



STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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MEMORANDUM

TO: Members of the Sedimentation Control Commission
FROM: M. Shawn Maier, Associate Attorney General
DATE: January 23, 2014
RE: **Analysis of the Sedimentation Control Commission's authority to approve proposal for implementation of Sedimentation Control Program by DEMLR's Energy Section**

ISSUE: Can the Sedimentation Control Commission (Commission) approve the Division of Energy, Mineral and Land Resources' (DEMLR) proposal for implementation of the Sedimentation Pollution Control Act (SPCA) by the Energy Section of DEMLR?

ANSWER: Yes. The Commission has authority; however, modifications will need to be made to existing local program memorandums of agreement (MOAs) to return exclusive authority over land disturbing activities for oil and gas development to the Commission.¹

Background

At the direction of the legislature, the Mining and Energy Commission, with the assistance of the Department of Environment and Natural Resources, is studying the "development of a coordinated permitting program for oil and gas exploration and development activities using horizontal drilling and hydraulic fracturing treatments in order that a single comprehensive environmental permit may be issued to a permit applicant to govern the applicant's exploration and development activities at a site, including ... well construction ..." S.L. 2013 c. 365 s. 2.(a). In conjunction with this task, the Commission has been asked to consider ways in which the Energy Section of DEMLR can implement the Commission's regulatory program over land-disturbing activities related to the exploration and development of oil and gas.

¹ This memorandum has not been prepared and approved in accordance with the procedures for issuing an Attorney General's Opinion.

DEMLR's Proposal

In order to incorporate the requirements of the SPCA into the comprehensive environmental permit being studied by the Mining and Energy Commission, DEMLR has proposed a two-part process for the Commission to undertake: (1) amend MOAs with existing local programs in areas with oil and gas potential to return jurisdiction to the Commission over land-disturbing activities related to oil and gas exploration and development; and (2) request that the Secretary of the Department of Environment and Natural Resources (Secretary) assign to DEMLR's Energy Section the administration and enforcement of the SPCA for land-disturbing activities related to oil and gas exploration and development and present to the Secretary any desired conditions or requirements that the Commission would ask of the Energy Section related to implementation of the Commission's regulatory program.

1. Amend memorandums of agreement with existing local programs

The scope of land-disturbing activities over which the Commission has exclusive jurisdiction is limited. The Commission retains exclusive jurisdiction over land-disturbing activities conducted or funded by a State or Federal agency, or conducted by a local government or person with the power of eminent domain. N.C. Gen. Stat. §113A-56(a). The list of land-disturbing activities in N.C. Gen. Stat. §113A-56(a) over which the Commission retains exclusive jurisdiction does not currently include oil and gas exploration and development.

The Commission shares concurrent jurisdiction with local governments that the Commission has authorized to operate delegated local programs. N.C. Gen. Stat. §113A-56(c). Where a local government has been authorized to operate a delegated local program, land-disturbing activities conducted for oil and gas exploration and development are subject to concurrent jurisdiction. The Commission's concurrent jurisdiction is limited to the power to review plans approved by the local government and require any changes necessary to comply with the SPCA or administrative rules, review compliance activities taken by a local government and take appropriate compliance actions, and assume administration of a local program if a local government fails to correct deficiencies identified by the Commission. N.C. Gen. Stat. §§ 113A-56(c), 113A-60(c). The Commission does not have the authority to review plans rejected by a local program, unless the submitting party appeals the decision directly to the Commission. In order to return jurisdiction over land disturbing activities for oil and gas development to the Commission, the MOA would need to be modified to reflect the return of jurisdiction to the Commission for oil and gas land-disturbing activities.

2. Request that the Secretary assign administration of the SPCA with regard to oil and gas exploration and development land-disturbing activities to the Energy Section

The sedimentation control program developed by the Commission is "administered by the Secretary under the direction of the Commission." N.C. Gen. Stat. §113A-55. The SPCA authorizes the Secretary to "employ necessary clerical, technical, and administrative personnel, and assign tasks to the various divisions of the Department for the purpose of implementing this Article." N.C. Gen. Stat. §113A-55 (emphasis added). Since the Secretary administers the sedimentation control program under the direction of the Commission, the Commission may request the Secretary assign DEMLR's Energy Section to review and enforce erosion control plans for land-disturbing activities related to oil and gas exploration and development.