August 23, 2013

U.S. Department of Interior
Director (630), Bureau of
Land Management
Mail Stop 2134 LM
1849 C Street, NW
Washington, DC 20240

Attn: 1004-AE26

Director:

We submit for your review and consideration, comments on the Bureau of Land Management’s Supplement Notice of Proposed Rulemaking for Oil and Gas: Hydraulic Fracturing on Federal and Indian Lands (“Supplemental Notice”). Our comments focus on the proposal’s chemical disclosure requirements, and its treatment of information claimed as trade secrets.

While a number of constituencies could make use of this information, we focus on the information needs of medical professionals and first responders, who rely on chemical information to provide emergency and non-emergency diagnosis and treatment, and conduct public health risks assessments.

In summary, we offer the following seven recommendations:

1. Require chemical reporting before fracturing, or otherwise ensure that information is accessible to medical professionals and first responders from the moment chemicals enter the well site;
2. Ensure baseline water quality testing of water wells and public drinking water sources near wells and waste impoundments, so that medical providers can determine the duration of exposure for people living near unconventional oil and gas development;
3. Require additional fracturing fluid information required by some states, and request that FracFocus update its form to accommodate that additional information;
4. Call for enhanced searchability of FracFocus;
5. Require operators to submit a copy of each completed FracFocus form directly to the BLM, with a certification as to the truth and accuracy of its contents;
6. Establish a process for challenging trade secret claims over fracturing chemicals; and
7. Provide limited access to chemical information claimed as trade secret, for emergency response, health care, and public health research needs.

As a general matter, we believe the BLM has missed a critical opportunity to invite public debate about the role of FracFocus, the quality of data reporting on the site, and strategies for providing meaningful disclosure. Repeatedly in the Supplemental Notice, the BLM makes vague

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references to future improvements that may occur on FracFocus. The Groundwater Protection Council announced these improvements two weeks after publication of the Supplemental Notice, under the tagline “FracFocus 2.0.” Moreover, most of the changes had been incorporated on the site in the months leading up to June 1, 2013. Therefore, when it published the Supplemental Notice, the BLM had reason to know the nature and extent of the promised improvements. The BLM should have described the changes to FracFocus, and sought comment on whether those changes are sufficient to address the concerns raised by commenters.

The BLM states that working with FracFocus to improve reporting and searchability is more “cost-effective and beneficial” than creating a separate database. However, the BLM is not limited to these two options. For instance, we believe BLM could push FracFocus to become a more useful tool, by setting minimum standards that must be met for a third party website to be eligible to receive operator reports. If FracFocus will not change, perhaps a competitor site will provide the BLM and states with enhanced functionality.

The Harvard Law School Environmental Policy Initiative published a report in April, outlining concerns about the use of FracFocus as a regulatory compliance tool. That report, Legal Fractures, is attached as Appendix A. As that report suggests, if the BLM and other public agencies are going to rely on a third party, industry-run registry as a method for providing critical information to the agency and to the public, it is incumbent on those agencies to design a program that ensures public oversight and accountability.

We do not provide recommendations for an ideal world, but attempt to address the most serious shortcomings in the proposal and suggest practical, reasonable ways to improve upon it.

**RECOMMENDATION #1: Require chemical reporting to take place before fracturing, or otherwise ensure that chemical information is accessible to first responders and medical professionals from the moment chemicals enter the well site.**

In the Supplemental Notice, the BLM claims that requiring chemical reporting through FracFocus within 30 days of the completion of fracturing operations “will provide to the public timely information from a single Web site.” However, for the information to be “timely,” it must be accessible to the public, or at least to medical professionals and first responders, from the moment that drilling and fracturing chemicals are brought onto the well site.

Emergency medical services and hospitals rely on HazMat policies and procedures to ensure fast, effective response to HazMat incidents. These protocols differ slightly to accommodate location, target workforce, and available resources. However, they commonly emphasize that the most vital piece of information to secure is the identity of any chemicals present at the emergency.

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4 78 Fed. Reg. 31636, 31657; see also 78 Fed. Reg. 31636 (characterizing the reporting requirement as providing “prompt access” to chemical information).
Most first responders and physicians have only basic training in toxicology. Therefore, HazMat protocols recommend that a medical professional consult specific toxicological references for more information on the chemicals at issue—references such as the EPA Integrated Risk Information System (IRIS), the ATSDR’s Medical Management Guidelines (MMGs) for Acute Chemical Exposures, and the National Library of Medicine’s TOXNET.6 Critically, effective use of these databases requires the ability to search these repositories, by a chemical’s CAS number, common chemical name or synonym, or a registered trade name.

Incidents such as fire, explosion, blowout, or accidental spill or release of fracturing fluids, produced water, or flow back at a well site can and do occur before well completion.7 When responding to this type of event, medical professionals must assess and minimize the risk of contamination to the patient and themselves. They can only do this if they have real time access to the chemical information. However, if an emergency occurs before well completion, under this proposal medical professionals will have to respond without complete chemical information.

Medical providers could find some information in Material Safety Data Sheets (MSDS), which are required to be kept at the work site by the federal Occupational Safety and Health Act (OSHA).8 However, these forms pose two issues. First, MSDS only list chemicals considered “hazardous chemicals” under OSHA. As noted in Appendix A,

While the law defines “hazardous chemical” broadly, manufacturers rely on existing literature to determine whether a chemical is hazardous; they are not required to test their product. Moreover, OSHA’s requirements only apply to chemicals “known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.” This further limits ‘hazardous chemicals’ to those that have been studied for workplace exposure. At a 2012 American Chemical Society conference, Matthew Watson of Environmental Defense Fund said, ‘Halliburton and others tell me that probably half of the chemicals used in fracturing aren’t those OSHA-regulated MSDS chemicals.’9

(observe that “[a]ccess to chemical identities assists health professionals, physicians, and nurses in obtaining further information for diagnostic and treatment recommendations during emergencies, and for prevention and treatment measures during nonemergencies”).

6 Dr. Rose Goldman, Information and Educational Resources for Occupational and Environmental Health Resources at uptodate.com (listing commonly used toxicological databases).
7 See, e.g., Ken Ward, Jr., Company Cited in Fatal Taylor Gas Well Explosion, WEST VIRGINIA GAZETTE (Aug. 16, 2013) (describing a February 15, 2013 explosion at a well site as an employee transferred wastewater from an onsite truck to a disposal truck); David Gutman, Doddridge County Gas Fracking Explosion Injures at Least 7, WEST VIRGINIA GAZETTE (July 7, 2013) (describing how tanks receiving flowback and produced water exploded during a fracturing job); Gayathri Vaidyanathan, Hydraulic Fracturing: When 2 Wells Meet, Spills Can Often Follow, E&E NEWS (Aug. 5, 2013) (documenting more than ten instances where one well has intercepted another during a frac job, spilling oil and fracturing fluids); and Laura Lagere, Wyoming County Well Malfunction Causes Spill, Evaluation, THE SCRANTON TIMES TRIBUNE (Mar. 15, 2013) (describing how a well spewed cut 227,000 gallons of fracturing fluid during the fracturing stage).
8 29 C.F.R. § 1910.1200.
9 See App. A, at 5.
Second, an MSDS does not always provide the information necessary to consult a toxicological reference database. When an MSDS does not identify all of the chemical ingredients of a product, medical professionals need to be able to search by trade name to determine the product’s potential health effects and risk characteristics. Sometimes, this is not possible. For instance, attached as Appendix B is an MSDS for a Halliburton product called “Be-9.” This is apparently not a registered trade name because nothing came up when this product was typed into the toxicological databases listed on the previous page. The MSDS lists only one ingredient – tributyl tetradecyl phosphonum chloride – which comprises just 5-10% of the overall product. The rest of the product remains a mystery, and could confound medical responses to a patient that has been exposed to this product, or emergency responses to a fire that contains this product.

Medical providers could also rely in part on emergency response plans and facility notifications, under the federal Emergency Planning and Community Right to Know Act (EPCRA). However, EPCRA contains a relatively short list of “extremely hazardous” substances, and establishes reporting thresholds that may not be met at most well sites.\(^1\) If a spill or other emergency occurs, EPCRA expands reporting requirements to include a larger list of chemicals and smaller threshold quantities; however, determining what amount of a reportable chemical has spilled may be challenging and could result in less than full disclosure under EPCRA.

In short, there is no substitute for the broader chemical reporting that could be available through FracFocus, where chemicals are disclosed whether they are regulated under OSHA or not, and regardless of reporting quantity. The BLM acknowledges that fracturing fluid chemicals are hazardous; in fact, the bureau justifies not requiring pre-fracturing disclosures by stating it can just assume “[f]or purposes of NEPA compliance, ... [that] chemicals used in hydraulic fracturing are generally considered hazardous.”\(^11\) The hazardous nature of these chemicals underscores the need to get information to the medical community as soon as the chemicals reach the well site, so that the medical community may respond effectively to an emergency.

Access to adequate information about chemicals used in unconventional oil and gas operations is also critical for care provided in non-emergency situations. While less time-sensitive than an emergency situation, one can imagine the anxiety and frustration a community member might feel if they seek medical treatment for a symptom that has emerged since the onset of nearby oil and gas activity, only to find that the doctor will be unable to determine what may be causing this symptom for some months down the road, after the drilling and fracturing have ended.

In addition to the clear medical need for this information, early disclosure of chemicals could support sound disposal decisions. Operators must submit disposal plans during the application process; however, the Supplemental Notice removes “chemical composition” from the

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\(^{10}\) 40 C.F.R. Ch. 1, Part 355, App. A, “The List of Extremely Hazardous Substances and Their Threshold Planning Quantities.” As a side note, the information reported on FracFocus forms makes it difficult to determine which well sites trigger EPCRA’s reporting and notification requirements. Not only does the assertion of trade secret protections mask the identity of many chemicals, but FracFocus directs operators to estimate amount of a fracturing fluid chemical by percentage of total gallons of fracturing fluid. EPCRA defines threshold reporting quantities in pounds.

\(^{11}\) 78 Fed. Reg. 31636, 31649.
information required to be submitted. The BLM asserts that the remaining information will provide “all necessary information regarding chemicals being used in the event that the information is needed to help protect health and safety or to prevent unnecessary or undue degradation of the public lands.”\(^{12}\) However, the BLM would be in a much better position to assess disposal methods if it knew something about the nature of the waste.

Against these clear needs for information about the chemicals stored, blended, and used at a well site, the BLM references vague “trade secret” concerns about disclosing chemicals before fracturing is completed.\(^{13}\) The BLM neither explains why chemicals that are not trade secrets should not be disclosed, nor describes how trade secrets would be more likely to be wrongfully disclosed if reporting were to occur at the fracturing stage, rather than a few months later. We see no reason to avoid early disclosure, as required in Wyoming\(^{14}\) and Illinois.\(^{15}\)

Finally, recovered fluids will not only include flowback of some of the fracturing fluids; they will also contain produced water. Produced water may contain heavy metals, volatile organic compounds, and radioactive material. Therefore, once fluids begin to be recovered, the chemical constituents of the wastewater should be tracked and reported. This will provide critical information to medical professionals and first responders, and alert the BLM to any adjustments that may need to be made in a waste disposal plan based on the presence of new constituents.

**RECOMMENDATION #2: Ensure baseline water quality testing of wells and public drinking water sources near oil and gas wells and waste impoundments, so that medical professionals can determine the duration of exposure for people and livestock living near unconventional oil and gas wells.**

Many people may think of federal lands as being located far from population centers or drinking water supplies. However, this has been changing in recent years. From 2000-2010, the five states experiencing the largest rate of population growth were Nevada (35.1% increase over the decade), Arizona (24.6%), Utah (23.8%), Idaho (21.1%), and Texas (20.6%).\(^{16}\) Of this list, all but Texas rank among the top ten states in terms of percentage of territory belonging to the federal government.\(^{17}\) What’s more, the Center for the Rocky Mountain West has determined that “[p]opulation growth in the non-metro West has increased … particularly in areas nearby high amenity federal lands. Being nearby lands with these kinds of amenities is becoming more


\(^{13}\) 78 Fed. Reg. 31636, 31649.

\(^{14}\) WYO. ADC OIL GEN. Ch. 3, § 45(d); Ch. 3, § 8(c)(ix).

\(^{15}\) Illinois Public Law 098-0022, Sec. 1-35(b)(4), (6), (8).


\(^{17}\) Ross W. Gorte et al., Federal Land Ownership: Overview and Data, CONGRESSIONAL RESEARCH SERVICE (Feb. 8, 2012).
important to more and more people, drastically altering historical migration patterns.\textsuperscript{18} As increasing numbers of people move closer to public lands, the likelihood that activities on those lands may pose a risk to nearby communities grows as well.

Meanwhile, longstanding use of public lands for ranching activities raises concerns about contamination of livestock. Therefore, concerns about water contamination are highly relevant in the federal lands context. For this reason, a number of comments on the first proposed rule suggested that the BLM should require baseline water quality testing. The BLM declined on the grounds that it “cannot authorize operators to enter non-Federal land.”\textsuperscript{19}

This is an odd rationale, given that at least seven states require baseline water quality tests. (Two additional states – Alaska\textsuperscript{20} and Wyoming\textsuperscript{21} - are considering similar requirements.) In most instances states are requiring or encouraging testing on private land.

Some states require baseline water quality testing statewide (North Dakota,\textsuperscript{22} Illinois,\textsuperscript{23} Idaho\textsuperscript{24}); in other states, the requirement only applies to certain locations (Colorado,\textsuperscript{25} Ohio\textsuperscript{26}). Some states do not outright require baseline testing, but impose a presumption of liability if contamination occurs within a certain time following well activity, which can only be rebutted by a baseline water quality test (Pennsylvania,\textsuperscript{27} West Virginia\textsuperscript{28}). Finally, South Dakota’s Board of Minerals and the Environment has pledged to take samples at the request of landowners, before and after fracturing, and to share results with the landowners.\textsuperscript{29} There are, therefore, a whole suite of options from which the BLM may choose. We recommend that the BLM follow the example set by Pennsylvania and West Virginia and impose a presumption of liability that may be rebutted by baseline water quality testing, or by failure to test because the private landowner refuses access. One way or another, the BLM should require or encourage

\textsuperscript{18} Larry Swanson, O’Connor Center for the Rocky Mountain West, “Public Lands in the West – Magnets for Population Growth,” University of Montana, \textit{available at} http://www.crmw.org/newsletter/newsarticles/archived/centerdecnewsletternographic.htm.
\textsuperscript{19} 78 Fed. Reg. 31636, 31649.
\textsuperscript{21} Trevor Brown, \textit{Baseline Water Testing Proposal Under Scrutiny}, WYOMING NEWS (July 21, 2013), \textit{available at} http://www.wyomingnews.com/articles/2013/07/21/news/03local_07-21-13.txt (reporting that the state Oil and Gas Conservation Commission voted to move into a formal rule-making process to consider mandatory baseline water quality testing).
\textsuperscript{22} N.D. CENT. CODE § 38-11.2-.07 (requiring developer to test water supply for the surface owner before drilling begins), N.D. CENT. CODE § 38-11.1-.06 (requiring reimbursement for property owners within 1 mile of the well site, if they want to test their water supply before drilling begins).
\textsuperscript{23} Public Act 098-0022, Sec. 1-80(b), (e).
\textsuperscript{24} IDAHO ADMIN. CODE r. 20.07.02.055.07(c).
\textsuperscript{25} 2 COLO. CODE REGS. § 404-1:317B(d)(4), (e)(2), (e)(4).
\textsuperscript{26} OHIO REV. CODE § 1509.06(A)(8)(c).
\textsuperscript{27} 58 PA. CONS. STAT. §3218.
\textsuperscript{28} W. VA. CODE § 22-6A-18.
baseline water quality testing for water wells, public drinking water sources, and livestock watering sources located near unconventional oil and gas development.

We offer two reasons for generating this data, beyond liability concerns. First, if a patient presents a medical complaint and the treating physician suspects that the complaint could be related to a chemical exposure, he or she takes an occupational and environmental health history. This history evaluates what chemicals the patient might come in contact with, and tries to determine the extent or duration of any potential exposure. Knowing whether a contaminant has been present for a long period of time, or has only recently emerged, is an important factor in determining whether the symptoms are causally related.

Second, baseline data informs long-term health assessments. A number of risk assessments, public health assessments, and health studies are underway to characterize exposures associated with hydraulic fracturing and to determine whether these potential exposures correlate with an increased incidence of disease or chronic ailments in the affected communities. The outcome of these studies could inform the development of preventive measures and/or treatment protocols. However, results could be compromised if public health researchers incorrectly assume a chemical contaminant is connected to oil and gas production, when in fact it was a background element in local drinking water.

RECOMMENDATION #3: Require additional fracturing information required by some states, and request that FracFocus add fields to accommodate the additional information.

The BLM seeks comment on whether state disclosure requirements should be deemed as compliant with the federal rule, if states meet or exceed the federal standard.\(^30\) We think that as or more stringent state rules should be deemed in compliance with the federal standard. However, we also think that the federal standard is far too weak and that the BLM should adopt some of the additional requirements set by many states. This would also address the BLM’s enforcement concerns.

Currently, the BLM only proposes to require reporting of information that the FracFocus form already clearly requires.\(^31\) Therefore, the BLM is requesting less information than many states. In addition, by adopting the FracFocus form categories as the federal reporting requirements, the BLM has allowed a third party private registry to set the federal floor for chemicals disclosure. Instead, the BLM should have determined whether any additional information might be useful for states, landowners, emergency responders, medical professionals, and the general public.

States have required additional reporting beyond what the default FracFocus form requires. For instance, Louisiana, Colorado, Mississippi, Oklahoma, and Texas require operators to report the type of base fluid used in their fracturing operations.\(^32\) While water is typically used, petroleum-based fracturing fluids are used as well and should be reported.

\(^{30}\) 78 Fed. Reg. 31636, 31640.

\(^{31}\) 78 Fed. Reg. 31636, 31657 (noting that “the required information has been restated to conform to the fields for disclosure provided by FracFocus”).

\(^{32}\) See App. A, at 6, and notes ivii, lviii, lx, lxi, and lxi.
Pennsylvania requires a company to report whether recycled water was used in a fracturing job; Ohio goes a step further and requires companies to report the amount and source of any recycled water used. Re-used fracturing water may contain chemicals from previous fracturing jobs; knowing the water source helps to evaluate the chemicals present on site, which in turns guides waste management and emergency response decisions.33

Montana requires companies to report the actual concentrations of chemicals used in the fracturing fluid.34 In the Supplemental Notice, the BLM explained that it was now proposing to require only maximum concentrations to be reported. The BLM’s rationale was twofold – fracturing plans might change in the field, and “the maximum concentration expressed in percent of total fluid would be helpful in determining the toxicity of the fluid in case of accidental spill or exposure.”35 This reasoning does not carry water. If the BLM were to require chemical reporting before fracturing begins, we would agree that maximum concentrations make more sense, to provide flexibility in the field. However, if reporting occurs after the fact, there is no reason not to provide actual concentrations. And however helpful maximum concentrations might be when responding to a spill, actual concentrations would be more helpful.36

Texas requires operators to provide the contact information for any business claiming entitlement to trade secret protection.37 This information is critical in the event a medical professional or first responder needs to identify the protected chemical in an emergency situation. As proposed, the BLM rule would require emergency room personnel to call the main switchboard of each chemical supplier, and then to track down the person or office in that company holding the protected information. Valuable time would be lost through such an endeavor.

These are common-sense requirements that help to provide a clearer picture to medical professional, first responders, and others about the risks that may be posed by unconventional oil and gas activity. FracFocus 2.0 accommodates some of these enhanced requirements – for instance, the new form enables operators to list non-MSDS chemicals at the bottom of the form – but not all. And the burden is still largely placed on operators to keep track of state-specific requirements when filling out the generic FracFocus form.

As noted in Legal Fractures, where FracFocus has not provided fields to accommodate this additional information, companies have not reported this information consistently. BLM would provide a great service to the states, and to operators, by requiring this important additional information and driving FracFocus to build a form that responds to the most comprehensive disclosure requests, rather than the lowest common denominator.

33 See App. A, at 6, and notes lxii, lxiii.
34 See App. A, at 6, and note lxv.
36 If companies are concerned that actual concentrations make it easier for a competitor to reverse engineer a formula, the BLM could follow the lead of states such as Oklahoma, which allow companies to list ingredients collectively and not by additive or product. See Rule 165:10-3-10(b)(1).
37 See App. A, at 6 and note lxviii.
Legal Fractures also observed that it is difficult to determine whether forms are uploaded to FracFocus within the deadlines established by states, because the date of submission does not appear on the form.\textsuperscript{38} In response, the Groundwater Protection Council declared that it sent periodic reports to states, which indicated when forms had been submitted.\textsuperscript{39} E&E News submitted public information requests to Colorado and Pennsylvania to confirm this practice. However, the news wire also determined that states were not enforcing against companies who submitted past the state deadline.\textsuperscript{40} We believe the lack of transparency surrounding the time of submittal contributes to low rates of enforcement. Therefore, we recommend that the BLM call on FracFocus to include the date of submittal on the face of the form.

Finally, we recommend that the BLM require FracFocus to provide hyperlinks to IRIS, TOXNET, or another toxicological database to facilitate first responder and medical research.

**RECOMMENDATION #4: Call for enhanced searchability of FracFocus, using EPA’s Toxic Release Inventory website as a model.**

The Supplemental Notice observes that, “Some commenters . . . were critical of FracFocus because of limitations in its ability to search and aggregate data across individual wells.”\textsuperscript{41} The BLM responds that it had “been in discussions with persons responsible for FracFocus and expects that recent and foreseeable improvements to the system will address many of these concerns.” While you can now search for a chemical and receive a list of individual well forms, FracFocus 2.0 still does not aggregate results. We recommend that the BLM require aggregation, to enable public health researchers to track use of products across communities.

We also believe that FracFocus could be urged to present material in a more user-friendly way, to expedite searches for emergency situation. To explain, we provide a brief comparison between FracFocus and EPA’s Toxic Release Inventory (TRI) website, known as My Right To Know (“myRTK”). We illustrate these points in Appendix C. The differences between FracFocus and myRTK contribute to the relative ease of gleaning information from each website.

- Format of the information presented: When you click on the pushpin that represents a well site on the FracFocus website, you have to download a PDF version of the disclosure form. When you click on the pushpin that represents a facility releasing TRI chemicals on myRTK, you can link within the website to the facility report. In myRTK, it is also possible to see all of the facilities for the area that has been searched on one list.

\textsuperscript{38} See App. A, at 7, 9.
\textsuperscript{40} Mike Soraghan, *Hydraulic Fracturing: One-Fifth of FracFocus Reports in Colo., Pa. Were Late in 2012*, E&E NEWS (June 7, 2013). After E&E published this story, Colorado announced that it would begin enforcing the time requirements. Mike Soraghan, *Hydraulic Fracturing: Colo. to Enforce FracFocus Deadlines*, E&E NEWS (July 11, 2013).
\textsuperscript{41} 78 Fed. Reg. 31636, 31657.
• Use of visuals: The myRTK facility report utilizes colored pie charts and bar graphs to illustrate the types and amounts of chemical releases, whereas FracFocus presents its information in a table format that is more difficult to understand quickly.

• Information on health effects of chemicals used/released: The myRTK facility report documents releases by chemical and includes links to basic information about the health effects of each chemical. FracFocus has no such capability.

• Compliance data: The myRTK facility report contains documentation of pollution prevention activities by the facility and compliance data for the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act, with a link to the full EPA Enforcement and Compliance History Online (ECHO) Detailed Facility Report.

This comparison demonstrates the shortcomings of FracFocus, and identifies opportunities for improvement. We recommend that the BLM call on FracFocus to present its material in a more accessible way, for first responders who need to quickly grasp the chemical profile and risk characteristics of a well site.

RECOMMENDATION #5: Require operators to submit a copy of completed FracFocus forms directly to the BLM, along with a certification that the company has submitted true, accurate, and complete information on the form, under penalty of perjury;

Legal Fractures raised concerns of quality control and inconsistent trade secret assertions. While some of these errors could be corrected automatically by the FracFocus data entry system (for instance, non-existent CAS numbers should be rejected by the program), we believe that so long as an operator does not believe a human will review the submission, that operator will undervalue the completion process. Legal Fractures noted that Texas requires operators to send a copy of the FracFocus report directly to the Railroad Commission, and suggested this was a way to increase the possibility of human review.42

We recommend that the BLM follow the lead of Texas and require that operators submit a copy of the form they complete for FracFocus directly to the BLM. The copy could accompany the Colorado affidavit that the BLM proposes to require (although further below, we describe why we do not believe that affidavit is sufficient to control trade secret assertions or provide protected information to medical professionals and first responders in emergency situations). In addition, we recommend that the BLM affidavit require companies to certify they have submitted true, accurate, and complete information on the FracFocus form.

RECOMMENDATION #6: Establish a process for the BLM or members of the public to challenge trade secret claims over fracturing chemicals.

The 2012 proposed rule would have directed companies to submit trade secret information to the BLM, with justification for the claims. In the Supplemental Notice, the BLM proposes that companies withhold information they claim is a trade secret, and follow the “Colorado system”

of submitting an affidavit that the undisclosed chemicals are entitled to this protection. However, the BLM retains its authority to ask for the trade secret information. Therefore, the newly proposed rule shifts all the burden onto the BLM—the resource-strapped agency must elect to review an affidavit, determine on that limited basis that a chemical’s eligibility should be reviewed, and ask the operator for information to be able to review the claim for protection.

Colorado has crafted an interesting tool. However, we think this proposal is far less satisfactory than the BLM’s original proposal. As an initial matter, we note that Colorado supplements its affidavit requirement with a public process for challenging trade secret assertions. Since the BLM proposal does not include a challenge process, the bureau is not actually following the “Colorado system.”

Colorado is not alone; a number of states have authorized members of the public to challenge trade secret assertions for drilling and fracturing chemicals. Like Colorado, Ohio and Texas allow certain persons to mount these challenges—any person “that may be negatively impacted by fracturing chemicals,” in the case of Ohio, and in Texas, state agencies, the surface property owner, and adjacent property owners. Other states provide much broader standing for these challenges (Illinois and Pennsylvania, for instance).

Whether the BLM requires operators to submit information claimed as trade secret, or an affidavit attesting to the claims, the process must empower the public to challenge trade secret claims through the courts or by petitioning the BLM to investigate. Moreover, the BLM should take possession of the protected materials—as agencies often do—so that it could review the assertions without having to ask the operator for the information. Neither the public nor the bureau has the capacity to question every trade secret assertion. However, by improving the possibility for review, the process puts the burden back where it belongs—on the companies contemplating trade secret protection.

While some drilling and fracturing chemical mixtures warrant trade secret protection, others have been widely used in the industry or previously disclosed. As noted in Legal Fractures, the huge differential between the percentage of chemicals protected as trade secrets under EPCRA and TSCA suggests that rate of designation is influenced by the process each regime sets forth—where companies have to substantiate trade secret claims, turn over protected materials for

45 Colorado Order No. 1R-114, Amendments to 200 Series Rules: Rule 205A, Hydraulic Fracturing Chemical Disclosure, at 12-13. Persons with standing are those who “may be directly and adversely affected or aggrieved as a result of an alleged violation of any Rule,” which might limit trade secret challenges to surface landowners concerned about contamination of drinking water.
46 Ohio Rev. Code § 1509.10(l)(2).
48 Public Law 098-0022, Sec. 1-77(j).
review by an agency or a third party, and face potential challenges, they make fewer assertions.\textsuperscript{50} A trade secret regime works best when it is narrowly drawn to protect only the information deserving of the designation.

**RECOMMENDATION #7: Provide limited access to chemical information claimed as trade secret, for emergency response, health care, and public health research needs.**

Under Recommendation #1, we describe how medical treatment or emergency response could be inhibited if chemical information were not available at the time of the exposure or emergency. However, even after disclosure occurs, the proposed rule would allow operators and service companies to withhold chemical information they designated as trade secrets. In response to comments, the BLM states that it cannot require disclosure to health officials or first responders for fear of violating the Federal Trade Secrets Act.\textsuperscript{51}

The BLM may be correct that the Federal Trade Secrets Act prevents it from fully disclosing trade secrets. However, several federal statutes authorize disclosure of some health and safety information even where trade secret protections have been asserted. Setting that point aside, the BLM could and should learn from states about how to make confidential information available to first responders and medical professionals without waiving trade secret status. This sidesteps the issue the BLM has raised.

Some states have enacted new legislation to facilitate transmittal of this information while maintaining confidentiality. For instance, Ohio law specifies that medical professionals who receive this information must keep it confidential for any purpose unrelated to diagnosis and treatment.\textsuperscript{52} Pennsylvania’s Act 13 requires medical professionals to complete a statement of need and a confidentiality agreement, and specifies that transmitting this information does not make the information a public record.\textsuperscript{53} Montana likewise requires medical professionals to sign a statement of need and, in some cases, a nondisclosure form.\textsuperscript{54}

If the BLM is reluctant to follow models based on new statutory language (since a legislative option is not available here), the bureau could look to cases where states have written rules to enable the transfer of confidential information to medical professionals. Sometimes the rules indicate that information about protected fracturing chemicals should be turned over to medical professionals “immediately upon request” (Arkansas\textsuperscript{55}) or “as required by law” (Louisiana\textsuperscript{56}). Other times – in Colorado\textsuperscript{57} for instance, medical professionals have to complete a statement of need, or a confidentiality agreement, or both, before they may receive the information.

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\textsuperscript{50} See App. A, at 7.
\textsuperscript{51} 78 Fed. Reg. 31636, 31660.
\textsuperscript{52} OHIO REV. CODE § 1509.10(H)(1).
\textsuperscript{53} 58 PA. CONS. STAT. §3222.1(b)(10), (11). Protected information must also be provided to DEP, public health officials, emergency manager, or first responders, in the event of a spill.
\textsuperscript{54} Rule 36.22.1016(3).
\textsuperscript{55} Rule B-19(k)(9), (l)(5).
\textsuperscript{56} 43 LA. ADMIN. CODE tit. XIX, §118.C.3.
\textsuperscript{57} 2 COLO. CODE REGS. § 404-1:205A(b)(3).
All of these states have enacted the Uniform Trade Secrets Act, which is very similar to the federal law cited by the BLM. And yet, they have found different ways to share confidential information with medical professionals and emergency responders. The BLM should explore these options, or default to state law where the state law enables this critical transfer of data, for its final rule.

Thank you for considering our comments. We think our recommendations are practical, common-sense ways to ensure that chemical reporting is more than a paper exercise. Medical professionals need timely information about the identity of chemicals, and they need it in a format that facilitates rapid understanding of the risks they may face in responding to, diagnosing, treating, and preventing problems associated with oil and gas production.

Sincerely,

/s/ Kate Konschnik            /s/ Alexandra Gast

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