

Meeting Minutes of the Protection of Trade Secret and Proprietary Information Study Group
of the
North Carolina Mining and Energy Commission
November 21, 2013

1. Preliminary Matters

Director Womack called the meeting of the Protection of Trade Secret and Proprietary Information Study Group to order at 3:04 pm in room #504-Q 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 Present

James Womack, Director, MEC
David Levine, Elon University School of Law
Tyler Mulligan, UNC School of Government

DENR Staff Members Present

Layla Cummings, Department of Environment and Natural Resources (DENR) Secretary's Office
Walt Haven, DEMLR
Tracy Davis, DEMLR
Rosalind Harris, DEMLR

Others in Attendance

Refer to the attached meeting sign-in sheets

2. Background and Introductions

Director Womack welcomed all members and others attending.

3. Approval of Minutes from Last Meeting

A quorum was not present, so minutes could not be approved.

4. Discussion of DENR Protection of Trade Secrets and Proprietary Information Memorandum

Ms. Layla Cummings reviewed her memorandum (attached to these minutes) and noted that the following items had been addressed in the document:

- a. Purpose of the study group and summary of meetings;
- b. Existing laws related to trade secrets;
- c. DWR and DAQ's retention of trade secret information;
- d. Trade secret laws and rules from other states; and
- e. Protection of other proprietary information (such as seismic data and maps).

Director Womack expressed his understanding that DENR did not wish to hold trade secret information. Additionally, he explained that although this Study Group had not been legislatively mandated, he would develop a report and route through the DENR's Secretary's Office during January 2014.

The Study Group decided that information from Mr. David Levine's letter regarding Alaska's approach to trade secret retention should be included within the final report. (The letter may be accessed through this link: http://portal.ncdenr.org/c/document_library/get_file?uuid=d47a4731-13f9-4753-9ae2-c14714ac9b77&groupId=8198095.)

5. Discussion of Trade Secret NC Statutes and Possible Implementation Approaches

Mr. Womack explained his ideas concerning § 132-1.2 (c) and (d) and noted the following:

- a. The statute would afford confidentiality with respect to trade secret protection;
- b. There appears to be no statutory or regulatory authority that would authorize a company not to disclose all information the state requires for permits and industry reporting;
- c. DEMLR has already been granted the authority to grant permits;
- d. The permitting application process would require industries to provide information to DENR, while Session Law 2012-143 would allow industry to retain trade secrets;
- e. A rule should be developed to satisfy the public's right to know, DENR leadership, and industry protection of intellectual property;
- f. State statute does not specifically state that industry can simply claim "trade secret" status by assertion; and
- g. Current statute might make DENR vulnerable to a lawsuit for allowing the use of hazardous chemicals in the state without compelling disclosure of required hazardous chemical information.

Study Group discussion revealed that a "trade secret" must have information that provides commercial value and the respective company must take steps to protect that information. Thus, "trade secrets" are typically accepted as being so based on industry assertion. The government does not assign trade secret. Additionally, public records law only applies once a company provides information to the government.

Mr. Tyler Mulligan explained that some companies would like to have more specified laws related to the unlawful release of trade secret by government employees. Thus, legislative changes for more clarity and greater protection would be appropriate.

Mr. David Levine noted that current statute and legal precedent already exists to protect legitimate claims of "trade secret" and that non-disclosure agreements may be redundant. Additionally, current North Carolina law already allows industry to pursue legal remedies in the event trade secret information is compromised by government employees.

Director Womack discussed his opinion that a surface land owner, under whose land fracturing chemicals were used, should have a right of action to legally compel a company to reveal trade secret information. He further explained that to his knowledge, such lawsuits were typically not successful for the plaintiffs. The Study Group noted that without government retention of trade secrets, legal relief allowing the general public to access protected information would be difficult to obtain.

The Study Group noted that Arkansas requires the disclosure of chemicals used for well stimulation. However, if an operator were to claim a "trade secret" status, then he or she must provide the respective chemical family name to the state.

The Study Group discussed the possibility of using a specialized trade secret panels and recognized the following:

- a. Current state statutes could allow for “over labeling” or industry abuse of trade secret claims;
- b. Companies could claim trade secrets for all subsurface fluids, without the opportunity for a state authority to verify the claim;
- c. The panel would help ensure that industry requests for trade secret protection would be valid claims;
- d. The panel would need to have experts with enough technical expertise to properly evaluate trade secret claims;
- e. The panel would allow for review authority, even if the state were not able to retain trade secret information;
- f. The panel would apparently have no authority to deny the use of environmentally dangerous chemicals, which a company claimed as being trade secret. Statutory changes would be needed to correct this deficiency; and
- g. The panel would allow the MEC to use a tiered approach to assess trade secrets as being protective, industry sensitive, etc.

The Study Group recognized that statutory changes would be needed to allow the MEC to either review or hold trade secret information.

Mr. Womack asked if the MEC were statutorily required to prevent long-term adverse environmental impacts. Mr. Mulligan explained that such statutes did not exist to his knowledge.

Director Womack suggested a scenario wherein a hydraulic fracturing vendor or manufacturer would be required to retain records of respective chemicals, which would be stored long term by a third party retention system. Records from the retention system would be available in the event that the vendor or manufacturer was to go out of business. Additionally, the company operating the retention system would be responsible for data verification. Such an “escrow” system would be analogous to current information technology systems of storing software source code. However, Study Group discussion revealed that under current legal authority, such an escrow system may not necessarily release information to a state government. Additionally, Mr. Levine expressed concern that the escrow system might result in litigation against the state.

The Study Group noted that ensuring companies have protection for trade secrets should encourage the use of environmentally safe chemicals. Unsafe chemicals used from past operations are already well known and are not considered as trade secret fluids by industry.

Director Womack suggested a scenario wherein a hypothetical company might develop a hazardous chemical, of previously unknown constituents that works great for fracturing and would claim the substance as a “trade secret” for use in North Carolina. He explained that under this situation, the state would have no opportunity to deny the use of the chemical or to retain information to address future environmental and human health impacts. Mr. Womack described the process whereby different states obtain, hold, and protect trade secret information and the benefits that such a process would provide to North Carolina.

Ms. Cummings noted that retaining trade secret information, even for the protection of data regarding “green” chemicals could expose North Carolina to lawsuits from environmental groups

denied access to trade secret information under the state Public Records Act or new oil and gas regulations. She explained that there was a concern about agency resources and such legal action results in costs to DENR. That is, resources spent responding to public records requests and potential litigation likely will result in resources being diverted from other regulatory efforts.

6. Public Comment

Jennie Ambrose (Chatham County resident) asked about assigning a time stamp for trade secret information expiration. She stated that doing so would allow for respective information to eventually be released to the public. The Study Group discussed the analogous use of expiration dates as related to classification standards of sensitive government documents.

Martha Girolami (Chatham County resident) asked, “what if a contractor used a trade secret chemical, but was unaware of the chemical constituents being used?” Mr. Womack answered that companies developing these fluids sell them to contractors. As a result, the contractors are unaware of the specific chemicals in the fluids. Ms. Girolami also asked if the state might be civilly liable for allowing fracking activities. Mr. Mulligan explained that the state could only be sued if it allows a waiver of sovereign immunity.

8. Closing comments

The next study group meeting was scheduled for January 09, 2014 at 2:30 pm.

9. Adjournment

Director Womack called the meeting adjourned at 5:14 pm.

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