

Meeting Minutes of the Protection of Trade Secret and Proprietary Information Study Group
of the
North Carolina Mining and Energy Commission
June 7, 2013
15 minutes following the adjournment of the MEC

1) Call to Order and Notice of NCGS 138A-15

Director Womack called the meeting of the Protection of Trade Secret and Proprietary Information Study Group to order at 2:58 pm in the Ground Floor Hearing Room of the Archdale Building in Raleigh, NC. Director Womack read the relevant excerpt of the State Government Ethics Act, and asked Commission Members to consider whether or not they had conflicts of interest with respect to any items on the agenda. No conflicts were reported.

The following persons were in attendance for all or part of the meeting:

Study Group Members:

James Womack, Director, MEC
Amy Pickle, MEC
Tyler Mulligan, North Carolina School of Government
Ward Lenz, State Energy Office

Attorney General's Office:

Jennie Wilhelm Hauser (legal counsel)

DENR Staff Member:

Trina Ozer, Department of Environment and Natural Resources (DENR) Secretary's Office
Layla Cummings, DENR Secretary's Office
Tracy Davis, Division of Energy, Mineral and Land Resources (DEMLR)
Rosalind Harris, DEMLR
Ryan Channell, DEMLR

Others in Attendance:

Refer to the attached meeting sign-in sheets.

2) Background and Introductions:

Director Womack discussed agenda items and specific statutory language and processes that the study group would capture in their final report.

3) Approval of Minutes from May 3, 2013 Meeting:

Ms. Amy Pickle made a motion to approve the minutes and Director Womack seconded. The motion passed.

4) Trade Secret & Proprietary Information Rule Review from Various States:

Ms. Layla Cummings presented Trade Secret and Proprietary Information Rule Review from Various States including: Arkansas, Colorado, Texas, and Illinois (see attached presentation).

5) Discussion about Trade Secret Rule-making Pending Study Group Final Report:

The study group discussed how the state could retain geological data in confidence for a particular time frame and not violate the Public Records Act. It was noted, that the Public Records Act has an exemption that cannot be challenged by the public if the information is identified as sensitive or of national security. Trade secret and proprietary information received by the Department of Environment and Natural Resources would be held at the departmental level and not within Commissions.

There would be a need to separate and identify information labeled trade secret or proprietary information based on either a competition sensitive nature (drilling and hydraulic fracturing techniques) versus chemicals used (hydraulic fracturing fluids). The organization claiming that information is either proprietary or a trade secret would be responsible for confirming that the information meets the requirements to be designated as such, and would be responsible for defending the designation in a court of law.

The study group discussed the differences between trade secret and proprietary information. Trade secrets would remain confidential for perpetuity whereas, proprietary information would remain confidential for a limited timeframe (i.e. 30 days). The Mining and Energy Commission (MEC) may have to define the terms trade secret and proprietary information as they apply to oil and gas operations in order to clarify and simplify the process for operators. The MEC would also have to request statutory authority from the General Assembly to define trade secret and proprietary information.

6) Public Comment:

- David Levine, Elon University Law Professor, shared with the Study Group his background and experience. Director Womack invited Mr. Levine to join the study group as an official member.
- Therese Vick, Blue Ridge Environment Defense League, spoke about the formality of a public records request.

7) Next Steps:

The following items were assigned to Staff for the next meeting:

- Case law studies in Arkansas, Colorado, Texas, and Illinois;
- Review of DENR internal policies outlining the technical review and classification of trade secrets;
- Define trade secret, proprietary information, competition sensitive, privileged, and confidential as the terms apply to North Carolina statutes; and
- Economic analysis presented by Mr. Tyler Mulligan and Mr. Ward Lenz.

8) Closing Comments:

Mr. Tyler Mulligan discussed the following items for the study group to address:

- 1) Identify a custodian (designated as state geologist, but might not make decisions about trade secrets)
 - a) Define the role between the MEC and DENR and who receives the records?
- 2) Establish the process for review and confirmation of trade secrets

- a) List the documents the state would possess and verify (chemical disclosure) and the process to release to other agencies (seismic or emergency management). The information has different purposes and therefore would have different processes.
- b) Designate a trade secret
 - i) Provide redacted and unredacted copy;
 - ii) Arkansas has a form for the company to certify a trade secret;
 - iii) Colorado and Texas allow companies to keep information and it never becomes a public record; and
 - iv) When a company is allowed to retain the trade secret information, under what conditions may documents be inspected?
- c) Identify the individual in the Department who will confirm that the record will be treated as a trade secret and when the confirmation occurs.
- d) Define the appeal process
 - i) Outline the process for in camera review (See DoL G.S. 95-197(b)); and
 - ii) Currently the appeal would go to the superior court, can it go to business court?
 - 1) Outline the appeal process in Arkansas;
 - 2) Determine where the burden is in court; and
 - 3) Are courts permitted to order release of records or required to maintain confidentiality?
- 3) Process for handling requests for public records that are trade secrets
 - a) Notice to company that request has been made
- 4) Punishment for release of public records
- 5) Specific rules regarding release of records to emergency management

9) Adjournment:

Director Womack adjourned the meeting at 4:40 pm.

DEMLR Staff contact for this Committee: Ryan Channell – NCDENR.