



NORTH DAKOTA
PETROLEUM
COUNCIL

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March 31, 2017

Environmental Protection Agency
Mr. Scott Pruitt, Administrator
Mail Code 28221T
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dear Mr. Pruitt;

Congratulations on your appointment as Administrator of the Environmental Protection Agency. I am the President of the North Dakota Petroleum Council (NDPC) and wanted to take this opportunity to tell you about the overreach of the prior administration that continues to affect NDPC members. Under the previous administration, EPA initiated sweeping Clean Air Act (CAA) Section 114 information requests and threatened company-ending sanctions under the CAA against oil companies operating in North Dakota. EPA's style and process were often contrary to the North Dakota Department of Health's (NDDoH) alternative approach to Clean Air Act Enforcement. In the one consent decree that EPA completed before the election, North Dakota refused to sign the final decree, even though NDDoH had participated fully in months of EPA driven negotiations with the operator. The North Dakota approach produced industry-wide results that immediately benefitted the environment in a shorter timeframe, with substantially less cost and included continued future compliance opportunities. Unfortunately, despite the successful North Dakota effort, we continue to see EPA focused on an aggressive, federal-only approach adopted under the earlier administration.

We respectfully request, consistent with your recent internal directive and President Trump's March 28, 2017 Executive Order, *Promoting Energy Independence and Economic Growth*, that you promptly review EPA's ongoing enforcement activities in North Dakota to determine whether they are consistent with your and the Trump Administration's approach to environmental protection and regulation.¹ We also ask that you seriously consider EPA's adoption of the NDDoH approach to Clean Air Act enforcement and take steps to amend, with court approval, the existing federal consent decree to add North Dakota (ND) so that the state continues to play an important role in protecting its environment. The attached documents describe the EPA Section 114 enforcement process, and contrasts it with the approach that North Dakota utilized. The information provided will show that ND achieved industry-wide compliance plus (above current regulations) in one-third of the time required by EPA to negotiate a settlement with one ND operator. NDPC believes that you will find this information of interest as you seek to make EPA a more effective and efficient agency, which works with states to implement, enforce and adopt resolutions that directly benefit the environment.

Please call or email with any questions you may have. We welcome the opportunity to discuss this with you and would be available to travel to Washington, DC if you feel it would be beneficial.

Thank you for your time and consideration.

Sincerely,

Ron Ness
President

cc: President Donald Trump
ND Governor Doug Burgum
Senator John Hoeven
Senator Heidi Heitkamp
Senator Cory Gardner
Congressman Kevin Cramer

¹ We understand that, on March 2, 2017, EPA Headquarters Assistant Administrators (AAs) and Regional Administrators (RAs) were notified that the Administrator was retaining approval authority for actions having significant regulatory and enforcement effect. The AAs and RAs were directed to "identify and send upward any proposed decisions or final agency actions for the Administrator's review" those items that "would limit the flexibility of the States, limit energy resource use, impose significant costs on industry or commerce, or otherwise likely result in significant public attention on the proposed decisions or final agency actions." See **Pruitt Withdraws Decision-Making Powers From Senior Officials**, <https://insideepa.com/daily-news/pruitt-withdraws-decision-making-powers-senior-officials-email-shows>.

1. **The North Dakota Petroleum Council.** The North Dakota Petroleum Council is a trade association representing more than 510 companies involved in all aspects of the oil and gas industry in North Dakota, South Dakota, and the Rocky Mountain Region. North Dakota is ranked second in the nation in the production of oil and gas, and NDPC members produce 98 percent of the oil and gas in North Dakota. North Dakota produces approximately 350 million barrels of oil per year and 567 billion cubic feet of natural gas per year. In 2015, the economic benefit from the oil and gas industry in North Dakota was approximately \$34 billion. North Dakota has two major economic generators, agriculture and energy. The state has more than 13,000 producing wells, and anticipates the development of tens of thousands of additional wells in the coming decades. North Dakota is only one of seven states to meet all national ambient air quality standards.

2. **The EPA CAA Enforcement Process.** Under the Obama Administration, EPA has, in the past two years, pursued a policy of changing regulatory standards via purported enforcement actions in North Dakota. This “sue and settle” strategy threatened companies with draconian penalties, effectively making settlement the only realistic option, generating new industry-wide “rules” that were not created in a formal rulemaking. EPA, without NDDoH’s consent as the concurrent regulatory authority, utilized its rarely-justified “over-filing” authority under the Clean Air Act in an attempt to develop new, basin-wide storage tank standards outside of the normal rulemaking procedures.

EPA’s “sue and settle” paradigm is slow and costly, and inherently unfair to the companies that are singled out. To pursue this policy regarding storage tank fugitive emissions, EPA first conducts field inspections to identify and allege violations (material and immaterial) of the Clean Air Act. Next, EPA uses Section 114 to collect detailed information about all companies’ facilities where any alleged violations were observed. Finally, EPA threatens enforcement actions under Section 113 of the CAA, using emissions calculated using a proprietary model and extrapolating the penalty amount to include all days since the alleged violation at the maximum penalty amount of \$37,500 per day per violation. To avoid the costly litigation with potentially massive penalties and negative publicity, the companies are forced to settle by executing a Consent Decree based on EPA’s interpretation of the applicable rules. The Consent Decrees often contain requirements for the companies to adopt sweeping changes to monitor operations, including an emphasis on “next-gen” technologies to gather information on, for example, methane emissions, escaping Paperwork Reduction Review Act requirements that would be required in a formal rulemaking effort.

a. **Field Inspections.** During the summer of 2014, EPA conducted several inspections of oil and gas facilities in North Dakota, on and off the Fort Berthold Indian Reservation (FBIR). EPA used AVO (audio, visual and olfactory) inspections and FLIR (Forward Looking Infrared Technology) cameras to detect fugitive emissions. Using FLIR technology in fugitive emissions detection and routine inspections was not required by any federal rulemaking until August 2, 2016 under EPA Quad Oa, and **no** federal rule currently requires use of FLIR emissions technology for existing facilities. The FLIR camera has a very high resolution so it is capable of detecting, without quantifying, minor immaterial leaks that would not otherwise be capable of detection by an operator’s standard AVO inspections. In some instances, the fugitive emissions observed by EPA’s FLIR cameras were from storage tank equipment such as thief hatches or pressure relief valves, equipment that is designed to provide “pressure relief” as part of normal and safe operations. Many of the fugitive emissions were also due to routine and expected performance of gaskets, seals, and other equipment that wears and becomes dirty during normal, intended use.

b. **The Noble Energy Consent Decree.** The first example of the “sue and settle” strategy related to storage tank emissions in the oil patch occurred in 2014 and 2015 in Colorado’s Denver-Julesburg Basin. In April 2015, EPA, the U.S. Department of Justice, and the State of Colorado entered into a Consent Decree with Noble Energy, Inc. for its alleged violations of Section 113 of the CAA.

EPA has held up the Noble Consent Decree as the template for EPA’s national enforcement campaign regarding storage tank fugitive emissions and the model for compliance in North Dakota. EPA interpreted North Dakota’s rules and regulations to be similar to the those applicable to nonattainment areas in Colorado. But the differences far outweigh any similarities. North Dakota’s laws differ from Colorado. North Dakota is in attainment for ozone and, understandably, its air quality regulations are therefore much less onerous than Colorado’s regulations. Nevertheless, EPA’s apparent goal is to use the Colorado nonattainment regulations and the Noble Consent Decree as a template for oil and gas operations nationally, even for attainment areas. This is directly at odds with the dynamic of “cooperative federalism” at the core of the Clean Air Act, which affords each state the flexibility to develop and implement its own regulations to meet national air quality standards.

c. **EPA Section 114 Information Requests.** When a company receives a Section 114 information request, it can take easily six months and hundreds of man-hours, both in the field and office, to provide the required information. In addition, because EPA has in the past threatened significant sanctions for imperfect compliance, companies must spend substantial sums on outside counsel to reduce the risk faced by just providing EPA the request information.

d. **Alleged Violations of the Clean Air Act - Design Flaws and The Picard Model.** To identify alleged violations of the CAA, EPA relies on conclusions provided by a Canadian company, Clearstone Engineering Ltd, and its engineer, David Picard. Picard developed a proprietary model (the Picard Model)—different from the many off-the-shelf models available to companies—that essentially finds that all of the oil facilities were prone to emissions because they had design flaws. The bias toward design flaws was apparent in the Noble Consent Decree and the NDPC members’ interactions with EPA. The Picard Model was at the heart of EPA design flaw assertion, but because the Picard Model was proprietary it had not been subjected to peer review or public comment, nor mandated by agency rulemaking. The companies in the Section 114 process were not allowed access to the Picard Model but were required to accept its results.

The Picard Model was developed for determining vapor generation rate for the worst-case conditions at a production facility. In other words, the Picard Model determines whether a facility is capable of handling peak vapor flow during worst-case conditions, that occur infrequently if at all. EPA then uses Picard Model results, assuming all of an operator’s facilities operate in constant worst-case conditions, and calculates unrealistic emissions estimates. Using these drastically overestimated emissions estimates, EPA calculates and threatens multi-billion dollar civil penalties, on the basis of statutory maximum daily penalties, to scare operators into one-sided settlement negotiations. To our knowledge, EPA or Clearstone did not validate the Picard Model against real world performance. Because of the errors and erroneous assumptions in the Picard Model, EPA claimed that operators had violated major federal air regulations and were subject to multibillion dollars in fines, but those claims had no basis in science or observed emissions.

e. **Negotiation of the Consent Decree.** After EPA identified the violations, it would skip issuing a Notice of Violation and move to settlement negotiations. To start the settlement process, EPA typically holds an all hands on deck meeting with the company and representatives from EPA legal and enforcement divisions as well as the Department of Justice. At one such meeting, there were five EPA attorneys, five EPA technical/enforcement personnel and two Department of Justice attorneys. At the meeting, EPA would typically present the results of its analysis of the 114 information after running it through the Picard Model, and the field inspection, and extrapolate the alleged violations over the time-period since the inspection, and calculate a theoretical maximum penalty amount at \$37,500 per day per violation. The company is presented two options, proceed to litigation or negotiate a settlement embodied in a Consent Decree. These negotiations often go on for a year or more and involve hundreds of company man-hours and hundreds of thousands of dollars in attorney's fees and third party engineering and modeling experts.

f. **Consent Decrees.** In the first 30 months of the Section 114 effort in North Dakota, EPA settled with only one company in early November 2016. Notably, though the North Dakota Department of Health (NDDoH) initiated a significant effort to address emissions and made substantial progress with most of the industry, EPA demanded terms relating to third party audits and extensive design analysis that were not found in any regulatory requirement. Because EPA steadfastly insisted these onerous settlement terms, NDDoH did not sign as a party to the Consent Decree—even after spending substantial efforts to try to accommodate EPA's unlawful demands.

That company spent substantial time and effort in the office and in the field working through the Section 114 process. The cost to that company for third party consultants, engineers, and attorneys exceeded \$1.2 million. Months and hundreds of man-hours were required to provide the information required by the Section 114 request, prior to the negotiation phase. The negotiation phase for the company involved in the settlement with EPA lasted over a year, and involved countless meetings all attended by EPA enforcement personnel, EPA lawyers and at least one DOJ lawyer.

In addressing storage tank emissions, EPA's Section 114 "sue and settle" process has proven to be expensive, inefficient, and unnecessary. NDDoH's enforcement model addresses the goal of minimizing emissions as quickly as possible and has achieved significant emissions reductions via cooperative settlements with numerous companies. In contrast, EPA has signed one Consent Decree in North Dakota that took over two years from the field inspections to execution of the Consent Decree. As set forth in the following section, the NDDoH has a better approach. The NDPC respectfully requests that EPA amend, with court approval, this consent decree to add North Dakota and harmonize its requirements with the effective and broad-reaching steps North Dakota has taken, as described below.

g. **President Trump's March 28, 2017 Executive Order.** EPA's enforcement initiative in North Dakota is just the type of government overreach that President Trump's Executive Order addresses. The Executive Order states,

“[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”¹ (emphasis added)

¹ See Section 2(a) of the Executive Order

Consistent with this policy, the President ordered the heads of agencies to “review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources, with particular attention to oil [and] natural gas.”² As EPA stated in its December 1, 2016 news release regarding the Slawson Consent Decree, that settlement (and subsequent similar settlements and enforcement actions) is “part of EPA’s national enforcement initiative to reduce public health and environmental impacts from energy extraction activities.”³

This national enforcement initiative targeting the oil and gas industry clearly constitutes agency policy or other action that requires your immediate review as EPA Administrator. In fact, in our view, the Executive Order prohibits EPA from moving forward with its national enforcement initiative until it has undergone the review and approval contemplated in the Executive Order.

3. **North Dakota Department of Health Process and Approach.** Initially, the NDDoH was participating as a partner with EPA in the 114 process and present at the meeting negotiating the Consent Decrees. However, after several months of observing the EPA process, NDDoH concluded the potential for statewide compliance could be achieved in a much shorter timeframe and at a much lower cost through collaborative effort with the industry. EPA’s paradigm was “sue and settle” with individual companies one by one, with the threat of penalties motivating other companies to comply. The NDDoH’s paradigm was to work cooperatively with industry to find a solution.

a. **The NDPC Bakken Upstream Air Task Force.** After NDPC’s six members received their respective EPA Section 114 information requests in late 2014 through the fall of 2015, the NDPC members formed the Bakken Upstream Air Task Force with the purpose of evaluating technical, mechanical, and engineering aspects of field management of vapor recovery and potential for fugitive emissions. The task force was comprised of more than 130 individuals from 30 companies representing more than 93 percent of the oil and gas production in North Dakota. The task force logged more than 3,000 man-hours exploring these topics and invited both EPA Region 8 and NDDoH personnel to participate in periodic updates and discussions.

b. **North Dakota Industry-Wide Consent Decree.** In a timeframe of six months, NDDoH in cooperation with NDPC finalized an industry-wide consent decree template that results in emissions reductions via provisions that exceed current regulatory requirements. In contrast to the thirty months long, burdensome and costly EPA Section 114 process, NDDoH’s policy was to identify problematic emissions and inform the companies accordingly. The companies then fixed the emissions, or faced administrative actions and penalties. This “find it and fix it” policy worked well, and was incorporated into the North Dakota industry-wide consent decree. This cooperative attitude and process between regulators and industry is a model for true innovative environmental improvement **without unnecessarily encumbering energy production, constraining economic growth or preventing job creation.** The success of this model comes not from a roomful of

² See Section 2(a) of the Executive Order

³ See <https://www.epa.gov/enforcement/reference-news-release-slawson-exploration-company-inc-make-system-upgrades-and> (copy attached)

attorneys and third party consultants with threatened punitive action, but from discussions between regulators and industry held in the spirit of collaborative problem solving.

NDPC has had a proven track record of industry led efforts leading to wide adoption of industry best practices and common sense rulemaking processes by state agencies. In fact, in 2011, NDPC and NDDoH collaborated to address VOC flash emissions that were self-reported by the industry. This effort led to an industry-wide consent decree with NDDoH, and millions of dollars in equipment upgrades in field equipment for statewide compliance.

The NDPC respectfully requests that EPA promptly reconsider its Clean Air Act enforcement initiative in North Dakota, and in its place, adopt something similar to the NDDoH model of enforcement, including amending, with court approval, the one federal-only Consent Decree in place by adding North Dakota, and making its terms consistent with the NDDoH industry-wide consent decree.