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MONTANA BOARD OF OIL & GAS CONSERVATION • BILLINGS

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.

reasonably likely to occur and are harmed by inadequate disclosure of chemical information under the current Disclosure Rule as described more fully below. Pursuant to Mont. Code Ann. § 2-4-315, the undersigned request that the Board take action within sixty days of the date of this petition by initiating proceedings to amend the Disclosure Rule or issuing a decision denying this petition.

I. FACTUAL AND LEGAL BACKGROUND

A. Hydraulic Fracturing Chemicals

Hydraulic fracturing, or “fracking,” is used to enable or enhance oil and gas production by injecting fluids (generally containing water, a proppant, and chemical additives) under sufficient pressure to fracture the oil- or gas-bearing formations. Chemical additives typically constitute a small percentage of the overall fluid volume. However, because more than one million gallons of fluids are typically used to frack a single well, thousands of gallons of chemicals may be stored at a drilling site and used to complete a fracking job.

Numerous studies have documented adverse health effects in people who live or use domestic water wells near fracking operations.² Many chemicals commonly used in fracking fluids pose threats to human health and the environment; many are toxic and some are known

² See, e.g., Hays J., Shonkoff SBC (2016) Toward an Understanding of the Environmental and Public Health Impacts of Unconventional Natural Gas Development: A Categorical Assessment of the Peer-Reviewed Scientific Literature, 2009-2015. PLoS ONE 11(4); Webb E., et al. (2014) Developmental and Reproductive Effects of Chemicals Associated With Unconventional Oil and Natural Gas Operations. Rev. Environ. Health 29(4); Rabinowitz P.M., et al. (2015) Proximity to Natural Gas Wells and Reported Health Status: Results of a Household Survey in Washington County, Pennsylvania. Environmental Health Perspectives 123(1); Casey J.A., et al. (2016) Unconventional Natural Gas Development and Birth Outcomes in Pennsylvania, USA. Epidemiology 27(2); McKenzie L.M., et al. (2014) Birth Outcomes and Maternal Residential Proximity to Natural Gas Development in Rural Colorado. Environmental Health Perspectives 122(4); Jemielita T., et al. (2015) Unconventional Gas and Oil Drilling is Associated with Increased Hospital Utilization Rates. PLoS ONE 10(7). All scientific papers cited in this petition and additional exhibits are provided on the accompanying DVD.

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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).

B. The Disclosure Rule

The current Disclosure Rule requires oil and gas operators⁷ seeking permits for hydraulic fracturing to disclose information about the chemical ingredients of the fracking fluids used. The rule outlines different requirements for pre- and post-fracking disclosure.

Before fracking may occur, operators must provide to the Board as part of their application for a permit to drill general information about the proposed chemical treatment, including “the trade name or generic name of the principle [sic] components or chemicals” in the well stimulation fluid proposed for use. Admin. R. Mont. § 36.22.608(1)-(3). To satisfy this pre-fracking disclosure requirement, operators are not required to disclose all individual chemical ingredients of the various additives proposed for use or provide the chemical ingredients’ CAS numbers. Further, instead of disclosing the specific additive types or products they intend to use for a planned fracking job, operators have discretion to submit “a copy of a final design of well treatment actually used for similar wells and which reflects the likely design for the well to be permitted” or “a pre-filed generic design submitted for specific geologic formations, geographic areas, or well types likely to be used in a particular well.” Id. § 36.22.608(4). With regard to timing, operators generally must submit their pre-fracking chemical disclosure as part of their permit application for the well at issue. Id. § 36.22.608(1). However, “[f]or wildcat or exploratory wells or when the operator is unable to determine that hydraulic fracturing, acidizing, or other chemical treatment will be done to complete the well,” the operator may defer submission of any chemical information until just 48 hours before fracking begins. Id. § 36.22.608(2). In short, in its current form the Disclosure Rule does not require disclosure of the specific chemicals proposed for use in an individual well before

⁷ For ease of reference, Petitioners refer to oil and gas well owners, operators, and service companies collectively as “oil and gas operators” or “operators.”

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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.

The Disclosure Rule contains limited exemptions from this trade secret protection where disclosure of chemical information is necessary to respond to a spill or release of chemicals, for a medical professional to diagnose or treat an individual patient who may have been exposed to the chemical, or to respond to a medical emergency. Id. § 36.22.1016(2)-(4). However, in such circumstances the operator is required to disclose the relevant chemical information only to the Board or responsible medical professional, and the individuals receiving such information may be required to sign a confidentiality agreement barring further disclosure. Id. In other words, these emergency exceptions do not provide for public disclosure of chemical information.

II. ARGUMENT

A. By Deferring Submission of Specific Chemical Information Until After Well Completion, the Disclosure Rule Frustrates Landowners' Ability to Conduct Baseline Water Quality Testing and Evaluate the Risks of Proposed Fracking Operations

By failing to require disclosure of the specific chemical ingredients of fracking fluids before fracking occurs, and permitting operators to withhold even generalized information about the chemicals proposed for certain fracking treatments until just 48 hours before fracking commences, the Disclosure Rule unfairly deprives nearby residents of information that is essential to understand the risks posed by planned fracking operations and frustrates landowners' ability to conduct effective baseline water quality testing on their property.

Because Montana law does not require oil and gas operators to conduct or fund baseline water quality testing in the vicinity of planned drilling operations, nearby landowners often want to conduct their own baseline testing. However, it is generally impracticable to conduct "complete" water quality testing that would reveal every substance present in a water sample; instead, effective baseline testing requires knowledge of the specific chemicals proposed for use

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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).

occur.¹³ If the chemicals used to complete a well ultimately differ from what was disclosed previously, the operator is required simply to notify the state oil and gas agency of the change.¹⁴ Indeed, underscoring the feasibility of such pre-fracking disclosure, Petitioners are aware of at least one instance in which a Montana operator disclosed to the Board a complete list of the chemical ingredients (and associated CAS numbers) of a fracking fluid planned for use before fracking occurred.¹⁵

There is no legitimate reason why Montana landowners should be deprived of meaningful pre-fracking chemical disclosure where providing specific chemical information to the public in advance of fracking is demonstrably feasible and, indeed, is standard practice in our neighboring state of Wyoming. Further, detailed, well-specific disclosure of chemicals proposed for use in fracking operations protects both landowners and well operators by enabling them to generate information that would be necessary to link any subsequent water contamination to a specific source—and thereby absolve sources that are not responsible. Accordingly, Petitioners request that the Board amend Admin. R. Mont. § 36.22.608 to require pre-fracking disclosure of the chemical ingredient name and CAS number for all ingredients of fracking fluids proposed for use as part of the operator's permit application.¹⁶ In amending these provisions, the Board should ensure that chemical information is received by the Board and made available to the public at least 45 days before fracking occurs.

¹³ Wyo. Admin. Code OIL GEN Ch. 3, § 45(a), (d)(ii).

¹⁴ See *id.* § 45(h)(ii) (Wyoming rule requiring well completion report to include name, type, and concentration of chemicals actually used).

¹⁵ See Exhibit 2.

¹⁶ See *infra* Point III & Ex. 4.

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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

scrutinize trade secret claims, it creates no incentive for operators to limit such claims to the narrow universe of chemicals that are bona fide trade secrets.¹⁷ A review of post-fracturing chemical disclosures submitted to the Board and posted on FracFocus reveals that operators frequently invoke the Disclosure Rule’s trade secrets provision to withhold chemical information from disclosure—sometimes withholding the identities of more than one-third of the chemicals used in an individual well.¹⁸ As a result, there likely is an expanding universe of fracking chemicals being used in our state whose identity is unknown to state government or the public, precluding advocacy or regulatory reform to ensure appropriate controls on the use of chemicals that are harmful to human health or the environment. More fundamentally, it is unjust that landowners and other citizens who might be exposed to fracking chemicals must bear the risk of suffering damage to their property or health from the use of an unknown chemical while oil and gas operators bear no burden to justify their claims that specific chemicals warrant confidentiality protection.

That operators just across the border in Wyoming are required to justify trade secret claims for fracking chemicals underscores the inequity of the Montana Disclosure Rule’s current approach. Under Wyoming’s fracking chemical disclosure rule, operators must submit to the state oil and gas commission documentation justifying any request to withhold fracking chemical information from the public and the state regulator must determine whether such claims are

¹⁷ Consistent with the Uniform Trade Secrets Act adopted in Montana, the Disclosure Rule exempts from disclosure only the identities of fracking-fluid ingredients that are demonstrably “unique to the owner or operator or service contractor” and “derive[] independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means” by competitors and which are “the subject of efforts that are reasonable under the circumstances to maintain [their] secrecy.” Mont. Code Ann. § 30-14-402(4); *see* Admin. R. Mont. § 36.22.1016(1).

¹⁸ *See* sample disclosures attached as Exhibit 3.

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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)).

to examine the documents and observe the deliberations of government bodies, “except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”²³

Though the provision does not mandate disclosure of bona fide trade secrets, it creates an express presumption in favor of public access to information and places the burden of establishing trade secret status on the entity seeking confidentiality protection.²⁴ It further requires that the responsible agency undertake a fact-specific inquiry to determine whether alleged trade secret information in fact qualifies as such under state law.²⁵

The Disclosure Rule’s trade secrets exemption contravenes the fundamental purpose of the constitutional right-to-know by arbitrarily denying citizens access to information that is necessary “to determine the propriety of governmental actions.”²⁶ The Board is obligated to regulate fracking and other aspects of oil and gas production to prevent contamination and protect surrounding land,²⁷ and, under the Disclosure Rule itself, the Board is required to collect and make available to the public all fracking chemical information except that which qualifies as a bona fide trade secret under state law.²⁸ But as a result of the Disclosure Rule’s existing exemption for trade secrets, citizens lack the ability to determine whether the Board is improperly allowing oil and gas operators to withhold chemical information that is not a legitimate trade secret and whether the Board is allowing the use of fracking chemicals that pose unacceptable risks to human health, property, or the environment.

²³ Mont. Const. Art. II, § 9 (emphasis added).

²⁴ See id.; Great Falls Tribune v. Mont. Pub. Serv. Comm’n, 2003 MT 359, ¶¶ 55, 59-62, 319 Mont. 38, 82 P.3d 876.

²⁵ Great Falls Tribune v. Mont. Pub. Serv. Comm’n, ¶ 54.

²⁶ Great Falls Tribune v. Great Falls Public Schools, 255 Mont. at 129, 841 P.2d at 504 (citation omitted).

²⁷ See Mont. Code Ann. § 82-11-111(2)(a) (directing the Board to “require measures to be taken to prevent contamination of or damage to surrounding land or underground strata caused by drilling operations and production ...”).

²⁸ See Admin. R. Mont. §§ 36.22.1015-.1016

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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.

representations of [companies] that the information contains trade secrets or other confidential proprietary information” violate the public’s constitutional right to know.³⁴

In sum, the Disclosure Rule does precisely what the Constitution’s right-to-know provision forbids: it withholds from citizens information to which they otherwise would be legally entitled on the ground that the information is a trade secret, and it provides that confidentiality protection to oil and gas operators without requiring any justification for the trade secret claim and without any determination by the Board that the claim is valid. To remedy this defect and protect citizens’ fundamental right-to-know, the Board should amend the rule’s trade secrets exemption to require operator substantiation and Board oversight of trade secret claims, as described more fully below.

3. The Disclosure Rule Unlawfully Delegates to Oil and Gas Operators the Board’s Authority to Determine Whether Chemical Information Constitutes Trade Secrets

By granting oil and gas operators exclusive power to determine whether chemical information covered by the Disclosure Rule constitutes trade secrets—without any oversight by the Board—the Disclosure Rule also offends the Montana Constitution’s non-delegation

³⁴ Id. ¶ 55. Relatedly, the Supreme Court has held that an agency violates the public’s constitutional right to know where its rules or practices provide automatic confidentiality protection to classes of information, without a fact-specific determination of trade secret status by the responsible agency. Associated Press, ¶ 26; see also Great Falls Tribune v. Mont. Pub. Serv. Comm’n, ¶ 56 (describing evidentiary showing that company seeking confidentiality protection under right-to-know provision must make to support its trade secret claim). The Disclosure Rule contravenes this principle by providing automatic confidentiality protection to any and all chemical information that an operator claims is a trade secret, without any independent evaluation by the Board.

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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).

4. The Disclosure Rule Violates Montana Citizens' Fundamental Right to a Clean and Healthful Environment

Finally, by restricting without justification the public's access to fracking chemical information, the Disclosure Rule's trade secrets exemption violates the Montana Constitution's clean and healthful environment provisions, Mont. Const. Art. II, § 3, Art. IX, § 1.

The Montana Constitution guarantees citizens' fundamental right to a clean and healthful environment,³⁸ and imposes on both citizens and the government an obligation to maintain and improve the environment.³⁹ As the Supreme Court has explained, these provisions "provide ... protections which are both anticipatory and preventive," not merely a remedy for environmental harm after it has occurred.⁴⁰ Further, these constitutional provisions are "not intend[ed] to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment," but instead demand "adequate remedies for degradation of the environmental life support system" and laws that will "prevent unreasonable degradation of natural resources."⁴¹ Further, because the constitutional right to a clean and healthful environment is fundamental, the Court has established that "any statute or rule which implicates that right" is valid only if it advances "a compelling state interest and ... is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective."⁴²

The Disclosure Rule implicates the fundamental right of Montana citizens to a clean and healthful environment. As discussed above, the rule responds to public concerns over the safety

³⁸ Mont Const. Art. II, § 3.

³⁹ Id. Art. IX, § 1.

⁴⁰ Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 ("MEIC").

⁴¹ Id.

⁴² Id. ¶ 63 (emphasis in original).

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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).

defects in the existing Montana Disclosure Rule discussed above, the Petitioners request that the Board promptly initiate proceedings to amend the Disclosure Rule in the following ways⁴⁵:

1. Amend Admin. R. Mont. § 36.22.608 (Well Stimulation Activities Covered by Drilling Permit) to
 - a. Require disclosure of—in addition to the information required under the current rule—the chemical ingredient name, CAS number, volume, and concentration for each ingredient of the well stimulation fluid proposed for use in a hydraulic fracturing operation as part of the permit application for the relevant well;
 - b. Require that this disclosure be made to the Board, and the information made available to the public via FracFocus or the Board's publically available website, at least 45 days before hydraulic fracturing occurs; and
 - c. Provide that these requirements apply to all wells for which hydraulic fracturing is proposed, including wildcat and exploratory wells.
2. Amend Admin. R. Mont. § 36.22.1016 (Proprietary Chemicals and Trade Secrets) to
 - a. Require operators seeking confidentiality protection for chemical information under that provision to submit as part of their permit application documentation establishing that the chemical information for which confidentiality protection is sought constitutes a trade secret as defined in Mont. Code Ann. § 30-14-402. In order to provide guidance to operators in fulfilling this requirement, Petitioners urge the Board to adopt guidelines for trade secret justifications similar to the Wyoming guidelines cited supra, n.19.

⁴⁵ As required by Admin. R. Mont. § 1.3.308(a)(iii), a copy of the rules Petitioners seek to amend is attached as Exhibit 4, with proposed changes marked in redline.

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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.



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