Written Testimony to the
House Energy and Natural Resources Committee
Against H.B. 152 and Sub. H.B. 152

Sean Jacobs
Emens Wolper Jacobs & Jasin Law Firm

June 22, 2021

Dear Chairman Stephens, Vice Chair Stewart, Ranking Member Weinstein, and members of the House Energy and Natural Resources Committee:

My name is Sean Jacobs and I am an attorney with Emens Wolper Jacobs & Jasin Law Firm ("EWJJ"). EWJJ is dedicated to representing Ohio landowners. Since the start of the Utica Shale Play, I and other members of my firm have represented thousands of Ohio landowners in oil and gas lease negotiations and numerous landowners in "force unitization" proceedings under R.C. 1509.28. I am testifying because I am concerned about the impact House Bill 152 ("H.B. 152") and Substitute House Bill 152 ("Sub H.B. 152") will have on Ohio landowners if either is enacted without substantial modifications.

Sponsor testimony indicates that the "overriding goal of House Bill 152 is to establish firm, predictable timelines for the ODNR to meet in order to get unitization applications processed and approved in an efficient manner." However, both H.B. 152 and Sub. H.B. 152 go far beyond establishing predictable timelines for ODNR. These bills include language which drastically reduces the compensation unleased mineral owners are provided in Orders for Unit Operations currently issued by ODNR ("ODNR Orders"). This would not only harm Ohio landowners who are subject to force unitization, but would also facilitate the ability of producers to exploit the many unleased Ohio landowners who want to voluntarily lease their mineral rights and may incentivize producers to voluntarily release Ohio landowners who are currently leased under favorable leases so that they can be force unitized.

It is unclear why the Ohio legislature would want to reduce the compensation Ohio landowners receive in voluntary lease negotiations by statutorily minimizing the compensation producers need to pay to remove oil and gas from beneath Ohio landowners' property without their consent. If oil and gas can be removed without consent for minimal compensation, there is no need for producers to offer adequate compensation to obtain voluntary leases once the 65% threshold is met.

Both H.B. 152 and Sub. H.B. 152 add three set compensation options as R.C. 1509.28(F)(9)(a)-(c). These options are all drastic departures from the compensation required by the ODNR Orders that have been issued and R.C. 1509.27. The default compensation option, R.C. 1509.28(F)(9)(a), would force unleased mineral owners to accept lease terms they do not have the opportunity to negotiate which include:

1. A 12.5% royalty far below the gross royalties I have negotiated on behalf of the landowners I have represented in shale lease negotiations. While the royalty in Sub. H.B. 152 is based on "gross proceeds," there is no requirement that the gross proceeds be received from an unaffiliated third-party purchaser in an arms-length transaction leaving Ohio landowners exposed to royalty manipulation through the use of affiliate sales. This omission is significant;
2. A bonus which is only 75% (in H.B. 152) or 50% (in Sub. H.B. 152) of the ambiguous "current market rate." Neither bill contains any parameters for how the "current market rate" will be determined. It is also unclear why Ohio landowners would receive less than the "current market rate" when their oil and gas is removed without their consent; and
3. Other "just and reasonable terms established at the hearing."
    a. Notably neither H.B. 152 nor Sub. H.B. 152 requires that unleased mineral owners be served notice of the hearing by certified mail a set amount of time prior to the hearing to assure that they have the opportunity to meaningfully participate in the hearing in which these lease terms will be established. I have represented landowners who have received notice of force unitization hearings just prior to, or even **after**, hearings have taken place. Disturbingly, this occurred despite the time prior to the hearing currently being longer than that proposed in either bill.

In order to elect out of the default leasing option and minimal compensation included in R.C.1509.28(F)(9)(a), an unleased mineral owner must choose either R.C. 1509.28(F)(9)(b) or R.C. 1509.28(F)(9)(c). R.C. 1509.28(F)(9)(b) would require the Ohio landowner to be responsible for a share of all drilling costs and therefore would be cost prohibitive for almost all of the Ohio landowners I have represented. It would also require the landowner to accept whatever terms the producer chooses to include in the joint operating agreement the producer attaches to its application no matter how unjust or unreasonable the terms may be.

The other option, R.C. 1509.28(F)(9)(c), would require an Ohio landowner to accept a drastically reduced version of the compensation currently included in ODNR Orders. Electing this option could result in the landowner receiving **no compensation** for the oil and gas being taken without their consent via force unitization. It would also require the Ohio landowner to subject himself to whatever unjust and unreasonable terms the producer includes in the joint operating agreement which are applicable to non-consenting parties other than the percentage of the non-participation charge. The terms in a joint operating agreement which are applicable to non-consenting parties are supposed to apply to parties who voluntarily entered the joint operating agreement and choose not to participate in some specific well, not unleased Ohio landowners who are being force unitized against their will. Parties who voluntarily enter joint operating agreements have the opportunity to negotiate terms to protect themselves. Both R.C. 1509.28(F)(9)(b) and R.C. 1509.28(F)(9)(c) would force unleased Ohio landowners to accept whatever terms a producer choose to include even though such terms can have drastically impact Ohio landowners who are subject to them.

All recent ODNR Orders require that unleased mineral owners who are force unitized receive a monthly cash payment equal to a one-eighth (1/8) share of the gross proceeds (a 12.5% gross

royalty) **in addition to** a seven-eighths (7/8) share of the net proceeds after the producer recovers either 150% or 200% of the cost of drilling, testing, and completing each well drilled under the ODNR Order. These terms are consistent with the requirements in R.C. 1509.27, the other Ohio statute allowing oil and gas to be removed from beneath Ohio landowners' property without their consent. Unless R.C. 1509.28(F)(9) is deleted in its entirety, at a minimum, it should contain a compensation option which would provide an unleased mineral owner at least a one-eighth (1/8) share of the gross proceeds from production prior to recovery of a non-participation charge and a seven-eighths (7/8) share of the net proceeds from production after the applicant recovers a non-participation charge which does not exceed 200% of the costs of drilling, testing, and completing any well. It is unconscionable that H.B. 152 forces landowners to either accept lease or joint operating agreement terms they do not get to negotiate and minimal compensation (or in the case of R.C. 1509.28(F)(9)(c) potentially no compensation) when oil and gas is being taken from beneath their land without consent.

Perhaps the most concerning aspect of H.B. 152 and Sub. H.B. 152 is the effect either of these bills would have on Ohio landowners who want to voluntarily lease their mineral rights. I represent many clients who own mineral rights in the Ohio counties that have significant shale production and who entered into oil and gas leases at the beginning of the Utica Shale Play which have since expired in whole or in part. Almost every one of these landowners wants to enter into a new lease for their unleased acreage. However, producers are telling them that their property will not be leased until closer to the time the producer plans to include it in a drilling unit. Due to this, there are a large number of Ohio landowners who want to enter into voluntarily leases but who are currently unleased. These landowners should not be affected by R.C. 1509.28. However, by statutorily minimizing the compensation producers must pay to take Ohio landowners' oil and gas without their consent, H.B. 152 and Sub. H.B. 152 remove any incentive producers have to engage in good faith lease negotiations with these unleased Ohio landowners. Once the 65% threshold required under R.C. 1509.28 is met, the producer can make low offers to all of the remaining landowners in a proposed unit on terms favorable to the producer and threaten to force unitize the landowner for the minimal compensation required under H.B. 152 and Sub. H.B. 152 if the landowner does not accept.

Even worse, H.B. 152 and Sub. H.B. 152 both incentivize oil and gas companies to make low bonus payments in voluntary lease negotiations in order to drive down the "current market rate" which is used to determine compensation in R.C. 1509.28(F)(9)(a). H.B. 152 and Sub. H.B. 152 would provide producers leverage to force Ohio landowners to accept below market lease terms or be force unitized for minimal compensation, which result in the "current market rate" dropping and the minimal compensation decreasing even more.

If H.B. 152 or Sub. H.B. 152 is enacted, it would also allow producers who have entered into favorable oil and gas leases covering acreage the producer does not need to meet the 65% threshold, to release those leases then force the newly unleased Ohio landowners to either accept a new lease with low compensation and unfavorable terms or be force unitized and receive one of the three minimal compensation options in H.B. 152 or Sub. H.B. 152, each of which will subject the landowner to terms in either a lease or joint operating agreement that they cannot negotiate and

will have no control over. At the current time it is common for producers who use R.C. 1509.28 to have far more than 65% of the landowners in a proposed unit under voluntary lease. However, R.C. 1509.28 does not currently allow producers to take oil and gas from unleased mineral owners for minimal compensation as H.B. 152 and Sub. H.B. 152 do, so it is easy to see why this trend would change if either of these bills are passed.

H.B. 152 and Sub. H.B. 152 completely subvert the intended purpose of R.C. 1509.28 which is to prevent waste by allowing for the development of oil and gas "even if there are mineral rights owners who **do not want to** lease their rights or are **unable to** lease their rights." (Emphasis added.) LSC Bill Analysis. Its purpose is not to allow producers to avoid having to engage in good faith lease negotiations with Ohio landowners who want and are able to lease their mineral rights by providing the option to take the oil and gas from Ohio landowners who want to lease for minimal compensation (or potentially no compensation under the current terms of proposed R.C. 1509.28(F)(9)(c)). It also certainly was not intended to incentivize producers to release favorable leases they have entered into in order to have the opportunity to exploit landowners through the use of R.C. 1509.28. However, that is what H.B. 152 and Sub. H.B. 152 would allow.

In closing, I hope that you understand the detrimental impact H.B. 152 and Sub. H.B. 152 will have on Ohio landowners. On behalf of all Ohio landowners, I hope that you will oppose this harmful legislation unless it is revised to: (1) remove R.C. 1509.28(F)(9) in its entirety and limit the legislation strictly to its intended purpose of establishing firm, predictable timelines for ODNR, or (2) address the issues discussed in this testimony and include a compensation option which provides for compensation similar to that which is included in the ODNR Orders that have been issued. Thank you for your time and thoughtful consideration.