VIRGINIA:

BEFORE THE VIRGNIA GAS AND OIL BOARD

IN RE:

Appeal of the Virginia Division of Gas and Oil Director's Decision IFFH 11199 dated March 1, 1999 (hereinafter the "Decision") in the matter of Robert and Phyllis Herbison (herein "Herbison") vs. Evans Energy Company (herein "Evans"), Re: Application/Permit for Gas and Oil Operations, Application #3262, Permit #4049, Operations Name RH-1 Pipeline located in Lee County, VA, VGOB Docket No. 99-0420-0718

This cause came on for final hearing before the Virginia Gas and Oil Board (herein "Board") on the 18th day of May 1999.

Mark Swartz of the firm Swartz & Stump, P.C. appeared as counsel for Evans. The Heribsons appeared in person. Sandra B. Riggs, Assistant Attorney General, was present to advise the Board.

I. HISTORY OF PROCEEDINGS

The history of the proceedings are recited in the Decision, as follows:

1. On April 9, 1998 the Division of Gas and Oil (herein "Division") received from Evans an application for a permit (herein "Application") for the construction of a gas pipeline designated RH-1 (herein "Proposed Operations").

2. The Proposed Operations were to be located in the Rose Hill section of Lee County.

3. The Application was entered into the Division's data base and assigned Application #3262.

4. On November 9, December 4, and December 7, 1998, the Division received from Evans revisions to the Application (herein collectively "Revised Application").

5. Having received from the Permittee the written certifications required by Va. Code 45.1-361.29E., and having received no objections to the Application or to the Revised Application as required by Va. Code 45.1-361.35, Permit #4049 was issued to Evans on December 9, 1998 (herein "Permit").

6. The Proposed Operations contemplated the construction of a gas pipeline across several tracts of property thereby causing disturbance to the surface estates of numerous owners, including the surface of the tract owned by Herbison (herein "Property").

7. The Property is currently vacant; however, Herbison testified that he has future plans for its use, including a site for his personal residence. Herbison contends that the pipeline, as currently constructed, prevents the development of his proposed access road into this site.

8. On February 4, 1999, the Division received a letter from George Cridlin, as counsel for Herbison, . . . "appealing for relief to include a hearing or review with the goal being to require the company to relocate this pipeline in accordance with the commitments and agreements" (herein "Request for Review").

9. At the time Herbison filed his Request for Review, Permit #4049 had already been issued by the Division and the pipeline had already been or was in the process of being constructed across the Property.

10. Herbison executed a Notice of Right to Object and a Waiver which stated "I acknowledge receipt of the notice that Evan Energy Company, LC has applied to the Commonwealth of Virginia, Department of Mines, Minerals and Energy, Division of Gas and Oil, for a permit to conduct gas and/or oil operations for well/pipeline number RH-1. I hereby waive my fifteen day right, if any, to object to the permit application."

11. The Division found that Herbison had not been given notice of the Revised Application, and assumed that had Herbison received such notice, he would have timely objected. For this reason, the Director granted to Herbison the requested review and in accordance with Va. Code 45.1-361.35.H. scheduled an Informal Fact Finding Conference for February 24, 2999 at 10:00 AM in the Conference Room of the Division at 230 Charwood Drive, Abingdon, VA. to afford Herbison an opportunity to present his objections to the Revised Application.

12. On March 1, 1999 the Director issued the Decision denying Herbison's objections for the reasons set forth therein, and thereafter, pursuant to Va. Code 45.1-361.36, Herbison appealed the Decision to the Board.

II. FINDINGS OF FACT

1. As a prerequisite to the issuance of the permit, Evans had to certify to the Division that it already had the right to conduct the operations as set forth in the Revised Application and operations plan. See Va. Code 45.1-361.29.E.

2. Herbison and Evans had entered into a written right-of-way agreement affecting the Property; however at the time of the Informal Fact Finding Hearing a copy of said agreement was not introduced into evidence. At the hearing of the appeal of the Decision, Evans introduced into evidence an agreement by and between Robert Herbison (grantor) and Evan Energy Co., L.C., a Virginia Corporation (grantee) executed December 16, 1997 and filed with the Clerk of the Circuit Court of Lee County on August 19, 1998 in Deed Book 481 at Page 621 (herein "Right of Way Agreement").

3. Herbison maintains that the Right of Way Agreement was orally modified. Evans maintains that the Application had to be revised to comply with Herbison's request that the proposed right-of-way route be changed to accommodate his planned use of the Property.

4. On January 21, 1999 the Circuit Court of Lee County granted Evan's Petition for injunction and stated "pending further order of the Court, [Herbison} shall cease, desist and refrain from interfering with the activity of the Evan Energy Co., L.C. in constructing its pipeline and exercise all rights described in Exhibit "A" to the Petition for injunction."

5. With respect to the Application, Herbison waived his right to object to the permit as proposed therein (see written "Notice of Right to Object" and a "Waiver" executed by Herbison on April 1, 1998).

6. With respect to the Revised Application Herbison did not receive the notice required by law, nor did he execute a waiver of his right to object. Therefore, pursuant to the requirements of Va. Code 45.1-361.35.H, the Director was correct in holding an informal fact finding conference of Herbison's objection(s) to the Revised Application.

7. Herbison's grounds for objection to the Revised Application is that the pipeline as constructed unreasonably infringes on his use of the surface of the Property.

III. LAW

The regulation of gas and oil development and production is governed by Article 3 of the Virginia Gas and Oil Act, Va. Code 45.1-361.27 et seq. The provisions pertaining to the permitting of wells, gathering pipelines, geophysical exploration or associated activity, facilities or structures is contained in Va. Code 45.1-361.29, the notice requirements in Va. Code 45.1-361.30, the bonding and financial security requirements in Va. Code 45.1-361.31, and the process for objecting to new or modified permit applications in Va. Code 45.1-361.35.

The **only** objections which the Director is statutorily granted the jurisdiction to consider and adjudicate are those set forth in Va. Code 45.1-361.35. More particularly, the only objections to permits or permit modification which may be raised before the Director by surface owners, such as Herbison, are those specified in Va. Code 45.1-361.35.B. Herbison relies on the grounds set forth in Va. code 45.1-361.B.4 which states:

> "Location of the coalbed methane well or coalbed methane well pipeline will unreasonably infringe on the surface owner's use of the surface, provided, however, that a reasonable alternative site is available within the unit, and granting the objection will not materially impair any right contained in an agreement, valid at the time of the objection, between the surface owner and the operator or their predecessor or successors in interest."

The Division lacks the statutory authority to supercede or to materially impair, abridge or affect the contractual rights or other obligations existing between Evans and Herbison. As an administrative agency, the Division has only those powers and authority granted to it by the Legislature. As a regulatory agency, it can do no more than the law permits. The consideration of rights flowing from contracts and agreements affecting real property are best addressed to a court of competent jurisdiction rather than to the Director of the Division because, unlike the former, the expertise of the latter does not extend to the analysis of chains of title and limitations therein.

IV. CONCLUSIONS

The Director's jurisdiction to hear Herbison's objection to the gas gathering pipeline proposed by the Revised Application is limited by the provisions of Va. Code 45.1-361.35.B. Va. Code 45.1-361.35.B.4, the specific ground relied upon by Herbison, applies to the permitting of coalbed methane wells or coalbed methane well pipelines. Additionally, to sustain an objection under Va. Code 45.1-361.35.B.4, the Director must find that the granting of the objection will not materially impair any right contained in an agreement, valid at the time of the objection, between Herbison and Evans.

The Board denies Herbison's objection to the Revised application for the following reasons:

1. The operations, activity and/or disturbances associated with the permitted site do not unreasonably infringe on the surface owner's use of the surface.

2. The pipeline proposed by the Revised Application is not a coalbed methane well pipeline; therefore, the provisions of Va. Code 45.1-361.35.B. do not provide a valid basis upon which Herbison may object to the Revised Application.

3. The granting of Herbison's objection would materially impair Evans rights under the Right of Way Agreement as is evidenced by the injunction issued by the Circuit Court of Lee County prohibiting Herbison from interfering with the pipeline construction proposed in the Revised Application.

Accordingly, for the reasons herein set forth the Board upholds the Director's Decision and denies Herbison's objection to the Revised Application.

DONE AND EXECUTED this 14th day of June, 1999, by Order of this Board.

Chairman, Benny R. Wampler

DONE AND PERFORMED this 21st day of June, 1999 by a majority of the Virginia Gas and Oil Board.

Byron Thomas Fulmer
Principal Executive to the Staff
Virginia Gas and Oil Board

STATE OF VIRGINIA)
COUNTY OF WISE)

Acknowledge on this 14th day of June 1999, personally before me a notary public in and for the Commonwealth of Virginia, appeared Benny R. Wampler, being duly sworn did depose and say that he is Chairman of the Virginia Gas and Oil Board, that he executed the same and was authorized to do so.

Susan G. Garrett
Notary Public

My Commission expires: 07/31/2002

STATE OF VIRGINIA)
COUNTY OF WISE)

Acknowledged on this 21st day of June, 1999, personally before me a notary public in and for the Commonwealth of Virginia, appeared Byron T. Fulmer, being duly sworn did depose and say that he is Principal Executive to the Staff of the Virginia Gas and Oil Board, that he executed the same and was authorized to do so.

Diane J. Davis
Notary Public

My Commission expires: 09/30/2001