

Oil and Gas Drilling: *What does it mean for localities?*



Presented by:
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* Any views, comments or statements made or expressed by Eric Gregory are his own and do not express the views or policies of King George County or the Board of Supervisors of King George County.

Background...

Summer/Fall 2013: News stories begin to appear about an oil and gas company acquiring leases for potential oil and gas well drilling sites in King George and adjacent counties and “fracking” ...



Initial analysis...

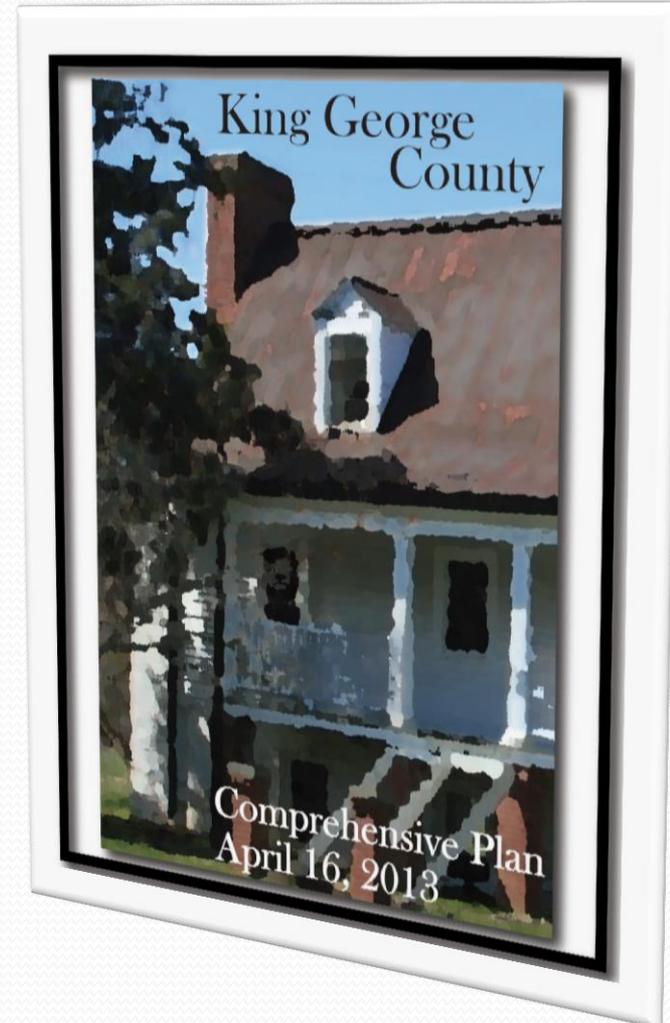
King George County Comp Plan Goals:

- Preserve the Rural Characteristics of King George County
- Promote a healthy, diversified economy in the County
- Encourage protection of critical environmental resources and maintain renewable natural resources for future generations
- Seek to manage the through-traffic flow on principal roads in such a manner as to minimize the impact on local-traffic flow
- Chesapeake Bay Preservation Act and Resource Protection Areas, Va. Code § 62.1-44.15:72
- County part of Groundwater Management Area

King George County Zoning Ordinance

§ 4.11. Exploratory drilling for oil and/or natural gas.

- County ordinance allows for exploratory drilling for oil and/or natural gas
- Special exception permit is required
- Under a special exception permit, the County may impose certain restrictions to address impacts associated with the use, such as setbacks, heavy truck traffic, noise, dust, etc.



Challenge:

Reconcile or balance community concerns, environmental protection, economic development goals, private property interests, public interests, federal, state, and local legal and regulatory requirements...

Does King George County ...

- Leave the ordinance as is?
- Amend the ordinance? or
- Eliminate the ordinance?*

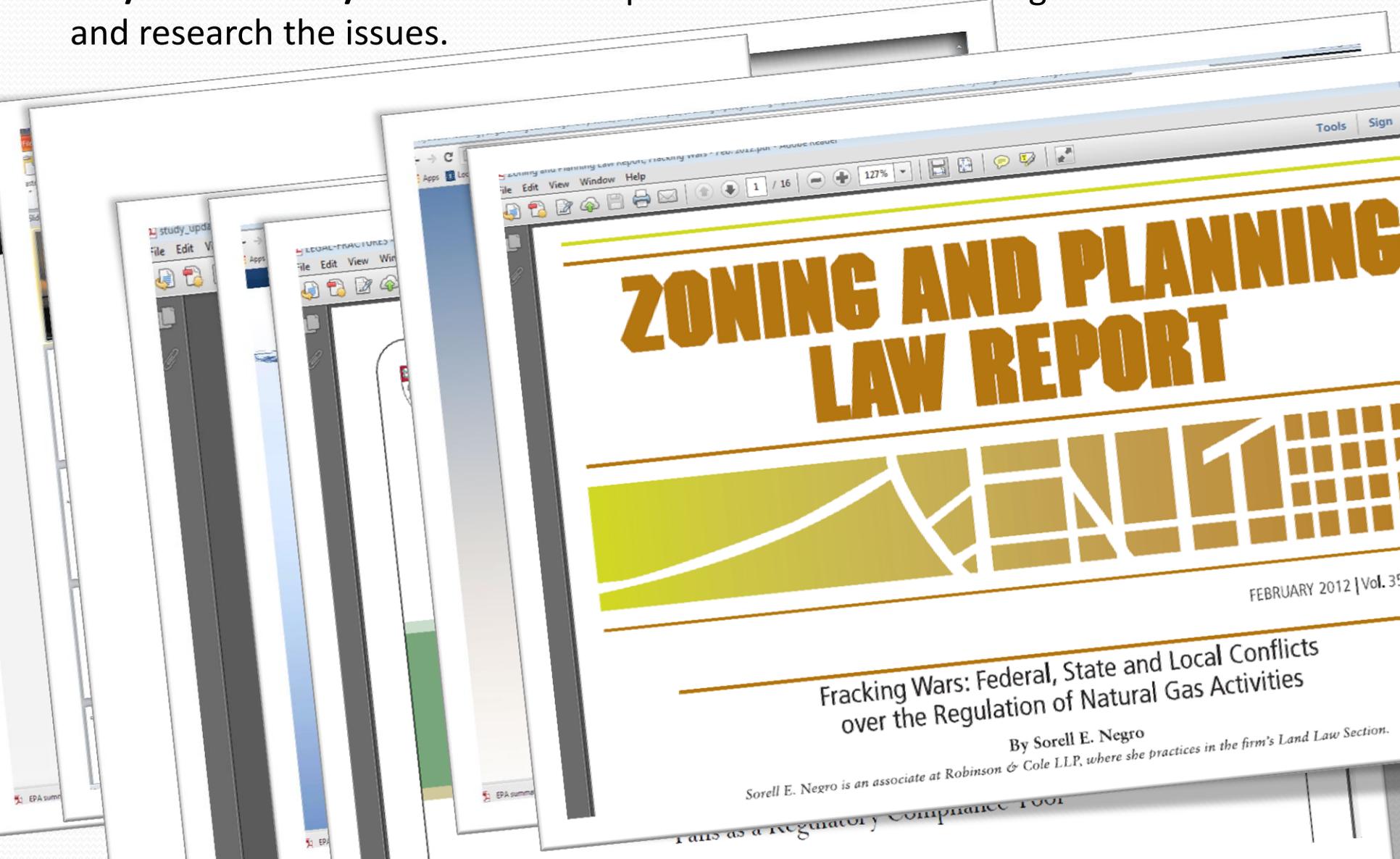
Key Questions:

- What is the interplay of state and local regulation of gas and oil drilling?
- What authority does a local government have to regulate oil and gas drilling and associated impacts within its jurisdiction? **What CAN local governments do?**
- How had or were other Virginia jurisdictions dealing with these issues?
 - Rockingham County
 - Washington County *

* In King George County, those uses of property not explicitly permitted by the Zoning Ordinance are prohibited. And see the Virginia Attorney General opinion of January 11, 2013, holding that Virginia local governments do not have the authority to impose a virtual prohibition on oil and gas drilling in their jurisdictions by refusing to rule on a SEP.

* Special thanks to their governing bodies and particularly to Washington County Attorney Lucy Phillips, who has been extraordinarily helpful.

Fall/Winter 2013/14: Board of Supervisors directs staff to gather information and research the issues.



ZONING AND PLANNING LAW REPORT



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**Fracking Wars: Federal, State and Local Conflicts
over the Regulation of Natural Gas Activities**

By Sorell E. Negro

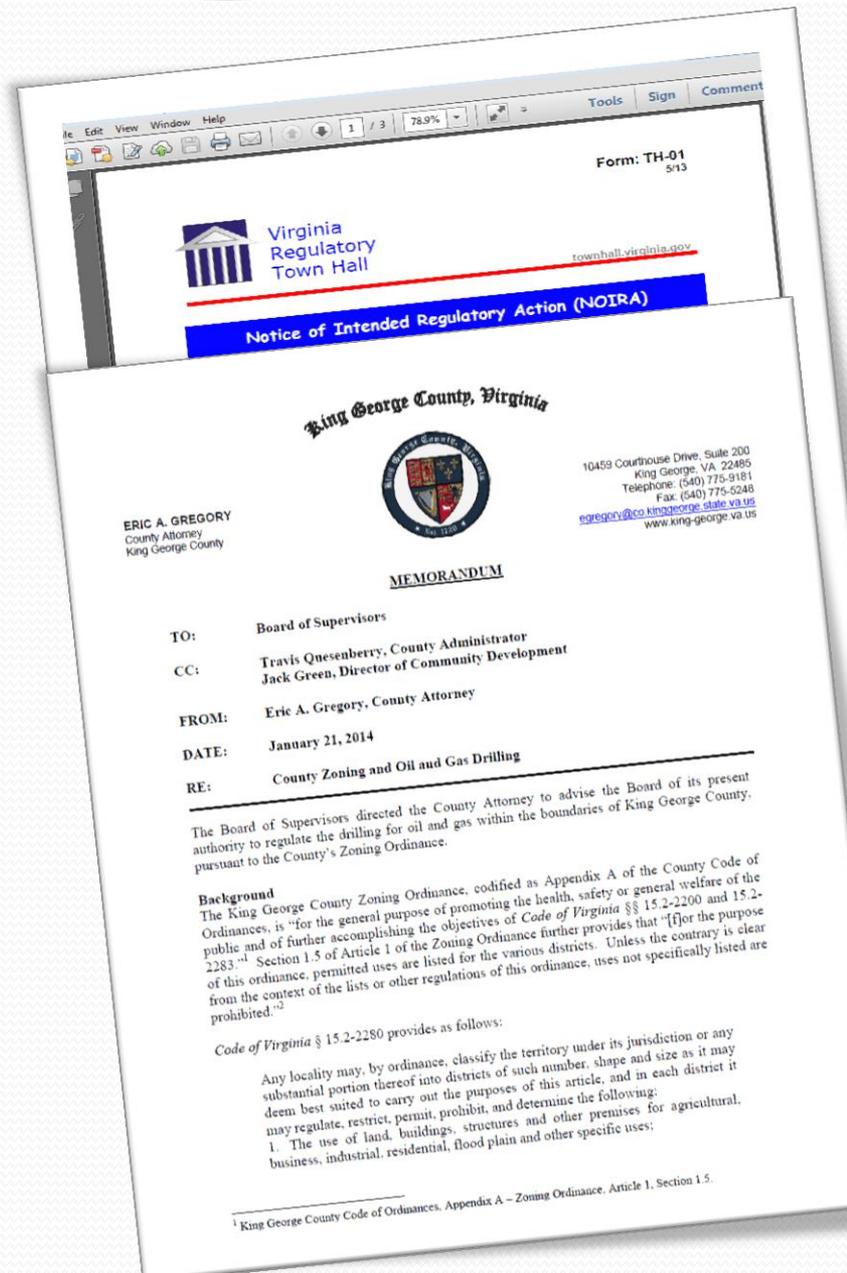
Sorell E. Negro is an associate at Robinson & Cole LLP, where she practices in the firm's Land Law Section.

Fracking Wars as a Regulatory Compliance Tool

December 2013: DMME issues Notice of Intended Regulatory Action (“NOIRA”) to amend Virginia Gas and Oil Regulation to expand disclosure of ingredients used in well stimulation and completion and to reflect current industry best practices

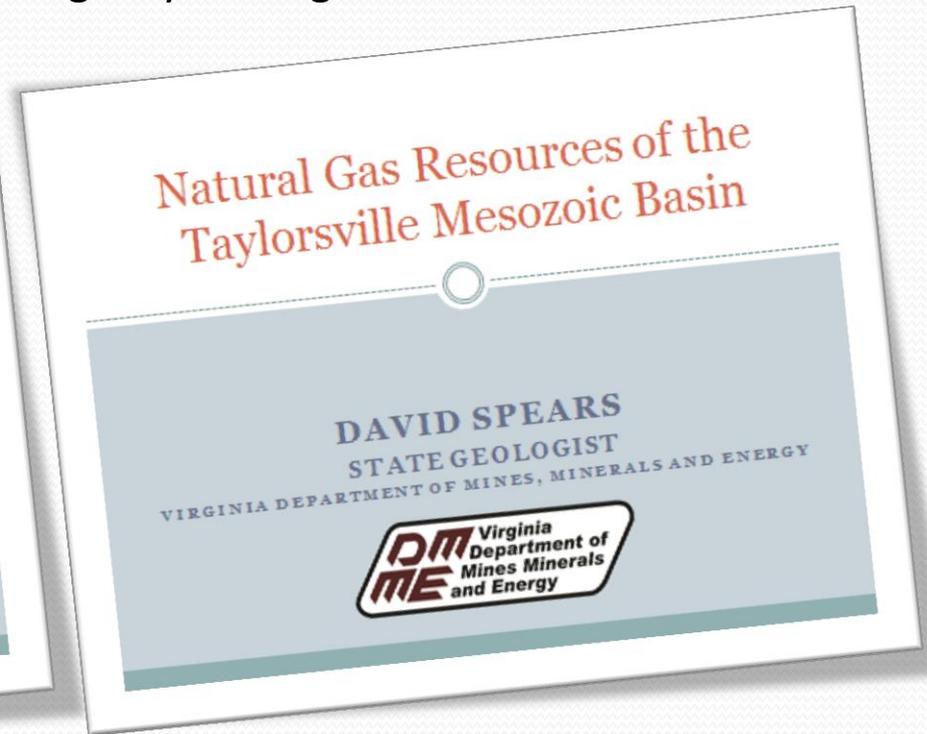
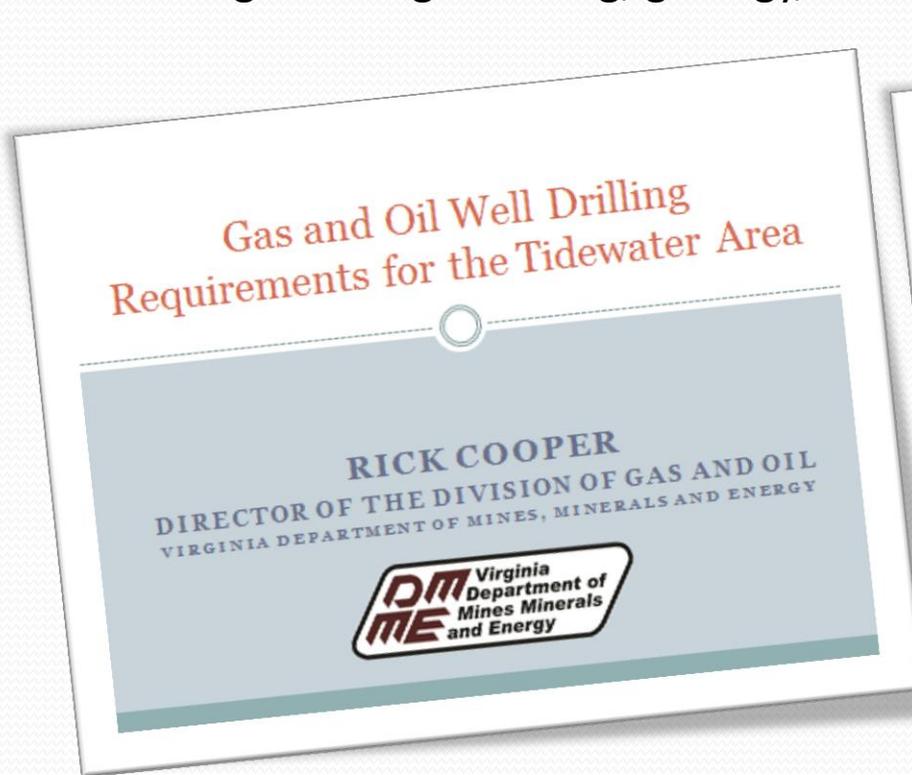
January 21, 2014: County Attorney provides analysis of state law and local authority pertaining to the regulation of oil and gas drilling in Virginia and King George County.

Conclusion: Virginia localities may regulate oil and gas drilling activities via their zoning and land use authority under state law, so long as such regulation does not encroach upon those areas regulated by state (DMME and DEQ) and federal law and regulatory agencies.



February 2014:

- King George conducts town hall meetings and DMME and others provide presentations concerning oil and gas drilling, geology, and agency oversight

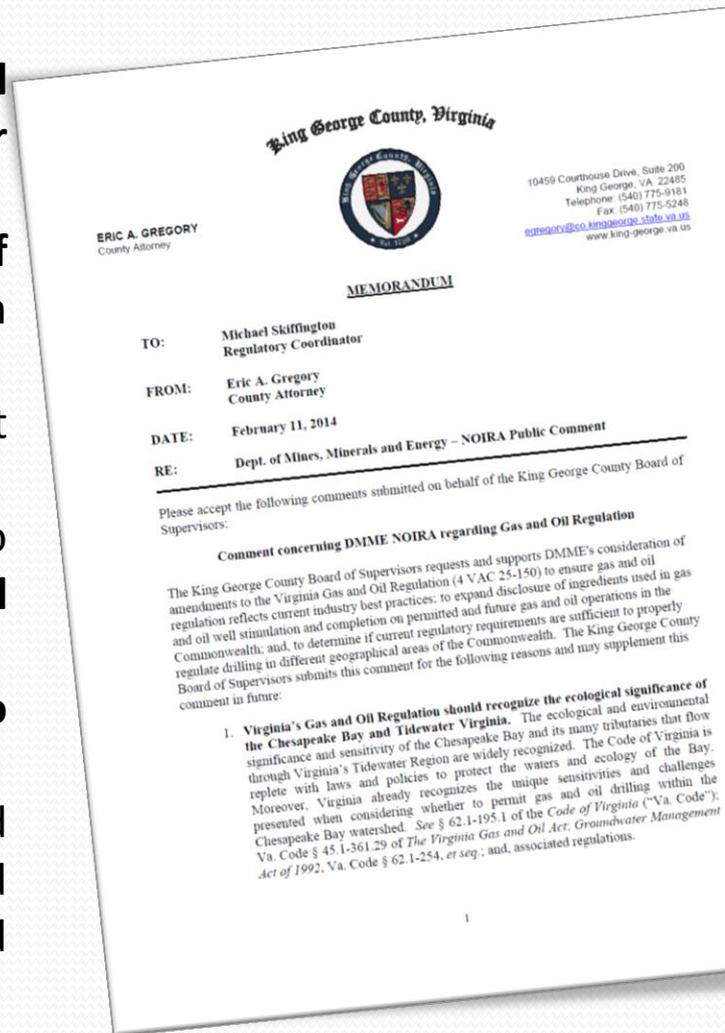


- Board of Supervisors directs County Attorney to submit comments in response to DMME's Notice of Intended Regulatory Action regarding Gas and Oil Regulation

Key points submitted in response to DMME NOIRA:

1. The Regulation should recognize the **ecological significance of the Chesapeake Bay and Tidewater Virginia.**
2. The Regulation should require **disclosure of ingredients** used in gas and oil well stimulation (“fracking”) and completion.
3. The Regulation should be amended to reflect current **industry best practices.**
4. Current regulatory requirements are not tailored to properly regulate drilling in **different geographical (geological) areas of the Commonwealth.**
5. **The Regulation should require permit applicants to certify compliance with all pertinent local ordinances.**
6. Permit applications should not be considered complete until DMME completes its review and amendments deemed necessary have been approved and become effective.

May 2014: DMME convenes Regulatory Advisory Panel (RAP) to advise the agency on potential regulatory amendments



Questions and Analysis:

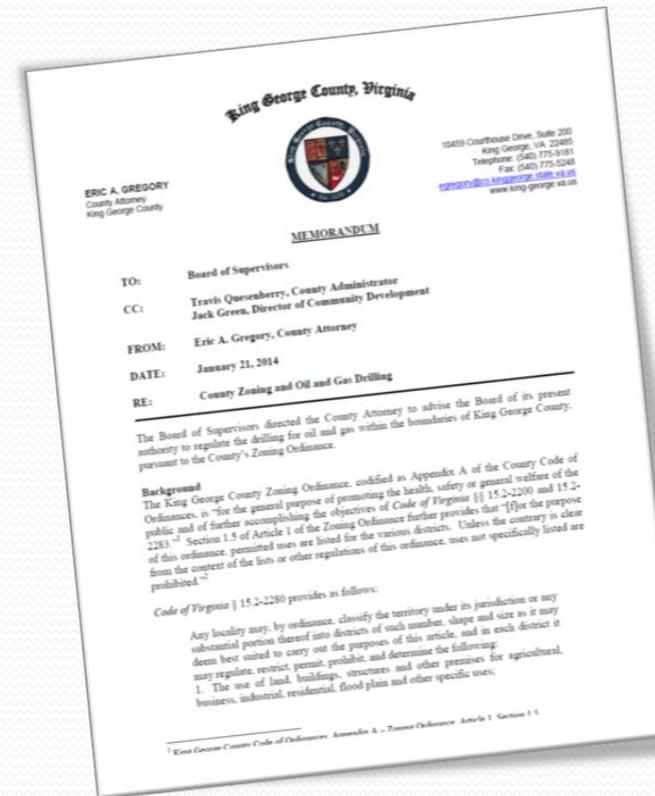
What is the interplay of state and local regulation of gas and oil drilling?

What authority does the County hold to regulate gas and oil drilling?

1. Va. Code § 15.2-2280. Zoning ordinances generally.

Any locality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it **may regulate, restrict, permit, prohibit, and determine** the following:

1. The use of land, buildings, structures and other premises for agricultural, business, **industrial**, residential, flood plain and other specific uses;
2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;
3. ...
4. **The excavation or mining of soil or other natural resources.**



Questions and Analysis (cont'd):

2. Virginia Gas and Oil Act recognizes and provides for local regulation pursuant to local zoning ordinances:

§ 45.1-361.5. Exclusivity of regulation and enforcement.

No county, city, town or other political subdivision of the Commonwealth shall impose any condition, or require any other local *license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter. However, no provision of this chapter shall be construed to limit or supersede the jurisdiction and requirements of other state agencies, local land-use ordinances, regulations of general purpose, or ...* [references to certain tax laws] [emphasis added]

3. But, are local ordinances preempted by state law? *Maybe...maybe not...?*

“Local authority may be preempted where the General Assembly has expressly preempted the field, or where preemption is shown through legislative intent. While localities may have the authority to regulate or restrict fracking under its zoning powers, it cannot do so if such powers are preempted by state laws regulating in the same area.”

- ***Hydraulic Fracturing in Virginia: Can Localities Ban or Strictly Regulate Fracking Operations Where Concurrent Jurisdiction Exists?***, M. Ann Neil Cosby and Ian Lambeets, *Journal of Local Government Law*, Vol. XXV, No. 2, Fall 2014.*

* Special thanks to attorneys **Ann Neil Cosby** and **Ian Lambeets** at the law firm of **Sands Anderson**, authors of ***Hydraulic Fracturing in Virginia: Can Localities Ban or Strictly Regulate Fracking Operations Where Concurrent Jurisdiction Exists?***, which provides an excellent analysis of the applicable law.

Questions and Analysis (cont'd):

Applicable case law:

Resource Conservation Management, Inc. v. Board of Supervisors, 238 Va. 15 (1989) (Supreme Court of Virginia affirmed local government's authority to regulate solid waste landfill via its zoning ordinance in conjunction with the Virginia Waste Management Act.)

Ticonderoga Farms, Inc. v. County of Loudoun, 242 Va. 170 (1991) (Supreme Court of Virginia holds the local power to prohibit includes the power to regulate debris landfills so long as the filed is not expressly preempted by the General Assembly. Local ordinance not in conflict with state laws.)

Blanton v. Amelia County, 261 Va. 55 (2001) (Supreme Court of Virginia overturns local prohibition of biosolids application via general and zoning ordinance in context of state legislative permitting program.)

Also see: Va. Code § 15.2-2315. Conflict with statutes, local ordinances or regulations. (Title 15.2, Chapter 22, Article 7, re: Zoning):

“Whenever the regulations made under authority of this article [local zoning authority] ... impose other ***higher standards*** than are required in any other statute or local ordinance or regulation, the provisions of the ***regulations made under authority of this article shall govern...***” [emphasis added]

The impact of Va. Code Va. Code § 15.2-2315, if any, is unknown at this point.

Questions and Analysis (cont'd):

4. Does the Energy Policy of the Commonwealth trump local regulation via zoning ordinance?

- The purpose of the Energy Policy of the Commonwealth is **“to provide guidance** to the agencies and **political subdivisions of the Commonwealth** in taking discretionary action with regard to energy issues, and [it] shall not be construed to amend, repeal, or override any contrary provision of applicable law”, **nor shall it “create any right, action, or cause of action or provide standing for any person to challenge the action of the Commonwealth or any of its agencies or political subdivisions.”** Va. Code § 67-100 through § 67-103. (Emphasis added.)
- While the Energy Policy provides important guidance, it provides only guidance, is not directive, and does not preclude or hinder local zoning regulation, in my view.

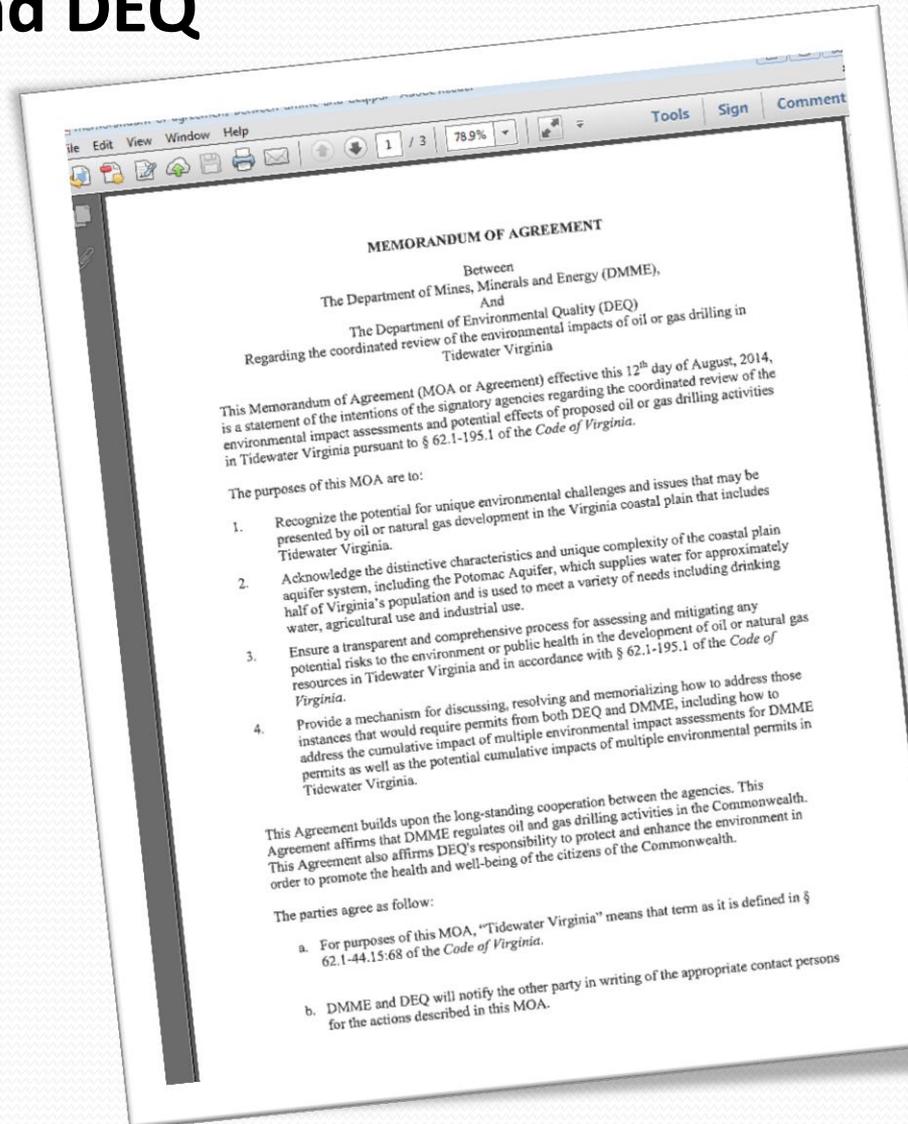
Questions and Analysis (cont'd):

5. Is local regulation of gas and oil drilling via the County Zoning Ordinance preempted by state law?

- Not in my view, so long as it does not conflict with or attempt to supersede the Virginia Gas and Oil Act.
- A local ordinance may not encroach upon the regulation of oil or gas drilling and extraction or the means and methods of gas or oil drilling; that is the province of DMME.
- The local ordinance should be limited to the context of zoning and land use/development and to address and protect the local public health, safety, and welfare from associated adverse impacts.
- Local zoning ordinances may address traffic, noise, dust, runoff, minimum lot size, setback requirements, well-pad footprints/dimensions, site plans, fencing/screening, etc. to minimize adverse impacts.
- A local ordinance (*probably*) may provide for baseline environmental assessments/testing of surface water and groundwater within a defined zone surrounding a well site.
- Special exception permit conditions must be related to the use of the land and tailored to address the potential or perceived impacts associated with the use (traffic, noise, dust, etc.)
- A local ordinance may also address emergency preparedness and potential incident mitigation.

DMME and DEQ

- DMME is conducting its Regulatory Advisory Panel.
- DEQ is providing input to DMME
- DMME and DEQ have entered into Memorandum of Agreement.
- Memorandum of Agreement, however, is only an agreement between two regulatory agencies as part of the present administration.
- The MOA could be altered, not renewed, disposed of...
- The principles in MOA should be memorialized in statute or regulations or at least, a joint Guidance Document to firmly memorialize the provisions of the MOA



Where are we now? Next steps?

- Upon staff's recommendation, Board of Supervisors referred KGC Oil and Gas Drilling Zoning Ordinance to County Planning Commission for review, further study, and recommendations, which is ongoing.
- Pending DMME and DEQ (?) regulatory amendments, EPA guidance/regulations? *(not likely)* EPA study re: hydraulic fracturing due out in late 2014.
- Board of Supervisors is taking a very balanced, deliberative approach as it studies the issues, seeks input and guidance from county staff, state agencies (including DMME's RAP), regulatory experts, industry representatives, the public, and advisory bodies

What does it mean for localities?

- Oil and gas drilling/production and “fracking” have been going on in Southwest Virginia for some time and this activity is expected to continue for the foreseeable future.
- Oil and gas development is an important economic driver in Virginia.
- To our knowledge, no permit applications to drill for oil or gas in the Taylorsville Basin have been filed recently with DMME.
- DMME’s regulatory review (including the RAP) is ongoing so we will see how that develops...
- Development of the Taylorsville Basin is an open question...

Future developments depend on:

- **Local governments** – To what extent will regulatory authority be exercised? Will it invite litigation, legislation...?
- **Virginia is a Dillon Rule state** – “Local authority is limited to those areas expressly granted by the General Assembly, or those necessarily or fairly implied from the express grant of power, and those that are essential and indispensable.” *Hydraulic Fracturing*, Cosby and Lambeets (2014) (internal citation omitted).
- **General Assembly** – Legislation to address local authority...?
- Localities have significant authority in the areas of zoning and land use, however, being overly aggressive often invites litigation or legislation... *See Resource Conservation Management, Inc. v. Board of Supervisors and Blanton v. Amelia County and Ticonderoga Farms, Inc. v. County of Loudoun.*
- **State Agencies (DMME, DEQ)** – How will state agencies apply current regulations or amend their regulations to address issues of concern...?
- **Property owners** – What action, if any, will they take to pursue development of mineral rights...?
- **Litigation** – How would courts address local authority, property rights issues...?



QUESTIONS?

THANK YOU!

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