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Class VI Underground Injection Control Program

Attorney General's Statement

I hereby certify, pursuant to my authority as Attorney General for the State of North Dakota and in accordance with the provisions of Part C of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.*, as amended, and 40 CFR 145.24(a), that in my opinion the laws of the State of North Dakota provide adequate authority to apply for, assume and carry out the program set forth in the Program Description submitted by the North Dakota Industrial Commission, Department of Mineral Resources, Oil and Gas Division (Commission). The specific authorities are contained in statutes and regulations lawfully adopted and will be in full force and effect on the date of approval of this program, as specified below:

1. Prohibition of Unauthorized Injection

Federal law prohibits any underground injection unless authorized by permit issued under the UIC program (SDWA Section 1421(b)(1)(A), 40 CFR 144.11, and 144.31 (a)).

State Statutory and Regulatory Authority

North Dakota Century Code Section 38-22-04

North Dakota Administrative Code Section 43-05-01-02.5

Remarks of Attorney General

N.D.C.C. Section 38-22-04 requires a permit from the Commission for the geologic storage of carbon dioxide. N.D.A.C. Section 43-05-01-02.5 requires that a permit be obtained from the Commission before underground injection may be conducted. Construction of an underground injection well prior to the issuance of a permit is prohibited by N.D.A.C. Section 43-05-01-02.5.

2. Prohibition of movement of fluid into underground sources of drinking water

Under federal law, no owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water if the presence of that contaminant may cause a violation of any primary drinking water regulation or may otherwise adversely affect the health of persons (SDWA Section 1421(b)(1)(A) and 40 CFR 144.12 (a)).

State Statutory and Regulatory Authority

North Dakota Administrative Code § 43-05-01-02.2

Remarks of Attorney General

N.D.A.C. Section 43-05-01-02.2 is virtually identical to the federal requirement.

3. Prohibition of Endangering Drinking Water Sources

State authority shall require that the applicant for a permit to inject satisfy the State that underground injection will not endanger drinking water sources (SDWA Section 1421(b)(1)(B)(i)).

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-08 (7)

North Dakota Administrative Code § 43-05-01-02.2

Remarks of Attorney General

N.D.C.C. § 38-22-08 (7) requires that the Commission make a finding that the storage facility will not affect surface waters or fresh water formations or endanger the environment before issuing an injection permit.

N.D.A.C. Section 43-05-01-02.2 is virtually identical to the federal requirements in 40 CFR §144.12 (a)

4. Authority to Issue Permits or Rule

The SDWA requires State authority to issue permits or promulgate rules for underground injection which are as stringent as regulations of the United States Environmental Protection Agency (SDWA Section 1422(b)(1)(A)(i) and 40 CFR Parts 124, 144, and 146).

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-03

North Dakota Administrative Code Section 43-05-01-02.5

Remarks of Attorney General

N.D.C.C. § 38-22-03 grants the Commission jurisdiction to establish rules and permit conditions. The administrative rules established by the Commission under N.D.A.C. Chapter 43-05-01 meet the United States Environmental Protection Agency stringency requirements.

N.D.A.C. Section 43-05-01-02.5 mandates that any underground injection of carbon dioxide for the purpose of geologic storage must be authorized by permit from the Commission.

5. Authority to Condition Authorized Injection Activities

The SDWA requires that the State have the authority to condition permits in accordance with conditions applicable to all permits (40 CFR 144.51 and 144.52)

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-09

North Dakota Administrative Code Section 43-05-01-07.3

North Dakota Administrative Code Section 43-05-01-07.4

Remarks of Attorney General

N.D.C.C. § 38-22-09 allows the Commission to “include in a permit or order all things necessary to carry out [N.D.C.C. Chapter 38-22] and to protect and adjust the respective rights and obligations of persons affected by geologic storage of carbon dioxide.” N.D.A.C. Section 43-05-01-07.3 lists the specific conditions that are applicable to all storage facility permits. To address the unique factors presented by each individual case, N.D.A.C. Section 43-05-01-07.4 requires that the Commission establish any other additional conditions necessary to prevent the endangerment of underground sources of drinking water.

6. Authority to Impose Compliance Evaluation Requirements

The SDWA requires the State to have authority to enter in or onto a site or facility for the purpose of inspections (SDWA Section 1421(b)(1)(C) and 40 CFR 144.51 (i) (1) and (3)).

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-03 (3)

North Dakota Administrative Code Section 43-05-01-04

North Dakota Administrative Code Section 43-05-01-07.3 (9) (a) and (c)

Remarks of the Attorney General

N.D.C.C. § 38-22-03 (3) grants the Commission authority “to inspect equipment and facilities; to observe, monitor, and investigate operations; and to inspect records required to be maintained at the facility.” N.D.A.C. Section 43-05-01-04 grants the Commission and its authorized agents the authority to have access to all storage facility records. N.D.A.C. Section 43-05-01-07.3 (9)(a) and (c) are virtually identical to 40 CFR 144.51 (i)(1) and (3).

7. **Authority for Enforcement Requirements**

- a. The State agency must have authority to immediately restrain any person from engaging in any unauthorized injection that is endangering or causing damage to public health or the environment (40 CFR §145.13(a)(1)).

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-12

Remarks of the Attorney General

N.D.C.C. § 38-22-12 mandates the Commission to take action to ensure “a storage facility does not cause pollution or create a nuisance;” “that substances that compromise ... the integrity of a storage reservoir do not escape from the storage facility.”

- b. The State agency must have authority to sue in courts of competent jurisdiction to abate any threatened or continuing violation of any program requirement or permit condition, without the necessity of prior revocation of a permit (40 CFR §145.13(a)(2)).

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-03(1)

North Dakota Century Code § 38-22-18

North Dakota Administrative Code Section 43-02-03-90

North Dakota Administrative Code Ch. 43-05-01

Remarks of the Attorney General

N.D.C.C. § 38-22-03(1) grants the Commission jurisdiction over all persons and property necessary to enforce the provisions of N.D.C.C. Chapter 38-22. Prior revocation of the permit before abatement effects is not required by N.D.C.C. Section 38-22-18, N.D.A.C. Section 43-02-03-90, or N.D.A.C. Chapter 43-05-01.

- c. The State agency must have authority to assess or sue to recover civil penalties and seek criminal remedies (40 CFR 145.13 (a)(3)(i)).

(1) Civil Penalties shall be recoverable in at least the amount of \$2500 per day.

(2) Criminal fines shall be recoverable in at least the amount of \$5000 per day against any person who willfully violates any program requirement.

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-18

Remarks of the Attorney General

N.D.C.C. § 38-22-18 provides that any person who violates a provision of N.D.C.C. Chapter 38-22 or any Commission rule or order under Chapter 38-22 is subject to civil penalty of up to \$12,500 for offense, and each day's violation is a separate offense.

- d. The State agency must have authority to assess or seek civil penalties that are appropriate to the violation (40 CFR 145.13(c)).

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-18

Remarks of the Attorney General

The Industrial Commission has authority to seek civil penalties in an amount up to \$12,500 per each day of violation. In setting the amount of the penalty, the Commission can consider factors such as those set out in 40 CFR 145.13(c).

- e. The State must provide for public participation in the State enforcement process (40 CFR 145.13(d)).

State Statutory and Regulatory Authority

North Dakota Administrative Code Section 43-02-03-88

North Dakota Administrative Code Section 43-02-03-90.1

North Dakota Administrative Code Section 43-02-03-90.2

North Dakota Century Code Chapter 32-40

Remarks of the Attorney General

N.D.A.C. Section 43-02-03-88 provides the process for filing an application for hearing with the Commission; the rule does not limit who may apply for a hearing nor does it limit the purposes for which an application may be filed. N.D.A.C. Section 43-02-03-90.1 authorizes the Commission to hold an investigatory hearing on any application or its own motion. N.D.A.C. Section 43-02-03-90.2 allows the comments or objections of any interested party to become part of the record of any investigatory hearing held by the Commission.

The Environmental Law Enforcement Act N.D.C.C. Chapter 32-40 also permits any person aggrieved by the violation of any environmental statute to bring suit in District Court to enforce a statute or collect damages, or both.

8. Authority for Public Participation in Permit Processing

The SDWA requires state authority to allow for adequate public involvement and participation in permit processing, including draft permits, public comment, public hearing, and response to comments on the final permit (40 CFR Part 124).

State Statutory and Regulatory Authority

North Dakota Century Code § 38-22-06 (1)

North Dakota Administrative Code Section 43-05-01-08

Remarks of the Attorney General

Pursuant to N.D.C.C. § 38-22-06 (1) and N.D.A.C. Section 43-05-01-08(1), the Commission shall hold a public hearing before issuing a permit. N.D.A.C. Section 43-05-01-08(3) provides that the Commission must provide a comment period of at least thirty days. Any interest person can provide written comments and the comments must be considered and answered by the Commission in making a final decision. N.D.A.C. Section 43-05-01-08(6)

9. Authority to Apply Technical Criteria and Standards for Control of Underground Injection Not Less Stringent than 40 CFR Part 146 (Section 1421(a)(1) and (b) (1))

State Statutory and Regulatory Authority

North Dakota Administrative Code Section 43-05-01-11

North Dakota Administrative Code Section 43-05-01-11.1

North Dakota Administrative Code Section 43-05-01-11.2

North Dakota Administrative Code Section 43-05-01-11.3

North Dakota Administrative Code Section 43-05-01-11.4

North Dakota Administrative Code Section 43-05-01-11.5

Remarks of the Attorney General

Under N.D.A.C. Section 43-05-01-11 (Injection Well Construction and Completion Standards); N.D.A.C. Section 43-05-01-11.1 (Mechanical Integrity – Injection Wells); N.D.A.C. Section 43-05-01-11.2 (Logging, Sampling, and Testing Prior to Injection Well Operation); N.D.A.C. Section 43-05-01-11.3 (Injection Well Operating Requirements); N.D.A.C. Section 43-05-01-11.4 (Testing and Monitoring Requirements); N.D.A.C. Section 43-05-01-11.5 (Injection Well Plugging), the Commission has established technical standards at least as stringent as the criteria of 40 CFR Part 146. Furthermore, the Commission can include technical standards as permit conditions under N.D.A.C. Section 43-05-01-07.4.

10. **Authority to Identify Aquifers that are Underground Sources of Drinking Water and Exempted Aquifers (40 CFR 144.7 and 146.4)**

State Statutory and Regulatory Authority

North Dakota Administrative Code Section 43-02-05-03

North Dakota Administrative Code Section 43-05-01-02.4

Remarks of the Attorney General

The provisions for exempted aquifers contained in N.D.A.C. Section 43-02-05-03 and N.D.A.C. Section 43-05-01-02.4 are essentially identical to the federal requirements.

11. **Certification of Statutes as Independent Legal Counsel**

The undersigned attorney does hereby certify that pursuant to the laws of the State of North Dakota he is counsel for the Commission, having full legal authority to independently represent the Commission in court in all matters pertaining to the State program described herein.



Wayne Stenehjem
Attorney General