What's wrong with SL2014-4 (S786), North Carolina's 2014 fracking bill

Thursday, June 5, 2014

Yesterday, Gov. Pat McCrory signed **SL2014-4, Energy Modernization Act (S786)**. The Act breaks the state legislature's 2012 and 2013 promises to review a finished package of rules before voting whether to allow fracking permits to issue in North Carolina. Instead, following a truncated legislative review period in early 2015, the rules will go into effect by default, and permits will begin to issue sometime in early to mid-2015. Beyond breaking the legislature's promise, the Act fails to address the most significant risks that shale gas development poses to our health, communities, and the environment.

SL2014-4 does not address the risks that matter most

- **Compulsory pooling**, in which a natural gas driller can force a landowner to allow development of their mineral estate against their will. The Act punts on this issue, asking for more studies [§25], where it should have explicitly prohibited compulsory pooling of unleased shale gas interests.

- **Wastewater disposal.** Fracking creates huge volumes of polluted wastewater. Even if some is reused, most will eventually need to be disposed of. It cannot safely be injected underground in North Carolina. North Carolina lacks both pre-treatment and discharge standards for many of the hundreds of contaminants that can be found in fracking wastewater, and the state is making no effort to establish them. Under the draft fracking rules, a facility could be permitted to treat and discharge fracking wastes to surface waters without removing contaminants that threaten public health.

- **Air emissions.** In 2012, S820 (SL2012-143) instructed the Environmental Management Commission (EMC) to develop rules to control toxic air emissions from fracking operations. In other states, those emissions have sickened families, destroyed property values, and appear tied to higher levels of birth defects among nearby newborns.[1] The Mining & Energy Commission (MEC), EMC, and Department of Environment & Natural Resources (DENR) have not proposed state rules, instead suggesting that the state will rely on federal protections. However, those protections explicitly exempt wildcat and exploratory wells – just the kinds that are likely to be drilled here.

- **Remedies for long term contamination**. Contamination may not show up until years after drilling, or even until after a driller has closed a well and moved on. Nothing in state law, S.L2014-4, or proposed state rules provides a remedy for people whose health or property are destroyed by long-term contamination.

- **Oversight of gathering lines**. To move gas from wells to processing facilities, operators send it through 'gathering lines'. In other states, operators have used their power over the lines to fleece landowners. The lines are largely uninspected, and operators in North Carolina may be able to take private property to lay the lines using eminent domain. SL2014-4 punts on this

[1] Lisa McKenzie, et al., Birth Outcomes and Maternal Residential Proximity to Natural Gas Development in Rural Colorado, *Environmental Health Perspectives*, January 2014.

issue too, telling the MEC to study 'midstream infrastructure', but putting no protections in place for landowners or the environment [§26].

Other missing safeguards include: presumptive liability for damage to private property from seismic testing [§15 leaves the burden on the injured landowner]; requirements for state regulators to be onsite during the critical phases of gas well development; any requirement for a water withdrawal permit; protections for surface landowners who do not own the gas beneath them; and certification criteria for gas well contractors and cementers [§16 exempts oil and gas contractors from the current certification for water well contractors, but does not place them under another authority].

SL2014-4 weakens substantive and procedural safeguards

- *Weakened protection for groundwater wells*. In 2012, S820 made drillers presumptively liable for contamination of groundwater wells within 5,000 feet of a gas well. As outlined in proposed state rules, a company can refute the presumption by collecting pre-drilling samples that show pre-existing contamination. SL2014-4 slashes the radius of presumptive liability to ½ mile (2,640 feet), nearly in half, amounting to a 72% reduction in the protected area [§13]. The Act adds more required tests following drilling (good), but places the burden of arranging for the tests to be carried out on landowners, making it quite likely that many will lose the protections theoretically provided by the presumption (very bad).

- *Constraints on local governments*. In 2012, S820 called for a study, and proposed to forbid local governments from adopting measures that would ban 'or having the effect of banning' fracking. That's pretty overbearing by itself. But SL2014-4 goes much further, preempting all local rules as needed to promote shale gas development, and assigning the MEC, rather than an impartial state court, to decide whether a local ordinance goes too far [§14].

- *Exemptions from rulemaking*. The NC Administrative Procedures Act (APA) sets out the process agencies must follow to draft rules, including review by the legislature. In addition to breaking the promise to hold a vote *after* the rules were final [§3], SL2014-4 radically shortens the time available to the legislature to review the complex package of 120+ fracking rules in 2015 [§2]. Meanwhile, those rules are first schedule to receive public comment in August, and serious gaps in the framework continue to be discovered.

SL2014-4 includes some flawed 'improvements'

- *Trade secrets*. The Act mandates that when a company says information (such as the chemical formula of its fracking fluid) is a 'trade secret', the company must let DENR hold that information in secure custody in case it is ever needed for emergency responders [§8]. That's better than a draft Mining & Energy Commission rule, which would have not let the state keep the information. However:

    - SL2014-4 makes it a misdemeanor to improperly disclose trade secret information [§8a] - up to four months of jail time, as well as full civil liability for economic losses. As enacted, that applies to a doctor sharing information with their staff or colleagues, or a fire chief sharing information with their firefighters.

- SL2014-4 does not require the agency to retain trade secrets for any particular length of time, and does not allow for release when contamination shows up years later in nearby drinking water wells. By that time, the drilling company may be long gone, with no other source for the information.

- SL2014-4 retains a provision from S820 allowing geological information to be classed as a trade secret [§8b]. The Deep River shale has complex patterns of dikes and faults, and the state cannot make a transparent decision about the safety of a proposed drilling plan without considering seismic and other geological data in the open. Allowing that data to be hidden will place local residents at risk.

- *Bad actor screen*. SL2014-4 gives DENR authority to screen permit applicants for their records in North Carolina and elsewhere, and allows the agency to deny a permit on that basis [§15]. That is perhaps the single actual improvement in the bill.

- *Prohibition on injection of fracking wastewater*. The Act would explicitly prohibit underground injection of fracking wastewater [§15]. That's already elsewhere in state law, so it is not new.

SL2014-4 promises a lot of pie in the sky

Finally, the Act wastes time and money on wishful thinking.

In addition to complicated and speculative severance tax provisions, SL2014-4 calls for studies of whether to site a liquid natural gas export terminal on the coast [§22] and whether to launch a curriculum to train drilling industry workers at Central Carolina Community College[§24]. Neither of these proposals makes much economic sense, given the small scale of North Carolina's resource and the lack of major industry interest.

The state has already spent significant resources in pursuit of fracking, with no new jobs to show for it (beyond the state government staff hired to write the new rules). If the legislature had spent a fraction of these resources on renewable energy and efficiency, we would already be seeing the payoff in jobs and income for North Carolinians. It is not too late to redirect future resources to policies and programs that will actually offer a positive return to the state economy.

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