

9/24/2010

---

## Oil and Natural Gas RCRA Exemption Under Attack

*Staff Contact: Lee Fuller*

Recently, the Natural Resources Defense Council (NRDC) – an aggressive anti-oil and natural gas environmental special interest group – [submitted a petition to the Environmental Protection Agency \(EPA\)](#) requesting a reconsideration of the 1988 Regulatory Determination that concluded the federal Resource Conservation and Recovery Act (RCRA) was not appropriate for regulating oil and natural gas drilling fluids and produced waters. This action is consistent with NRDC's pattern of opposing the development of American oil and natural gas in every possible venue. IPAA is uniquely positioned to oppose the NRDC effort and will be initiating a thorough response.

### NRDC's Agenda

NRDC's actions follow on its manifesto opposing American oil and natural gas development called "Drilling Down." Drilling Down is an NRDC "wish list" that presents a categorization of federal laws that NRDC wants changed with the clear purpose of inhibiting – or eliminating – American production. This document triggered the industry realization that, despite its tepid endorsement of natural gas in a climate context, NRDC's agenda presented a serious, long term risk. It led to IPAA's development of Energy In Depth, creating a rapid and aggressive response to the allegations made against production activities.

In addition to the NRDC petition on RCRA, NRDC petitioned EPA to regulate diesel used in the hydraulic fracturing process under the Safe Drinking Water Act (SDWA), supported the DeGette and Casey bills to impose SDWA regulation of hydraulic fracturing, endorsed the Arcuri amendment to impose unworkable storm water construction management requirements under the Clean Water Act (CWA), and litigated against EPA's CWA storm water regulations that tried to create a manageable construction regulatory system.

### The Issue of Federal Regulation

NRDC's RCRA petition dredges up issues settled for more than 20 years. Following amendments to RCRA in 1980, Congress suspended federal regulation of oil and natural gas drilling fluids and produced waters under the hazardous waste program (Subtitle C). It required EPA to determine whether Subtitle C was an appropriate regulatory structure for these wastes and whether state programs were effectively controlling their environmental risks. In 1988, EPA reported its conclusions which include:

*(1) Subtitle C does not provide sufficient flexibility to consider costs and avoid the serious economic impacts that regulation would create for the industry's exploration and production operations;*

*(2) Existing State and Federal regulatory programs are generally adequate for controlling oil, gas, and geothermal wastes. Regulatory gaps in the Clean Water Act and UIC program are already being addressed, and the remaining gaps in State and Federal regulatory programs can be effectively addressed by formulating requirements under Subtitle D of RCRA and by working with the States;*

Subsequently, EPA supplemented its analysis by creating the State Review of Oil and Natural Gas Environment Regulations (STRONGER). STRONGER conducts reviews of state regulations to address the "regulatory gaps" EPA identified. Each STRONGER review is conducted by a team of state regulators, environmentalists and industry representatives. Since its initiation, the state review process has completed the reviews of twenty-one state programs responsible for the regulation of over 90% of the American onshore production of oil and natural gas.

## **IPAA's Expertise**

While the RCRA Regulatory Determination is not an issue that should be addressed, clearly, the industry must respond to the NRDC threat. IPAA is uniquely positioned to address the challenge.

The RCRA Amendments of 1980 created the suspension of federal regulation and triggered the Regulatory Determination. And current IPAA President and CEO, Barry Russell, was IPAA's principal staff during the Regulatory Determination, intimately involved as the information was developed and EPA made its assessments. In the early 1990's, Russell served as IPAA's counsel as Congress considered – but ultimately failed to pass – new requirements for oil and natural gas drilling fluids and produced water.

The RCRA 1980 provision on oil production wastes – even in NRDC's petition – is labeled the Bentsen amendment. IPAA's Vice President of Government Relations, Lee Fuller, was Senator Lloyd Bentsen's staff during the 1979-1980 RCRA development and debate on the provision; more than any other person, he is the architect of the current law. In the early 1990's, Fuller worked as the principal consultant advocate for industry's response to that legislative threat.

Jim Collins, an IPAA consultant, served as API's task force chair during the RCRA 1980 debate working closely with Lee and me. He served in a key role during the EPA Regulatory Determination. He is now a member of the STRONGER board and participates in state reviews as an industry representative.

Additionally, IPAA's newest staff member, Wendy Kirchoff, comes from Representative Dan Boren's office where she has worked on oil and natural gas environmental issues for the past several years developing a broad experience in dealing with the Congressional politics of these issues. She will be part of the IPAA advocacy to Congress responding to the NRDC petition.

Clearly, American oil and natural gas production faces another compelling challenge by special interests dedicated to preventing new development, seeking to shut down existing operations. As we have seen in the past, meeting these challenges will be neither easy nor quick. However, IPAA is well positioned to respond – and will keep its membership informed as it does and as this issue progresses.

## **IPAA Files Petition and Letter with CFTC to Further End User Exemption**

**Staff Contact: Susan Ginsberg**

IPAA submitted two documents – a petition and a letter – to the CFTC on September 20 regarding implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

The petition, filed on behalf of IPAA members, seeks legal certainty that IPAA members' exempt commodity transactions that fall within the provisions of Section 2(h) of the Commodity Exchange Act, as in existence on the day before enactment of Dodd-Frank, may remain exempt from collateral and margin requirements for a one-year period starting July 15, 2011, or for a period deemed appropriate by the CFTC. IPAA filed the petition as a precaution to comply with the statutory deadline in Dodd-Frank. The CFTC indicated that it would not act on the exemption requests previously filed but would be prepared to revisit its decision should it be necessary to ensure a smooth transition to the new regulatory regime under Dodd-Frank. Hundreds of individual companies filed for the exemption. IPAA's filing was intended to cover members not filing on their own behalf. In all likelihood, any extension of the exemption beyond the Dodd-Frank implementation date will be granted broadly. However, the clear statutory deadline warranted the precautionary filing.

The letter supports the September 20 filing by the Coalition of Physical Energy Companies (COPE) in response to the advanced notice of proposed rulemaking covering key definitions in Dodd-Frank (e.g., swap dealer, major swap participant). COPE is comprised of several IPAA members and other energy producers, retail energy providers, and midstream companies. In particular, IPAA supported COPE's focus on the distinction between the "swaps business" and the "physical energy business." IPAA also strongly supported COPE's inclusion of exceptions to exclude "a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, to hedge or mitigate commercial risk, provided such person is not engaging in a business that is principally comprised of buying and selling swaps."

The CFTC and the SEC will be issuing proposed rules within the next few months to implement Dodd-Frank. IPAA will continue to follow this process and promote the exemption for commercial end users.

## **IPAA Wildcatter Fund Candidate Profile - Cory Gardner, GOP Candidate for Colorado's 4th Congressional District**

**Staff Contact: Brent Golleher**

Cory Gardner is the Republican candidate in Colorado's 4<sup>th</sup> Congressional District's U.S. House race against Rep. Betsy Markey (D-CO). A fifth generation Coloradoan, Gardner holds a bachelor's degree from Colorado State University and a J.D. from the University of Colorado. Gardner served as General Counsel and Legislative Director for U.S. Senator Wayne Allard. He also worked for the National Corn Growers Association. He serves in the Colorado House of Representatives and works for his family's farm implement dealership.

Gardner is a supporter of the oil and gas industry. Gardner recognizes that the 4<sup>th</sup> District relies upon the industry for a lot of their economic stability. He is an ardent critic of the "Waxman-Markey" legislation that passed the U.S. House in 2009, which he says would "devastate the economy of the district." Gardner often cites this issue, and Markey's "yes" vote, as one of the main reasons he decided to enter the race.

## **Make Plans to Attend IPAA's Upcoming Meetings/Events**

**Staff Contact: Nikki McDermott**

**OGIS San Francisco**  
October 12-14, 2010  
The Palace Hotel  
San Francisco, California

**IPAA's 81st Annual Meeting**  
November 8-10, 2010  
The Ritz-Carlton, Dove Mountain  
Tucson, Arizona

Please visit [www.ipaa.org/meetings](http://www.ipaa.org/meetings) for more information.

## Passive Loss Exception for Working Interests – Information Needed

**Staff Contact: Ryan Ullman**

The Obama Administration has proposed to repeal the passive loss exception for working interests in oil and natural gas properties. IPAA is opposing this repeal. In presenting arguments to Congress, members ask about the importance of the issue to operators in their states. IPAA would like to develop a list of companies that value the provision and their states of operation.

In this tax provision, Congress permitted taxpayers to deduct losses from oil and natural gas investments if the investments are made in the form of a working interest. That is, it is an interest that carries with it the obligation to share in the costs to develop the resources on the property. To qualify, the taxpayer must hold the working interest through an entity that does not limit liability with respect to the interest. Thus, a taxpayer who holds a working interest in this prescribed fashion and puts up capital to fund the drilling of oil and natural gas wells is entitled to deduct their share of tax losses resulting from the drilling expenditures. If the passive loss exception is repealed, working interest owners who are not the actual operator of a property- e.g., all other investors - would have to treat the property as a passive investment.

Please contact Ryan Ullman, [rullman@ipaa.org](mailto:rullman@ipaa.org), to provide information.

## Rig Count

**Staff Contact: Fred Lawrence**

	<u>9/17/10</u>	<u>9/10/10</u>	<u>Year Ago</u>
<b>Land</b>	1626	1620	971
<b>Inland Waters</b>	14	13	7
<b>Offshore</b>	21	21	32
<b>U.S. Total</b>	1661	1654	1010
<b>Gulf of Mexico</b>	21	21	30
<b>Oil</b>	670	663	293
<b>Gas</b>	982	980	705
<b>Miscellaneous</b>	9	11	12

Source: Baker Hughes