

# Alaska Oil and Gas Association

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*Kara Moriarty, Deputy Director*

February 8, 2010

Commissioner Dan Seamount, Chair  
Alaska Oil and Gas Conservation Commission  
333 W. 7<sup>th</sup> Avenue, Suite 100  
Anchorage, AK 99501

RE: AOGA Comments on Annular Disposal of  
Drilling Waste [20 AAC 25.080]

Dear Commissioner Seamount:

The 14 members of the Alaska Oil and Gas Association (AOGA) account for the majority of oil and gas exploration, development, production, transportation, refining and marketing activities in the state. We appreciated the opportunity to present testimony on October 15, 2009 and for the Commission's actions during that hearing to postpone any decision on these very important regulations. In both our written comments and the public testimony at the hearing, AOGA voiced its concern that the changes to 20 AAC 25.080 were being made without an adequate public record and significantly, without a stated purpose of why the current regulations, which have been largely unchanged since 1996, needed to be changed. We still hold that opinion and request the AOGCC reconsider its entire rulemaking as explained further in the analysis below.

## Overview of the Issue

The federal Safe Drinking Water Act (SDWA) was written in 1974 and extensively amended in 1986. Among other things, the SDWA and the U.S. Environmental Protection Agency's (EPA's) regulations developed under it, regulate the underground injection control (UIC) of wastes. States are allowed to assume primacy of certain UIC activities.

The heart of the UIC program is its classification of UIC disposal wells into five classes, each with its own regulatory scheme. The state of Alaska, through the AOGCC, has primacy for Class II wells – wells which inject fluid for enhanced oil and gas recovery (EOR) and for the disposal of non hazardous wastes associated with the oil and gas industry.

The SDWA does not regulate the drilling of oil and gas wells. In the years following the 1986 amendments to the Act, EPA (at the same time it was preparing its December 1987 Report to Congress on the Management of Wastes from the Exploration, Development, and Production of Crude Oil, Natural Gas, and Geothermal Energy) at the request of the Alaska oil and gas industry

and the AOGCC determined that the SDWA and EPA's regulations under it did not regulate the annular injection of oil and gas wastes directly associated with the drilling of an oil and gas well. This decision was extremely important to the entire oil and gas industry and is set out in a November 24, 1987 policy memo written from the EPA Office of Water to EPA Region 10 where EPA stated "that the disposal of drilling mud whether in a dry hole or in the annulus of a producing well is not covered by the UIC regulations." The history of that memo and how it was arrived at, the direct correspondence to the AOGCC from EPA, and the corresponding changes that were made to Paragraph 10 of the Memorandum of Agreement (MOA) between the AOGCC and EPA is described in greater detail in our October 9, 2009 comments. A January 8, 1998 letter from EPA Region 10 to the AOGCC then reinforced this decision and stated that the memorandum made it clear that injection of drilling mud into the annulus was not covered by the UIC program and "reinforces the Alaska Oil and Gas Conservation Commission position on the subject." The AOGCC has held firm with this determination since that time, until this recent rulemaking, where it appears to have been inadvertently undermined.

### AOGCC Regulations

AOGCC regulations mirror the EPA determination on annular disposal and form the foundation for the distinction between: (1) annular injection activities regulated under 20 AAC 25.080; and (2) the underground disposal of oil field wastes in 20 AAC 25.252 and any associated requests for a freshwater aquifer exemption under 20 AAC 25.440. Sections 25.252 and 25.440, along with the MOA, form the backbone of Alaska's approved Class II UIC disposal program. Importantly, 20 AAC 25.252(k) reinforces the EPA determination where it states that "the annular disposal of drilling wastes under 20 AAC 25.080 is an operation incidental to the drilling of a well and is not a disposal operation subject to this section."

To obtain approval of Class II UIC disposal activities which may affect fresh water under section 25.252 the SDWA and EPA's regulations often require the AOGCC to issue an aquifer exemption under 25.440 in order for the regulated disposal activity to occur. However, because annular injection is not a regulated disposal activity under the SDWA, neither the SDWA nor EPA regulations require the issuance of an aquifer exemption prior to AOGCC authorization of an annular disposal activity. This distinction is extremely important and has been lost in this rulemaking.

### The Commission's Rulemaking

On May 21, 2009, the AOGCC proposed a revision to 25.080. However, as the Commission has done in other recent rulemakings instead of using strikeout type amendatory language to show the true changes that were being made, the Commission stated it was proposing to repeal the old regulations and readopt all new regulations.

Importantly, the Commission's oversight process for the annular disposal of drilling waste that could impact freshwater -- the most controversial issue being addressed in this rulemaking and a major subject of this hearing -- was not being substantively changed at all. However, you cannot reach that conclusion without a detailed comparison against the current regulations.

AOGCC regulations at 25.080(e)(1) state “In addition, an authorization to dispose of drilling waste under this section is subject to the following conditions:

- (1) drilling waste may not be disposed of into freshwater, unless
  - (A) freshwater is identified in the Application for Sundry Approval; and
  - (B) commission finds that the freshwater has a total dissolved solids content of more than 3,000 mg/l, and is not reasonably expected to supply a public water system; the commission will, in its discretion, provide 15 days notice and the opportunity for a public hearing in accordance with 20 AAC 25.540 before making that finding;”

In its May 21, 2009 rulemaking the Commission did not propose to change this provision. Instead it was reorganized and rewritten as a standalone subsection at 25.080(d). As such, AOGA and its member companies did not comment on that proposal. For that reason, we were extremely surprised by the September 1, 2009 proposal and the Commission’s abrogation of its oversight authority by proposing a section of regulation that would have prohibited annular disposal of drilling waste into freshwater unless the operator applied for and EPA granted an aquifer exemption. Furthermore, nothing in the administrative record explained why the Commission made this change, a fact the Commission acknowledged at the hearing itself.

After its October hearing, the AOGCC asked EPA for written comments to supplement the administrative record in this rulemaking proceeding. The November 20, 2009 letter from EPA states that it did not believe the Commission’s May 2009 regulations followed federal legal requirements. We disagree and believe the agency misinterpreted what was being proposed. In Paragraph two at the third sentence EPA states “20 AAC 25.080(d) ... would authorize the AOGCC to use its discretion in avoiding a public notice period and an opportunity for a hearing *before granting an aquifer exemption.*” The letter then states that EPA informed the AOGCC that the May 21, 2009 rule change would contravene federal statutory and regulatory provisions relating to aquifer exemptions and be considered a major modification to the state’s underground injection control program. This is incorrect.

The process the Commission has followed for two decades that is set out in 25.080(e) for annular injection is well grounded in law and *is not* a decision by the Commission to grant a freshwater aquifer exemption. It was never intended to be because the SDWA does not regulate the annular disposal of drilling waste. In the fall of 1987, EPA described the practice of annular disposal in its Report to Congress and, when asked by the AOGCC, told the Commission that the SDWA and EPA’s UIC regulations did not cover annular injection activities.

Instead, the disposal activities the AOGCC does oversee that are regulated by the SDWA and EPA’s regulations are set out in the 25.252 disposal regulations and the process for securing a freshwater aquifer exemption under 25.252 is set out in 20 AAC 25.440. Importantly, these two sets of regulations remain unchanged.

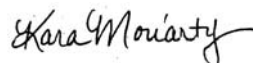
Neither EPA nor the AOGCC have shown why this drastic and substantial change is required.

First, as stated above, annular pumping is not an activity regulated by EPA under the Safe Drinking Water Act or its implementing regulations. As such, EPA cannot require the AOGCC to grant an aquifer exemption under its annular injection regulations. Second, the AOGCC is not changing its UIC Class II disposal regulations or its freshwater aquifer exemption regulations. Third, even if an aquifer exemption was required that process is set out in 25.440. The letter from EPA says the current process the AOGCC uses works. Requiring an aquifer exemption under the annular disposal program will cause timing delays that would severely impact an individual company's plans and work activities. Delegating it to EPA would cause even further delays and would create a process that conflicts with existing AOGCC regulations. Finally, there could be serious implications for exploration activities, especially in remote locations of Alaska, such as the National Petroleum Reserve-Alaska, the Foothills region of the North Slope and the west side of Cook Inlet. Unlike other parts of the country, these drilling prospects are located in very isolated regions, with no infrastructure, roads, or permanent facilities. Mandating an aquifer exemption in these areas under the annular disposal regulations is inconsistent with state and federal law and policy.

In summary, AOGA members appreciate the consideration given to our previous comments. We do not however believe the administrative record supports the change to 25.080 that were proposed in September, and re-proposed in January. We therefore recommend one of two courses of action. First, the Commission should revert to its original proposal at 25.080(d) from May of 2009 that keeps the same regulatory process in place that has existed since at least 1996. As an alternative, the AOGCC could consider another rule making approach to amend (not repeal and readopt) the current regulations. This approach would allow the AOGCC to highlight proposed changes and give the public the opportunity to clearly follow and understand true regulatory changes that are being proposed. Whatever course of action is taken, we strongly recommend the AOGCC retain the distinction between Class II waste disposal activities, which are regulated by the SDWA and EPA regulations, and annular injection activities, which are not, and retain the current language in 20 AAC 25.080 (e)(1).

Again, thank you for soliciting public comment on these proposed regulations. At the February 16, 2010 hearing we will have AOGA member company technical and legal representatives available to address any questions related to this issue.

Sincerely,



KARA MORIARTY  
Deputy Director

Cc: Thor Cutler, EPA, UIC Division