



To the Members of the Montana Board of Oil and Gas Conservation:

Please accept the following comments concerning the Board's proposed revisions to its hydraulic fracturing rules. These comments are submitted on behalf of the Montana Environmental Information Center, Natural Resources Defense Council, Bonnie and Jack Martinell, Dr. David Lehnherr, David Katz, Anne Moses, Dr. Mary Anne Mercer, and Dr. Willis Weight.

We appreciate this opportunity to provide additional comments on the Board's regulations to implement SB 299, codified at MCA §§ 82-10-601 – 82-10-604, which established new requirements for hydraulic fracturing chemical disclosure to provide the necessary information to the public and medical professionals. As outlined below, we strongly support the changes the Board proposes to make to ensure public access to specific hydraulic fracturing chemical information as now required by statute and provide oversight of trade secret claims from oil and gas companies. However, the current proposal falls far short of guaranteeing the public timely access to the chemical information they need to protect their water, land and health. Attached to these comments as Exhibit 1 is a redlined version of the Board's proposed amendments showing the additional rule changes we believe are necessary to adequately protect the interests of landowners and the broader public.

1. Background

In SB 299, the Legislature established important new requirements to expand public access to information concerning hydraulic fracturing, or "fracking," chemicals and directed the Board to implement those new requirements through rulemaking. Since the coalition of landowner, public health, and conservation interests represented in these comments began advocating for this much-needed regulatory overhaul in 2016, we have cited numerous peer-reviewed scientific studies and other evidence that document the public's need for timely access to information about the specific chemical ingredients of fracking fluids in order to protect landowner interests and public health. We hereby incorporate those materials by reference.¹

2. Comments on Proposed Amendments to Hydraulic Fracturing Chemical Disclosure Rules and Policies

At the outset, we strongly support aspects of the proposed rule amendments that implement new legislative requirements for detailed pre-fracking chemical disclosure and justification of trade secret claims.

First, we support the Board's proposed revision of ARM 36.22.608 and 36.22.1015 to require disclosure of the specific chemical ingredients of fracking fluids before and after fracking occurs and no longer allow "generic" chemical disclosure that may not reflect the actual treatment used for the well at issue, as mandated by SB 299. Oil and gas operators will now be required to disclose the specific fracturing fluid ingredients proposed for each well, including the individual chemical ingredient names and unique Chemical Abstract Service (CAS) number. This new requirement is needed to satisfy the

¹ We are submitting our prior rulemaking petition and previous comments and supporting materials on a DVD accompanying this letter.

clear legislative mandate in SB 299 and provide public access to the specific chemical information landowners need to protect their water and the broader public needs to understand the risks associated with planned fracking operations and prepare for emergencies.

Second, we support the Board's proposed revision of ARM 36.22.1016 to require operators to justify requests for trade secret exemptions to the Board, as now required by statute. Under the Board's proposed rule amendments, operators must provide a detailed justification for any request to withhold chemical information from the public on the ground that it is a trade secret. Requiring such justification allows the Board to provide needed oversight of trade secret claims and make the ultimate decision to grant or deny trade secret requests.

However, the proposed rule amendments fail in two critical respects to ensure public access to fracking chemical information when it is needed the most.

First, as stated in our previous comments, we strongly disagree with the Board's refusal to ensure timely public access to fracking chemical information by requiring operators to disclose the ingredients of fracking fluids planned for use in Montana at least 45 days in advance of the fracking activities. The Board's proposed revisions still do not provide any minimum time period for advance disclosure to landowners, despite uncontested evidence presented to the Board that such advance disclosure is essential for landowners to do baseline water testing. Moreover, for wildcat wells and exploratory wells, companies may provide their chemical disclosure as little as 48 hours before fracking occurs. This framework threatens to deprive landowners of the opportunity to conduct baseline water testing and undermines the purpose of requiring and providing disclosure.

As we have documented in prior comments, there is a growing consensus among both water quality experts and industry that conducting baseline water testing before fracking begins is an essential and common-sense safeguard given the known risks of water contamination from fracking and related activities.² Because Montana landowners do not have the benefit of mandatory operator-funded baseline and post-drilling water testing under the Board's current rules, landowners must be given a fair opportunity to protect their own interests by receiving in a timely manner the information they need to do their own testing. As explained in the February 2018 comments of Dr. Dominic DiGiulio and underscored in comments from Dr. Willis Weight submitted today, landowners must have access to information about the fracking fluids planned for use on or near their land no fewer than 45 days before fracking occurs in order to design and implement an effective baseline water testing program that could help pinpoint the source of contamination should it occur. Further, as we have stated in our Feb. 2018 Comments, a requirement that fracking chemical information be made available to the public no fewer than 45 days before fracking occurs would impose no burden on companies in most cases. A February 2018 review of well files on the Board's website revealed that far more than 45 days routinely elapse between the date an operator submits its pre-fracking chemical disclosure and the date of well completion, even without the requested 45-day advance disclosure requirement established by rule.³

² See, Oct. 2017 Comments Exhibit 8; Feb. 2018 Comments Exhibit H; Groundwater Prot. Council, FracFocus, Groundwater Quality & testing, <https://fracfocus.org/groundwater-protection/groundwater-quality-testing> (last visited Sep. 12, 2018) (all stating the importance of baseline testing before fracking occurs).

³ See, Feb. 2018 Comments, Footnote 22.

Establishing a 45-day advance disclosure requirement in all cases—including for wildcat and exploratory wells— would ensure that all affected landowners have at least this minimal window of time to do baseline water testing. Without a requirement for operator-funded baseline water testing or a 45-day advance disclosure requirement, the rules for fracking chemical disclosure will have little use for landowners.

Second, additional changes to the Board’s rules are needed to get chemical information to medical professionals in an emergency. As proposed, the Board’s rule revisions still do not direct the Board’s administrator to provide trade secret chemical information directly to medical professionals in situations where that information is necessary to provide treatment. Instead, the Board’s proposal requires medical professionals to track down the oil and gas operator or service company to request chemical information—including in an emergency, which could threaten a patient’s health or life. Under the Board’s proposed changes to ARM 36.22.1016, the Board’s administrator will have all trade secret chemical information in his confidential files; given that reality, there is no justification for requiring medical professionals to try to identify the company that possesses that information, contact them, and persuade them to provide the information to which medical professionals are legally entitled under the Board’s rules. The framework in the Board’s current proposal threatens to unnecessarily impede medical treatment for Montanans without providing any confidentiality benefit to industry. We have provided the Board in our previous comments examples of incidents when medical professionals needed chemical information to treat patients. More recent incidents affirm that oil well explosions can not only be fatal but also expose first responders and the public to fracking chemicals. Accordingly, we ask the Board to amend ARM 36.22.1016 to reflect the new reality that the administrator will possess all trade secret chemical information and require him to promptly provide such information directly to medical professionals under the terms of that rule.

Should you have any questions about these comments, please contact the undersigned at number or email addresses below.

Sincerely,

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