

Minutes of a Meeting of the Industrial Commission of North Dakota
Held on March 31, 2015 beginning at 9:30 a.m.
Governor's Conference Room
State Capitol

Present: Governor Jack Dalrymple, Chairman
Attorney General Wayne Stenehjem

Also

Present: Lynn Helms, Department of Mineral Resources
Bruce Hicks, DMR-Oil and Gas Division
Hope Hogan, Attorney General's Office
Matthew Sagsveen, Attorney General's Office
Craig Smith, Crowley Fleck
Ron Ness, ND Petroleum Council
Kari Cutting, ND Petroleum Council
Zac Weis, Marathon Oil
Allen Nygard
Mike McEnroe, ND Chapter of the Wildlife Society
J. Roger Kelley, Continental Resources
Members of the Press

Governor Dalrymple called the Industrial Commission meeting to order at 9:30 a.m. and the Commission took up Department of Mineral Resources business.

Attorney General Stenehjem discussed his recommendation regarding litigation of the United States Department of Interior and Bureau of Land Management (BLM) hydraulic fracturing rule on federal and Indian lands. He said at the Commission's March 24 meeting his office was asked to look into the different options the State has with respect to potential litigation regarding the fracturing rule the BLM had announced and was published on March 26. They have worked diligently in his office on this issue and he recognized the work done by Matthew Sagsveen, head of his Natural Resources Division, and Hope Hogan.

He stated that on March 26 the regulations were published in the Federal Register which starts the sixty day process before which rules will become final. That same day, the State of Wyoming filed its own lawsuit challenging the applicability and lawfulness of this proposed rule. He visited at length with an attorney from the Wyoming Attorney General's Office to discuss their process and he has a copy of their filing. (A copy of that filing is available in the Commission files.) He stated that as he and staff looked through them and found that in most respects the claims they have in their lawsuit parallel the interests the State of North Dakota had with respect to North Dakota's regulations for hydraulic fracturing.

Attorney General Stenehjem outlined what Wyoming's claim is. He noted that their claims parallel in many respects the comments that the Commission has submitted on at least three occasions when the Industrial Commission objected to the draft rules. Chief among them is recognition that the Administrative Procedures Act requires courts to hold unlawful and set aside any agency action that is contrary to the law and in excess of statutory jurisdiction. The BLM's hydraulic fracturing rule exceeds the statutory authority that Congress granted the Department of the Interior and BLM in both the Federal Land Policy and Management Act (FLPMA) and the Mineral Leasing Act (MLA). The BLM's hydraulic fracturing rule regulates the underground injection of fluids and proppants as part of the hydraulic fracturing process but in 1974 Congress created a comprehensive program for regulated underground injection in Part C of the Safe

Drinking Water Act commonly known as the Underground Injection Control Program, (UIC), which the Commission has discussed on many occasions. That UIC Program commits exclusive authority to regulate underground injection to the states and the U.S. Environmental Protection Agency. In fact, one court said it is clear that Congress dictated that all underground injection be regulated under the Safe Drinking Water Act. This conforms with the statement Governor Dalrymple made that recognized that the states are given primacy in the area of regulation of water within its boundaries. The FLPMA which Congress enacted two years after that does not authorize the BLM to create a separate program to regulate underground injection outside of the Safe Drinking Water Act. In that Act, Congress generally required BLM to manage public lands for sustained yields with multiple uses, to prevent unnecessary and undue degradation of the lands and to protect the quality of environmental ecological water resources on public lands. But Congress made it clear that the FLPMA shall not be construed – quoting the Congressional Record – as affecting in any way any law governing use of water from public lands nor as superseded in modifying or repealing existing laws applicable to the various federal agencies which are authorized to develop or participate in the development of water resources or exercising licensing or regulatory functions in relation thereto. Attorney General Stenehjem stated that is clear.

He continued by stating that the MLA does not provide the Department of Interior or BLM authority to regulate underground injections. The MLA regulates the leasing and development of federally owned oil and gas resources. The MLA authorizes the Secretary of Interior to regulate surface disturbing activities and to prevent waste of oil and gas resources but nowhere in the MLA does Congress contemplate the regulation of underground injection. In light of Congress's specific intent that the UIC Program provide exclusive means for regulating underground injections and general authorities granted to BLM and the Department of the Interior cannot be read to authorize regulation of underground injection outside that Underground Injection Control Program. If Congress had intended those laws to create special BLM or Interior Department programs for regulating underground injection outside the Safe Drinking Water Act Congress would have said so as it had in a number of other contexts. In 2005, the Energy Policy Act Congress prohibited the regulation of hydraulic fracturing under the UIC Program although Congress required all underground injections including those on federal property to be subject to uniform regulation under that program. BLM's hydraulic fracturing rule purports to regulate precisely that activity that Congress prohibited from federal regulation under the UIC Program.

Attorney General Stenehjem stated that he thinks BLM's hydraulic fracturing rule exceeds the statutory jurisdiction that Congress granted to BLM and is contrary to the Safe Drinking Water Act where the state is determined to have primacy and this seeks to usurp and override the State's authority.

Attorney General Stenehjem said the Wyoming lawsuit and any lawsuit North Dakota would file would declare that the respondents violated the Administrative Procedures Act and the Safe Drinking Water Act by promulgating these rules. Wyoming asks for a temporary and permanent injunction and that those rules be set aside. These are in parallel to the kinds of comments that the Commission had previously submitted to the BLM as this proposed rule worked its way through the system.

Attorney General Stenehjem said we have a couple options and he has a recommendation.

- North Dakota could file its own lawsuit here in the State of North Dakota. That has a couple of advantages but mostly some reasons why it might not be a good idea to do that. If we did file a lawsuit here in North Dakota there is always a possibility that the court would simply stay proceedings here in North Dakota until the Wyoming proceedings were completed. It could proceed and if that happens there is the risk that we could wind up with a number of state filings; similar lawsuits in their own jurisdictions and have a variety of different potential results. The most likely thing that would happen if we filed here is that this case and other cases that might be filed elsewhere would be consolidated in one court--in this case it would likely be Wyoming because they are the state that filed first.
- The other option, the one he is recommending, is that the State of North Dakota intervenes in the lawsuit that has already been filed by the State of Wyoming. That is something that is generally granted. That would give us an opportunity to be heard as we have common interests. Wyoming was the first state to adopt its own comprehensive strategy for regulation of hydraulic fracturing, North Dakota was the second. This will give us an opportunity to be heard there. Also, importantly he thinks because our geology is different and our rules vary in some respects from those in Wyoming, we would have an opportunity to make a distinction if that became necessary but for the most part, we are likely to be in common interest with the kind of arguments that Wyoming is making. That seems like the most cost efficient and reasonable approach for the Commission to take.

Attorney General Stenehjem stated it is his recommendation to authorize his office to intervene in the lawsuit filed by the State of Wyoming in Wyoming and to take such other legal action that may be necessary or proper.

Attorney General Stenehjem said that the BLM has reached out to the State of Wyoming seeking to see if there might be a possibility of reaching a memorandum of understanding. He is not sure that is permissible because this is now a rule and not just a policy and whether they can grant a blanket exemption to a state under the rule is something he thinks is not possible. They have been reaching out to us in North Dakota to at least discuss the possibility of such a memorandum of understanding. He indicated that he is always willing to sit down and listen to what it is they have to say although he is not too optimistic about it. They may have some kind of proposal that will recognize the State has primacy and that we have rules that we have adopted and have been operating under for a number of years and that are working well in the State of North Dakota. Anything short of recognizing our primacy is not something he thinks is acceptable but we can discuss it as a Commission if it comes to that.

Attorney General Stenehjem stated that one of the major problems that we have with this rule is the timeframe. The Commission has mentioned this in its prior comments. Getting a permit from the BLM, federal government or any of these agencies can range up to 290 days and in North Dakota we are doing it in a matter of a few days or a few weeks. BLM is

looking at a system that would increase that period of time up to a matter of months and will dramatically increase the amount of work they have and they have acknowledged they do not have the staff to issue the permits on a timely basis. Now they propose this kind of a rule that will only increase to months or perhaps even years the time that it takes them to issue a permit. So for all of those reasons he indicated that was his recommendation.

It was moved by Attorney General Stenehjem and seconded by Governor Dalrymple that the Industrial Commission accept the recommendation of the Attorney General and authorize the Attorney General to intervene in the lawsuit filed by the State of Wyoming and take such other legal action that he may deem proper and necessary to set aside the United States Department of Interior and Bureau of Land Management hydraulic fracturing rule published in the Federal Register on March 26, 2015.

In response to a question, the Attorney General indicated that the State of North Dakota would become a party to the case and have a right to file its own briefs and its own motions. The State of Wyoming Attorney General's Office stated that they would welcome the State of North Dakota's participation in the case.

Attorney General Stenehjem informed everyone that there will be a motion in Wyoming soon to get a temporary injunction to prohibit implementation of this rule. His plan is that North Dakota's motion to intervene will be filed tomorrow.

Governor Dalrymple said he finds the entire situation frustrating because he thinks the BLM would say in casual conversation with us that they are impressed with the rules that we have developed in North Dakota for hydraulic fracturing. They follow very much the goals that they have established for the nation. He thought they feel we are doing a good job and it is frustrating we have to deal with this in a legal context when clearly they are not in a position to enforce and administer every rule in every state in the United States. They must form partnerships with states if they are to have any hope of actually regulating this. North Dakota has a good reputation in its ability to enforce clean air and clean water laws. Governor Dalrymple indicated that the Commission has no choice but to protect its rights to have primacy.

Attorney General Stenehjem said he has not had the opportunity to visit the Three Affiliated Tribes. The tribal government is certainly going to be affected similarly and they may have an interest of their own that they want to assert and it is important to have that conversation with them as well. Governor Dalrymple concurred that this be done as soon as possible.

On a roll call vote, Governor Dalrymple and Attorney General Stenehjem voted aye and Commissioner Goehring was absent and not voting. The motion carried.

Attorney General Stenehjem said the Legislature for a number of sessions has appropriated \$1 million recognizing the potential for this kind of litigation. Typically that has been rolled over from one biennium to another and the Department of Mineral Resources has not had to spend it until now. Now is the time to seek authority and dip into that fund to pay some of these expenses. He said that he does not expect a large expenditure as they will be partnering with the State of

Wyoming and perhaps other states that may join. They hope to do a considerable amount of the work in-house. They will, however, be seeking involvement of counsel that has expertise in the Administrative Procedures Act and to get their advice on the litigation.

Attorney General Stenehjem also commented that House Bill 1432 is still pending and that includes an appropriation to be used for litigation. If passed that would also be a source of funding if needed.

It was moved by Attorney General Stenehjem and seconded by Governor Dalrymple that the Department of Mineral Resources be authorized to expend the litigation funding provided in the Industrial Commission/Department of Mineral Resource 2013-2015 budget for the litigation to set aside the United States Department of Interior and Bureau of Land Management hydraulic fracturing rule, to request that any unused litigation funding in the 2013-2015 budget be rolled over to the 2015-2017 biennium and to request additional litigation funding for the 2015-2017 biennium for this litigation as well as other litigation that the Attorney General and Commission may enter into. On a roll call vote, Governor Dalrymple and Attorney General Stenehjem voted aye and Commissioner Goehring was absent and not voting. The motion carried.

There was discussion about having all the various appropriations for litigation consolidated into one appropriation so there is flexibility to use the resources as needed.

Being no further Department of Mineral Resources business, Governor Dalrymple adjourned the meeting at 9:53 p.m.

INDUSTRIAL COMMISSION OF NORTH DAKOTA



Karlene Fine, Executive Director and Secretary