



Senate Bill 2371 Section 28 Status Report

Budget Section
June 19, 2012

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 43-02-03-27.1 and 43-02-05-1 through 14.

Congress explicitly affirmed the historical approach of not regulating hydraulic fracturing under the Safe Drinking Water Act (SDWA) 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 the Environmental Protection Agency (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.

At the September 27, 2011 Ground Water Protection Council (GWPC) meeting in Atlanta, GA the EPA suggested that it would seek a broad definition of diesel fuels in its draft guidance for permitting hydraulic fracturing operations.

It was this critical definition which led the Industrial Commission to request contingency funds to initiate legal action if required between now and the regular 2013 Legislative Session.

Draft EPA Guidance for permitting hydraulic fracturing using diesel fuel were published in May with comments due by 5pm EDT on July 9, 2012.

There are a significant number of concerns with the EPA draft guidance, but the major points are as follows:

1) **This is a state's rights issue.** States that have adopted hydraulic fracturing rules that include chemical disclosure, well construction, and well bore mechanical integrity testing requirements should be explicitly exempted from the guidance.

EPA has termed this proposal as “guidance” and stated that it is not a regulation. At the same time, EPA has explicitly stated the published draft guidance that EPA retains an oversight role in primacy states and may commence enforcement actions under specific conditions if an owner or operator violates a UIC requirement.

EPA states that this guidance does not apply to states, tribes, and territories with UIC primacy, but goes on to explain how such entities must choose either to prohibit hydraulic fracturing using diesel fuels or utilize various approaches to integrate UIC and other oil and gas permitting, “although a UIC permit will still be necessary”.

In December 2010 EPA commenced enforcement action against Range Resources over the objections of the Texas Railroad Commission. After 15 months of appeals, injunctions, and penalties EPA agreed to dismiss the case when they lost another Clean Water Act case that was appealed to the US Supreme Court.

2) **The definition of diesel fuel in the draft guidance is too broad. 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 recommending a unique definition for the single reference to diesel fuel in section 322 of the law.** The definition in the draft guidance includes six Chemical Abstract Service Registry Numbers (CASRN) as well as the language “any portion of the injectate that has any of the CASRNs, or is referred to by its **primary name** or any **associated common synonyms**”. In addition the draft guidance states that “**EPA may periodically update** this list of CASRNs recommended for UIC permitting purposes after providing notice and an opportunity for public comment” because “new chemical compounds are developed and assigned new CASRNs on an ongoing basis and some of these compounds may be **substantially similar in chemical and physical structure to existing compounds** in the list of six CASRNs.”

The typical North Dakota Bakken frac fluid contains no diesel fuels as defined by the four appropriate CASRNs in the guidance and only 0.088% petroleum distillates as defined by one synonym.

3) EPA made no attempt to identify dangerous concentrations of these materials while allowing biodiesel because although it contains the same chemicals of concern as petroleum-derived diesel but in lower concentrations. **The federal Consumer Product Safety Commission exempts household products with concentrations of distillates and other hydrocarbons less than 10% from child resistant packaging and labeling requirements.** This rationale supports the exclusion of hydraulic fracturing fluids containing low concentrations of diesel from the permitting requirements.

The final EPA guidance is expected 90 – 120 days after the comment period ends (late October or early November). If the final guidance contains the current overly broad definition of diesel fuels, requires a UIC permit if any portion of the injectate is a chemical they define as diesel fuel, or maintains the explicit right to commence enforcement actions within primacy states the Industrial Commission will need to initiate immediate legal action. Over 35,000 North Dakota jobs could be at risk and the entire industry could be mired in permitting delays and federal administrative complaint actions for months or years.