

STATE OF NEW MEXICO
ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN RE THE APPLICATION OF THE NEW MEXICO
OIL AND GAS ASSOCIATION FOR AMENDMENT
OF CERTAIN PROVISIONS OF TITLE 19, CHAPTER 15,
PART 16 OF THE NEW MEXICO ADMINISTRATIVE
CODE CONCERNING LOG, COMPLETION, HYDRAULIC
FRACTURING, AND WORKOVER REPORTS, STATEWIDE

Case No. 14753

EARTHWORKS'
OIL AND GAS ACCOUNTABILITY PROJECT'S
PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

RECEIVED OGD
2012 JAN -6 A 10:00

Earthworks' Oil and Gas Accountability Project (OGAP) hereby requests that the New Mexico Oil Conservation Commission adopt the following proposed findings of fact and conclusions of law.

Findings of Fact

1. Hydraulic fracturing involves the injection of substances into wells drilled into the ground for purposes of extracting oil and gas. OGAP exhibit F, page 23.
2. Larry Dillon testified as a witness for the New Mexico Oil and Gas Association (NMOGA) on the basis of his experience working for ConocoPhillips. Testimony of Larry Dillon (Dillon), transcript (TR) 39.
3. Mr. Dillon was the only witness to testify for NMOGA.
4. Mr. Dillon was not recognized or qualified as an expert on any subject.
5. The ConocoPhillips company (ConocoPhillips) uses hydraulic fracturing in oil and gas wells in New Mexico. Dillon, TR 16-17.
6. ConocoPhillips currently discloses the materials used in its hydraulic fracturing

fluids to the FracFocus website. Dillon, TR 17, 41.

7. The FracFocus website originally required disclosure of chemicals for which there are material safety data sheets (MSD sheets) only. Testimony of Gwen Lachelt, TR 97; OGAP exhibit F, 23-24.

8. MSD sheets are prepared only for substances that have been determined to be hazardous in an occupational setting by the Occupational Safety and Health Administration. OGAP exhibit F, 23-24.

9. There are chemicals used in hydraulic fracturing for which there are no MSD sheets. Lachelt, TR 97; OGAP exhibit F, 23-24.

10. Chemicals that are used in hydraulic fracturing might be hazardous if human exposure occurs through environmental pathways. OGAP exhibit F, 24.

11. Since September 2011, the FracFocus website has required disclosure of each chemical used in hydraulic fracturing regardless of whether there is an MSD sheet for the chemical. Lachelt, TR 97-98.

12. ConocoPhillips currently discloses to the FracFocus website in accordance with the current requirements of that website. Dillon, TR 41.

13. Mr. Dillon could not explain the assertion by NMOGA that OGAP's submitted modifications to NMOGA's proposed rule are inconsistent with the New Mexico Surface Owners Protection Act. Dillon, TR 40.

14. Mr. Dillon could not explain the NMOGA assertion that OGAP's proposed modifications to NMOGA's submitted rule would impose an unworkable burden on the New Mexico Oil Conservation Division. Dillon, TR 40-41.

15. Ed Martin (Martin) was the only witness to testify for the New Mexico Oil

Conservation Division (OCD).

16. Mr. Martin testified on the basis of his experience working for the OCD. Martin, TR 60-61.

17. Mr. Martin was not recognized or qualified as an expert on any subject.

18. Mr. Martin asserted that the OCD could not deal with redacting confidential material submitted to it. Martin, TR 59.

19. Mr. Martin did not, however, attribute this inability of OCD to factors such as such as legal requirements or limitations of technology. Mr. Martin also did not explain how OCD deals with other confidential materials such as personnel records.

20. OCD would accept for filing any information (including information that is not contained in MSD sheets) that is not confidential by nature or by statement. Martin, TR 62.

21. If the OCD has information about substances used in hydraulic fracturing, an individual can obtain that information by requesting it at or from an OCD office. Martin, TR 64.

22. Gwen Lachelt (Lachelt) was the only witness to testify for OGAP.

23. Ms. Lachelt testified on the basis of her extensive experience working with communities and landowners affected by oil and gas development. Lachelt, TR 83-87; OGAP exhibit A (Lachelt resume), 1.

24. Ms. Lachelt was recognized by the Oil Conservation Commission (Commission) as an expert in the concerns of communities and surface owners about hydraulic fracturing. TR 89.

25. Members of communities and surface owners are concerned about hydraulic fracturing primarily because they are worried about the possible adverse impacts of hydraulic fracturing on their ground water and other resources. Lachelt, TR 91-92.

26. Members of communities and surface owners are concerned about hydraulic fracturing to be conducted near homes and ranches, and on adjacent public lands. Lachelt, TR 122.

27. Members of communities where hydraulic fracturing occurs, and surface owners of lands under which hydraulic fracturing occurs, need disclosure prior to hydraulic fracturing of the substances to be used in the hydraulic fracturing so that they can do baseline testing of the water in their wells to determine whether the hydraulic fracturing affects that water. Lachelt, TR 91-92.

28. A regulation that is proposed in Colorado would require disclosure of the substances to be used in hydraulic fracturing before hydraulic fracturing occurs. Lachelt, TR 92.

29. A regulation currently in effect in Wyoming requires disclosure of the substances to be used in hydraulic fracturing before hydraulic fracturing occurs. Lachelt, TR 92; OGAP exhibit E, 3-61 - 3-62.

30. Oil and gas extraction is occurring in Wyoming, and companies are complying with the Wyoming regulation that requires advance notice of the substances to be used in hydraulic fracturing. Lachelt, TR 92, 136-137.

31. In particular, oil and gas extraction is occurring in the Jonah Field and the Pinedale and Anticline Field. Lachelt, TR 108.

32. Chemicals that are used in hydraulic fracturing might be hazardous if human exposure occurs through environmental pathways. OGAP exhibit F, 24.

33. Members of communities where hydraulic fracturing occurs, and surface owners of lands under which hydraulic fracturing occurs, need disclosure of all substances used in hydraulic fracturing regardless of whether there are MSD sheets for those substances. Lachelt,

TR 131, OGAP exhibit F, 24.

34. Members of communities where hydraulic fracturing occurs, and surface owners of lands under which hydraulic fracturing occurs, need disclosure of all substances used in hydraulic fracturing regardless of whether those substances are subject to claims of confidentiality based on trade secret or other considerations. Lachelt, TR 131, OGAP exhibit F, 24.

35. Approximately 35% of New Mexicans do not have internet access. Lachelt, TR 99.

36. A person without internet access will not be able to access information that is posted on the FracFocus website. Lachelt, TR 98.

37. New Mexicans should be able to access information about hydraulic fracturing even if they do not have internet access. Lachelt, TR 99, 143-144.

38. Information on hydraulic fracturing should be available in the OCD offices so that New Mexicans can access the information there. Lachelt, TR 99.

39. From the points of view of surface owners and members of communities where hydraulic fracturing is conducted, it is preferable to have disclosure of substances used in hydraulic fracturing in gallons rather than by mass. Lachelt, TR 146.

40. Agencies should adopt rules that prevent problems from occurring rather than adopting rules only after problems have occurred. Lachelt, TR 141.

Conclusions of Law

1. The New Mexico Surface Owner Protection Act, NMSA 1978 §§70-12-1, *et seq.* allows an operator, as defined by the Act (NMSA 1978 §70-12-3.B), to enter onto a surface owner's land to conduct oil and gas operations even if no surface use and compensation

agreement has been reached. NMSA 1978 §70-12-6.

2. The purpose of the New Mexico Water Quality Act (Water Quality Act), NMSA 1978 §§74-6-1, *et seq.* is to prevent, abate, and control water pollution. NMSA 1978 §74-6-13.

3. The Water Quality Act, NMSA 1978 *et seq.* defines “water pollution” as:

introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or use of property.

NMSA 1978 §74-6-2.C.

4. The regulations adopted by the New Mexico Water Quality Control Commission (WQCC) to implement the Water Quality Act provide that all new discharges of any water contaminant must be disclosed by the filing of a notice of intent. §20.6.2.1201 NMAC.

5. The WQCC regulations also provide that notices of intent regarding injection to wells associated with oil and gas facilities shall be filed with the OCD. §20.6.2.1201.A, B NMAC.

6. The WQCC regulations further provide that any person in charge of a facility shall, within 24 hours of learning of a discharge of a contaminant to ground water, provide notice of the discharge to the Chief of the Ground Water Bureau of the State Environment Department (the Ground Water Bureau Chief) or his counterpart in any constituent agency delegated responsibility for enforcement of the WQCC regulations. §20.6.2.1203.A(1) NMAC.

7. The WQCC regulations provide as well that any person who has knowledge of a discharge to ground water that may “with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property” is urged to report the discharge to the Ground Water Bureau Chief.

§20.6.2.1203.E NMAC.

8. The New Mexico Oil Conservation Commission (Oil Conservation Commission) is a constituent agency of the New Mexico Water Quality Control Commission (WQCC). NMSA 1978 §74-6-3.A(5).

9. The Oil Conservation Commission is responsible for implementation of the Water Quality Act and its implementing regulations with regard to matters within its jurisdiction. NMSA 1978 §74-6-4.F.

10. As a constituent agency of the WQCC, the Oil Conservation Commission is responsible for adoption of regulations governing the oil and gas industry that are consistent with the regulations adopted by the WQCC to implement the Water Quality Act. NMSA 1978 §74-6-4.E(1).

11. As a constituent agency of the WQCC, the Oil Conservation Commission may not adopt regulations that are inconsistent with or violate the intent of the regulations adopted by the WQCC to implement the Water Quality Act. NMSA 1978 §74-6-4.E(2).

12. The Oil Conservation Commission is responsible for adoption of regulations concerning disclosure of substances used in hydraulic fracturing. NMSA 1978 §§74-6-4.F, 74-6-4.E(1), and 74-6-4.E(2).

13. To comply with its mandate as a constituent agency of the WQCC, the Oil Conservation Commission must adopt regulations that require disclosure:

A. Of all substances used in hydraulic fracturing, regardless of whether there are MSD sheets for those substances (§20.6.2.1203.A NMAC);

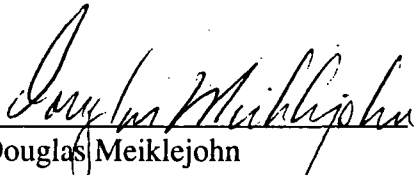
B. Of all substances used in hydraulic fracturing, regardless of whether those substances are subject to claims of trade secret or other confidentiality (§20.6.2.1203.A NMAC);

C. Before hydraulic fracturing occurs (§20.6.2.1201.A NMAC);

D. To the OCD (§20.6.2.1201.A; §20.6.2.1203.A) so that the information will be accessible to all members of the public regardless of whether they have internet access (NMSA 1978 §§74-6-4.F[2]); and

E. Stated in gallons rather than mass so that the information will be meaningful to members of the public. (NMSA 1978 §§74-6-4.F[2])

Dated: January 6, 2012.


Douglas Meiklejohn
Eric Jantz
Bruce Frederick
New Mexico Environmental Law Center
1405 Luisa Street, Suite #5
Santa Fe, N.M. 87505
(505) 989-9022
ejantz@nmelc.org
bfrederick@nmelc.org
dmeiklejohn@nmelc.org

Attorneys for OGAP

Certificate of Service

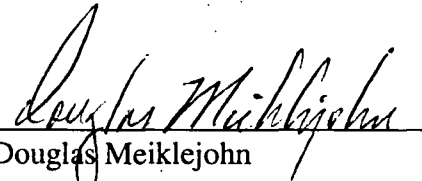
I certify that on January 6, 2012 copies of the foregoing proposed findings of fact and conclusions of law were mailed to:

William F. Carr
Michael H. Feldewert
Adam G. Rankin
Holland & Hart, LLP
P.O. Box 2208
Santa Fe, N.M. 87504-2208

Attorneys for the New Mexico
Oil and Gas Association

Gabrielle A. Gerholt
Assistant General Counsel
Energy, Minerals, and Natural
Resources Department
1120 S. St. Francis Drive
Santa Fe, N.M. 87505

Attorney for the New Mexico Oil
Conservation Division


Douglas Meiklejohn