko reported on presentations given at the October 22 Maryland Water Monitoring Council workshop on Water Resources Monitoring and Marcellus Shale Gas Development in Western Maryland. He described some USGS water quality monitoring of surface water and groundwater. Jeff Halka and Dave Bolton from the Maryland Geological Survey provided some information on groundwater issues in Garrett County, and stated that the pilot study of methane in Garrett County wells would soon be released. Methane was found in some wells but not in others, and no levels were high enough to be flammable. There was a brief discussion of total dissolved solids and conductivity as indicator parameters for pollution.

Chairman Vanko also talked about the November annual meeting of the Geological Society of America. He mentioned

- A report that most stray gas in surface water and shallow groundwater is related to shallow engineering problems that mobilize dissolved gas in the shallow groundwater or shallow formation
- Monitoring methane levels in low-flow streams to indicate levels in the shallow groundwater
- Efforts to collect baseline and background data in New York
- A talk on effective regulatory programs that noted the importance of strong casing regulations, cement bonding logs, mechanical integrity testing, annulus pressure testing, notification to surface owners, prompt notification of spills, chemical disclosure, and advance notice to the regulatory department before initiating certain actions.

The floor was opened for public comment, which lead to discussions that included the audience and the Commissioners. There was talk of the lack of data and the anecdotal nature of some of the evidence. Public health studies are just getting underway in some

states, and several persons mentioned the need for the Commission to address public health. An audience member urged the Commission to support more funding for the studies. Commissioner Raley advocated partnering to get the work done and noted that Garrett County was providing $32 thousand to help fund some groundwater work.

A representative of the Greater Cumberland Committee suggested that the Commission's next meeting should be held in conjunction with the Mountain Maryland PACE (Positive Attitudes Change Everything) legislative meeting in Annapolis January 24 and 25. Some persons opposed the idea, and the matter was dropped.

The meeting adjourned.

Attachment 1

Financial assurance, insurance, bonding

1. Every holder of a permit to drill for gas or oil shall provide financial assurance for
    a. compliance with the provisions of Subtitle 1 of Title 14 of the Environment Code, including proper sealing and plugging of the gas or oil well and reclamation of the site;
    b. comprehensive general liability for bodily injury and property damage to third parties, caused by sudden accidental occurrences arising from the activity undertaken pursuant to the permit or in support of the activities undertaken pursuant to the permit, including costs and expenses incurred in the investigation, defense or settlement of claims; and
    c. pollution liability for bodily injury and property damage to third parties, natural resource damage and cleanup, caused by the sudden or non-sudden release of pollutants arising from the activity undertaken pursuant to the permit or in support of the activities undertaken pursuant to the permit including costs and expenses incurred in the investigation, defense or settlement of claims.
2. Financial assurance for pollution liability must continue until a date 5 years after the Department determines that the well has been properly sealed and plugged and the site reclaimed.
3. The holder's financial assurance must extend to the owner of the surface and subsurface property and the holder's contractors and subcontractors.
4. If a change of ownership occurs, or the permit is to be transferred, the existing financial assurance must remain in force until a replacement financial assurance is approved by the Department.
5. The Department may, by regulation, establish alternative means for demonstrating financial assurance, including:
    a. A performance bond;
    b. A blanket bond;
    c. Comprehensive general liability insurance;
    d. Environmental Pollution Liability insurance;
    e. Cash;
    f. Certificates of deposit;
    g. Letters of credit;
    h. A financial test; or

i. Corporate guarantee; or

j. Any other surety the Department determines to be good and sufficient.

6. At the time of permit application and each application for renewal, the holder shall provide the Department with a cost estimate for proper sealing and plugging of the gas or oil well and reclamation of the site.

7. The following are the amounts for financial assurance which the Department may adjust upward or downward by regulation:

   a. for compliance with the provisions of the subtitle, including proper sealing and plugging of the gas or oil well and reclamation of the site, at least $50,000 for each gas or oil well, but it may not be less that the most recent closure cost estimate provided by the holder:

   b. for comprehensive general liability insurance that excludes pollution, at least $300,000 for each person and $500,000 for each occurrence or accident; and

   c. for pollution insurance, at least $1,000,000 per loss.