

LFC Requester:	Mary McCoy
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**AGENCY BILL ANALYSIS
2013 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

And

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original Committee / Floor Amendment _____
Correction _____ Committee Substitute _____

Date 1/23/2013
Bill No: HB 136--305

Sponsor: Rep. B. Egolf **Reviewing** Attorney General's Office
Short Disclosure of Hydraulic **fsdfs** **Analysis:** Tannis L. Fox, AAG
Title: Fracturing Fluids **Phone:** 827-6695 **Email** tfox@nmag.gov

SECTION II: FISCAL IMPACT ** FOR LFC OFFICIAL PURPOSES**
AGO STAFF SHOULD LEAVE SHADED AREAS BLANK

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY13	FY14		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY13	FY14	FY15		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion letter. This is a staff analysis in response to the agency’s, committee’s or legislator’s request.

BILL SUMMARY

Summary Synopsis:

HB 136 proposes to amend the Oil and Gas Act to require the Oil Conservation Commission (OCC) to promulgate rules: (1) requiring public disclosure of each chemical ingredient used in hydraulic fracturing treatment, (2) allowing a service company, supplier, or an oil or gas operator to claim the identity or amount of a chemical ingredient as “trade secret,” (3) allowing landowners on whose property a well is located or adjacent landowners to challenge a claim of trade secret, and (4) requiring disclosure of trade secret information to health professionals or emergency responders under certain circumstances.

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

None identified.

SIGNIFICANT LEGAL ISSUES

Hydraulic fracturing, commonly referred to as “fracking,” has taken on growing significance for energy use and the environment in the United States in recent years because of new technologies that allow for horizontal drilling, the use of great volumes of water for drilling, and the use of chemical additives, under significant pressure, to stimulate oil and gas production. The fracturing fluids are pumped deep into wells at pressures sufficient to create or restore small fractures in reservoir rock needed to make oil or gas production possible. Older formations, including shale plays with high permeability and porosity, previously considered to be inaccessible, may now be accessed. Water and sand make generally make up over 98 to 99.5% of the fracturing fluids, and chemical additives are used. <http://fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process> (accessed Jan. 23, 2013). New Mexico has shale plays that may be explored.

Because of the potentially harmful nature of some of the chemical additives used in hydraulic fracturing, there has been concern from the public about potential ground water contamination as a result of “fracking.” The extent to which ground water contamination presents a risk is the subject of much debate nationally and, in particular, in those states that have shale plays that are subject to hydraulic fracturing treatment.

There is no comprehensive federal regulatory scheme for the regulation of hydraulic fracturing,

and presently much of the regulation is being conducted at the state level. As a result of public concern, many states in which hydraulic fracturing is taking place have passed laws or regulations governing hydraulic fracturing treatment, including laws and regulations requiring public disclosure of the chemical additives in the fracturing fluids. States in the West enacting such laws include Colorado, Texas, and Wyoming.

The Colorado, Texas and Wyoming regulations provide for disclosure of *all* chemical additives in the fracking fluids, protection of chemical additives or concentrations considered to be “trade secret” by oil and gas operators, and an opportunity for challenge to a claim of trade secret. *See* 2 CO Code of Reg. § 404-1:205A; 16 Tex. Adm. Code Part 1, § 3.29 & Tex. Govt. Code, ch. 552; Wyo. Adm. Code, ch. 3, § 44 & Wyo. Stat. Ann, § 16-4-203(f).

OCC promulgated regulations, effective February 2012, governing disclosure of chemicals used in hydraulic fracturing. *See* 19.15.16.19.B NMAC.¹

The OCC regulations do not require disclosure of *all* chemical additives, but only those that are required to be disclosed under Occupational Health and Safety Administration regulations (OSHA) for which material safety data sheets are required. *See* 19.15.16.19.B NMAC (referring to 29 CFR § 1910.1200).

The OCC regulations do “not require the reporting or disclosure of proprietary, trade secret or confidential business information.” *Id.* “Proprietary, trade secret and confidential business information” are not defined terms in the regulations, and there is no opportunity to challenge a claim of trade secret under OCC’s regulations.

According to Pivot Upstream’s D-Frac database, 84% of fracking fluid disclosures in New Mexico claim trade secret protection. This level of non-disclosure is higher than, for example, Pennsylvania (38%), Colorado (50%), and Wyoming (73%).
<http://www.eenews.net/public/energywire/2012/09/26/1> (accessed Jan. 23, 2013).

HB 136 would require OCC to amend its current regulations to require disclosure of *all* chemical additives in fracturing fluids, not just those that are required for OHSAs purposes; to define “trade secret;” to allow for disclosure of chemical additives claimed to be trade secret to health professionals and emergency responders under circumstances outlined in OSHA regulations, 29

¹ Section 19.15.16.19.B NMAC provides in full:

For a hydraulically fractured well, the operator shall also complete and file the division’s hydraulic fracturing disclosure form within 45 days after completion of the well. The hydraulic fracture disclosure form shall include the well API number; the well name; the well number; the well location by unit, lot, section, township and range; the county where the well is located; the well’s surface and bottom hole locations by footage from the section line; the operator’s name and address; the operator’s OGRID; the operator’s phone number; the fracture date; the well’s production type (oil or gas); the pool code; the well’s gross fractured interval; the well’s true vertical depth; the total volume of fluid pumped; and a description of the hydraulic fluid composition and concentration listing each ingredient and for each ingredient the trade name, supplier, purpose, chemical abstract service number, maximum ingredient concentration in additive as percentage by mass, maximum ingredient concentration in the hydraulic fracturing fluid as percentage by mass; certification by the operator that the information included on the hydraulic fracture disclosure form is true and complete to the best of the operator’s knowledge and belief; and the signature, printed name, e-mail address and title of the operator or operator’s designated representative. The division does not require the reporting of information beyond the material safety data sheet data as described in 29 C.F.R. 1910.1200. The division does not require the reporting or disclosure of proprietary, trade secret or confidential business information.

CFR § 1910.1200(i) (in an emergencies and where necessary for public health reasons in non-emergencies); and to allow landowners on whose property a well is located and adjacent landowners to challenge a claim of trade secret.

HB 136 allows for disclosure of all chemicals and provides protections for public health and potentially affected landowners while still providing trade secret protection to oil and gas operators in order that they do not lose competitive advantage. HB 136's requirements and protections are consistent with the regulatory requirements and protections of other Western oil and gas producing states.²

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

None identified.

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

HB 136 would require OCC to conduct a public rulemaking.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP THIS BILL HAS WITH OTHER BILLS INTRODUCED THIS SESSION

None identified.

TECHNICAL ISSUES OR DRAFTING ERROR

1. Section 1.A(1) of HB 136 requires OCC to promulgate rules for disclosure of "each chemical ingredient" used in hydraulic fracturing treatment and for completion of the "hydraulic fracturing registry form" on the websites of the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission (each of which uses FracFocus Chemical Disclosure Registry at <http://fracfocus.org/>). While the FracFocus form requires disclosure of the maximum concentration of each chemical ingredient, HB 136 does not expressly require disclosure of the concentration. The concentration of a chemical provides information as to potential risk. HB 136 could be clarified to require disclosure of "the actual or maximum concentration of each chemical ingredient."

OTHER SUBSTANTIVE LEGAL ISSUES

None identified.

ALTERNATIVES TO ENACTING THIS BILL

None identified.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

² Colorado's hydraulic fracturing fluids disclosure rule, 2 CO Code of Reg. § 404-1:205A.a, effective April 1, 2012, represented a consensus among the oil and gas industry, environmentalists, and the Colorado Attorney General's Office. Personal communication with Steven Nagy, Assistant Attorney General, Colorado Attorney General's Office (NAAG Mining, Oil and Gas Conference, Feb. 2, 2012, Columbus, OH).

The OCC regulations will remain in effect, which do not require disclosure of all chemical additives, do not define “trade secret,” do not allow for disclosure of trade secret information for public health purposes, and do not allow for any challenge to a claim of trade secret by potentially affected land owners.

AMENDMENTS NEEDED TO IMPROVE THIS BILL

1. A number of other states’ regulations allow for a challenge to a claim of trade secret by any person, not just potentially affected landowners.
2. A number of other states’ regulations allow for disclosure of the “chemical family” of the chemical ingredient for which trade secret is claimed, unless the “chemical family” is trade secret. One definition for “chemical family” is “a group of chemicals that share similar chemical characteristics and have a common general name.” 2 CO Code of Reg. § 404-1:100.