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CLOSING THE HALLIBURTON LOOPHOLE IN NEW MEXICO: LETTING DEVELOPERS CHOOSE BETWEEN R&D DOLLARS AND TRADE SECRETS

by Christian Johnson*

INTRODUCTION

During the last fifteen years, the southwestern United States has recorded exceptional levels of drought and is experiencing a severe water crisis. At the same time, billions of gallons of freshwater are being used each year to supply a booming natural gas development. While not much can be done about the drought, water use could be better monitored and controlled.

Deep fracturing technology, or “fracking,” permanently denies human beings the future use of billions of gallons of freshwater¹ because the water used to extract natural gas must be mixed with toxic chemicals, most of which cannot be economically removed.² Thus natural gas drilling prevents billions of gallons of fresh water from being returned to the natural water cycle.³ Developers are not even required to disclose which chemicals are used because these chemicals are considered to be “trade secrets” (this is the result of an industry sponsored carve-out in the Safe Drinking Water Act, commonly referred to as the “Halliburton loophole”).⁴ One of the major criticisms of this state of affairs is that wells can potentially leak contaminants into the water table, compromising huge amounts of groundwater.⁵ This is particularly relevant to arid states like New Mexico,⁶ which is currently experiencing both a severe drought and a natural gas boom.

DISCUSSION

To potentially reallocate costs associated with water degradation and other negative externalities,⁷ New Mexico could pass legislation incentivizing industry-funded research and development for cleaner fracking practices. However, the state would need to impose an additional tax⁸ on natural gas production to fund the operation of an oversight agency comprised of scientists, policy analysts, and lawyers. As part of the legislation, the State would require all natural gas developers to disclose a full list of dangerous chemicals being used in every natural gas well. The data would then be analyzed to determine whether any given

developer should be required to disclose its frack-fluid “recipe” for public safety reasons.⁹

Scientists employed by the agency would need to decide which classes, types, and concentrations of particular pollutants constitute a public safety risk.¹⁰ The decision to designate risk would be based on dangers related to human exposure, dangers to the environment, difficulty of clean up or containment, and any other relevant factor as determined by agency experts. If, for example, a developer were using a chemical type—or concentration—deemed to be a “substantial risk to health or safety,” then the agency would be required to publish the findings. However,

if the agency made no finding of substantial health or safety risk, the developer’s trade secret would be fully protected and left undisclosed.¹¹ Additionally, before the agency published any trade secret, it would be required to forewarn developers of the listing, and to give the developer

a mandatory grace period to find a less harmful substitute prior to publication.

CONCLUSION

The effect of public disclosure of toxic chemicals would be threefold. First, it would create public awareness about the potential dangers of fracking and close the Halliburton Loophole in the state. Doctors, hospitals, affected communities, and interested parties would be apprised of potential exposure risks and would be better equipped to respond to accidents and spills. Second, the heightened awareness and public response could promote industry-funded research and development. A major developer wishing to protect its trade secrets could invest in safer and cleaner fracking technology, thus avoiding disclosure while also advancing environmental prerogatives. Third, the government agency could generate revenue by assessing levies, and by charging fines against developers who engage in false or deceptive reporting. The

“Natural gas drilling prevents billions of gallons of fresh water from being returned to the natural water cycle.”

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ideal outcome would result in the industry footing the bill for research and development, which would cure the most environmentally unfriendly practices by substituting safer additives for the most dangerous chemicals. Alternatively, if developers decided that the costs of research and development outweighed

the costs of trade secret disclosure, the public would at least be apprised of the worst kinds of chemicals potentially being placed in their streams, wells, and aquifers, and made more aware of the risks involved.



ENDNOTES: CLOSING THE HALLIBURTON LOOPHOLE IN NEW MEXICO: LETTING DEVELOPERS CHOOSE BETWEEN R&D DOLLARS AND TRADE SECRETS

¹ See U.S. ENVTL. PROT. AGENCY, 19 (2011) available at [http://yosemite.epa.gov/sab/sabproduct.nsf/0/D3483AB445AE61418525775900603E79/\\$File/Draft+Plan+to+Study+the+Potential+Impacts+of+Hydraulic+Fracturing+on+Drinking+Water+Resources-February+2011.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/D3483AB445AE61418525775900603E79/$File/Draft+Plan+to+Study+the+Potential+Impacts+of+Hydraulic+Fracturing+on+Drinking+Water+Resources-February+2011.pdf) (estimating that “the annual water requirement [for fracking] may range from 70 to 140 billion gallons”); see also generally *infra*, note 2-3.

² See FRAC FOCUS, *What Chemicals Are Used?* <http://fracfocus.org/chemical-use/what-chemicals-are-used> (last visited Oct. 21, 2014) (providing a list of chemicals commonly used in fracking); see generally *infra*, at note 3.

³ See WESTERN RESOURCE ADVOCATES, *FRACKING OUR FUTURE 6* (June 2012) http://www.westernresourceadvocates.org/frackwater/fracking_our_future_july_2012.pdf (“wastewater [from fracking] is of such poor quality that it [] cannot be returned to streams... differ[ing] from most other water uses, which create return flows that are used downstream and that benefit aquatic ecosystems along the way”); Roger Real Drouin, *As Fracking Booms, Growing Concerns About Wastewater*, ENVIRONMENT 360 (Feb 18, 2014), 360.yale.edu/feature/as_fracking_booms_growing_concerns_about_wastewater/2740/ (“the large amounts of wastewater generated during the [fracking] process, is causing increasing concern among [scientists]”).

⁴ See Energy Policy Act of 2005, Pub. L. No. 109-58, § 322, 119 Stat. 594, 694 (2005).

⁵ Thomas H. Darrah et al., *Noble Gases Identify the Mechanisms of Fugitive Gas Contamination in Drinking-Water Wells Overlying the Marcellus and Barnett Shales*, NATIONAL ACADEMY OF SCIENCES (2014), available at <http://www.pnas.org/content/111/39/14076.full> (finding evidence of groundwater contamination caused by failures of annulus cement and faulty production casings).

⁶ New Mexico has very few freshwater resources and is particularly susceptible to drought, making water conservation a politically important issue in the state. See Robert C. Balling Jr. & Gregory B. Goodrich, *Increasing Drought in the American Southwest? A Continental Perspective Using a Spatial Analytical Evaluation of Recent Trends*, 31 PHYSICAL GEOGRAPHY, no. 4, 301-03 (2010)

(finding a highly statistically significant trend toward increased drought in the American Southwest”); Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873, 1874 (2005) (stating that “the United States is heading toward a water scarcity crisis”).

⁷ Asymmetric information problems arise when people are exposed to fracking chemicals. See Susan Greene, *Oil Secret Has Nasty Side Effect*, THE DENVER POST (July 24, 2008), available at http://www.denverpost.com/news/ci_9976257 (explaining that a contaminated oil pad worker and his attending nurse—who suffered organ failure from vicarious chemical exposure—were denied access to information regarding the chemicals they were exposed to protect a “trade secret”).

⁸ See STATE OF NEW MEXICO COMPREHENSIVE ANNUAL FINANCIAL REPORT 310 (June 30, 2012), available at http://nmdfa.state.nm.us/uploads/files/FS%20WORD%2060419_1212_CAFR%20-%208%2027%2013%20-%20new.pdf (showing that in 2012 tax revenue for Natural Gas Processors totaled \$23,343,000, and the Oil and Gas School Tax generated \$399,589,000 in revenue).

⁹ See SOURCEWATCH, *New Mexico and Fracking*, http://www.sourcewatch.org/index.php/New_Mexico_and_fracking#Public_disclosure (last visited Oct. 21, 2014) (noting that “[t]he Commission’s rule requires [fracking] companies to report only what they already report on Material Safety Data Sheets (MSDS)... [leading] some to call New Mexico’s fracking disclosure law the worst in the country.”).

¹⁰ Government agencies routinely set safety and pollution standards for safety and health. See e.g. 29 C.F.R. §§ 1910.1000-1910.1200 (containing OSHA chemical classifications, toxicity levels, labeling practices, proper hygiene and handling, communication practices, and exposure risk for common industrial toxins).

¹¹ See N.M. STAT. ANN. § 14-2-1(6) (West 2011) (protecting “trade secrets” from government information requests).