Secretary of Energy Advisory Board (SEAB) Task Force on FracFocus 2.0
U.S. Department of Energy
1000 Independence Ave. SW
Washington DC 20585

March 25, 2014

Re: Comments to SEAB on the *Task Force Report on FracFocus 2.0*

Dear Chairman Deutch and Task Force Members:

We would like to thank the Secretary of Energy Advisory Board (SEAB) for its February 24th Task Force on FracFocus 2.0 draft report entitled, *Task Force Report on FracFocus 2.0.*[1] We believe that maximizing public disclosure of and access to information on the chemicals associated with hydraulic fracturing is the necessary first step to ensuring that our search for new domestic energy supplies does not compromise our natural resources or threaten public health.

Disclosure of the chemicals in hydraulic fracturing serves a number of vital purposes. Proper public disclosure would enable nearby residents to conduct appropriate baseline testing and future monitoring of water quality. Such public access would also allow them to know what chemicals they may be exposed to and the appropriate response. Local governments need to know the chemicals used to ensure that emergency responders have the training, protective equipment, and plans to respond to accidents. Medical professionals need to know the chemicals used when treating exposure. Researchers need to know the chemicals to study the public health effects of hydraulic fracturing.

We strongly agree with the Task Force's recommendations concerning the flaws with the structure of FracFocus. Data in FracFocus is often inaccurate, inaccessible, and incomplete. State and federal governments have a responsibility to ensure that publicly disclosed information is accurate, complete, easily accessible, continues to be available when needed, and is easy to search and aggregate. For these reasons, we have serious concerns about using the FracFocus website for reporting of data on hydraulic fracturing operations required by several states and possibly the federal government. Specifically:

1. *FracFocus does not currently provide an adequate platform for public disclosure of hydraulic fracturing chemical information.*

Several states are already using the FracFocus website for reporting information on chemical disclosure. And yet the site remains flawed and limited in the level of access to fracking information it provides to the public. We have serious concerns about using this third party website for reporting of data on hydraulic fracturing operations required by states or federal agencies.

[1] U.S. Department of Energy, Secretary of Energy Advisory Board, Draft Task Force Report on FracFocus 2.0, February 24, 2014.

Government's primary obligation to protect public health and the environment demands that states collect, review, and post the data required. While use of FracFocus may have certain benefits, such as possible cost savings, states and federal agencies should not adopt its use unless they can ensure the site is improved to ensure full, accurate and complete access to all disclosed information and its aggregation capabilities are improved.

2. Quality control procedures are limited to ensure accuracy of data

We agree with the Task Force's recommendations to improve the timeliness, accuracy and completeness of data storage. FracFocus has limited quality assurance procedures to ensure accuracy. And we worry that even with new commitments to data quality, the site will always remain inferior to government collection and oversight of data.

In most government reporting programs, the overseeing agency is able to establish procedures to review submissions, identify outlier filings, and work with filers to correct obvious errors. For instance the Toxic Releases Inventory, managed by the U.S. Environmental Protection Agency, has several steps to review and confirm filed information with the submitting facilities. The program has even been able to develop program specific software, with data quality checks built in, to help filers submit information more quickly and with fewer errors.

However, FracFocus does not even review submissions. A recent study by Harvard University Law School highlights the numerous inaccuracies that have been found with the data.[2] For example, the registry is supposed to indicate automatically when certain pieces of information (i.e., an invalid date, API number, or latitude or longitude values that places a well outside of North America) are incorrect on a newly completed form. However, oftentimes, the latitude and longitude values are still incorrect, showing the location of wells in the ocean or Canada. FracFocus's registry also does not seem to reject incorrect Chemical Abstract Services (CAS) numbers, which help to identify chemicals. A recent review of FracFocus found that 29% of CAS numbers reported at Texas wells in July 2012 did not exist.[3] In addition, concentration ranges were frequently used even when a state's rules did not allow the ranges, but required the exact amounts to be reported. In other instances, required information is simply omitted from the disclosure.

At a minimum, FracFocus must create a plan to ensure that each submission is reviewed for full compliance with each state's disclosure requirements. There are electronic tools available that FracFocus can use to streamline and even partially automate such data quality checks. But it is the responsibility of states and federal agencies to ensure such a process occurs and that problems are reported back to submitters quickly with a clear requirement to correct the information. If more states or federal agencies decide to use FracFocus or any other third-party

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[2] Kate Konschnik, Harvard Law School Environmental Law Program Policy Initiative, *Legal Fractures in Chemical Disclosure Laws: Why the Voluntary Chemical Disclosure Registry FracFocus Fails as a Regulatory Compliance Tool* 9 (April 23, 2013).

[3] Konschnik, at 7; Scott Anderson, *A Red Flag on Disclosure of Hydraulic Fracturing Chemicals*, EDF: Energy Exchange (Dec. 12, 2012), http://blogs.edf.org/energyexchange/2012/12/12/a-red-flag-on-Disclosure-of-hydraulic-fracturing-chemicals/.

website for disclosure purposes, the data should first be reported to the appropriate government agencies for review and then be forwarded to FracFocus for posting.

3. FracFocus data is not available in a downloadable and machine-readable format

We agree with recommendations in the SEAB's 2011 report and the Task Force's 2014 draft report that the system "includes tools for searching and aggregating data by chemical, well, by company, and by geography."[4] But, the ***only*** way to provide researchers with full access to public information would be to release the full contents of the FracFocus database in raw form so the public can download and aggregate – a step that FracFocus has specifically resisted. As this is the only way to provide full public access, the Task Force should include in its final report a strong statement calling for the site to post the full downloadable database.

Currently, the FracFocus website only allows users to download PDF files of reports, which are not considered to be an open format.[5] This makes it very difficult for the public to use and analyze data on wells and chemicals that the government would require companies to collect and make available. Many uses of this information require aggregating and analyzing the chemical information obtained from many individual hydraulic fracturing operations. However, FracFocus prevents aggregation, which unnecessarily restricts full public access and use of the information.

Americans from many different sectors, including scientific researchers, health professionals, concerned citizens, local policymakers, public interest groups, and industry, would need to undertake redundant, very costly efforts to obtain the data in a usable form, or simply do without the information. For instance, scientific researchers would find it extremely cumbersome to use FracFocus to study regional patterns and trends in the use of chemicals, or to measure and better understand any impacts of drilling activity on public health, safety, and environmental indicators.

Moreover, the U.S. Bureau of Land Management (BLM) is considering using FracFocus as a vehicle for disclosure of hydraulic fracturing operations on public lands. But, doing so would violate President Barack Obama's executive order, signed on May 9th, requiring new government information to be made available to the public in open, machine-readable formats.[6] President Obama sent a clear statement that open and machine readable should be "the default state of new and modernized Government information resources." Concurrently, the Office of Management and Budget (OMB) released an Open Data Policy that clearly applies "to all new information collection, creation, and system development efforts as well as major modernization projects that update or re-design existing information systems." [7]

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[4] Natural Gas Subcommittee of the Secretary of Energy Advisory Board, 90-Day Report, 24 (Aug. 18, 2011) available at http://www.shalegas.energy.gov/.

[5] According to the White House's Project Open Data, "while ISO 32000 is an open standard, the Portable Document Format (PDF) does not achieve the same level of openness as CSV, XML, JSON, and other generic formats." *See, http://project-open-data.github.io/faq/.*

[6] Exec. Order 13642 of May 9, 2013. http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf.

[7] Memorandum: Open Data Policy – Managing Information as an Asset, May 9, 2013. Sylvia M. Burwell, Steven VanRoekel, Todd Park, Dominic J. Mancini. http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf.

The Open Data Policy requires that agency Chief Information Officers validate that new information systems meet minimum standards and "must be scalable, flexible, and facilitate extraction of data in multiple formats and for a range of uses as internal and external needs change." The significant limitations on searching, downloading, and aggregating data on FracFocus make it clear that it does not meet the standards of being flexible or facilitate the extraction of data in multiple formats.

In its proposed rule, BLM indicates that the agency plans to work with the Groundwater Protection Council (GPC) and the Interstate Oil and Gas Compact Commission (IOGCC) to further improve the website's capabilities. While this would likely result in welcome improvements, BLM makes no specific mention of whether the website will allow for the data to be machine-readable and easy to aggregate. And we worry that since neither the GPC nor the IOGCC are covered by the new open data policy, that any improvements could be removed or limited in some way later on.

BLM and state governments should not use FracFocus for data collection and dissemination. BLM and states should establish their own reporting and dissemination processes that ensure the public easy access to the data collected. If the BLM and states were to maintain FracFocus as a reporting option, it should include provisions to ensure the site be brought into compliance with the Open Data Policy and specifically include minimum functionality on searching, sorting, downloading, or other mechanisms to make complex data usable. Additionally, should states and the BLM use FracFocus, they should commit to providing direct access to the data should the FracFocus website fail to meet expected standards of access and transparency.

4. *Fails to meet minimum standards for managing records and data custody practices*

We agree with recommendations in the Task Force's 2014 draft report that FracFocus adopt the following standards in relation to data custody practices: protections against unauthorized alteration or deletion of data; long-term retention policy including both original and any updated submissions, and audit trails. We also agree that FracFocus should amend its "term of use" to eliminate restrictions on sharing and aggregation of data on the site, as mentioned in the previous point.

Government agencies' systems for managing electronic records must generally meet certain minimum standards.[8] FracFocus fails to meet those standards. For instance, federal regulations require protections against unauthorized alteration or deletion, and controls, such as audit trails to ensure records are complete and unaltered.[9]

However, FracFocus records contain no publication date, and operators have full access to change records at any time. And when changes are made to records on FracFocus, the original record is not publically preserved and there is no indication that additions or deletions have

[8] 36 C.F.R. § 1236.10(b),(c). Available at: http://www.gpo.gov/fdsys/pkg/CFR-2010-title36-vol3/pdf/CFR-2010-title36-vol3-sec1236-10.pdf.
[9] 36 C.F.R. § 1236.10(b),(c). Available at: http://www.gpo.gov/fdsys/pkg/CFR-2010-title36-vol3/pdf/CFR-2010-title36-vol3-sec1236-10.pdf.

occurred. FracFocus even explicitly states that it "assume[s] no responsibility for the timeliness, deletion, misdelivery, or failure to store any" information.[10] If data on the site were lost, corrupted or deleted, neither the government nor the public would have any recourse.

As observed in those states which use FracFocus for their mandatory disclosure requirements, states are unable to enforce timely disclosure requirements.[11] FracFocus does not notify a state when it receives a disclosure from a company operating in that state, and most states are not able to determine when a disclosure is made. Reports indicate that FracFocus 2.0 may have resolved this issue by notifying states when a submission has been made, but it is unclear whether this has occurred. Moreover, there is no reason to withhold this information from the public.

FracFocus should ensure that publication dates are included in each well completion record, so that states and the public can track compliance with the reporting deadlines. States should also require the operators to send them copies of their FracFocus disclosure forms. The state should review the form to ensure that it was published on FracFocus by the deadline, and penalize those companies for late submittal or failure to submit.

5. *Information Provided by FracFocus Disclosure Form is Insufficient*

FracFocus provides an insufficient source of information needed to ensure public health and the environment. The FracFocus disclosure form, in many instances, does not include fields for information required by state disclosure rules. The FracFocus form discloses a limited amount of information: true vertical depth of the well, total water volume used, and for each chemical used (including the base fluid) the trade name, supplier, purpose, ingredients, CAS number, maximum ingredient concentration in the additive, and maximum ingredient concentration in the fracturing fluid. The public should have access to all of the information required by states disclosure rules regarding hydraulic fracturing, not just a limited amount of information determined by an existing website designed to encourage voluntary disclosure.

States must engage in a careful process to identify the best information needed to protect public health and the environment, instead of pre-determined information to ease the burden of well operators. For instance, FracFocus fails to include any data on the volume, handling or disposal of recovered fluids, and its management. It also fails to include any information on any potential risks to water and air quality. FracFocus does not allow for pre-disclosure data, which a few states have started requiring, or for much of the information that we believe should be added to post-disclosure forms, such as base fluid source and actual concentrations in the additive and in the fracturing fluid (rather than the maximum).

We support conducting an audit to determine the accuracy of the operator's field records and the accuracy of the data entry into FracFocus 2.0.

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[10] See Website Terms and Conditions of Use §2 available at http://fracfocus.org/terms-of-use (accessed Aug. 5, 2013).

[11] Kate Konschnik, Harvard Law School Environmental Law Program Policy Initiative, *Legal Fractures in Chemical Disclosure Laws: Why the Voluntary Chemical Disclosure Registry FracFocus Fails as a Regulatory Compliance Tool* 9 (April 23, 2013).

6. *Disclosures must encompass all chemicals used, with no exceptions for trade secrets*

We agree with the SEAB 2011 report and current Task Force draft report that "strongly endorsed full disclosure of the chemical composition of fracturing fluids." FracFocus and states should require public disclosure of all relevant information, including the composition, concentration, and chemical identities of all hydraulic fracturing fluids that are collected.

Complete disclosure of all chemicals and techniques used in hydraulic fracturing is required to adequately protect the environment and public health. For instance, if the identities of certain chemicals are withheld, physicians may be unaware of certain chemicals to which a patient may have been exposed. This may make it difficult or impossible to accurately diagnose and treat the patient, or to understand the interactive effects that chemicals can have on a patient's health. Because complete information is necessary to "ensure that acute exposures are handled appropriately and to ensure that surveillance programs are optimized," the Pediatric Environmental Health Specialty Units, a network of experts in children's environmental health, have recommended full disclosure of all chemical information.[12]

Beyond care of individual patients, epidemiologists and other public health researchers require knowledge of the full suite of chemicals used in order to evaluate the risks posed by well stimulation, and these researchers must be able to freely share information about stimulation chemicals. State officials also need chemical information to evaluate the hazards posed by these chemicals in advance of hydraulic fracturing. Information on chemicals used also encourages industry to create safer products and allows parents and community leaders to protect families from unnecessary toxic exposures. Trade secret exemptions undermine these purposes and put public health at risk.

We believe that states should eliminate any exemption for disclosure of trade secret information. But, if states and FracFocus continue to adopt a trade secret exemption to public disclosure requirements, this exemption must be narrowly applied. In this instance, we support the Task Force on the following steps to reduce the use of trade secret exemption:

- Report the complete list of chemicals by their CAS numbers and quantities added;
- Report a complete list of products without linking to the list of chemicals;
- Assemble accurate data about the nature and extent of trade secrecy claims across chemical, states, operators, supplies and time;
- States and federal regulators should establish a standard for claiming the exemption, including requirements for justification for claims of trade secrecy. Government officials should weigh individual claims of trade secrecy against the public's interest in disclosure; and
- States and federal regulators must establish compliance of trade secret claims and challenging mechanisms for the public.

[12] Pediatric Environmental Health Specialty Units, *PEHSU Information on Natural Gas Extraction and Hydraulic Fracturing for Health Professionals* 3 (Aug. 2011) *available at* aoec.org/pehsu/documents/hydraulic_fracturing_and_children_2011_health_prof.pdf.

In sum, states and federal regulators must revise their handling of trade secrets to provide a robust and transparent system for evaluating and, when necessary, challenging claims of trade secrecy, and for protecting the public's interest in disclosure.

Conclusion

We appreciate the opportunity to comment on SEAB's Task Force on FracFocus 2.0 draft report, *Task Force Report on FracFocus 2.0.* If you have questions about our comments or want to discuss the issues further, please feel free to contact us. Questions about these comments can be directed to Sofia Plagakis, Policy Analyst, Center for Effective Government (formerly OMB Watch)

Sincerely,

Center for Effective Government

Clean Water Action

Earthjustice

Earthworks

National Parks Conservation Association