



INDUSTRIAL COMMISSION OF NORTH DAKOTA

Jack Dalrymple
Governor

Wayne Stenehjem
Attorney General

Doug Goehring
Agriculture Commissioner

November 11, 2011

Cynthia Dougherty
Office of Ground Water and Drinking Water
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 4601M
Washington, DC 20460

Dear Ms. Dougherty,

The North Dakota Industrial Commission is writing to communicate the State of North Dakota's position on the regulation of hydraulic fracturing under the Safe Drinking Water Act (SDWA) Underground Injection Control (UIC) Class II Program.

The Department of Mineral Resources has received the full support of our State Legislature to retain regulatory responsibility over all hydraulic fracturing within the State. We have attached Concurrent Resolutions and a statute passed by our Legislature during the most recent regular and special sessions that state in part:

"The state of North Dakota, through the Oil and Gas Division of the Department of Mineral Resources has proven more than capable of regulating oil and gas recovery processes and ensuring the safety of workers while protecting the environment and is best situated to closely monitor oil and gas drilling and fracturing operations to ensure they are conducted in an environmentally sound manner."

We believe United States Environmental Protection Agency (EPA) regulation of any hydraulic fracturing processes is unnecessary, especially in North Dakota because of our own statutes, rules and programs that are already in place to regulate the full life of hydraulic fracturing. The North Dakota Water Commission has jurisdiction over industrial use of ground water and surface water, the North Dakota Industrial Commission through the Department of Mineral Resources, Oil and Gas Division has jurisdiction over both hydraulic fracturing and Class II Underground Injection in the State of North Dakota under North Dakota Century Code 38-08 and North Dakota Administrative Code 43-02-03-27 and 43-02-05-01 through 14, and the North Dakota Department of Health and Department of Emergency Services have jurisdiction over environmental release response and recovery.

North Dakota has been regulating the full life cycle of hydraulic fracturing for decades and we see no reason for that to change; not only because of our unique geology, but because of our continued effort to keep our rules current with changes in technology.

North Dakota is currently in the process of clarifying and strengthening its hydraulic fracturing regulations. We already assure that a minimum of two steel casings and two layers of cement are installed. Should our proposed rules be approved there would be an additional fifth layer of protection as well as publication of the chemicals used on the Fracfocus website, further protecting ground water sources.

For many years, your Agency's position was that oil and gas production wells being hydraulically fractured should not be regulated under the UIC program because the principal function of these wells was not to inject fluids (such as liquid wastes) into the subsurface but was instead to remove (i.e., produce) valuable oil and gas from the subsurface. For example, in 2000 the EPA noted that hydraulic fracturing is a one-time activity and it did not seem appropriate to categorize a hydraulically fractured well as a Class II well for its entire operational life--which could encompass many years--because of temporary activity.

The Energy Policy Act of 2005 placed hydraulic fracturing with diesel fuel under the Safe Water Drinking Act, but it does not require regulation under any specific program or well type.

SEC. 322. HYDRAULIC FRACTURING.

Paragraph (1) of section 1421(d) of the Safe Drinking Water Act (42 U.S.C. 300h (d)) is amended to read as follows:

“(1) UNDERGROUND INJECTION.—The term ‘underground injection’—

“(A) means the subsurface emplacement of fluids by well injection; and

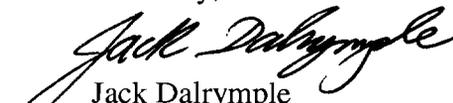
“(B) excludes— “(i) the underground injection of natural gas for purposes of storage; and

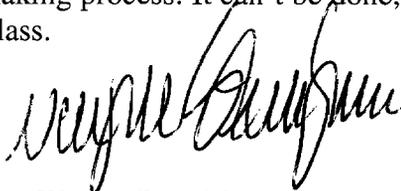
“(ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.”

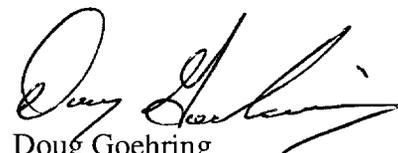
As late as 2008, EPA had done nothing with regard to nationwide regulation of hydraulic fracturing operations utilizing diesel fuels and continued to stand by its 2004 study finding that hydraulic fracturing poses little or no threat to Underground Sources of Drinking Water (USDW). The typical North Dakota Bakken frac contains 0.088% petroleum distillates. If EPA persists with regulation of diesel fuel hydraulic fracturing under UIC Class II along with a new and unique definition of diesel fuel, North Dakota oil and gas investment and jobs would come to a standstill, and potentially never return to the activity and growth we are seeing today.

The EPA should absolutely not determine that regulation of hydraulic fracturing under the SDWA is needed until the current congressionally mandated study is completed. If at that time EPA and other stakeholders find that regulation is necessary and want to begin regulation, it must go through the proper rule making process. It can't be done, and shouldn't be done through guidance within an existing well class.

Sincerely,


Jack Dalrymple
Governor and Chairman


Wayne Stenehjem
Attorney General


Doug Goehring
Agriculture Commissioner

Enclosures

CHAPTER 528

HOUSE CONCURRENT RESOLUTION NO. 3008

(Representatives DeKrey, Kempenich, Skarphol)
(Senators Christmann, Wardner, O'Connell)

A concurrent resolution urging Congress to clearly delegate responsibility for the regulation of hydraulic fracturing to the states.

WHEREAS, hydraulic fracturing, a mechanical method of increasing the permeability of rock, thus increasing the amount of oil or gas produced from the rock, has greatly enhanced oil and gas production in North Dakota; and

WHEREAS, oil and gas production increases in North Dakota have led to growth in employment and economic development as well as promotion of energy independence for the United States; and

WHEREAS, the state of North Dakota, through the Oil and Gas Division of the Department of Mineral Resources, has proven more than capable of regulating oil and gas recovery processes and ensuring the safety of workers while protecting the environment; and

WHEREAS, the state, through the Oil and Gas Division of the Department of Mineral Resources, is best situated to closely monitor oil and gas drilling and fracturing operations to ensure they are conducted in an environmentally sound manner;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:

That the Sixty-second Legislative Assembly urges the Congress of the United States to clearly delegate responsibility for the regulation of hydraulic fracturing to the states; and

BE IT FURTHER RESOLVED, that the Secretary of State forward copies of this resolution to the administrator of the Environmental Protection Agency and to each member of the North Dakota Congressional Delegation.

Filed March 28, 2011

Introduced by

Representatives Kasper, Bellew, Drovdal, Rust

Senators Andrist, Nodland

(Approved by the Delayed Bills Committee)

1 A concurrent resolution urging Congress to clearly limit United States Environmental Protection
2 Agency regulation of hydraulic fracturing under the Safe Drinking Water Act to well stimulation
3 treatments that use diesel fuel as the primary constituent--more than 50 percent diesel fuel by
4 volume--of hydraulic fracturing fluid.

5 **WHEREAS**, hydraulic fracturing, a mechanical method of increasing the permeability of
6 rock, thus increasing the amount of oil or gas produced from the rock, has greatly enhanced oil
7 and gas production in this state; and

8 **WHEREAS**, oil and gas production increases in this state have led to growth in employment
9 and economic development as well as promotion of energy independence for the United States;
10 and

11 **WHEREAS**, the Energy Policy Act of 2005 uses the term "diesel fuel" more than 40 times
12 and defines "diesel fuel" according to the American Society for Testing and Materials standard
13 specifications for fuel oils; and

14 **WHEREAS**, the Environmental Protection Agency is being urged to define "diesel fuel" in
15 Section 322 of the Energy Policy Act of 2005 in a different and broader manner than the
16 definition of "diesel fuel" used elsewhere in the Act; and

17 **WHEREAS**, Section 322 of the Energy Policy Act of 2005 was never intended to subject
18 injection of hydraulic fracturing fluids that contain minute amounts of diesel fuel, typically less
19 than one-tenth of 1 percent by volume, to Safe Drinking Water Act regulation;

20 **NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF**
21 **NORTH DAKOTA, THE SENATE CONCURRING THEREIN:**

22 That the Sixty-second Legislative Assembly urges the Congress of the United States to
23 clearly limit Environmental Protection Agency regulation of hydraulic fracturing under the Safe
24 Drinking Water Act to well stimulation treatments that use diesel fuel as the primary constituent--
25 more than 50 percent by volume--of the hydraulic fracturing fluid; and

Sixty-second
Legislative Assembly

- 1 **BE IT FURTHER RESOLVED**, that the Secretary of State forward copies of this resolution
- 2 to the administrator of the Environmental Protection Agency and to each member of the North
- 3 Dakota Congressional Delegation.

MINING AND GAS AND OIL PRODUCTION

CHAPTER 264

HOUSE BILL NO. 1216

(Representatives DeKrey, Kempenich, Skarphol)
(Senators Christmann, Wardner, O'Connell)

AN ACT to provide that hydraulic fracturing is an acceptable recovery process in North Dakota; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

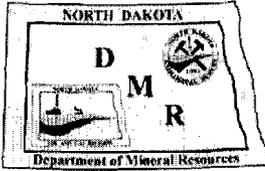
SECTION 1.

Hydraulic fracturing - Designated as acceptable recovery process.

Notwithstanding any other provision of law, the legislative assembly designates hydraulic fracturing, a mechanical method of increasing the permeability of rock to increase the amount of oil and gas produced from the rock, an acceptable recovery process in this state.

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure.

Approved April 11, 2011
Filed April 11, 2011



2011 DISASTER RELIEF BILL

Joint Appropriations Committee
November 7, 2011

Testimony of Lynn D. Helms, Director

The Industrial Commission through the Department of Mineral Resources, Oil and Gas Division currently has jurisdiction over both hydraulic fracturing and Class II Underground Injection in the state of North Dakota under North Dakota Century Code 38-08 and North Dakota Administrative Code 43-02-03-27 and 43-02-05-1 through 14.

HISTORY

The Safe Drinking Water Act (SDWA) was originally passed by Congress in 1974. The Act created the Underground Injection Control (UIC) program and instituted a requirement that injection wells be authorized by permit. However, the Environmental Protection Agency (EPA) did not propose a permitting program to implement the SDWA's UIC permitting requirements until 1976, and did not begin to enforce those requirements until appropriate regulations were finally put in place in 1980, and UIC programs for specific states were approved beginning around 1984.

EPA has not historically considered hydraulic fracturing activities to require a permit under the SDWA and its UIC permitting program. For many years, the Agency's position was that oil and gas production wells being hydraulically fractured were not required to be regulated under the UIC program because the principal function of these wells was not to inject fluids (such as liquid wastes) into the subsurface but was instead to remove (i.e., produce) valuable oil and gas from the subsurface.

Twenty years later EPA's position was challenged when the Florida based Legal Environmental Assistance Fund (LEAF) petitioned EPA in 1994 to withdraw its approval of the Alabama UIC program because that program did not regulate hydraulic fracturing as underground injection. EPA denied the petition and the group sought review before the Eleventh Circuit. In 1997 the Eleventh Circuit rejected EPA's argument that hydraulic fracturing activities were not "underground injection "under the SDWA, relying on what it viewed as the plain language of the statute and ignoring Congressional intent.

Consistent with the court's decision, In **May 1999** EPA subsequently initiated proceedings to withdraw approval of Alabama's Class II UIC program. The Alabama Oil & Gas Board went through a rulemaking process and proposed new regulations addressing hydraulic fracturing operations, which EPA approved **Jan. 19, 2000**. In doing so, EPA noted that hydraulic fracturing is a one-time activity (often taking only a couple of hours) and that it did not seem entirely appropriate to categorize a well being hydraulically fractured as a Class II well for its entire operational life - which could encompass many years - because of a temporary activity. EPA agreed that Alabama's program could treat hydraulic fracturing as a "Class II-like" activity adhering to some, but not all of EPA's regulatory requirements for Class II wells. EPA's approval of Alabama's revised program was again challenged and reviewed by the Eleventh Circuit in **2001**. The LEAF II court concluded that EPA's UIC regulatory scheme was of such a nature that all injection wells fall into one of five categories; under this scheme, Class II wells are those wells that are used for injection of fluids for specified purposes related to oil and gas operations while Class V is a catch -all category. Because EPA did not argue that hydraulic fracturing should be considered a Class V well and apparently was not willing to revise its existing regulatory structure, the LEAF II court believed it had no option but to find that Alabama's program must classify wells being hydraulically fractured as Class II UIC wells. LEAF appealed to the US Supreme Court in **2002**, but the court refused to hear the appeal. The court remanded to EPA to determine whether Alabama's revised program for the regulation of hydraulic fracturing met the requirements for Class II wells. EPA published a notice in the Federal Register in **July 2004** setting forth its response to the Court's remand. In its notice, the Agency stated that it still had not promulgated any "national regulations expressly and specifically designed to establish minimum requirements for state programs that regulate hydraulic fracturing of coal beds to enhance methane production. EPA expressed concern about "according `full' Class II status" to oil and gas wells being hydraulically fractured to increase production because the production of natural gas in Alabama could be impeded as a result of the imposition of certain regulatory requirements applicable to Class II wells, contrary to the mandate of Congress. The Agency reiterated that "EPA's Class II regulations were not designed to, and do not specifically address the unique technical and temporal attributes of hydraulic fracturing. EPA ultimately determined that the Alabama program was not required to comply with all of the specific regulations promulgated by EPA for Class II UIC wells because of the flexibility provided by Section 1425 of the SDWA, for state UIC programs related to oil and gas production wells. At the same time, EPA did not withdraw approval for any other of the 32 states that operate under state -administered, EPA-approved UIC programs even though none of these states had modified its UIC program to regulate hydraulic fracturing. EPA also did not require oil and gas well operators using hydraulic fracturing to obtain Class II UIC permits in those states in which the UIC program is directly administered by EPA, such as New York and Pennsylvania. In light of EPA's then just-issued study concerning the potential impacts of hydraulic fracturing of coal bed methane wells on Underground Sources of Drinking Water (USDW) and its conclusion that "hydraulic fracturing did not present a significant public health risk," the Agency told members of Congress that "we see no reason at this time to pursue a national hydraulic fracturing regulation to protect USDWs or the public health."

Congress explicitly affirmed the historical approach of not regulating hydraulic fracturing under the SDWA and largely overturned the LEAF I and LEAF II decisions with the passage of the Energy Policy Act of 2005.

SEC. 322. HYDRAULIC FRACTURING.

Paragraph (1) of section 1421(d) of the Safe Drinking Water Act (42 U.S.C. 300h(d)) is amended to read as follows:

“(1) UNDERGROUND INJECTION.—The term ‘underground injection’—

“(A) means the subsurface emplacement of fluids by well injection; and

“(B) excludes—

“(i) the underground injection of natural gas for purposes of storage; and

“(ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.”.

The 2005 Act's exclusion did not extend to hydraulic fracturing with diesel fuels, thereby providing EPA with the authority to regulate hydraulic fracturing with diesel fuel under the SDWA. However, Congress did not expressly require the regulation of hydraulic fracturing with diesel fuel or otherwise dictate how EPA must address such operations. As late as 2008, EPA had done nothing with regard to nationwide regulation of hydraulic fracturing operations utilizing diesel fuels and continued to stand by its 2004 study finding that hydraulic fracturing poses little or no threat to USDW.

Notwithstanding the lengthy history of effective non-acquiescence in the LEAF I and LEAF II decisions and without any other intervening action by Congress or any court, EPA in early 2010 announced via its website that “[a]ny service company that performs hydraulic fracturing using diesel fuel must receive prior authorization from the UIC program. Injection wells receiving diesel fuel as a hydraulic fracturing additive will be considered Class II wells by the UIC program”. The statements appeared without any opportunity for comment by members of the regulated community or even any notice.

In light of the irregular nature of EPA's decision-making process and the significance of its economic consequences, among other things, the Independent Petroleum Association of America (IPAA) filed an action seeking review of EPA's decision. Oral arguments in this case will be heard by the US Court of Appeals District of Columbia Circuit on November 14, 2011. The North Dakota Industrial Commission is communicating our support of the IPAA position to EPA.

It is likely that a settlement will be reached. This settlement is unlikely to result in EPA dropping efforts to regulate hydraulic fracturing using diesel fuel, but instead is likely to just require that proper rule making begin at some future date.

At a recent Ground Water Protection Council (GWPC) meeting in Atlanta, GA the EPA suggested that it will seek a broad definition of diesel fuels in its draft guidance for permitting hydraulic fracturing operations, an approach favored by federal officials, some Democrat congressmen, and environmentalists because it requires permits for a broader range of operations that use substances found in diesel, such as benzene, toluene, ethylbenzene and xylene (BTEX) compounds, in fracturing fluids. **The typical North Dakota Bakken frac contains 0.088% petroleum distillates.**

"I think you'll see a definition that takes into consideration the physical and chemical characteristics" of diesel fuels, Ann Codrington, acting director of EPA's Drinking Water Protection Division, told the Sept. 27 annual GWPC meeting. The initial website document listed one possible definition as **"Any amount of diesel fuel (whether mixed with or applied to other constituents being injected)"** Codrington said EPA has completed its draft guidance for permitting fracturing operations that use diesel fuel under the SDWA submitted the document for White House Office of Management & Budget (OMB) review and "In this climate, the expectation is that OMB will review the document for at least 90 days". An EPA source says that staff has been working on crafting the guidance to ensure it can withstand OMB review and a likely legal challenge from industry groups who have already filed the IPAA lawsuit.

The definitional question is "just one" among a number of aspects of the guidance that have contributed to the delay, but industry and state regulators have identified it as a critical point because it will determine how many fracturing operations are subject to the permitting requirements. Industry and state regulators argued to EPA in stakeholder meetings earlier this year that "diesel fuel" refers to specific products linked to two specific Chemical Abstract Services numbers, or, alternatively, that diesel fuels are already well defined in a regulatory context, including EPA's fuels and fuel additive standards. The latter definition identifies diesel fuels as "any fuel sold in any state or territory of the U.S. and suitable for use in diesel engines, and that is a distillate known as No.1 or No.2, a non-distillate fuel with comparable chemical and physical properties (bio diesel), or a mixture of fuels meeting the requirements of the above paragraphs." **Although the word diesel is used 174 times and "diesel fuel" is used 45 times in the Energy Policy Act of 2005 the EPA is suggesting a unique definition for the single reference to diesel fuel for hydraulic fracturing in section 322 of the law.**

Representatives of four EPA regions, the Energy Department and the Interior Department during a May 10 meeting voiced concern that a "narrow definition of diesel fuels could make it economical to design fracture fluid components that are hydrocarbon-based but fall outside of the permit requirement for hydraulic fracturing using diesel fuels". The CAS numbers are preferred by industry and states because they offer more clarity and certainty, but Codrington said during the Sept. 27 GWPC meeting that EPA found CAS numbers are not always good indicators of the physical characteristics of a substance.

Recommendation

It is this critical definition which may require the Industrial Commission to initiate legal action between now and the regular 2013 Legislative Session. Over 27,000 North Dakota jobs could be at risk and an entire industry could be idled for 18-24 months, never to return to its former activity level. We must be prepared to defend our state's historical right to regulate this activity.