

Trade Secrets in Hydraulic Fracturing

By: Maria Khvatskaya

Duke University School of Law

Supervisor: Therese Vick

Blue Ridge Environmental Defense
League



Fracking History in NC

- The ban on hydraulic fracturing in North Carolina has been lifted in 2012
- The granting of permits for wells will be allowed as early as March 2015
- The North Carolina Mining and Energy Commission (MEC) is tasked with developing regulations for fracking in North Carolina

High-Pressure Hydraulic Fracturing:

The process

- Drilling a vertical well thousands of feet into the earth, then extending laterals or “legs” up to two miles in a horizontal direction
- Injection of fracking fluid, composed of base fluid (generally water), proppants and chemicals
- This creates fissures (fractures) and allows collection of the freed gas

Roughly 200 tanker trucks deliver water for the fracturing process.

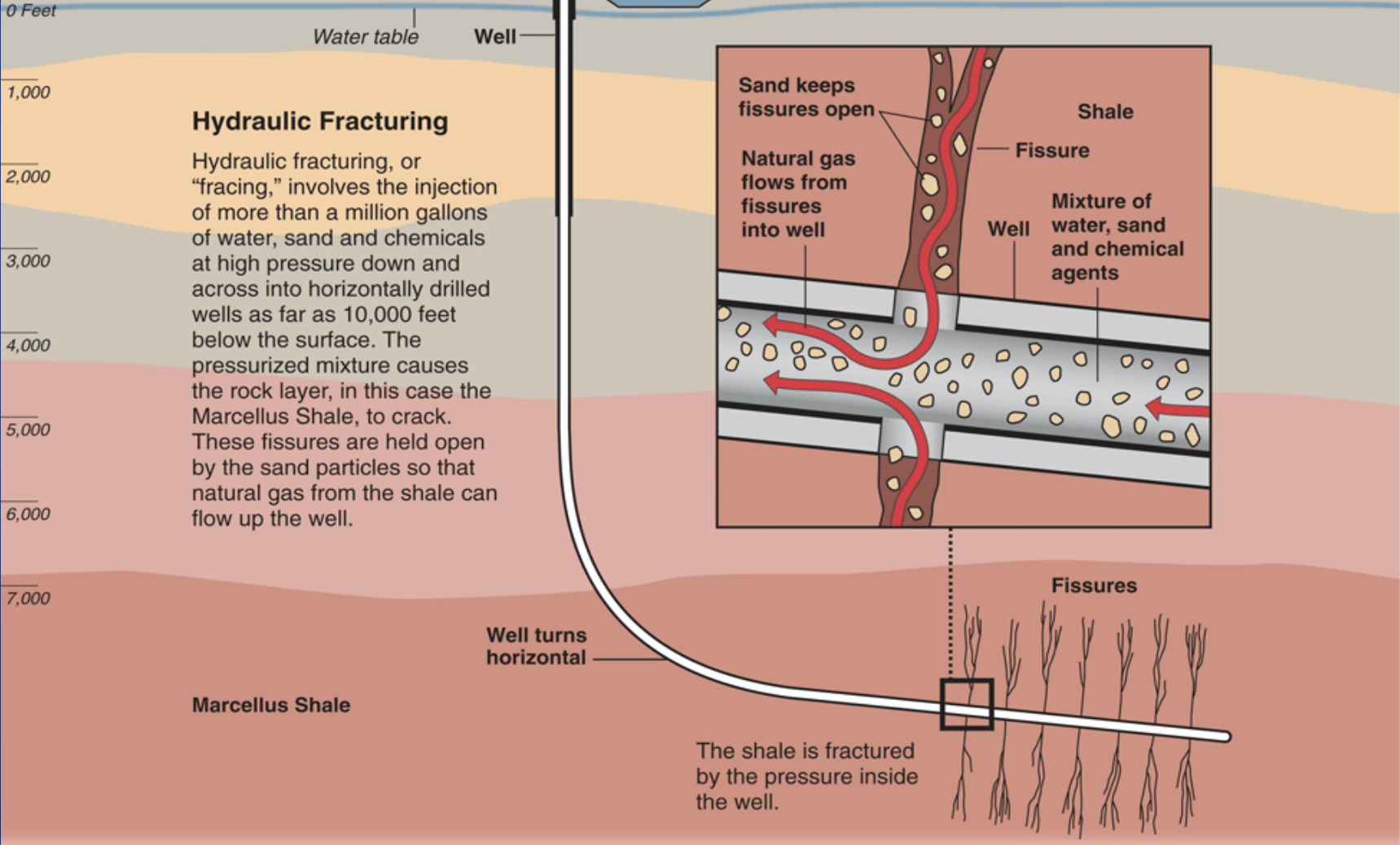
A pumper truck injects a mix of sand, water and chemicals into the well.

Natural gas flows out of well.

Recovered water is stored in open pits, then taken to a treatment plant.

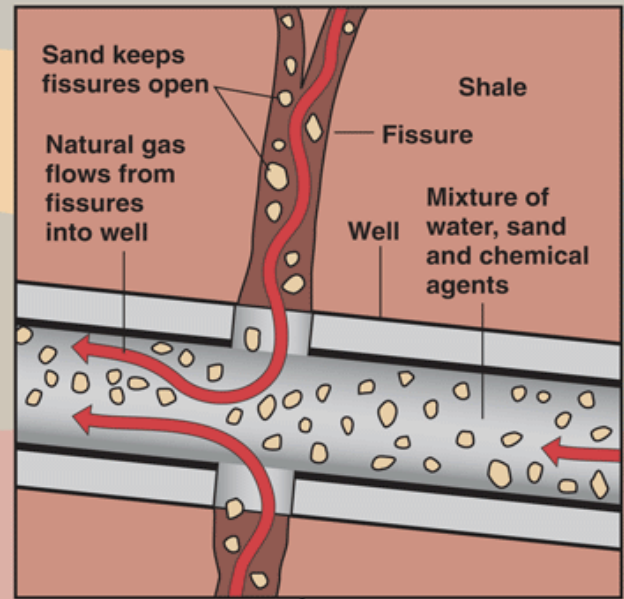
Storage tanks

Natural gas is piped to market.



Hydraulic Fracturing

Hydraulic fracturing, or "fracing," involves the injection of more than a million gallons of water, sand and chemicals at high pressure down and across into horizontally drilled wells as far as 10,000 feet below the surface. The pressurized mixture causes the rock layer, in this case the Marcellus Shale, to crack. These fissures are held open by the sand particles so that natural gas from the shale can flow up the well.



Fracking: The actors

- Manufacturer/distributor of chemicals
- Transporters of the equipment and chemicals
- The drilling operator
- The fracking operator
- The clean-up operator

- Why is this important?

Trade Secrets: Definition

- A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. (Torts Restatement § 757).

Trade Secrets v. Patents

- Length of protection: indefinite
- Breadth of protection: anything that could qualify under the definition
- Qualifications: economic advantage, kept secret
- Length of protection: 20 years
- Breadth: invention or manufacturing process
- Qualifications: novel, useful, non-obvious

Trade Secrets in Fracking

- Trade secrets, unlike copyright or patent protections, are not dictated by a statute
- Why is this not already decided?
 - Generally used to sue for misappropriation
 - Contract or a tort claim from the employer
 - Now, disclosure rules would require it beforehand

Trade Secrets from the industry's point of view

- Competitive, economic advantage
- Possible loss of the trade secret protection overall
- Choosing the state for their venture
- Choosing the equipment/process for drilling

Trade Secrets from the public's point of view

- Chemicals going into the ground
- Possible accidents, spills and left-overs (contamination)
- Effects of the daily fracking operations (transportation, noise)
- Disposal of wastes
- Split estates and forced pooling

The process for Trade Secrets

- Who determines the status?
 - The company
 - Another authority
- Does the secret have to be disclosed?
 - No
 - Yes, but it will be kept confidential
 - Only in case of emergency

The process (continued)

- When does the trade secret information get disclosed?
 - With the filing of the permit
 - Before drilling
 - After drilling
 - After completion of the operation
- How long does the protection last?

The process (continued)

- What information gets disclosed?
 - Composition
 - The actual chemical
 - Chemical family
 - Chemical classification
 - Concentration
 - Actual concentration
 - A range
 - A maximum

Appeal Process

- If the determination is by another authority other than the company, what is the appeal process?
 - What legal forum?
 - What guarantees exist to keep the trade secret, secret?

Challenging the determination

- Standing
 - Land owners
 - Renters
 - People affected
 - Public
- Process
 - A lawsuit
 - An institutionalized process

Challenges (continued)

- Who makes the determination?
 - Judge
 - Jury
 - A government agency
 - Panel

Who holds the trade secrets?

- The company
- A government agency (DENR)
- A third party
- Considerations:
 - Public's access to the information
 - The secrecy protection
 - Litigation concerns

Emergency exceptions

- Who?
 - First responders
 - Medical personnel
- Process
 - Signed non-disclosure
 - Timing
 - Justification for the information access

Currently going on in MEC

- Bill 94: undermines the MEC authority for determining the rules for trade secret disclosure
- Looking to make trade secrets protection time-limited
- DENR holding the trade secrets

Illinois

- Hydraulic Regulatory Fracturing Act (06/17/13)
 - Total disclosure at the time of the filing for a permit
 - Trade secret exception granted only for qualified trade secrets
 - Public can challenge it
 - Health needs trump this protection
 - Trade secrets submitted to the department
 - Released to emergency staff as necessary

Thank you

- Therese Vick
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- Mining and Energy Commission