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## **FAQ: FRACKING, REGULATION AND OBSTACLES TO LITIGATION**

### **What is fracking?**

Hydraulic fracturing, commonly referred to as fracking, is the process used by oil and gas companies to extract large amounts of natural gas from shale rocks deep underground. Fracking involves injecting millions of gallons of water, sand, and chemicals into the ground at very high pressure to break up these rocks so that the oil and gas from the rocks can flow into nearby oil and gas wells.<sup>1</sup>

### **How do oil and gas companies get onto land to engage in this process?**

Companies must obtain leases from landowners, which give them the legal authority to frack.

### **Is fracking safe?**

No. Many chemicals used in fracking are toxic and can have dangerous health effects on the brain and nervous system, the respiratory system, the immune system, the cardiovascular system, kidneys, and organs like eyes and skin.<sup>2</sup> Others are known carcinogens.<sup>3</sup> These chemicals can contaminate our air and soil, lakes and streams, as well as our groundwater and drinking water.<sup>4</sup>

### **Are the ingredients used in fracking fluid public knowledge?**

Oil and gas companies keep many of the ingredients in their fracking fluid secret making it difficult to prove the extent to which fracking has contaminated air, water, or soil. Most states do not require companies to disclose all of the chemicals they use in fracking and even fewer require any disclosure before fracking begins.<sup>5</sup>

Companies are usually permitted to keep information secret from regulators and the public by claiming they are “trade secrets.”<sup>6</sup> The American Legislative Exchange Council (ALEC), a secretive organization comprised of conservative politicians and corporations that ghostwrite model bills and shop them around to state legislatures, adopted a model bill<sup>7</sup> on fracking, written by ExxonMobil, that pushes for strong “trade secret” protections and other loopholes that keep information from the public.<sup>8</sup>

The Bureau of Land Management recently proposed federal rules for fracking on federal land that also have broad trade secret protections.<sup>9</sup> Both the BLM rules and several states allow

companies to disclose their chemicals on an industry funded website called FracFocus.org<sup>10</sup> that is difficult to navigate and makes data analysis hard.<sup>11</sup>

### **Who regulates fracking and why is it failing?**

State oil and gas agencies regulate fracking. In 2005, Congress made fracking exempt from the federal Safe Drinking Water Act. It is also exempt from the Clean Water Act.<sup>12</sup> This means that the states are primarily responsible for fracking oversight. The Bureau of Land Management has very limited power to regulate fracking. It has proposed chemical disclosure rules regarding fracking on federal land.

Even though states have the responsibility to regulate fracking, they are doing a poor job. They do not inspect the majority of oil and gas wells. Two different organizations<sup>13</sup> recently conducted studies that show inspectors fail to do their jobs effectively. Despite an increase in oil and gas drilling, inspections are underfunded and, in most cases, inspectors are given too many wells to inspect.<sup>14</sup> Additionally, individual inspectors often have discretion as to whether or not they record violations that they uncover. And in the instances where violations are recorded, the penalties are often so low that “they provide little incentive for companies to not offend again.”<sup>15</sup>

### **What kinds of lawsuits have been brought over harm caused by fracking?**

Landowners and others impacted by fracking activities have brought lawsuits against fracking companies for physical illnesses and property damage because of contaminated drinking water and ground water, air pollution, and exposure to hazardous chemicals, gases, and toxic waste.<sup>16</sup> Recently families in Pennsylvania brought a nuisance lawsuit, complaining that fracking is interfering with the use and enjoyment of their property.<sup>17</sup>

### **Do the leases contain provisions that make it difficult to sue for fracking harm?**

Yes, many leases contain forced arbitration clauses<sup>18</sup>. These clauses are typically buried in fine print within the lease and mean that if landowner has a dispute over the lease, they cannot sue the fracking company in court. They must go before an arbitration judge or panel, and share at least part of the cost of this process, which can be prohibitively expensive for the landowner. Also, court rules that protect victims in court are weakened or eliminated altogether. In other words, the process can be extremely biased in favor of the fracking companies. So far, many arbitration clauses cover only disputes over the lease. Some cases involving damage caused by drilling can still be brought in court. However, this may change as forced arbitration clauses are broadened to cover drilling damage, as well as to ban class actions (meaning landowners could not band together to challenge widespread abuse).

### **How does the industry keep the public and regulators from learning information discovered in litigation?**

When people settle fracking lawsuits, the oil and gas company almost always requires the plaintiff to sign nondisclosure agreements, which force them to stay silent about their lawsuit.<sup>19</sup> This means that people bringing future lawsuits are unable to access any of the information

learned in earlier suits and have to start from scratch – thus expensive testing, already completed in one lawsuit, has to be completed again in all subsequent lawsuits.<sup>20</sup> This also keeps the information from the media, researchers, regulators, scientists, and politicians and makes it difficult for anyone to challenge the fracking industry’s claims that fracking has not tainted anyone’s water.<sup>21</sup>

It is unclear how many settlements there have been because of these nondisclosure agreements. However, occasionally plaintiffs who have been forced to settle confidentially have gotten around it. For example, a settlement in a Pennsylvania lawsuit recently became public after a judge ordered the record opened in March 2013. That’s because two minor children were involved in the settlement, so as to require court approval. During this process, the media and public interest groups challenged the order that sealed the case.<sup>22</sup> It became public knowledge that the entire family, including the children, ages seven and ten, were under a lifetime “gag order” and that the Hallowiches received a \$750,000 settlement.<sup>23</sup>

## NOTES

<sup>1</sup> “What is Fracking and Why Should it Be Banned?” *Food & Water Watch*, <http://www.foodandwaterwatch.org/water/fracking/>

<sup>2</sup> Theo Colborn et al, *Natural Gas Operations from a Public Health Perspective*, 17 *Hum. & Ecology Risk Assessment* 5, 1039-1056, <http://cce.cornell.edu/EnergyClimateChange/NaturalGasDev/Documents/PDFs/fracking%20chemicals%20from%20a%20public%20health%20perspective.pdf>

<sup>3</sup> Theo Colborn et al, *Natural Gas Operations from a Public Health Perspective*, 17 *Hum. & Ecology Risk Assessment*, <http://cce.cornell.edu/EnergyClimateChange/NaturalGasDev/Documents/PDFs/fracking%20chemicals%20from%20a%20public%20health%20perspective.pdf>

<sup>4</sup> Mark Drajem, “EPA official links fracking and drinking water issues in Dimock, Pa,” *The Washington Post*, July 29, 2013, [http://www.washingtonpost.com/politics/epa-official-links-fracking-and-drinking-water-issues-in-dimock-pa/2013/07/29/7d8b34b2-f8a1-11e2-afc1-c850c6ee5af8\\_story.html](http://www.washingtonpost.com/politics/epa-official-links-fracking-and-drinking-water-issues-in-dimock-pa/2013/07/29/7d8b34b2-f8a1-11e2-afc1-c850c6ee5af8_story.html)

<sup>5</sup> Matthew McFeeley, “State Hydraulic Fracturing Disclosure Rules and Enforcement: A Comparison,” *NRDC Issue Brief*, July 2012, <http://www.nrdc.org/energy/files/Fracking-Disclosure-IB.pdf>

<sup>6</sup> “Fracking Chemical Disclosure Rules,” ProPublica, February 16, 2012, <http://www.propublica.org/special/fracking-chemical-disclosure-rules>

<sup>7</sup> ALEC Model Bill “The Disclosure of Hydraulic Fracturing Fluid Composition Act” [http://www.eenews.net/assets/2012/05/01/document\\_ew\\_01.pdf](http://www.eenews.net/assets/2012/05/01/document_ew_01.pdf)

<sup>8</sup> Mike McIntire, “Conservative Nonprofit Acts as Stealth Business Lobbyist,” *New York Times*, April 21, 2012, <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=2&ref=politics>

<sup>9</sup> Sofia Plagakis, “BLM Fracking Rule Violates New Executive Order on Open Data,” *Center for Effective Government*, May 16, 2013, <http://www.foreffectivegov.org/blog/blm-fracking-rule-violates-new-executive-order-on-open-data>

<sup>10</sup> FracFocus.org is funded by the American Petroleum Institute and other industry associations and is managed by organizations and state agencies that promote oil and gas development (Sofia Plagakis, “BLM Fracking Rule Violates New Executive Order on Open Data,” *Center for Effective Government*, May 16, 2013, <http://www.foreffectivegov.org/blog/blm-fracking-rule-violates-new-executive-order-on-open-data>)

<sup>11</sup> Sofia Plagakis, “BLM Fracking Rule Violates New Executive Order on Open Data,” *Center for Effective Government*, May 16, 2013, <http://www.foreffectivegov.org/blog/blm-fracking-rule-violates-new-executive-order-on-open-data>

<sup>12</sup> “Fracking: Laws and Loopholes,” *Clean Water Action*, <http://cleanwater.org/page/fracking-laws-and-loopholes>

<sup>13</sup> The Western Organization of Resource Councils and EarthWorks Oil & Gas Accountability Project

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<sup>14</sup> “Law and Order in the Oil and Gas Fields: A Review of the Inspection and Enforcement Programs in Five Western States,” *Western Organization of Resource Councils*, 2013, <http://www.worc.org/userfiles/file/Oil%20Gas%20Coalbed%20Methane/Law&Order2013.pdf>

<sup>15</sup> “Breaking All the Rules, The Crisis in Oil & Gas Regulatory Enforcement,” *EarthWorks Oil & Gas Accountability Project*, September 2012, <http://www.earthworksaction.org/files/publications/FINAL-US-enforcement-sm.pdf>

<sup>16</sup> “Fracking Damage Cases and Industry Secrecy,” EarthJustice, <http://earthjustice.org/features/campaigns/fracking-damage-cases-and-industry-secrecy>

<sup>17</sup> Jim Efstathiou Jr, Andrea Harris, and Sophia Pearson, “Missouri Lawyer Brings Nuisance Claims to Fracking Arena,” *Bloomberg News*, June 11, 2013, <http://www.bloomberg.com/news/2013-06-11/missouri-lawyer-brings-nuisance-claims-to-fracking-arena.html>

<sup>18</sup> A typical forced arbitration clause reads as follows:

“ARBITRATION. In the event of a disagreement between the Lessor and Lessee concerning this lease, performance thereunder, or damages caused by Lessor’s operations, settlement shall be determined by a panel of three disinterested arbitrators. Lessor and Lessee shall appoint and pay the fee of one each, and the two so appointed shall appoint the third, whose fee shall be borne equally by Lessor and Lessee. The award shall be by unanimous decision of the arbitrators and shall be final.”

<sup>19</sup> “Fracking Damage Cases and Industry Secrecy,” EarthJustice, <http://earthjustice.org/features/campaigns/fracking-damage-cases-and-industry-secrecy>

<sup>20</sup> Center for Justice & Democracy interview with Jessica Ennis, July 9, 2013.

<sup>21</sup> Jim Efstathiou Jr. & Mark Drajem, “Drillers Silence Fracking Claims With Sealed Settlements,” *Bloomberg News*, June 6, 2013, <http://www.bloomberg.com/news/2013-06-06/drillers-silence-fracking-claims-with-sealed-settlements.html>

<sup>22</sup> Jim Efstathiou Jr. & Mark Drajem, “Drillers Silence Fracking Claims With Sealed Settlements,” *Bloomberg News*, June 6, 2013, <http://www.bloomberg.com/news/2013-06-06/drillers-silence-fracking-claims-with-sealed-settlements.html>

<sup>23</sup> Don Hopey, “Confidential agreement should have been part of Washington County Marcellus Shale case record” *Pittsburgh Post-Gazette*, July 31, 2013, <http://www.post-gazette.com/stories/local/washington/confidential-agreement-should-have-been-part-of-washington-county-marcellus-shale-case-record-697530/#ixzz2adjSSMfH>