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How Do You Mix Timberland with Oil and Gas?!

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I. General Comments

The top priority of the timberland owner is to protect the timber crop and maximize investment while complying with all applicable laws designed to protect the environment and the rights of other landowners. Often the owner of the surface does not own the corresponding mineral rights, further complicating the various uses to which the surface may be put. An owner of mineral rights is entitled to reasonable and necessary use of the surface in order to explore and recover minerals.

For the purpose of this paper and discussion, we assume that you are a timberland owner whose primary purpose is to grow, produce, cut and replant trees for a profit, as well as conduct additional surface uses for pleasure and profit. You own no oil, gas, or mineral interests under the timberland. You want to maximize the use of your property and the productivity of every acre that you own for a number of reasons, including the fact that you pay tax on every acre, have liability for activities that occur on the property, pay or should have insurance on every acre of the property, expend funds for the protection and security of the property, incur expenses for marking land lines, building fences, roads and other improvements that are constructed to service the property and need to be maintained. Our focus is to talk about private property, but these same comments are applicable to publicly owned property.

At the time of purchase, you should acquire all of the incidents of ownership of property including access to public rights of way, easements across adjacent properties, if necessary, transfer of any permits affecting the property and use of property that have been acquired by predecessors in title, surveys and any studies made of the property, **and** title to oil, gas and minerals situated in, on, and under the property. It is better to acquire some of the minerals if you cannot acquire all. "Minerals" may include not only oil and gas, but hard minerals such as

shale, marble, granite, coal and any substance associated with any of these including trapped gas or oil. Minerals may but does not always include sand and gravel. *See, e.g., Harper v. Talladega* County, 185 So. 2d 388 (Ala. 1966) (sand and gravel may be considered minerals if specifically reserved). In addition, consideration should be made for water and water use, whether it's brine, fresh water (however located), geothermal or any other water source.

It is typical when purchasing tracts of timberland for timberland purposes to think only of the surface use. It is also typical that you will acquire title to the timberland without minerals, where mineral interests are being reserved by the seller in the transaction, or where the mineral interests are subject to a "prior reservation" by a predecessor in title. Without an extensive abstract of title or substantial title research, identification of the mineral owner may be very difficult and expensive, and therefore, not the primary concern. While it becomes a "business decision" whether to pursue the mineral interests or not, the decision does have legal consequences. For example, it is very important to know exactly what rights have been reserved and what restrictions may be imposed on you as the surface owner.

II. Issues for the timberland owner who has no mineral rights – Reasonable and Necessary Use of the Surface

A. Alabama Rule of "Reasonable and Necessary Use" of the Surface

Since the primary land use is the timber production and possibly other development use of the surface of the property, minerals take a backseat for the most part. You should be advised that the principals of law in Alabama concerning the relationship between a surface owner who owns no minerals and mineral owner who typically will lease those minerals to an oil company who is interested in exploring and thereafter producing oil and gas are now dictated by a 1963 case called *Gulf Oil Co. v. Deese*, 153 So. 2d 614, 617 (Ala. 1963). Extracting and mining hard minerals follow the cases cited and distinguished by the *Deese* court. Simply stated, the *Deese*

case is most often cited by the mineral owner to support a position that the surface owner's use is subservient or subordinate to the use of the surface by the mineral owner. This superior right is not absolute but is limited to the mineral owner's "reasonable and necessary use" of the surface in order to do what is necessary to extract the oil, gas, and minerals. Some states have attempted to codify and more specifically define just what reasonable and necessary means. Alabama has not and relies on the subjective interpretation of each factual situation, case, and jury.

1. The Reasonable and Necessary Doctrine

The facts in *Deese* are as follows: Deese filed an action claiming that Gulf Oil Company trespassed on his property when Gulf Oil drilled an oil well on adjacent property, and encroached on the surface of property owned by Deese by leveling and grading the surface for the well site, cutting trees, removing wire fencing and pouring oil and water on the surface. Deese purchased property in Mobile County in the Citronelle Oil Field and claimed that the oil, gas and mineral reservation language in his deed did not cover all of the property transferred to him. Gulf Oil Company therefore did not have a valid lease covering his minerals and could not use any of the surface of his land to locate and drill an oil well or continue to produce oil where they did not have a valid lease. After reviewing the language of the deeds and the mineral reservations, the Circuit Court of Mobile County interpreted the language used in the Deese deed to convey certain mineral rights to Deese, and therefore, Gulf Oil was trespassing and had damaged the surface of the Deese property. The Alabama Supreme Court reversed the judgment and held that Deese did not receive any mineral interests under language of his deed.

The Court then stated:

> The question then arises: If [Deese] does not own any interest in the oil, and hence receives no benefit from its production, then why should his surface interest be burdened by action taken, in recovering the oil? The obvious answer is that he acquired the surface subject to the **right of the owner** of the oil thereunder to use

> the surface in such manner as is reasonably necessary to recover the oil. And Gulf is the present owner of that right. It seems apodictic that Deese has no cause to complain about Gulf's partial use of the surface of Lots 1, 2, 3 and 5, when it has the right, as owner of the oil thereunder, to use all of the surface of said lots reasonably necessary in recovering the oil. In other words, if all action taken by Gulf in producing oil had taken place on the surface owned by Deese he would have no right to complain, so what reasonable basis could there be for saying that Gulf's partial use of the surface was wrongful (unless, of course, such use was not reasonably necessary in recovering the oil)?

Deese, 153 So. 2d 614, 618-19.

In addition to stating the reasonable use principle, the *Deese* court established the split between the law governing hard minerals and that governing oil, gas, and other fluid minerals. Deese contended that, even if the Gulf Oil Company owned the minerals under his lots, "[t]he right to use the surface of land as an incident of ownership of mineral rights does not carry with it the right to use the surface in aid of mining or drilling operations on other or adjoining lands." *Deese*, 153 So. 2d at 617 (citing *Phillips v. Sipsey Coal Mining Co.*, 118 So. 513 (Ala. 1928); *Corona Coal Co. v. Hendon*, 94 So. 527 (Ala. 1922); *Brasfield v. Burnwell Coal Co.*, 60 So. 382 (Ala. 1912); *Hooper v. Dora Coal Mining Co.*, 10 So. 652 (Ala. 1892)). In holding that a mineral lessee may make reasonable use of adjacent lands in order to produce oil, the Court explained:

> The mining of solid minerals has aspects essentially different from those involved in drilling and operating oil wells. For instance, there may be a pool of oil under several tracts of land with each tract having a different ownership, yet all of such oil might be removed by a single well on one of the tracts simply because of its fluidity, to the detriment of the owners of the other tracts. Basically, this is the reason for the need of laws providing for the pooling of diverse interests into one or more drilling units for the production of oil, as has been done in Alabama by the enactment of [Ala. Code §§ 9-17-1 et seq.]. Whether, in the absence of such pooling law, there might be reason for applying the same principle to oil as is applicable to solid minerals, there is no occasion to decide. We are clearly of the opinion, in view of [Ala. Code §§ 9-17-1 et seq.], that the reason for application of the principle to the mining of solid minerals does not exist with respect to the construction and operation of oil wells pursuant to the pooling provisions of said Act.

153 So. 2d at 618. As a result of *Deese*, an oil and gas lessee can make reasonable use of the surfaces adjacent to the parcel from which he is drilling if he has proper leases of the oil and gas interests.

From the point of view of a timberland owner who owns no minerals, the "reasonable and necessary use" doctrine means that certain acreage that is now in timber production will be taken out of timber production and used for a drill site, typically two to three acres in size, requiring access from a public road across your improved roads and probably the need to use additional acreage taken out of production for access to the well site from your private road. While you may use these additional roads, you probably would not have built them in the location where the well site will be located, nor would you have taken four to six to eight additional acres out of timber production for an undetermined amount of time. If the well is unproductive or a dry hole, then the presence of the operator and activity will be temporary but the site and the road will exist until restored and replanted with trees, and thereafter the site quality and age class of the trees will be different than the surrounding properties.

In the event that the well is successful and a producer, then the activities will continue requiring access on a periodic basis, probably by people unfamiliar to you, who will have a key to the gate, have access to other parts of your property, whether by permission or not, and will change the character of the surrounding properties from strictly timberland, secluded and quiet, to areas of constant activity with perhaps a generator and pumping station imposing a level of noise that didn't exist prior to the activity.

Not only will property be taken out of production by the well site and access road, but in order to run the generator, lights, and pumps, electrical lines may be necessary as well as additional easement areas for the pumping station, additional areas for a tank battery in the case

of oil or heavy crude, or pipelines buried across other property by easements connecting several wells or transporting gas or other product off the well site to some other location. You may also encounter attempts to utilize groundwater, surface water and even sand and gravel located on the property for road access. In some instances, even timber has been reserved for use by the mineral interest owner for particular purposes. *See Shackleford Coal Co. v. Knight*, 108 So. 247 (Ala. 1926).

Who decides what is or is not "reasonable and necessary?" The *Deese* court opened the door to oil and gas interest owners to exercise rights of surface use but failed to explain or define just what activities qualify and what specific limitations apply to "reasonable and necessary use." *Deese*, 153 So. 2d at 619. Looking back at some coal cases and the development of the "reasonable and necessary" standard, there are cases which may give some guidance to the interpretation with timber/oil and gas cases:

In *Williams v. Gibson*, 4. So. 350 (Ala. 1887), the Supreme Court stated that the mineral owner has

> the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary . . . without injury to the support for the surface . . . in its natural state. . . . Which of these improvements are reasonably necessary for the profitable and beneficial working of the mines, [and] how much of the surface of the land may be reasonably needed for this purpose

are questions of fact for the jury. 4 So. at 354. The *Wilson* Court also described certain limitations to consider when determining what is a **necessity**. If an improvement is a

> mere convenience, and not a necessity, within the meaning of the law[,] this necessity cannot be deemed to exist if a similar privilege can be otherwise secured by reasonable trouble and expense. [I]t would be proper for the jury to consider in solving the question of necessity, - a word of relative import, which may mean, on the one hand, less than imperative need, and, on the other, more than mere suitable convenience.

Id. at 354.

The reasonableness standard has not been codified or specifically laid out in Alabama. Instead, it continues to be interpreted on a case by case basis by a jury.

2. Examples of Reasonable Use

The Alabama Supreme Court has described the reasonableness standard as follows:

> A reservation or grant of the minerals, severed from the ownership of the surface, carries with it the right to penetrate through the surface to the minerals for the purpose of mining and removing them. This includes the adoption and use of such machinery, methods, appliances, and instrumentalities as may be reasonably necessary and are ordinarily used in such business; and, it may be, for the storage of the minerals in the first marketable state until they can be transported with due diligence.

Hooper v. Dora Coal Min. Co., 10 So. 652, 653 (Ala. 1892) (citing *Williams v. Gibson*, 4 So. 350 (Ala. 1888)).

The following are some examples of surface activities by mineral owners that have been found **unreasonable** by the Alabama Supreme Court:

(1) dumping slate and refuse from the mine on the surface, unless expressly authorized (*see Brasfield v. Burnwell Coal Co.*, 60 So. 382 (Ala. 1912) and *Hooper v. Dora Coal Mining Co.*, 10 So. 652 (Ala. 1892));

(2) extracting minerals located so close to the surface that the natural state of the surface is destroyed (*see Bibby v. Bunch*, 58 So. 916 (Ala. 1912));

(3) extracting minerals without leaving support for the surface (*Hooper*, supra, and *Williams v. Gibson*, 4 So. 350 (Ala. 1888)); and

(4) building coke ovens on the surface for preparation of coal after it is mined (*see Williams v. Gibson*, 4 So. 350 (Ala. 1888)).

(5) bulldozing a road on an adjacent tract to reach the tract where the well is located, even thought the operator owned the mineral rights on the adjacent tract (*see Tutweiler v. Etheridge*, 231 So. 2d 93 (Ala. 1970).

One example of use that is frequently contested is the mining operator's use of surface or groundwater. The accepted doctrine for competitive use of groundwater is also "reasonable use," described by the court as follows: where a landowner

> is conducting any sort of operations to which its land is adapted in an ordinary and careful manner, and as a consequence percolating water is drained, affecting the surface owner's water supply, either of that or adjoining land, no liability for his damage exists. [However,] if the waters are drained without a reasonable need to do so, or are willfully or negligently wasted in such operation in a way and manner as that it should have been anticipated to occur, and as a proximate result the damage accrued to the surface owners so affected, including adjoining landowners, there is an actionable claim.

Adams v. Lang, 553 So. 2d 89, 91 (Ala. 1989) (quoting *Sloss-Sheffield Steel & Iron Co. v. Wilkes*, 165 So. 764, 770 (Ala. 1936).

B. Other jurisdictions' reasonable use doctrines

1. Arkansas

In an Arkansas case cited in *Significant Cases in Oil & Gas Law* by the Alabama State Oil and Gas Board, Oil and Gas Report 20, 2011, *McFarland v. Taylor*, 76 Ark. App. 343, 65 S.W.3d 468 (2002), the Arkansas court takes a more common sense approach to what is reasonable. The case also illustrates how oil and gas activities can increase over time. In this case, a landowner had a private road for ingress and egress and claimed that the road had been used for farming purposes long before oil and gas activities existed. Wells were drilled and producing in the area. The surface owner gave permission to companies to use the residential road until such time that he told them to quit and to use an alternate route. Several companies had been allowed to use this road, but the traffic increased to all hours of the day and night, and the surface owner told them to quit. When they did not, the surface owner blocked the road.

The oil company filed an action to enjoin the surface owner from blocking the road. The lower court ruled in favor of the surface owner, and on appeal, the Appellate Court affirmed and dismissed the case discussing the evidence and standards which it applied:

> We are not prepared to hold that, as a matter of law, a mineral owner is always entitled to choose between two or more means of access to the minerals, without regard to necessity or to the harm it may cause the surface owner, if the surface owner's use did not predate the mineral owner's use. The respective rights of mineral and surface owners are well settled. The owner of the minerals has an implied right to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and to remove its products. *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 511 S.W.2d 160 (1974). His use of the surface, however, must be reasonable. *Id.* The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner. *See id.* (citing *Getty Oil Co. v. Jones,* 470 S.W.2d 618 (Tex.1971)).
>
> In *Martin v. Dale,* 180 Ark. 321, 21 S.W.2d 428 (1929), the Arkansas Supreme Court made it clear that, in all circumstances, the mineral owner's use must be necessary and the potential harm to the surface owner must be considered:
>
> > It is not questioned that Lenz, as agent for the trustee to whom the lease was given, had the right of access to the lands covered by the lease; but this is a right which arose out of necessity, and not as a matter of convenience. In other words, while the right of entry was implied, this right did not authorize Lenz to enter as he pleased; it was his duty to do so in the manner least injurious to his grantor, and if a means of ingress existed when the lease was taken, and which continued to be available, this entry, and no other, should have been used, although it was not the most convenient.
>
> 180 Ark. at 324, 21 S.W.2d at 429.

McFarland, 65 S.W.3d at 470-71.

2. Legislation

(a) Colorado

In 2007, the Colorado legislature enacted a statute to codify the standard of reasonableness recognized in that state, "reasonable accommodation." This was recognized in a 1997 opinion of the Colorado Supreme Court, *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d

913 (Colo. 1997). The legislation, COLO. REV. STAT. §§ 34-60-101 et seq., requires oil and gas operators to conduct operations in a manner that "accommodates the surface owner" by minimizing intrusion and damage to the surface by selecting alternative locations for wells, roads, pipelines or facilities, and to prevent or mitigate impacts with alternatives that are economically practicable, and reasonably available. The use statute recognizes the right of reasonable use of the surface and does not preclude surface use agreements.

(b) New Mexico

Other states have also attempted to provide limitations on the "reasonable and necessary use" doctrine through legislation and to provide and mandate compensation to the surface owner. See, for example, NM STAT. ANN. §§ 70-12-1 through 70-12-10 (Surface Owners Protection Act).

(c) Oklahoma

The Oklahoma legislature has passed the Surface Damages Act, 52 OKL. ST. ANN. § 318.2 et seq. A mineral operator is required to give notice to the surface owner of his intent to drill, including the proposed location of the drill site. 52 OKL. ST. ANN. § 318.3. Additionally, the operator and surface owner are required to enter into "good faith negotiations to determine the surface damages." *Id.*

III. Surface Use Agreements

A. General Comments

As I have mentioned earlier, the attitudes of the surface owner, mineral owner and operator should be considered throughout this situation. In order to avoid conflict throughout the process, a written agreement for the well site, access road, any easements that may be necessary (pipeline, utility), water use and damages is recommended to include additional provisions to protect the parties from the actions of the other including indemnity provisions, limitations and

restrictions on activities such as access, improvements to roads, damages to adjacent properties, security and protection of sensitive surface and subsurface resources.

It should be noted that the surface owner actually owns title unless otherwise stated or reserved, to all of the property from the surface to the center of the earth with the exception of those reserved minerals. So, if the minerals are located 5,000 feet below the surface, the surface owner owns everything in between the surface and 5,000 feet, including whatever is at 5,000 feet except for the oil or gas that will be extracted and the ownership continues below 5,000 feet. **Looking at and determining exactly what is reserved and what under the documents are considered oil, gas and minerals and where they are located is extremely important throughout the process and should be diligently researched and not taken for granted.** "That's the way it's always been done" or "that's company policy" is no excuse for an agreement that does not consider the needs of the parties. Although we are speaking to a surface and timberland owner who has no minerals, the same conversation and advice would be given to those clients who own surface and minerals or those clients that only own minerals. There needs to be a holistic approach as well as a recognition that there are other parties on the other side that must be considered, and the better the relationships, the better the operations. In other words, lack of understanding, misinterpretation, arrogance, and lack of cooperation are expensive with costs that can increase rapidly.

Even though the rule in Alabama is that the owner of severed oil and gas interests may use and possess the surface of the property, we would advise the mineral owner against forcefully or arrogantly attempting to exercise those rights. The better practice to avoid litigation and unnecessary expense is to contact and work with the timberland owner to address issues

affecting the surface use and the concerns of the timberland owner. This could potentially be a long term relationship, and good neighborly relations are essential.

The oil and gas operator will be interested in locating a particular well site to place the drilling rig, and will need enough area to install and excavate a drilling fluid or mud pit, locate necessary equipment, drill pipe, fuel, and parking, and will want to locate a convenient access to and from a public road to the well site. If the well is successful, additional areas may be necessary for electrical service and pipelines or storage tanks.

To determine if the site is a prospect, preliminary seismic studies will be requested, if not required, and thereafter surveys to locate a well site and access.

There are several surface use agreements and provisions that the timberland owner should consider and negotiate.

B. Limited and Temporary Seismic Survey and Entry Permit

This agreement is between the surface owner and the company conducting seismic surveys on behalf of the oil and gas interest owner. Seismic crews use heavy equipment but can maneuver around timber. They like to follow a grid pattern in straight lines and can cause damage to timber, fences, roads, culverts, etc. The seismic agreement should identify the parties and the owner of the mineral interests, be of limited duration, restrict the route and times of entry and provide for advance payment with a provision for damages to be paid if any occur. The seismic company should warrant (and provide written proof of) who they represent, that they have full authority to make the survey and that they agree to indemnify the timberland owner against any claim made as a result of the seismic operation. The agreement should be limited in time and location, provide for notice prior to entry and notice of completion.

The most common geophysical exploration technique is seismograph or seismic, which requires some use of the surface. The right to explore generally belongs to the owner of the mineral estate, not the owner of the surface rights. See, e.g., *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 590 (5th Cir. 1957); *Yates v. Gulf Oil Corp.*, 182 F.2d 286 (5th Cir. 1950). This right extends to a lease of mineral rights, but may be limited by the lease. Unless the lease states that the right to seismic exploration belongs exclusively to the lessee, he may retain that right or permit others to conduct seismic exploration. See, e.g., *Mustang Production Co. v. Texaco, Inc.*, 754 F.2d 892 (10th Cir. 1985).

A cause of action for "seismic trespass" may exist for the unauthorized geophysical surveying of an owner's mineral estate, for which damages are available in the amount of the "value of the lease or shooting rights," *Layne Louisiana Co. v. Superior Oil Co.*, 26 So. 2d 20, 22 (La. 1946), or the reasonable market value of the use defendant made of the portion of plaintiff's land actually occupied. *Phillips*, 256 F. 2d 408.

C. Temporary and Limited Well Site and Road Survey Permit

Many of the same provisions should be negotiated with the oil and gas operator: the time and location of surveying, the well site location, the boundaries of the well site and the centerline of the access road to the well site. Entry should be limited in time and require prior notice. You should be provided a copy of the survey.

D. Limited and Temporary Oil and Gas Drill Site and Road Access Permit

This should be temporary and specific until it is determined that the well will be a producer. The provisions should address particular matters including: (i) the specific purpose of the permit; (ii) the payment terms for the timber and land taken out of production at the well site and on the access road as well as any other amounts to be paid for the surface use including

improvements to and use of existing roads, costs associated with loss of income (for example, from hunt clubs who may not want to lease lands being drilled or any adjacent lands), and costs associated with security of the property, such as gates and fences to control workers and unauthorized entry. There should be provisions included to address the responsibilities of the parties including the use of the road, the oil company's responsibility to maintain all roads and make improvements, continuous compliance with all laws, regulations and permits, the term or duration of the permit, continuous cleanup during the operations and restoration of the surface when operations are complete. While authorities disagree as to whether an operator has an implied obligation to restore the surface, this is something that can be included in the terms of the lease or surface use agreement, or by petition to the State Oil and Gas Board for enforcement of the Board's rules requiring restoration. Ala. Admin. Code r. 400-1-3-.05., 400-1-5-.03, and 400-1-5-.07.

In addition, the operator should protect the adjoining timber and properties from damage, erosion, sedimentation, fire and pollution, and be restricted from storing or disposing of any regulated substance or waste. The operator should bear all risk and liability, agree to pay all damages and expense incurred by the timberland owner, "indemnify, protect and defend" the timberland owner from claims of others including the operator's employees, and provide proof of insurance in amounts to fully protect the property, timberland owner, and the operator. There are also many other provisions which should also be considered and negotiated.

E. Long Term Agreement

In the event that the well is a producer and the well site will be operated for an extended time, the temporary permits for the well site, production activities and access should then be replaced with a long term agreement.

IV. Things To Do

A. Determine who has title to minerals

B. Buy the minerals/Nondisturbance

Negotiate with the seller of the timberland or other mineral owner to sell all or at least a portion of the mineral interests, or if not, negotiate a nondisturbance of surface or limitation of surface use agreement.

C. Work with the mineral owner in a cooperative manner

Minimize access, timber disturbance and insure proper restoration by negotiating an access road agreement, a well site permit, and if necessary, an electrical and pipeline permit with provisions to protect your uses, to restrict the uses and areas accessed by the mineral owner to those areas of necessary operation only, and include provisions for security, indemnity, and restoration.

D. Compliance with regulations

The mineral owner should do everything necessary to maintain full compliance with all laws and regulations, obtain all required permits and approvals from the various agencies that have jurisdiction, and provide and maintain all required reports and documentation.

As the surface owner, you should be diligent in knowing what the mineral owner and operator are required to do, and make sure they obtain proper permits, maintain compliance and do not violate your rights or their requirements.

1. Alabama Oil and Gas Statutes, Ala. Code §§ 9-17-1 through 9-17-15

In addition to establishing the State Oil and Gas Board, the Alabama Code §§ 9-17-1 et seq. sets forth many statutory requirements imposed upon an operator of an oil and gas well addressing the drilling of the well, the conservation of resources and the production of oil and

gas, the prevention of waste, fire, and damage to property, the regulation of transportation of oil and gas and the proper disposal and cleanup of waste and drilling fluids. By Ala. Code § 9-17-12, limitations on the number and spacing of wells are set forth to prevent waste of resources and to "avoid the drilling of an excessive and unnecessary number of wells." The focus of the State Oil and Gas Board is to conserve and prevent waste of the limited oil and gas resources of Alabama. From the surface owner's standpoint, the fewer the wells allowed, the fewer timberland acres are affected.

By Ala. Code § 9-17-19, any person (including the surface owner) may file an action against the oil and gas operator or other person violating any provision of these statutes, or any rule or regulation of the State Oil and Gas Board.

By Ala. Code § 9-17-24, no well can be drilled without first filing a petition and application with the State Oil and Gas Board.

The statutes, rules, and regulations can be found online at the Oil and Gas Board's website, www.ogb.state.al.us.

2. Alabama Oil and Gas Board Rules and Regulations

The rules and regulations governing onshore oil and gas activities are found at Alabama Administrative Rules 400-1-1.

Rule 400-1-1-.06 lists the various forms which must be filed with the State Oil and Gas Board including applications to drill, affidavits of ownership, reports of progress, notification of fire, spills, or leaks, waste manifests and many others. You should participate and review records and filings concerning any activity that affects activities on your property or which includes your property. You can intervene in any proceeding and hearing of the State Oil and Gas Board, and you can file documents describing your concerns and give testimony at the

hearings. You can also contact the State Oil and Gas Board and staff with any questions you may have.

Permitting rules are found at 400-1-2.

Notification rules are found at 400-1-3.

Drilling rules are found at 400-1-4, which also addresses surface operations such as constructing and maintaining a drilling fluid pit next to the well site, 400-1-4.1; recycling or disposal of drilling fluids, 400-1-4.11; plugging and abandonment of wells, 400-1-4.14; requirements to restore the surface, 400-1-4:16; requirements addressing safety and the environment, 400-1-9, including waste disposal and transportation of wastes, 400-1-9.03; and monthly reports to the Oil and Gas Board, 400-1-10.

3. Conservation and Environmental Laws

(a) Clean Water Act § 404

33 U.S.C. § 1344

Unless permitted or exempt, any activity that discharges dredged or fill material into "waters of the United States" including wetlands, is prohibited. Oil and gas operations normally include an access road to a well site of 2 to 4 acres where the drilling operations will occur and a drilling mud or fluid holding pond will be excavated or built.

In order to landclear and excavate the well site, build the access road, if all or a portion are located in a wetland, a Clean Water Act § 404 joint permit application should be filed with the U.S. Army Corps of Engineers and the Alabama Department of Environmental Management. Public notice will be issued as well as notice to the surface owner, surrounding owners, and numerous agencies. In the event a permit application is not filed and no permit is obtained, any discharge of fill or dredged material into wetlands is a violation of the Clean Water Act and

subject to enforcement action. It may be possible to obtain an "after the fact" permit instead of removing all fill material and restoring the site. *See* After the Fact Application No. AM-2011-1062-SBC, MIDROC Operating Company.

The regulations pertaining to 33 U.S.C. § 1344 (Clean Water Act § 404) are found at 33 C.F.R. § 320 (Corps/Engineers) and at 40 C.F.R. § 230 (EPA). The Clean Water Act § 404 permit application also requires certifications from the Alabama Department of Environmental Management (ADEM) that the discharge and fill activity will be consistent with the water quality laws and regulations of the state.

There are certain exemptions from permitting requirements such as **"construction of temporary roads for moving mining equipment"** (33 C.F.R. § 323.4, 40 C.F.R. § 233) so long as the roads are built according to the regulations and requirements, meet the limitations, and best management practices described in the regulations are used. Also, an operator is permitted to fill up to one-half acre of wetlands in non-tidal waters that are not adjacent to tidal waters, pursuant to **Nationwide Permit 44** so long as a preconstruction notice is given to the U.S. Army Corps of Engineers.

Since these activities occur on the surface, and will involve clearing timber and permanently filling wetlands on your property, you should be informed and involved in the process.

(b) Water Quality

Clean Water Act § 401

Clean Water Act § 402

EPA and the Alabama Department of Environmental Management (ADEM) each have regulations addressing water quality and erosion controls.

EPA – 33 U.S.C. § 1341 - 33 C.F.R. § 320; 40 C.F.R. § 230.

33 U.S.C. § 1342.

ADEM – Ala. Code § 22-22A-1, and ADEM Admin. Code R. 335-6-6.

(c) Cultural Resources/Historic Properties

National Historic Preservation Act – 16 U.S.C. § 470; 36 C.F.R. § 800; 40 C.F.R. § 1502

Alabama State Historical Commission – Ala. Code §§ 41-3-1, 41-9-290

(d) Endangered and Threatened Species

U.S. Fish and Wildlife Service – 16 U.S.C. § 1531; 50 C.F.R. § 17.

V. Pipelines and utility easements

Interstate and intrastate pipelines pose another challenge for timberland owners. Pipeline companies are transporting and pumping natural gas, carbon dioxide, liquids, and other resources in pipelines typically buried in lateral corridors miles in length and 50 to 100 feet in width through your productive timberland. It does not matter whether you own oil and gas interests under the property where a pipeline is proposed.

Issues:

1. Timberland taken out of timber production
2. Transportation of highly dangerous gases/installation and pipeline long term maintenance issues
3. Payment and terms of pipeline agreements and easements; taxes
4. Longterm relationships and establishment of a "corridor"
5. Environmental compliance and maintenance of easement

As a timberland owner, you may receive a call from a landman requesting permission or stating that he and surveyors and appraisers will be on your property for

the purpose of clearing a way for a natural gas pipeline to be constructed and buried on your property.

If this is a major interstate project, the company may have requested permission from the Federal Energy Regulatory Commission (FERC) and be required to perform an environmental assessment and/or an environmental impact study to address issues under the National Environmental Protection Act (NEPA) and regulations as well as comply with other federal and possibly state requirements.

There are many preliminary matters that the pipeline company will need to address, and the surface owner should be informed and actively involved in the process.

1. Acquisition

a. Negotiation:

Negotiating a clear and precise agreement is essential for what will be a very long term relationship. The company will present to you their form of perpetual pipeline easement which should be carefully considered by you and your attorney. The terms, damages, and payment as well as any future payment should be considered. In most instances, you will receive one payment but the pipeline will be with you for a long time.

Payment and damages for land acquisition, value, effect on adjacent property, security from trespassers, establishment of pipeline crossings, safety issues, access issues, future damages, and invasive plant species, are just some of the matters to consider.

b. Condemnation:

If negotiation takes too long or is unsuccessful, the company can resort to statutory eminent domain in Alabama. The procedures are found at Ala. Code § 10A-21-2.01.

The easement agreement should identify and address all concerns of the owner. The payment for damages should be an agreed amount, and additional payments should address any continuing or future damages. Beware of executing a "release of future damages." In *Schultz v. Southeast Supply Header, LLC*, 661 F. Supp. 2d 1260 (S.D. Ala. 2009), the landowner executed and easement which included a release a release of future damages related to the construction of the pipeline. The U.S. District Court upheld the release language even though the landowner claimed he only intended to release those damages related to the construction and not future damages.

The easement agreement should also address specifically the location and depth of the pipeline and type of pipe, limit the number of pipelines and substance to be transported, state the depth of the top of the pipe at pipeline crossings (for log truck and equipment use), and many other matters.

Pipelines do explode. Extreme caution and attention to safety matters must be addressed and practiced by the landowner and the company. Insurance provisions should also be included.

Provisions requiring the pipeline company to comply with all laws and regulations must be included and address those requirements before, during, and after construction. This includes all FERC requirements, requirements and permits needed under the Clean Water Act, the Endangered Species Act, and all agency approvals and licenses. Additional agreements regarding access over adjoining land, security, gating, and use of the easement should be included. So long as the gating or fencing does not unreasonably interfere with the use of easement by the pipeline company, the landowner

can erect and maintain the structures. *Hammond v. Lovvorn*, 16 So. 3d 813 (Ala. Civ. App. 2009).

CONCLUSION

Be informed.

Be aware.

Be involved.