

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-15

Date Issued: July 26, 1996

Requested by: Wes Norton
Director, Oil & Gas Division

- QUESTIONS PRESENTED -

I.

Whether an applicant for an underground injection permit under N.D. Admin. Code ch. 43-02-05 must satisfy all the elements set forth in N.D. Admin. Code § 43-02-05-03, concerning the definition of "exempt aquifers."

II.

Whether the Industrial Commission may use the authority of N.D. Admin. Code § 43-02-03-02 to grant exceptions to the requirements of N.D. Admin. Code § 43-02-05-03, concerning the definition of "exempt aquifers."

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that an applicant for an underground injection permit under N.D. Admin. Code ch. 43-02-05 is not obligated to satisfy all the elements set forth in N.D. Admin. Code § 43-02-05-03, concerning the definition of "exempt aquifers."

II.

It is my opinion that the Industrial Commission may use the authority of N.D. Admin. Code § 43-02-03-02 to grant exceptions to the requirements of N.D. Admin. Code § 43-02-05-03, concerning the definition of "exempt aquifers," provided that the granting of an exception is not inconsistent with the objectives of the Commission's duty to protect underground sources of drinking water.

- ANALYSES -

I.

Chapter 43-02-05 of the North Dakota Administrative Code governs the underground disposal of saltwater. Its purpose is to protect underground sources of drinking water. These rules are the result of the Safe Drinking Water Act of 1974 (SDWA). 42 U.S.C.A. §§ 300f-300j (1991). "The SDWA establishes a regulatory mechanism to insure the quality of publicly supplied drinking water." Phillips Petroleum Co. v. United States Environmental Protection Agency, 803 F.2d 545, 547 (10th Cir. 1986). The Environmental Protection Agency implements the Act, but may allow states to regulate underground injection if they meet the minimum requirements established by EPA. Id. at 548. North Dakota's program, N.D. Admin. Code ch. 43-02-05, has been approved by the EPA. 40 C.F.R. § 147.1750 (1995).

Disposal into an underground source of drinking water is prohibited unless the source is an "exempted aquifer." N.D. Admin. Code § 43-02-05-02. An "exempted aquifer" is described in N.D. Admin. Code § 43-02-05-03. In preparing this opinion some uncertainty arose as to the exact terms of Section 43-02-05-03.

As printed in the current edition of the N.D. Admin. Code § 43-02-05-03 states:

An aquifer or a portion thereof which meets the criteria for an underground source of drinking water may be determined by the commission, after notice and hearing, to be an exempted aquifer if it meets all of the following criteria:

1. It does not currently serve as a source of drinking water.
2. It cannot now and will not in the future serve as a source of drinking water because:

- a. It is mineral, hydrocarbon, or geothermal energy producing, or can be demonstrated by a permit applicant as part of a permit application for an underground injection permit to contain minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible;
 - b. It is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical; or
 - c. It is so contaminated that it would be economically or technologically impractical to render that water fit for human consumption; or
3. The total dissolved solids content of the ground water is more than three thousand and less than ten thousand milligrams per liter and it is not reasonably expected to supply a public water system.

Letter dated July 19, 1996, from Jeffrey N. Nelson, Asst. Code Revisor, N.D. Legislative Council, to Charles Carvell, Asst. Attorney General (hereafter cited as "Nelson Letter").

However, this version of the rule as published in the Administrative Code is not the version that the Industrial Commission adopted and Attorney General approved in 1982 and sent to the Legislative Council for publication. See Letter dated July 19, 1996, from Karlene Fine, Secretary, N.D. Industrial Commission to Charles Carvell, Asst. Attorney General (hereafter cited as "Fine Letter"); Nelson letter. Upon receipt of the rule, the Legislative Council revised it. See Nelson Letter. One change added the words "all of" in the introductory sentence. See attachment to Nelson letter showing changes made by Legislative Council. Another change deleted the word "and," which appeared immediately after the first subsection. Id. Had the Legislative Council not made

these changes the rule that would have appeared in the Administrative Code would have no substantive differences with EPA's exempted aquifer rule. 40 C.F.R. § 146.4 (1995).

Substantive changes made by the Legislative Council have no effect. The administrative rule in force is that adopted by the agency and not as it was revised by the Council. A number of courts have addressed the question of the effect of revisions or errors made by code revisors. Because code revisors are not lawmakers, their substantive revisions are of no effect. E.g., United States v. Welden, 377 U.S. 95 (1964) ("Certainly where, as here, the 'change of arrangement' was made by a codifier without the approval of Congress, it should be given no effect"); Alcala v. Wyoming State Bd. of Barber Examiners, 365 F.Supp. 560, 562 (D. Wyo. 1973) ("it is clear that the original enactment must prevail over the erroneous compilation"); Hinchey v. Thomasson, 727 S.W.2d 836, 838 (Ark. 1987) (an enacted law is valid and in force even if the revisor fails to include it in the code); Elliot v. Blue Cross & Blue Shield, 407 A.2d 524, 528 (Del. 1979) (same). This office has concluded that substantive statutory changes made by a code reviser are not to be honored. 1988 N.D. Op. Att'y Gen. 99. See also 1989 N.D. Op. Att'y Gen. 1, 4 ("The action of the 1943 Code Revisor cannot take the place of legislative action . . ."). The changes made by the Legislative Council in adding the words "all of" directly before "the following criteria" in the opening sentence of the rule and in deleting the word "and" after the first subsection, therefore, may not be used to change the interpretation of the rule as promulgated by the Industrial Commission and submitted to Legislative Council for publication.

Even with the presence of "all," however, the rule does not require that an applicant satisfy every one of the listed criteria. The rule requires that subsection 1 must be met in all cases. But at the end of subsection 2 there is the word "or." All words in a rule must be given effect. See County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). The only meaning that "or" can have is to give an applicant alternatives to compliance. Its presence means that to qualify as an exempted aquifer, either subsection 2 or subsection 3 of the rule needs to be satisfied, but not both.

For example, if an applicant satisfies subsection 3, subsection 2 is irrelevant.

II.

The Industrial Commission is authorized to grant exceptions to its administrative requirements. N.D. Admin. Code § 43-02-03-02 states that "[t]he commission may grant exceptions to this chapter, after due notice and hearing, when such exceptions will result in the prevention of waste and operate in a manner to protect correlative rights." N.D. Admin. Code § 43-02-05-01.1, which took effect on July 1, 1996, makes Section 43-02-03-02 applicable to the underground injection program.

N.D. Admin. Code § 43-02-03-02 authorizes exceptions to the rules only if waste will be prevented or correlative rights will be promoted. Correlative rights are the rights of mineral owners and well operators to recover their fair share of a reservoir's oil and gas. Amoco Prod. Co. v. North Dakota Industrial Comm'n, 307 N.W.2d 839, 842 n.4 (N.D. 1981). "Waste" is defined in N.D.C.C. § 38-08-02(15) to include such matters as physical waste, dissipation of reservoir energy, locating and operating wells in a way that tends to reduce the ultimate recovery of oil and gas, operating a well which tends to cause unnecessary surface loss, inefficient storing of oil, and production in excess of marketing facilities and market demand.

The Industrial Commission may use N.D. Admin. Code § 43-02-03-02 to grant an extension from satisfying all elements of N.D. Admin. Code § 43-02-05-03 if to do so will prevent waste or protect correlative rights. In exercising this authority, however, I emphasize that the Commission must keep in mind the purpose of the underground injection program and not exempt its rules if doing so will jeopardize an underground source of drinking water. The Commission cannot apply the exception in a way that swallows the rule.

In defining "waste," N.D.C.C. § 38-08-02(15) uses the word "includes" and then goes on to list a number of matters that constitute waste. By the use of the word "includes," the Legislature did not intend the listed items to be exclusive.

See Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980). The items set forth in the definition are illustrative, not exhaustive. See Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941). "Waste", therefore, can include other matters, such as economic waste. For instance, if a company would be required to use a much more expensive means of disposal, such as trucking water to disposal sites located a considerable distance from the producing wells, instead of being able to dispose of water by piping it to a nearby disposal well, the increased cost which is not necessary to protect an underground drinking source could be viewed as economic waste.

Further, the definition of waste in N.D.C.C. § 38-08-02(15) includes operating a well in a manner that tends to cause a reduction in the quantity of oil and gas ultimately recovered. N.D.C.C. § 38-08-02(15)(c). Operation of a well includes water disposal. Water disposal costs are taken into consideration in deciding whether a well has reached its economic limit. The economic life of wells could be shortened with a resultant reduction in the oil and gas ultimately produced if water disposal costs are excessive. This circumstance also involves correlative rights. If less oil and gas is produced because of high water disposal costs, correlative rights are adversely affected. Whether waste will be prevented or correlative rights will be promoted in any given instance is a question of fact for the Industrial Commission.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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