

Halvorson, Jim

From: Halvorson, Jim
Sent: Wednesday, July 27, 2016 10:06 AM
To: Jones, Ben (BJones@mt.gov); Linda Nelson; paul.gatzemeier@earthlink.net; 'Peggy Ames Nerud'; Rath, Jennifer (JRath@mt.gov); 'Ron Efta'; 'Steve Durrett'; Stutz, Rob (RStutz@mt.gov); 'Wayne Smith'
Cc: Hudak, George
Subject: Request for rulemaking
Attachments: RequestForRulemaking_160726.pdf

Board,

Yesterday we received a request for rulemaking. Under statute the board has 60 days to deny the petition in writing or initiate rulemaking. (2-4-315, MCA, copied below). Since the board has one scheduled meeting within the 60-day period we will work with Rob to determine the best way to proceed.

The basic application is attached to this email. Supporting information is available on the board's website at the following link:

<http://www.bogc.dnrc.mt.gov/misc/Miscellaneous/RequestForRulemaking/>

There are three files in the directory. "RequestForRuleMaking_160726" is the formal request that is also attached to this email; "Exhibits.zip" are the exhibits that accompanied the request; and "LiteratureCited.zip" are the published papers referenced in the request. "Literature_Cited.zip" and "Exhibits.zip" are fairly large files so only download it if you have a good internet connection.

The files can be downloaded to your computer by right-clicking on zipped file and selecting "Save target as..." or "Save link as..." from the drop-down list; actual language may vary by web browser.

If you would rather have a paper copy of the basic application prior to any hearing we might have let Jennifer know.

The pertinent statute is:

2-4-315. Petition for adoption, amendment, or repeal of rules. An interested person or, when the legislature is not in session, a member of the legislature on behalf of an interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall determine and prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 60 days after submission of a petition, the agency either shall deny the petition in writing or shall initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305. A decision to deny a petition or to initiate rulemaking proceedings must be in writing and based on record evidence. The written decision must include the reasons for the decision. Record evidence must include any evidence submitted by the petitioner on behalf of the petition and by the agency and interested persons in response to the petition. An agency may, but is not required to, conduct a hearing or oral presentation on the petition in order to develop a record and record evidence and to allow the petitioner and interested persons to present their views.

History: En. Sec. 7, Ch. 2, Ex. L. 1971; amd. Sec. 2, Ch. 236, L. 1974; amd. Sec. 12, Ch. 285, L. 1977; R.C.M. 1947, 82-4207; amd. Sec. 1, Ch. 110, L. 1997.

Jim

BEFORE THE MONTANA BOARD OF OIL AND GAS CONSERVATION

In the Matter of the Amendment of Regulations)
Governing Disclosure of Well Stimulation Fluids) RULEMAKING PETITION
and Proprietary Chemicals and Trade Secrets,)
ARM §§ 36.22.608, 36.22.1015-36.22.1016)

Pursuant to Mont. Code Ann. § 2-4-315, the Natural Resources Defense Council (“NRDC”), Montana Environmental Information Center (“MEIC”), and the undersigned Montana property owners and public health professionals hereby petition the Montana Board of Oil and Gas Conservation (“the Board”) to amend the Board’s regulations governing disclosure of the chemical ingredients of well stimulation fluids used for hydraulic fracturing in Montana, Admin. R. Mont. §§ 36.22.608, 36.22.1015-36.22.1016 (the “Disclosure Rule”).¹ By adopting the Disclosure Rule, the Board has taken a significant step forward in protecting the interests of Montana citizens in safeguarding their property, health, and environment from the adverse effects of unconventional oil and gas development. But as described below, two features of the current Disclosure Rule—namely, its limited requirements for pre-fracturing disclosure of chemical information and its exemption for alleged trade secret information—undermine that purpose by needlessly depriving Montanans of information about the composition of hydraulic fracturing fluids that is critical to protect their interests.

NRDC and MEIC are non-profit conservation organizations, each of which has over 5,000 members and supporters across Montana. NRDC and MEIC members and the undersigned individual petitioners live, own property, farm and ranch, work, travel, recreate, and provide medical care to individuals in areas where hydraulic fracturing has occurred or is

¹ The Board is an “agency” under Montana law, see Mont. Code Ann. §§ 2-4-102(2)(a), 2-3-102(1), and is therefore subject to the petition provision of Mont. Code Ann. § 2-4-315.

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human carcinogens.³ Fracking chemicals can contaminate drinking water sources through surface spills or underground migration of contaminants.⁴ Chemical releases also may occur during transport of fracking fluids to the well site, chemical mixing and other pre-fracking operations at the well site, fracking itself, escape of produced water that returns to the surface after fracking, and produced water storage and disposal. Studies have documented migration of fracking fluids into domestic drinking water sources as far as 3 km from the release site.⁵ Individuals also may be exposed to fracking chemicals in the form of air pollution.⁶

In light of the documented threats to health, water supplies, property, and the environment in the event that a release of fracking chemicals occurs, there is widespread demand for chemical information among members of the public. As the Board has recognized by enacting the Disclosure Rule, such information is vital for individuals and communities to assess the risks associated with fracking operations and to take steps to protect their health and property. As explained below, however, two features of the current Disclosure Rule critically undermine the rule's protective purpose and needlessly deprive Montana citizens of important chemical information.

³ Colborn T., et al. (2011) Natural Gas Operations from a Public Health Perspective, *Hum. & Ecological Risk Assessment* 17(5).

⁴ See, e.g., Llewellyn G.T., et al. (2015) Evaluating a Groundwater Supply Contamination Incident Attributed to Marcellus Shale Gas Development. *Proceedings of the National Academy of Sciences of the U.S.* 112(20); DiGiulio D.C. and R. B. Jackson (2016) Impact to Underground Sources of Drinking Water and Domestic Wells from Production Well Stimulation and Completion Practices in the Pavillion, Wyoming, Field. *Environ. Sci. Technol.* 50(8); Hays & Shonkoff (2016).

⁵ Llewellyn, et al. (2015).

⁶ Webb E., et al (2016) Potential Hazards of Air Pollutant Emissions from Unconventional Oil and Natural Gas Operations on the Respiratory Health of Children and Infants. *Rev. Environ. Health* 31(2); Haley M., et al. (2016) Adequacy of Current State Setbacks for Directional High-Volume Hydraulic Fracturing in the Marcellus, Barnett, and Niobrara Shale Plays. *Environmental Health Perspectives*; Lund, H.L.; Weight, W.W.; and Lopach, D.R. *Fracking in Montana: Asking Questions, Finding Answers* (Dec. 2015).

fracking occurs and it allows operators to forego disclosure of any chemical information for certain wells until just 48 hours before fracking commences.

The Board's regulations require more detailed disclosure of chemical information after well stimulation is complete. For hydraulically fractured wells, the operator must provide to the Board or post on the FracFocus website⁸ "a description of the stimulation fluid identified by additive type (e.g. acid, biocide, breaker, brine, corrosion inhibitor, crosslinker, demulsifier, friction reducer, gel, iron control oxygen scavenger, pH adjusting agent, proppant, scale inhibitor, surfactant)" and the chemical ingredient name and CAS number "for each ingredient of the additive used." Id. § 36.22.1015(2)-(4).

However, operators are not required to disclose at any time chemical information that is entitled to trade secret protection under Montana law. Id. § 36.22.1016(1). If an operator asserts that specific chemical information itself constitutes a trade secret or, if disclosed, would reveal other trade secret information, the operator may withhold the specific chemical ingredient name and CAS number and instead "identify the trade secret chemical or product by trade name, inventory name, chemical family name, or other unique name and the quantity of such constituent(s) used." Id. Critically, the Disclosure Rule does not require the Board to review operators' claims that specific chemical information constitutes a trade secret that warrants an exemption from disclosure requirements, nor does the Disclosure Rule require any other independent body, third party, or regulatory agency to affirm the legitimacy of the trade secret exemption. Instead, confidentiality protection is automatically provided for any chemical information that an operator asserts is a trade secret.

⁸ www.fracfocus.org.

in nearby industrial operations.⁹ Particularly in areas with a history of oil and gas drilling or multiple active wells, landowners must test for specific chemicals proposed for use in nearby fracking operations in order to generate baseline data that could be used to determine the source of any subsequent contamination.¹⁰

Given this practical reality, the Board's existing requirements for pre-fracking chemical disclosure are inadequate. A review of recent well files demonstrates that pre-fracking disclosures often consist merely of a list of additive types (e.g., friction reducer, crosslinker, breaker, biocide) with additive product trade names sometimes included.¹¹ Such a list provides no information about specific chemical constituents for which a landowner could conduct baseline water-quality testing and does not enable individuals to investigate the risks to human health or the environment posed by specific chemicals planned for use.¹²

Regulatory practice in our neighboring state of Wyoming demonstrates that it is feasible to require pre-fracking disclosure of the specific chemicals proposed for use in an individual well. Wyoming requires operators to submit the chemical compound name and CAS number for each ingredient of the well stimulation fluid proposed for use before well stimulation activities

⁹ See, e.g., FracFocus Chemical Disclosure Registry, Groundwater Quality Testing, <https://fracfocus.org/groundwater-protection/groundwater-quality-testing> (last visited June 30, 2016). Indeed, most commercial laboratories in the United States are set up to test only for the presence or absence of specific chemical compounds in a water sample and cannot effectively test for a broad category of chemicals. Llewellyn et al. (2015).

¹⁰ See generally DiGiulio & Jackson (2016); Llewellyn et al. (2015); Beak D.G., et al. (2015) Retrospective Case Study in Killdeer, North Dakota: Study of the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources, EPA/600/R-14/103; U.S. Environmental Protection Agency, Office of Research and Development, Washington, D.C.

¹¹ See sample disclosures attached as Exhibit 1.

¹² Knowledge of the specific chemicals proposed for use in a fracking job is important because certain chemicals pose more serious health risks if spilled or otherwise conveyed to water or released as air pollutants. E.g., Webb et al. (2016). Additionally, different chemicals pose distinct risks of underground transport to domestic wells based on their ability to migrate in groundwater. Llewellyn et al. (2015).

B. By Granting Operators Unfettered Discretion to Withhold Chemical Information as Trade Secrets, the Disclosure Rule Unfairly Deprives Montanans of Critical Information and Violates the Montana Constitution

Petitioners also request that the Board amend Admin. R. Mont. § 36.22.1016, which addresses proprietary chemicals and trade secrets, to remedy a major defect in the Disclosure Rule. This provision currently gives oil and gas operators complete discretion to withhold from the Board and the public any and all chemical information that the operator claims is a trade secret; except in emergencies, operators are not required to submit this information to the Board and the Board has no authority or obligation to determine whether trade secret claims are legitimate as a precursor to allowing confidentiality protection. As explained below, this approach is unfair as a matter of public policy and is irreconcilable with the Montana Constitution's non-delegation principle and its protections for Montana citizens' right to know and right to a clean and healthful environment. Accordingly, Petitioners request that the Board amend § 36.22.1016 to (1) require that operators seeking to withhold alleged trade secret chemical information provide to the Board a written justification demonstrating that the information at issue qualifies as a trade secret under Montana law; and (2) provide that the Board shall review all requests for trade secret protection and issue a final determination as to whether that protection is justified under Montana law before authorizing the fracking job at issue.

1. The Disclosure Rule's Trade Secrets Provision Unfairly Deprives Montana Citizens of Information Necessary to Protect their Property, Health, and Environment

By giving operators unfettered discretion to choose which chemicals to disclose to the Board and the public, the current Disclosure Rule's trade secrets provision defeats the Rule's very purpose while providing no assurance that only legitimate trade secrets receive confidentiality protection. Because the rule affords no opportunity for the Board or the public to

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legitimate.¹⁹ The public can review the justifications operators submit, with necessary redactions, and may challenge the wrongful extension of confidentiality protection by the state regulator.²⁰ There is no reason why Montana citizens should have to “take it on faith” that oil and gas operators are withholding only legitimate trade secrets, while Wyoming citizens enjoy public oversight of trade secret claims and the ability to scrutinize and challenge illegitimate trade secret determinations by their state regulator.

2. The Disclosure Rule’s Trade Secrets Exemption Violates Montana Citizens’ Constitutional Right to Know

Further, by providing confidentiality protection for any chemical information claimed to be a trade secret—without any evidence of trade secret status or oversight by the Board—the Disclosure Rule contravenes the Montana Constitution’s protections for citizens’ “right to know,” Mont. Const. Art. II, § 9. The Board should amend the rule’s trade secrets exemption to ensure protection of this fundamental constitutional right.

“The right-to-know guarantees of Article II, Section 9, of the Montana Constitution are among the most important guarantees that Montanans enjoy.”²¹ The central purpose of the Constitution’s right-to-know provision is “to provide the public information to enable citizens to determine the propriety of governmental actions.”²² The provision guarantees the public’s right

¹⁹ See Wyo. Admin. Code OIL GEN Ch. 3, § 45(f); Wyo. Oil & Gas Conservation Comm’n, WOGCC Trade Secret/CCI Guidelines, available at http://wogcc.state.wy.us/tradesecrets/Trade_Secret_Form_and_Guideline_012015.pdf (last visited June 30, 2016) (describing information operators must submit to substantiate trade secret claims).

²⁰ This information is available on the Wyoming Oil and Gas Conservation Commission’s website, <http://wogcc.state.wy.us>.

²¹ Yellowstone County v. Billings Gazette, 2006 MT 218, ¶ 37, 333 Mont. 390, 143 P.3d 135 (Nelson, J., concurring) (footnote omitted).

²² Great Falls Tribune v. Great Falls Public Schools, 255 Mont. 125, 129, 841 P.2d 502, 504 (1992) (citing Mtn. States v. Dep’t of Pub. Serv. Reg., 194 Mont. 277, 285, 634 P.2d 181, 186-87 (1981)).

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The fact that the Board has structured its Disclosure Rule in a manner that prevents alleged trade secret information from ever coming into the Board's possession cannot justify a framework that undermines citizens' fundamental constitutional rights.²⁹ Indeed, the fact that the current Disclosure Rule treats alleged trade secret information like a "hot potato" on which the Board never gets its hands further undermines the Constitution's right-to-know provision. The Constitution places on entities seeking to avoid public disclosure a burden "to establish prima facie proof that the information is a discernible property right entitled to protection."³⁰ But the Disclosure Rule turns this requirement on its head by creating an irrebuttable presumption that any chemical information claimed to be a trade secret is indeed a trade secret warranting constitutional protections that outweigh the public's right to know.³¹ Further, the Disclosure Rule impermissibly relieves the Board of its "affirmative duty to ... make an independent determination whether the [ingredients of hydraulic fracturing fluids] are in fact property rights which warrant due process protection under the applicable state or federal law."³² In this regard, the Montana Supreme Court has made clear that "the determination of what is or is not a protected property interest must be first addressed by the [agency] in accordance with [the Uniform Trade Secrets Act] and supporting case law."³³ Agency rules that "rely on mere

²⁹ The record of the Disclosure Rule's enactment indicates that the Board intentionally structured the rule to avoid obtaining any alleged trade secret information in order to avoid the prospect of liability if the Board then improperly disclosed genuine trade secrets to the public. See Mont. Bd. of Oil & Gas Conserv., Tr. of Pub. Hearing on Hydraulic Fracturing Rule 2 (June 15, 2011) (Board Administrator Tom Richmond stating, in support of proposed Disclosure Rule, "I think it is important that the agency not possess trade secrets and then incur potential liability for disclosure of protected information").

³⁰ Great Falls Tribune v. Mont. Pub. Serv. Comm'n, ¶ 60.

³¹ See id.; Associated Press v. Mont. Dep't of Revenue, 2000 MT 160, ¶ 26, 300 Mont. 233, 4 P.3d 5 (affirming that agencies must balance legitimate interest in secrecy against the public's constitutional right to know).

³² Great Falls Tribune v. Mont. Pub. Serv. Comm'n, ¶ 57.

³³ Id., ¶ 63.

principle, which limits the government's ability to cede decision-making powers to private parties.³⁵

While the Board has authority to determine in the first instance whether specific chemical information qualifies for an exemption from public disclosure under its rule, it may not cede that authority to private oil and gas operators without providing any oversight or process through which members of the public can challenge the extension of trade secret protection. The Montana Supreme Court has held that a statute that delegates to a private entity such "absolute discretion" to determine legal rights or status is unconstitutional,³⁶ and Petitioners are not aware of any authority supporting the proposition that administrative agencies may do what the Court has held the legislature may not. Indeed, federal authority makes clear that delegations of power from administrative agencies to private parties are more offensive to constitutional principles than delegations from the legislature to an agency.³⁷

For this reason, too, the Board should amend the Disclosure Rule to provide for Board review of trade secret claims and to require operators to submit adequate evidence in support of trade secret claims to inform a reasonable determination by the Board.

³⁵ See Mont. Const. Art. III, § 1 (requiring separation of powers), Art. II, § 17 (due process); see also Williams v. Bd. of Cnty. Comm'rs, 2013 MT 243, ¶ 45, 371 Mont. 356, 308 P.3d 88 (citing constitutional due process guarantee as source of non-delegation principle); In re Petition to Transfer Territory, 2000 MT 342, ¶¶ 13-15, 303 Mont. 204, 15 P.3d 447 (citing separation of powers provision as source of non-delegation principle).

³⁶ Ingraham v. Champion Internat'l, 243 Mont. 42, 48, 793 P.2d 769, 772 (Mont. 1990) (holding unconstitutional state statute that gave insurance companies "absolute discretion" to determine whether injured workers could obtain lump-sum payment of benefits under workers' compensation system); see also Calvin R. Massey, The Non-Delegation Doctrine and Private Parties, 17 GREEN BAG 2D 157, 165 (Winter 2014) ("It is generally acknowledged among the states that delegations to private parties violate state constitutions").

³⁷ See Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095, 1143-44 (D.C. Cir. 1984); accord Ass'n of Am. Railroads v. U.S. Dep't of Transp., 721 F.3d 666, 670-71 (D.C. Cir. 2013), vacated on other grounds, ---U.S.---, 135 S. Ct. 1225 (2015).

of fracking chemicals and the risks of environmental harm if those chemicals contaminate surrounding land, water, or air. The rule is an exercise of the Board's authority to protect surrounding land from the adverse effects of oil and gas development. But the rule's trade secrets exemption violates the Constitution's environmental provisions because it does not employ the least onerous approach to achieve the Board's objective of protecting legitimate proprietary information.⁴³ Instead, the exemption provides impermissibly overbroad protection by shielding from disclosure not only chemical information that in fact constitutes trade secrets under Montana law, but also any chemical information that an operator claims—based on no evidence—to be a trade secret. To align with the Constitution's environmental provisions, the Board must at a minimum require substantiation of trade secret claims and scrutinize those claims to ensure that only legitimate trade secrets are shielded from the public.

III. SUMMARY OF REQUESTED AMENDMENTS TO THE DISCLOSURE RULE

For the foregoing reasons, the Petitioners submit that the existing Disclosure Rule's limited requirements for pre-fracking chemical disclosure and procedure for exempting alleged trade secret information from disclosure render the rule unfair and unlawful. In this regard, Petitioners note that the U.S. Bureau of Land Management's hydraulic fracturing rules for federally managed lands and minerals, which include a chemical disclosure requirement, have been set aside by the federal district court in Wyoming, leaving the Board's rules as the only operative regulations requiring any fracking chemical disclosure in Montana.⁴⁴ To remedy the

⁴³ See *id.* ¶¶ 63, 80 (holding that, to the extent a state law arbitrarily and categorically excluded certain industrial activities from environmental review to ensure adequate protection of state waters used by members of the public, it violated the affected individuals' fundamental constitutional rights).

⁴⁴ *Wyoming, et al. v. U.S. Dep't of Interior, et al.*, No. 2:15-CV-043-SWS+ (D. Wyo. June 21, 2016).


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- b. Provide that the Board shall determine, based upon the documentation provided with the permit application and such additional documentation as the Board may require the operator to submit, whether the chemical information at issue constitutes a trade secret as defined in Mont. Code Ann. § 30-14-402. If the Board determines that the chemical information at issue does not constitute a trade secret warranting confidentiality protection, the operator may decide whether to use the relevant chemical—in which case its chemical name and CAS number must be publicly disclosed—or decline to use the chemical for hydraulic fracturing in the State of Montana.
- c. Provide that, when the Board determines that a specific chemical constituent proposed for use in a well stimulation fluid constitutes a trade secret under Montana law, the operator shall be required to disclose to the Board and the public the chemical family name to which the chemical constituent at issue belongs.

We look forward to your response to this petition within sixty days. Should you have any questions about this petition, please contact Katherine O'Brien, Earthjustice, at the number or email address below.

Submitted July 25, 2016.



Katherine K. O'Brien
Earthjustice
313 East Main Street
Bozeman, Montana 59715
(406) 586-9699
kobrien@earthjustice.org
Counsel for Petitioners NRDC and MEIC
(List of petitioners follows)

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Barry Hjort
Sheridan County, Montana mineral interest owner
1621 West Boulevard
Rapid City, SD 57701

Mary Anne Mercer
Roberts, Montana landowner and Richland County, Montana mineral interest owner
550 Elbow Creek Road
Roberts, Montana 59070

Deb & Buck Griffin
Nye, Montana property owners
9154 Selborne Lane
Chatt Hills, GA 30268

Carol & Jerry Nash
Tom Tschida
1951 Highway 72
Bridger, Montana 59014

Halvorson, Jim

From: Linda Nelson <nelsonl@nemont.net>
Sent: Wednesday, July 27, 2016 8:59 AM
To: Halvorson, Jim
Subject: RE: FYI

It made the morning Montana news on the radio today.

From: Halvorson, Jim [<mailto:jhalvorson@mt.gov>]
Sent: Tuesday, July 26, 2016 2:45 PM
To: Linda Nelson
Subject: RE: FYI

I had no direct idea it was coming, although we had a number of questions about frac'ing months ago. I'm not sure we have had a well frac'd this year so the matter was not on the top of my mind.

Rob is off today and my plan was to touch base with him asap and see where to go from here. Sixty days is an issue with our hearing schedule, and our agenda for the upcoming hearing is somewhat final at this time.

We'll see what he has to say; there was a chance he would stop by this afternoon since he is in Billings - but I have to leave early to see if I can figure out how to get my mortgage company to endorse an insurance check for our hail damage before the roofers show up & demand to be paid....

Jim

From: Linda Nelson [<mailto:nelsonl@nemont.net>]
Sent: Tuesday, July 26, 2016 2:39 PM
To: Halvorson, Jim
Subject: RE: FYI

Hmmmm..... This looks like it's going to take some discussion. Were you aware it was coming? I suppose it needs to be on our agenda or is it too late? Lest we not get bored....

From: Halvorson, Jim [<mailto:jhalvorson@mt.gov>]
Sent: Tuesday, July 26, 2016 11:50 AM
To: Linda Nelson
Subject: FYI

2-4-315. Petition for adoption, amendment, or repeal of rules. An interested person or, when the legislature is not in session, a member of the legislature on behalf of an interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall determine and prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 60 days after submission of a petition, the agency either shall deny the petition in writing or shall initiate rulemaking proceedings in accordance with [2-4-302](#) through [2-4-305](#). A decision to deny a petition or to initiate rulemaking proceedings must be in writing and based on record evidence. The written decision must include the reasons for the decision. Record evidence must include any evidence submitted by the petitioner on behalf of the petition and by the agency and interested persons in response to the petition. An agency may, but is not required to, conduct a hearing or oral presentation on the petition in order to develop a record and record evidence and to allow the petitioner and interested persons to present their views.

History: En. Sec. 7, Ch. 2, Ex. L. 1971; amd. Sec. 2, Ch. 236, L. 1974; amd. Sec. 12, Ch. 285, L. 1977; R.C.M. 1947, 82-4207; amd. Sec. 1, Ch. 110, L. 1997.

Rath, Jennifer

From: Rath, Jennifer
Sent: Tuesday, September 06, 2016 9:25 AM
To: Linda Nelson; paul.gatzemeier@earthlink.net; 'Peggy Ames Nerud'; 'Ron Efta'; 'Steve Durrett'; 'Wayne Smith'
Cc: Jones, Ben; Halvorson, Jim; Hudak, George; Stutz, Rob
Subject: Wyoming's Well Stimulation Rule
Attachments: WY Well Stimulation Rule.pdf

Good Morning,

The Board's discussion of Earthjustice's petition of rulemaking regarding fracking will occur on September 22, 2016, at 1:00 p.m.

In preparation of this discussion, Wyoming's Well Stimulation rule is attached. The rule starts in section 45. Please review this rule prior to the September meeting.

Regards,

Jennifer Rath

Program Specialist
Montana Board of Oil & Gas Conservation
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(406) 655-6015 - Fax

shall be ineffective and revoked by the Commission, unless, for good cause shown, the Commission extends that time.

(h) Any interested person may file an application with the Wyoming Oil and Gas Conservation Commission requesting an order applicable only to the proposed unit area described in the application which shall provide for the percentage of approval or ratification to be reduced from eighty percent (80%) to seventy-five percent (75%). The application shall contain the information required by WYO. STAT. ANN. § 35-11-315(a) and any order of the Commission entered pursuant to the application shall comply with WYO. STAT. ANN. § 35-11-316(b). Notice of the hearing on the application shall be given in the same manner and to the same persons as required by WYO. STAT. ANN. § 35-11-316(a).

(i) An order entered by the Wyoming Oil and Gas Conservation Commission under this section may be amended as provided by WYO. STAT. ANN. § 35-11-316(e).

(j) The Wyoming Oil and Gas Conservation Commission, upon its own motion or upon application, and with notice and hearing, may modify its order regarding the operation, size or other characteristic of the unit area in order to prevent or assist in preventing a substantial inequity resulting from operation of the unit, provided that no such modification may amend any permit issued under WYO. STAT. ANN. §§ 35-11-313 and 35-11-316(d).

(k) Any owner of pore space within a geologic sequestration site who has not been included within a unitization application or order authorizing a unit under this section, may petition for inclusion in the unit area, as provided by WYO. STAT. ANN. § 35-11-316(g).

Section 44. Change of Address.

Any Owner/Operator of a well shall, at all times, keep the Commission apprised of their current mailing and physical address. This may be done on a Sundry Notice (Form 4) or in the form of a letter.

Section 45. Well Stimulation.

(a) An approved Application for Permit to Drill (APD, Form 1) or an approved Sundry Notice (Form 4) is required prior to the initiation of any well stimulation activity. Additional stimulation fluid information shall be provided to the Commission as an addendum to the APD (Form 1), or as part of a comprehensive drilling/completion/recompletion plan, or on a Sundry Notice (Form 4). A federal fieldwide development document or similar document may be accepted by the Supervisor. The Supervisor may require, prior to the well stimulation, the Owner or Operator to perform a suitable mechanical integrity test of the casing or of the casing-tubing annulus or other mechanical integrity test methods using procedures set forth in Chapter 2, Section 6 and Chapter 4, Section 7(e)(i).

(b) Where multiple stimulation activities will be undertaken for several wells proposed to be drilled to the same zone(s) within an area of geologic similarity, approval may be sought from the Supervisor to accept a comprehensive master drilling/completion/recompletion plan containing the information required. The approved master drilling/completion/recompletion plan will then be referenced on each individual well's Application for Permit to Drill (Form 1).

(c) The Owner or Operator shall provide geological names, geological description and depth of the formation into which well stimulation fluids are to be injected.

(d) The Owner or Operator shall provide detailed information to the Supervisor as to the base stimulation fluid source. The Owner or Operator or service company shall provide to the Supervisor, for each stage of the well stimulation program, the chemical additives, compounds and concentrations or rates proposed to be mixed and injected, including:

(i) Stimulation fluid identified by additive type (such as but not limited to acid, biocide, breaker, brine, corrosion inhibitor, crosslinker, demulsifier, friction reducer, gel, iron control, oxygen scavenger, pH adjusting agent, proppant, scale inhibitor, surfactant);

(ii) The chemical compound name and Chemical Abstracts Service (CAS) number shall be identified (such as the additive biocide is glutaraldehyde, or the additive breaker is aluminum persulfate, or the proppant is silica or quartz sand, and so on for each additive used);

(iii) The proposed rate or concentration for each additive shall be provided (such as gel as pounds per thousand gallons, or biocide at gallons per thousand gallons, or proppant at pounds per gallon, or expressed as percent by weight or percent by volume, or parts per million, or parts per billion);

(iv) The Owner or Operator or service company may also provide a copy of the contractor's proposed well stimulation program design including the above detail;

(v) The Supervisor may request additional information under this subsection prior to the approval of the Application for Permit to Drill (Form 1) or of the Sundry Notice (Form 4);

(vi) The Supervisor retains discretion to request from the Owner or Operator and/or the service company, the formulary disclosure for the chemical compounds used in the well stimulation(s).

(e) The Owner or Operator shall provide a detailed description of the proposed well stimulation design, which shall include:

- (i) The anticipated surface treating pressure range;
- (ii) The maximum injection treating pressure;
- (iii) The estimated or calculated fracture length and fracture height.

(f) Upon prior request via Application for Permit to Drill (Form 1), and/or a comprehensive drilling/completion/recompletion plan, or by Well Completion Report (Form 3), or by Sundry Notice (Form 4), and/or by written letter to the Supervisor justifying and documenting the nature and extent of the proprietary information, confidentiality protection shall be provided consistent with WYO. STAT. ANN. § 16-4-203(d)(v) of the Wyoming Public Records Act for the following records: “trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person.”

(g) The injection of volatile organic compounds, such as benzene, toluene, ethylbenzene and xylene, also known as BTEX compounds or any petroleum distillates, into groundwater is prohibited. The proposed use of volatile organic compounds, such as benzene, toluene, ethylbenzene and xylene, also known as BTEX compounds or any petroleum distillates for well stimulation into hydrocarbon bearing zones is authorized with prior approval of the Supervisor. It is accepted practice to use produced water that may contain small amounts of naturally occurring petroleum distillates as well stimulation fluid in hydrocarbon bearing zones.

(h) The Owner or Operator or service company shall provide the Supervisor, on a Well Completion or Recompletion Log (Form 3), or on a Sundry Notice (Form 4) for an existing well, the following post well stimulation detail:

- (i) The actual total well stimulation treatment volume pumped;
- (ii) Detail as to each fluid stage pumped, including actual volume by fluid stage, proppant rate or concentration, actual chemical additive name, type, concentration or rate, and amounts;
- (iii) The actual surface pressure and rate at the end of each fluid stage and the actual flush volume, rate and final pump pressure;
- (iv) The instantaneous shut-in pressure, and the actual 15-minute and 30-minute shut-in pressures when these pressure measurements are available;
- (v) In lieu of (i) through (iv) above, Owner or Operator shall submit the actual well stimulation service contractor’s job log, without any cost/pricing data from the field ticket, or an Owner or Operator representative’s well treatment job log or any report

providing the above required information. If information on the actual field ticket describes the Owner's or Operator's proprietary completion design and/or well stimulation design, confidentiality may be afforded per subsection (f) above.

(i) During the well stimulation operation, the Owner or Operator shall monitor and record the annulus pressure at the bradenhead. If intermediate casing has been set on the well being stimulated, the pressure in the annulus between the intermediate casing and the production casing shall also be monitored and recorded. A continuous record of the annulus pressure during the well stimulation shall be submitted on Well Completion or Recompletion Log (Form 3) or on a Sundry Notice (Form 4).

(i) If during the stimulation, the annulus pressure increases by more than five hundred (500) pounds per square inch gauge (psig) as compared to the pressure immediately preceding the stimulation, the Owner or Operator shall verbally notify the Supervisor as soon as practicable but no later than twenty-four (24) hours following the incident. The Owner or Operator shall include a report containing all details pertaining to the incident, including corrective actions taken, as an attachment to the Well Completion Report (Form 3).

(j) The Owner or Operator shall provide information to the Supervisor on Well Completion Report (Form 3) or on Sundry Notice (Form 4) as to the amounts, handling, and if necessary, disposal at an identified appropriate disposal facility, or reuse of the well stimulation fluid load recovered during flow back, swabbing, and/or recovery from production facility vessels. Storage of such fluid shall be protective of groundwater as demonstrated by the use of either tanks or lined pits. If lined pits are utilized to store fluid for use in well stimulation, or for reconditioning, for reuse, or to hold for appropriate disposal, then the requirements of Chapter 4, Section 1 of these rules shall be met to protect wildlife and migratory birds.

Section 46. Groundwater Baseline Sampling, Analysis and Monitoring

Note: Effective date of Chapter 3, Section 46 is March 1, 2014.

(a) All operators are required to submit a groundwater baseline sampling, analysis and monitoring plan with an Application for Permit to Drill or Deepen a Well (Form 1). The groundwater monitoring program will consist of initial baseline water sampling and testing followed by a series of subsequent sampling and testing after setting the production casing or liner. This Rule will not apply to an existing oil or gas well that is converted to an injection well for enhanced recovery or disposal purposes.

(b) If four (4) or fewer available water sources are present within a one-half (1/2) mile radius of the location of a proposed oil well, gas well (including coalbed methane wells), dedicated injection well, or Commission approved monitoring well, the operator shall collect a sample from each available water source.

Halvorson, Jim

From: Paul Gatzemeier <paul.gatzemeier@earthlink.net>
Sent: Tuesday, September 06, 2016 12:31 PM
To: Rath, Jennifer
Cc: Linda Nelson; Peggy Ames Nerud; Ron Efta; Steve Durrett; Wayne Smith; Jones, Ben; Halvorson, Jim; Hudak, George; Stutz, Rob
Subject: Re: Wyoming's Well Stimulation Rule

Thanks. Could we get a staff summary of current rules and legislative activity on this topic.

Paul Gatzemeier
406.696.9842

On Sep 6, 2016, at 8:24 AM, Rath, Jennifer <JRath@mt.gov> wrote:

Good Morning,

The Board's discussion of Earthjustice's petition of rulemaking regarding fracking will occur on September 22, 2016, at 1:00 p.m.

In preparation of this discussion, Wyoming's Well Stimulation rule is attached. The rule starts in section 45. Please review this rule prior to the September meeting.

Regards,

Jennifer Rath

Program Specialist
Montana Board of Oil & Gas Conservation
2535 St. Johns Avenue
Billings, MT 59102
(406) 656-0040 - Office
(406) 655-6015 - Fax

<WY Well Stimulation Rule.pdf>

Halvorson, Jim

From: Halvorson, Jim
Sent: Tuesday, September 06, 2016 1:08 PM
To: 'Paul Gatzemeier'; Rath, Jennifer
Cc: Linda Nelson; Peggy Ames Nerud; Ron Efta; Steve Durrett; Wayne Smith; Jones, Ben; Hudak, George; Stutz, Rob
Subject: RE: Wyoming's Well Stimulation Rule

We are working on materials to summarize the current status, as well as reviewing the materials submitted along with the petition. We will have something to send out prior to the hearing.

Jim

From: Paul Gatzemeier [<mailto:paul.gatzemeier@earthlink.net>]
Sent: Tuesday, September 06, 2016 12:31 PM
To: Rath, Jennifer
Cc: Linda Nelson; Peggy Ames Nerud; Ron Efta; Steve Durrett; Wayne Smith; Jones, Ben; Halvorson, Jim; Hudak, George; Stutz, Rob
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(406) 655-6015 - Fax

<WY Well Stimulation Rule.pdf>

Halvorson, Jim

From: Linda Nelson <nelsonl@nemont.net>
Sent: Monday, September 12, 2016 5:58 AM
To: Halvorson, Jim
Subject: Re: special meeting info

Great. I just needed to know where to tell them to look.

Sent from my iPad

On Sep 11, 2016, at 11:06 AM, Halvorson, Jim <jhalvorson@mt.gov> wrote:

This should all be out there under the heading of "09/22 Special Hearing". I added a new "new" button so hopefully everyone can find it.

Halvorson

From: Linda Nelson [<mailto:nelsonl@nemont.net>]
Sent: Friday, September 09, 2016 1:34 PM
To: Halvorson, Jim; Stutz, Rob
Cc: 'Linda Nelson'
Subject: special meeting info

Jim and Rob,

Is the information contained in the petition available to the public so that they can make informed comments if they choose? I understand that the notice went in the mail but there's not much information there to make pertinent comments. Could/should we post the petition on our website where people could read it?

Linda

Halvorson, Jim

From: Corey Welter - Welter Consulting <mtoilman@welterconsulting.com>
Sent: Tuesday, September 13, 2016 11:36 AM
To: Halvorson, Jim
Subject: RE: Welcome...

I'll swing by sometime after lunch.

From: Halvorson, Jim [mailto:jhalvorson@mt.gov]
Sent: Tuesday, September 13, 2016 10:41 AM
To: mtoilman@welterconsulting.com
Subject: RE: Welcome...

Certainly. We'll be here any time after 1:00.

From: Corey Welter - Welter Consulting [mailto:mtoilman@welterconsulting.com]
Sent: Tuesday, September 13, 2016 10:27 AM
To: Halvorson, Jim
Subject: RE: Welcome...

Jim,
Are you open anytime this afternoon?

From: Halvorson, Jim [mailto:jhalvorson@mt.gov]
Sent: Sunday, September 11, 2016 11:05 AM
To: Corey Welter <mtoilman@welterconsulting.com>
Subject: Welcome...

Corey,

We received notice of your appointment last week – welcome aboard.

Just to start things off on a roll, there is a special hearing scheduled for September 22; it has to do with a petition for rulemaking that we received from EarthJustice on July 26, 2016. This is a formal request, and under state law we have 60 days to make a decision. The options are to deny the petition or agree to begin rulemaking, and the board will have to pick on the 22nd.

Everything that was filed with the petition is on the internet at:
http://www.bogc.dnrc.mt.gov/Misc/Petition_For_Rulemaking/. The petition is the file called "Petition For Rulemaking.pdf. Filed along with the petition were "literature cited" and "Exhibits"; each of these is a directory under that web address. Staff has been going through all the submissions in detail for the past few weeks.

We will mail you a copy of everything we have sent to the other board members with regard to the petition, and we are gathering other things that are appropriate for new members to send your way.

Feel free to stop by before the September 22 meeting if you wish & we can visit about things in general or answer any questions you might have.

Halvorson

J.W. Halvorson
Administrator / Geologist
Montana Board of Oil and Gas
2535 St. Johns Avenue
Billings, MT 59102
406-656-0040