



# INDUSTRIAL COMMISSION OF NORTH DAKOTA

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February 18, 2014

United States Environmental Protection Agency  
Office of Ground Water and Drinking Water  
1200 Pennsylvania Avenue, NW (MC-4606M)  
Washington D.C. 20460

Re: **Comments for consideration on US EPA's Draft UIC Class VI Program: Guidance on Transitioning Class II to Class VI Wells**

Dear Sir/Madam:

The North Dakota Industrial Commission (NDIC) is pleased to provide these comments on the draft "Underground Injection Control (UIC) Guidance on Transitioning Class II Wells to Class VI Wells" (EPA 816-P-13-004) released for comment December 12, 2013.

In addition to providing comments on the draft guidance, the NDIC is also formally requesting the United States Environmental Protection Agency (USEPA) reconsider the provision 40 CFR 144.19 Transitioning from Class II to Class VI and allow for public comment. These comments also serve as a request for reconsideration of the Federal Requirements under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO<sub>2</sub>) Geologic Sequestration (GS) Wells; Final Rule December 10, 2010, promulgated on December 24, 2010 (75 Federal Register 77230 to 77303).

### **Request to Reconsider 40 CFR 144.19 and Open for Public Comment**

The NDIC respectfully requests USEPA reconsider 40 CFR 144.19 Transitioning from Class II to Class VI and provide an opportunity for public comment. This reconsideration request is based on the unlawful adoption of 40 CFR 144.19 which was adopted pursuant to public comment as described in the Class VI Final Rule Preamble (77243-77245 *H. How does this rule affect existing injection wells under the UIC program?*) without an opportunity for public comment. Changes may be made to a proposed rule based on the public comments received. *Shell Oil Co. v. E.P.A.*, 950 F.2d 741, 750 (D.C. Cir. 1991). However, any changes made to a final rule must be of a type that could have been reasonably anticipated by the public – a logical outgrowth of the proposal. *Id.*

The United States Court of Appeals describes the "logical outgrowth" test as follows:

"A final rule is a logical outgrowth of the proposed rule 'only if interested parties should have anticipated that the change was possible, and thus

reasonably should have filed their comments on the subject during the notice-and-comment period.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94-95 (D.C. Cir. 2010) (quoting *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)). Notice of agency action is “crucial to ‘ensure that agency regulations are tested via exposure to diverse public comment, ... to ensure fairness to affected parties, and ... to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review’.” *Id.* at 95 (quoting *Int’l Union*, 407 F.3d at 1259).

*Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013).

If the “logical outgrowth test” is not met, agencies must provide a second notice with an opportunity for public comment on the changes. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

40 CFR 144.19 is not a logical outgrowth from the Class VI rule proposed for public review and comment on July 25, 2008 (the comment period for the proposed Class VI rule closed December 24, 2008). USEPA adopted 40 CFR 144.19 pursuant to comments it received and added the provision to the final rule published on December 10, 2010, without providing a second notice or opportunity for public comment. The adoption of this provision is a change in philosophy from the proposed rule to the final rule. USEPA stated in the preamble of the proposed rule, “injection of CO<sub>2</sub> for the purposes of enhanced oil and gas recovery (EOR/EGR), as long as any production is occurring, will continue to be permitted under the Class II program.” The final rule preamble describes USEPA’s change in philosophy from the proposal:

“EPA proposed that the Class VI GS requirements would not apply to Class II ER wells as long as any oil or gas production is occurring, but would apply only after the oil and gas reservoir is depleted. Under the proposed approach, Class II wells could be used for the injection of CO<sub>2</sub>, as long as oil production is simultaneously occurring from the same formation. The preamble to the proposal sought comment on the merits of this approach.

Some commenters agreed with the proposed approach while others suggested that the approach did not adequately address risks posed to USDWs by injection operations transitioning from production to long-term storage of CO<sub>2</sub>. A majority of commenters requested that EPA develop specific criteria for this transition.

Consistent with these comments, EPA determined that owners or operators of wells injecting CO<sub>2</sub> in oil and gas reservoirs for GS where there is an increased risk to USDWs compared to traditional Class II operations using CO<sub>2</sub> should be required to obtain a Class VI permit, with some special

consideration for the fact that they are transitioning from a well not originally designed to meet Class VI requirements.”

The proposed rule provided that there would be no transition “as long as any oil or gas production is occurring”. The final rule, however, creates a transition point which will take place while oil production is occurring. North Dakota did not anticipate this significant change to the rule and therefore was denied an opportunity to comment. 40 CFR 144.19 and this draft guidance clearly indicate that what is published in the final rule is not a logical outgrowth from what was originally proposed.

#### **Guidance Attempts to Expand USEPA Authority:**

This guidance document appears to be an attempt to expand the authority of the USEPA by overfiling State Class II primacy programs. Under the guidance, the Class II UIC program Director and/or the EOR project operator are potentially required to report any and all data that may be requested by the Class VI UIC program Director (as of September 7, 2011 USEPA Regional Administrators or USEPA Administrator). Furthermore, this guidance appears to expand the authority of the Class VI UIC program Director over a Class II program or a Class II operator by allowing the Class VI UIC program Director the authority to require additional information/data to make a determination whether the Class II project can continue or should be required to transition. The Class VI UIC program Director has no authority over the Class II UIC program Director, nor does the Class VI UIC program Director have authority over the Class II project owner or operator.

#### **Interpretation of CFR**

The NDIC strongly disagrees with USEPA’s interpretation of 40 CFR 144.17 on page 6:

*40 CFR 144.17 provides either the Class II or Class VI UIC Program Director with the authority to require that a Class II owner or operator “conduct monitoring, and provide other information as is deemed necessary to determine whether the owner or operator has acted or is acting in compliance with Part C of the SDWA or its implementing regulations.” This could include requesting information needed to determine whether the injection may lead to an increased risk to USDWs relative to Class II operations.*

Allowing the Class VI UIC program Director to require the Class II owner or operator to “conduct monitoring, and provide other information as is deemed necessary to determine whether the owner or operator has acted or is acting in compliance with Part C of the SDWA or its implementing regulations”, would conflict with State Class II primacy where the State is the primary regulatory authority. This would be considered overfiling should the Class VI UIC program Director require a Class II owner or operator to report directly to USEPA.

The NDIC interprets 40 CFR 144.17 as allowing the UIC program Director the flexibility to require the owner or operator to establish and maintain records, make reports, conduct monitoring, and provide other information as it relates to the well class under its primacy authority; not as allowing the UIC program Director to overfile injection well classes it does not directly regulate (i.e. the Class VI UIC program Director has direct regulatory authority over the

Class VI UIC program and the Class II UIC program Director has direct regulatory authority over the Class II UIC program). The NDIC has administered the 1425 UIC program regulating Class II injection well activities in North Dakota since 1983. The USEPA currently administers the Class VI UIC program in North Dakota. Under North Dakota's Class II UIC program primacy agreement with USEPA it would be consider overfiling if USEPA bypassed the NDIC and attempted to directly regulate a Class II owner or operator. USEPA's interpretation of 40 CFR 144.17 can be construed as an attempt to expand the direct regulatory authority of the Class VI UIC program Director. The only way USEPA's interpretation would be permissible is if the Class II program and the Class VI program were regulated under the same primacy authority. Under Safe Drinking Water Act (SDWA) Part D – Emergency Powers, Section 1431 (a) the USEPA can enact its overfiling authorities, when a "State or local authorities have not acted to protect the health of such persons, [USEPA Administrator] may take such actions as he may deem necessary in order to protect the health of such persons." In the context of the UIC program, the USEPA does not have the authority to overfile a State administered Class II UIC program or directly regulate an operator of a carbon dioxide enhanced oil recovery project under the jurisdiction of a State administered Class II UIC program, unless the State Class II UIC program Director has not acted to protect USDWs or the health of such persons pursuant to the SDWA.

The NDIC strongly disagrees with USEPA's interpretation of 40 CFR 144.51(h) on page 6:

*40 CFR 144.51(h) requires permittees to provide "any information which the Director may request to...determine compliance with [a] permit." This gives the Class II UIC Program Director the authority to include Class II permit provisions to gather information that may be needed in the future to determine whether the project meets the definition of a Class II well or whether re-permitting as a Class VI well is necessary.*

The USEPA interpretation appears to obscure the lines between the Class II UIC program and the Class VI UIC program. The USEPA interpretation of 40 CFR 144.51 (h) which grants the Class II UIC program Director the authority to include additional permit provisions for a future determination, appears to create a process to add Class VI requirements to a Class II permit. The NDIC interprets 40 CFR 144.51 (h) as allowing the UIC program Director the flexibility he/she may need to require "any information" pertaining to the determination of whether the operator is operating the injection well as permitted. The USEPA's interpretation appears to constitute an overfiling prior to any determination that the Class II UIC program Director has not acted to protect human health and the environment.

In addition, USEPA describes a "project" as meeting the definition of a Class II well. This is a common inaccuracy throughout the draft guidance where USEPA misapplies the term "project" when referring to individual wells. The SDWA and the UIC program do not grant USEPA the authority over enhanced recovery projects, nor does USEPA have authority over carbon dioxide storage projects. The USEPA authorities are limited to the injection well.

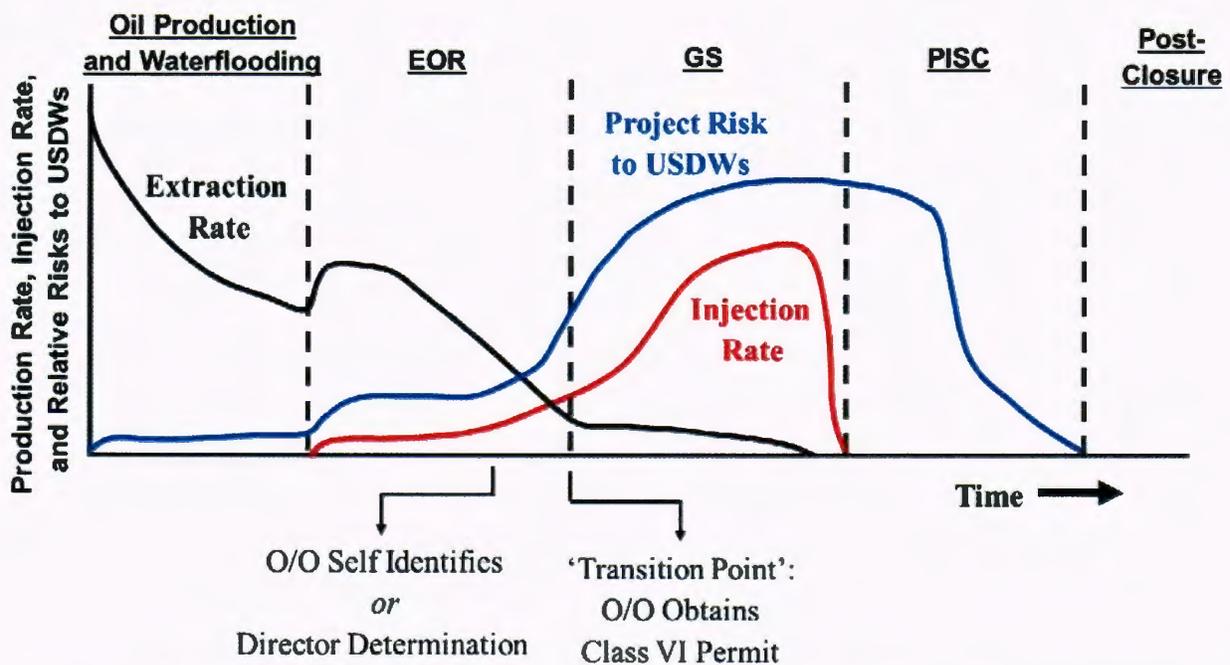
The NDIC recommends amending the above language as follows:

*40 CFR 144.51(h) requires permittees to provide "any information which the Director may request to...determine compliance with [a] permit." ~~This gives~~ Upon the owner or*

*operator expressing intent to transition to Class VI injection this provision allows the Class II UIC Program Director the authority to include Class II permit provisions to gather information that may be needed in the future to determine whether the project meets the definition of a Class II well or whether re-permitting as a Class VI well is necessary.*

### **Hypothetical EOR Project Transitioning to a GS Project**

The following diagram found on page 15 illustrates the transition point as taking place while oil production is occurring.



The NDIC requests further explanation of the specific parameters used to create this diagram as well as the data used to plot the graph and a description of why the injection rate increases as the extraction rate decreases. The NDIC is also requesting USEPA further explain the specific factors used in plotting project risk to underground sources of drinking water (USDWs); for example, does this diagram depict a specific geologic setting or is it a generalization of all EOR projects that transition into storage projects?

### **Traditional EOR**

USEPA uses the term “traditional Class II operations” and “traditional EOR projects” when comparing increased risk to USDWs in a carbon dioxide enhanced oil recovery project. The word “traditional” should be defined, especially as the enhanced oil and gas recovery industry increases its use of anthropogenic carbon dioxide, explores potential “unconventional” oil reservoirs, and adapts to new technologies and modern approaches of oil recovery while simultaneously storing carbon dioxide.

### **Equally as Protective**

Class II injection wells are equally protective of USDWs as compared to Class VI. USEPA states, “The Class VI requirements are more comprehensive and specific than the Class II requirements”, but both well classes are designed to protect USDWs.

### **Individual Injection Well versus EOR/CCS Projects:**

Throughout this guidance document USEPA uses the term “project” when referring to a carbon dioxide enhanced oil recovery Class II injection well or a Class VI carbon dioxide storage injection well. The context in which this guidance document refers to enhanced oil or gas recovery projects transitioning into geologic storage projects is beyond the authority of USEPA and the UIC program. The USEPA’s authority is limited to the injection well. For example, the title of the guidance document describes the transition as “Class II Wells to Class VI Wells.” The UIC program is defined in this guidance document as follows:

**Underground Injection Control Program** refers to the program USEPA, or an approved state, is authorized to implement under the Safe Drinking Water Act (SDWA) that is responsible for regulating the underground injection of fluids by wells injection. This includes setting the federal minimum requirements for construction, operation, permitting, and closure of underground injection wells.

Throughout this guidance, USEPA mistakenly describes the transition from an injection well to a project and vice versa. For example on page 31, “Following a determination that there is an increased risk to USDWs from the injection project (see Section 3), owners or operators will need to apply for a Class VI permit.” A project more than likely would consist of multiple injection wells, facilities, and potentially multiple types of wells (i.e. injection, production, and disposal).

The NDIC recommends USEPA replace “project” with “injection well” throughout this draft guidance, where appropriate.

### **Transitioning a Project from Mineral Rights to Storage Rights**

The SDWA authority does not extend to private minerals or pore space ownership, further complicating the entire concept of transitioning a carbon dioxide enhanced recovery project to a carbon dioxide storage project. In North Dakota, the pore space is owned by the overlying surface estate rather than a severed mineral owner. The NDIC regulates the drilling and production of oil and gas in North Dakota with the mission:

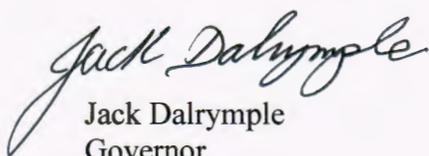
...to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be

obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources.

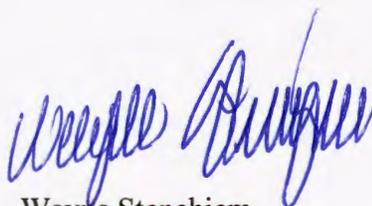
N.D.C.C. § 38-08-01

It is of great concern to the NDIC that the transition discussed in this USEPA guidance would potentially conflict with this agency's mission to prevent waste, maximize recovery, and fully protect correlative rights.

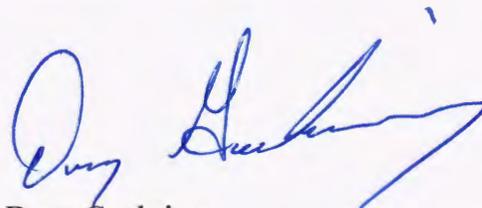
Sincerely,



Jack Dalrymple  
Governor



Wayne Stenehjem  
Attorney General



Doug Goehring  
Agriculture Commissioner