15A NCAC 05D .0XX1 CHEMICAL DISCLOSURE REQUIREMENTS

These rules establish requirements and procedures for permitting, constructing, operating, monitoring, reporting, and abandoning wells in the process of obtaining oil and/or natural gas from the subsurface while ensuring the protection of public health, safety, and welfare, including the environment and wildlife resources (G. S. 113-391). The provisions of this Rule shall apply to all new wells for which an initial drilling permit is issued on or after the effective date of this Rule.

15A NCAC 05D .0XX2 DEFINITIONS

The terms used in this Subchapter shall have the definitions assigned by G.S. 113-389. In addition, the words defined in this Rule shall have the following meanings:

(1) "Accredited laboratory" means the North Carolina State Laboratory of Public Health certified by the United States Environmental Protection Agency or a laboratory certified by the Certification Section of the North Carolina Public Health Laboratory pursuant to 10A NCAC 42D to perform tests to determine the presence of coliform bacteria or the chemical constituents to be tested.

(2) "Additive" means any chemical substance or combination of substances, including a proppant, contained in a hydraulic fracturing fluid that is intentionally added to a base fluid for a specific purpose whether or not the purpose of any such substance or combination of substances is to create fractures in a formation.

(3) "Adjacent property" means a tract of property next to the tract of property on which the subject wellhead is located, including a tract that meets only at a corner point.

(4) "API number" means a unique, permanent, numeric identifier assigned to each well drilled for oil or gas in the United States.

(5) "Chemical(s)" means any element, chemical compound, or mixture of elements or compounds that has its own specific name or identity such as a Chemical Abstract Service number, whether or not such chemical is subject to the requirements of 29 CFR 1910.1200(g)(2)(2011).

(6) "Chemical Abstracts Service" means the division of the American Chemical Society that is the globally recognized authority for information on chemical substances.

(7) "Chemical Abstracts Service number or CAS number" means the unique identification number assigned to a chemical by the Chemical Abstracts Service.

(8) "Chemical Disclosure Registry" means the chemical registry website known as FracFocus developed by the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. If such website becomes permanently inoperable, then chemical disclosure registry shall mean any other publically accessible information website that is designated by the Commission.

(9) "Chemical family" means a group of chemical ingredients that share similar chemical properties and have a common general name.

(10) "Chemical ingredient" means a discrete chemical constituent with its own specific name or identity, such as a CAS number, that is contained in an additive.

(11) "Department" means the Department of Environment and Natural Resources.

(12) "Health professional or emergency responder" means a physician, physician's assistant, industrial hygienist, toxicologist, epidemiologist, nurse, nurse

Comment [tso1]: I removed the definition of "base fluid" and a few others because I think it's covered by this statement, but if anyone disagrees, please let me know.

Comment [tso2]: Do we need this?

practitioner, or emergency responder who needs information in order to provide medical or other health services to a person exposed to a chemical ingredient.

(13) "Landowner" means the person listed on the applicable county appraisal roll as owning the real property on which the relevant wellhead is located.

(14) "Request" means a telephonic request for information that will be followed by a written statement.

(15) "Requestor" means a person who is eligible to request information claimed to be entitled to trade secret protection.

(16) "Service Company" means a person that performs hydraulic fracturing treatments on a well in this state.

(17) "Total water volume" means the total quantity of water from all sources used in the hydraulic fracturing treatment, including surface water, groundwater, produced water, reused water, reclaimed water or recycled water.

(18) "Trade name" means the name given to an additive or a hydraulic fracturing fluid system under which that additive or hydraulic fracturing fluid system is sold or marketed.

(19) "Trade secret" means any formula, pattern, device, or compilation of information that is used in a person's business, and that gives the person an opportunity to obtain an advantage over competitors who do not know or use it in accordance with G.S. 66-152(3) and G.S. 132-1.2.

(20) "Well completion report" means the report an operator is required to file with the Commission following the completion or recompletion of a well.

(21) "Well Stimulation" means any process used to increase the production of an oil or gas well by improving the flow of hydrocarbons, such as, but not limited to, hydraulic fracturing.

(22) "Vendor" means a company that sells or provides an additive for use in a hydraulic fracturing treatment.

Comment [tso3]: After discussion with Kat, we decided that supplier and vendor were being used to mean the same thing, so I eliminated one.

15A NCAC 05D .0XX3 REQUIRED DISCLOSURES

(a) A service company who performs any part of a hydraulic fracturing treatment and a vendor who provides hydraulic fracturing additives directly to the operator for a hydraulic fracturing treatment shall, with the exception of information claimed to be a trade secret, furnish the operator with the information required by subsection 05D .0XX3 Section (b)(1-14) as applicable, and with any other information needed for the operator to comply with subsection 05D .0XX3 Section (b). Such information shall be provided as soon as possible within 30 days following the conclusion of the hydraulic fracturing treatment and in no case later than 90 days after the commencement of such hydraulic fracturing treatment.

Comment [tso4]: Note: Texas requires 15 days; Arkansas requires 30.

(b) Within 30 days following the conclusion of a hydraulic fracturing treatment, and in no case later than 60 days after the commencement of such hydraulic fracturing treatment the operator of the well must complete the Chemical Disclosure Registry form and upload the form on the Chemical Disclosure Registry and provide the Department and the Commission with an electronically submitted copy, including:

Comment [tso5]: Note: Texas states, "on or before the date the well completion report for a well on which hydraulic fracturing treatment(s) was/were conducted is submitted to the Commission in accordance with §3.16(b) of this title."

(1) The operator name;

(2) The date the hydraulic fracturing treatment(s) began;

(3) The date of completion of the hydraulic fracturing treatment(s);

(4) The county in which the well is located;
(5) The API number for the well;
(6) The well name and number;
(7) The longitude and latitude of the wellhead (in decimal degrees);
(8) A certified directional survey of each horizontal well
(9) The measured depth (MD) of the well and the true vertical depth (TVD) of the well;
(10) The total volume of water used in the hydraulic fracturing treatment(s) of the well, including the total volume of water reused from other hydraulic fracturing treatment(s), or the type and total volume of the base fluid used in the hydraulic fracturing treatment(s), if something other than water;
(11) The source of water used in the hydraulic fracturing treatment(s) and the point of withdrawal of the water used;
(12) The well that is the source of recycled fluid used or the centralized facility that is the source of the recycled fluid;
(13) Each additive used in the hydraulic fracturing treatments and the trade name, vendor, and a brief description of the intended use or function of each additive in the hydraulic fracturing treatment(s);
(14) Each chemical ingredient used in the hydraulic fracturing treatment(s) of the well and their CAS numbers, as provided by the chemical vendor or service company or by the operator, if the operator provides its own chemical ingredients, that were intentionally included in and used for the purpose of creating the hydraulic fracturing treatments for the well
(15) An indication of which chemicals are subject to the requirements of 29 CFR Part 1910.1200(g)(2);
(16) The actual or maximum concentration of each chemical ingredient listed under clause (xi) of this subparagraph in percent by mass;
(17) The CAS number for each chemical ingredient listed; and

(c) A vendor, service company, or operator is not required to:
(1) Disclose chemicals that occur incidentally or are otherwise present in trace amounts, may be the incidental result of a chemical reaction or process, or may be constituents of naturally occurring materials that became part of the hydraulic fracturing fluid; or
(2) Identify specific chemical ingredients and/or their CAS numbers that are claimed as entitled to trade secret protection based on the additive in which they are found or provide the concentration of such ingredients, unless the Office of the Attorney General, or a court of proper jurisdiction on appeal of a determination by the Office of the Attorney General, determines that the information would not be entitled to trade secret protection under G.S. 66-152(3) and G.S. 132-1.2.

(d) If the Chemical Disclosure Registry known as FracFocus is temporarily inoperable, the operator of a well on which hydraulic fracturing treatment(s) were performed must supply the Department and the Commission with the required information with the well completion report and must upload the information on the FracFocus Internet website when the website is again operable. If the Chemical Registry known as FracFocus is discontinued or becomes permanently

Comment [tso6]: The stakeholders recommended putting in a substitute for a CAS number where it was not available. DENR said it wanted to look into this issue further. After discussion with DENR staff, I am told that CAS numbers always exist. Thus I am not sure of the reason for the language "if applicable," other than it's found in other states' rules. I will continue to investigate this issue with other sources between now and the next ESC committee meeting. Please let me know if you have comments on this.

Comment [tso7]: The stakeholders recommended deleting this. I've asked Tom Alexander if this is something the service company or vendor can reasonably be expected to control. He said he can give me an answer by 2/14/13.

inoperable, the information required by this rule must be filed electronically as an attachment to the completion report for the well, which is posted, along with all attachments, on the Commission's Internet website, until the Commission amends this rule to specify another publicly accessible Internet website.

(e) If the vendor, service company, or operator claim that the specific identity and/or CAS number or amount of any additive or chemical ingredient used in the hydraulic fracturing treatment(s) is entitled to protection as trade secret information pursuant to G.S. 66-152(3) and G.S. 132-1.2, the operator of the well must indicate on the Chemical Disclosure Registry form that the additive or chemical ingredient is claimed to be entitled to trade secret protection. If a chemical ingredient name and/or CAS number is claimed to be entitled to trade secret protection, the operator of the well on which the hydraulic fracturing treatment(s) were performed must provide the following information:

(1) The chemical family or other similar description associated with such chemical ingredient;
(2) The MSDS, which must disclose information concerning the properties and effects of the hazardous substance or hazardous mixture;
(3) The label and MSDS must show that the specific chemical identity is being withheld as a trade secret and that a trade secret for a special hazardous substance is being claimed; and
(4) The contact information, including the name, authorized representative, mailing address, and phone number of the business organization claiming entitlement to trade secret protection on Form X.

Comment [TO8]: I spoke with Chris LeTourneau at DEM about whether this was already covered by federal law. He said that he is not sure whether the law requiring MSDSs applies to oil and gas. He is looking into it further. I added this information to address the stakeholder recommendation to require MSDS information for trade secrets. This language is based on Pennsylvania's law.

(f) Unless the information is entitled to protection as a trade secret under G.S. 66-152(3) and G.S. 132-1.2, information submitted to the Department and the Commission or uploaded on the Chemical Disclosure Registry is public information.

Comment [tso9]: The language below is the incorporation of the "master list" recommendation of the stakeholder group. This language comes from EDF's model regulatory framework.

(g) In addition to the other requirements of this section, if a service company or operator seeking designation as an approved contractor by the Department seeks to perform hydraulic fracturing treatments in the state, the service company or operator shall submit to the Department, along with its request for approved contractor designation, the following additional information:

(1) A list of all base fluids that the service company or operator expects to use in any hydraulic fracturing treatment performed in the state;
(2) A list of all additives that the service company or operator expects to use in any hydraulic fracturing treatment performed in the state;
(3) A list of all chemicals, and their associated CAS numbers, the service company or operator expects to use in any hydraulic fracturing treatment performed in the state; provided, however, that for those chemicals that are entitled to trade secret protection under 15A NCAC 05D .0XX3, unless the Office of the Attorney General, or a court of proper jurisdiction on appeal of a determination by the Office of the Attorney General, determines that the information would not be entitled to trade secret protection under G.S. 66-152(3) and G.S. 132-1.2, then the service company or operator shall provide the chemical family or other similar description associated with such chemical ingredient.

(4) Contact information for the authorized agent of the service company or vender that can provide the Department or health professionals with the chemical information described in 15A NCAC 05D .0XX3(h)(3).
(5) The service company or vendor shall provide updated information to the Department within 30 days of the date any of the information described in 15A NCAC 05D .0XX3(h)(1-4).becomes inaccurate or incomplete.

(h) The Department shall either approve or deny the application to be designated as an approved contractor. If the Department does not recommend approval, or denies the application, the applicant may request a hearing on its application. The Department shall post all information provided under 15A NCAC 05D .0XX3(h) to a publicly accessible website along with instructions for health professionals on how to obtain the chemical information described in 15A NCAC 05D .0XX3(b), including any such chemical information that qualifies for trade secret protection.

15A NCAC 05D .0XX4 DISCLOSURE TO HEALTH PROFESSIONALS

(a) Vendors, service companies, and operators shall identify the specific identity and amount of any chemicals claimed to be a trade secret to any health professional who requests such information in writing if the health professional provides a written statement of need for the information and executes a confidentiality agreement, **Form X3**. The written statement of need shall be a statement that the health professional has a reasonable basis to believe that:
(1) The information is needed for purposes of diagnosis or treatment of an individual,
(2) The individual being diagnosed or treated may have been exposed to the chemical concerned, and
(3) Knowledge of the information will assist in such diagnosis or treatment.

(b) The confidentiality agreement, Form X3, shall state that the health professional shall not use the information for purposes other than the health needs asserted in the statement of need, and that the health professional shall otherwise maintain the information as confidential. Where a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret are necessary for emergency treatment, the vendor, service company, or operator, as applicable, shall immediately disclose the information to that health professional upon a verbal acknowledgement by the health professional that such information shall not be used for purposes other than the health needs asserted and that the health professional shall otherwise maintain the information as confidential.

(c) The vendor, service company, or operator, as applicable, may request a written statement of need, and a confidentiality agreement, Form X3, from all health professionals to whom information regarding the specific identity and amount of any chemicals claimed to be a trade secret was disclosed, as soon as circumstances permit. Information so disclosed to a health professional shall in no way be construed as publicly available.

15A NCAC 05D .0XX5 TRADE SECRET PROTECTION

(a) Vendors, service companies, and operators are not required to disclose trade secrets, as defined by G. S. 66-152, to the chemical disclosure registry.

(b) If the specific identity of a chemical, the concentration of a chemical, or both the specific identity and concentration of a chemical are claimed to be entitled to protection as a trade secret, the vendor, service company or operator may withhold the specific identity, the concentration, or both the specific identity and concentration, of the chemical, as the case may be, from the information provided to the chemical disclosure registry. Provided, however, operators must provide the information required by 15A NCAC 05D .0XX3(e).

(c) The vendor, service company, or operator, as applicable, shall immediately provide the specific identity of a chemical, the concentration of a chemical, or both the specific identity and concentration of a chemical claimed to be a trade secret to the Commission upon a request from the Director stating that such information is necessary to respond to a spill or release or a complaint from a person who may have been directly and adversely affected or aggrieved by such spill or release. On request of necessity, such information shall be disclosed by the vendor, service company, or operator, as applicable, directly to the Director or his or her designee and shall in no way be construed as publicly available.

(d) The Director or designee may disclose information regarding the specific identity of a chemical, the concentration of a chemical, or both the specific identity and concentration of a chemical claimed to be a trade secret to additional Commission staff members to the extent that such disclosure is necessary to allow the Commission staff member receiving the information to assist in responding to the spill, release, or complaint, provided that such individuals shall not disseminate the information further.

(e) In addition, the Director may disclose such information to any Commissioner, the relevant county public health director or emergency manager, or to the Department of Public Health director of environmental programs upon request by that individual. Any information so disclosed to the Director, a Commission staff member, a Commissioner, a county public health director or emergency manager, or to the Department of Public Health director of environmental programs shall at all times be considered confidential and shall not be construed as publicly available. The Department of Public Health director of environmental programs, or his or her designee, may disclose such information to Department of Public Health staff members under the same terms and conditions as apply to the director.

15A NCAC 05D .0XX5 TRADE SECRET CHALLENGE

(a) A property owner, an adjacent property owner, or any person or agency of this state having an interest that is or may be adversely affected by a product, fluid or substance or by a chemical component in a product, fluid or substance may submit a request challenging a claim of entitlement to trade protection for any chemical ingredients and/or CAS numbers used in hydraulic fracturing treatment(s) of a well:

Comment [TO10]: The stakeholder group recommended that the MEC consider adding others who may be directly affected by hydraulic fracturing, such as people who rent housing on land where a hydraulic fracturing treatment is occurring, or neighbors of land where hydraulic fracturing is occurring. This language is similar to that of Ohio, Pennsylvania and Colorado.

(b) A requestor must certify in writing to the Director, over the requestor's signature to the following:

(1) The requestor's name, address, and daytime phone number;
(2) The county in which the wellhead is located; and
(3) The API number or other identifying information, such as field name, oil lease name and number, gas identification number, and well number.

(c) A requestor may use the format as seen in FORM X2 to provide written certification by paragraph (b) of this subsection.

(d) If the Commission determines that the certification is properly completed and signed, the Commission will consider this sufficient for the purpose of forwarding the request to the North Carolina Business Court.

(e) Within 10 business days of receiving a request that complies with paragraph (2) of this subsection, the director must:

(1) Submit to North Carolina Business Court a request for decision regarding the challenge;
(2) Notify the operator of the subject well and the owner of the claimed trade secret information of the submission of the request to the North Carolina Business Court and of the requirement that the owner of the claimed trade secret information submit directly to the North Carolina Business Court, the claimed trade secret information, clearly marked "confidential," submitted under seal; and
(3) Inform the owner of the claimed trade secret information of the opportunity to substantiate to the North Carolina Business Court, its claim of entitlement of trade secret protection.

(f) If the North Carolina Business Court determines that the claim of entitlement to trade secret protection is valid, if the information had been provided to the Commission, the owner of the claimed trade secret information shall not be required to disclose the trade secret information, subject to appeal.

(g) The request shall be deemed withdrawn if, prior to the determination of the North Carolina Business Court on the validity of the trade secret claim, the owner of the claimed trade secret information provides confirmation to the Commission and the North Carolina Business Court that the owner of the claimed trade secret information has voluntarily provided the information that is the subject of the request to the requestor subject to a claim of trade secret protection, or the requestor submits to the Commission and the North Carolina Business Court a written notice withdrawing the request.

(h) A final determination by the North Carolina Business Court regarding the challenge to the claim of entitlement of trade secret protection of any withheld information may be appealed within 10 business days to a district court of the North Carolina Business Court.

(i) If the North Carolina Business Court, or a court of proper jurisdiction on appeal of a determination by the North Carolina Business Court, determines that the withheld information would not be entitled to trade secret protection, if the information had been provided to the Commission, the owner of the claimed trade secret information must disclose such information to the requestor as directed by the North Carolina Business Court or a court of proper jurisdiction on appeal.

Comment [TO11]: I removed the deadline per the stakeholder recommendations and because I thought existing statutes of limitation may apply. Colorado, Pennsylvania and Ohio do not impose time limits on trade secret challenges. However, in Ohio, the owner of the well only has to maintain records on the data for two years.

Comment [TO12]: In Ohio, A property owner or "any person or agency of [the] state having an interest that is or may be adversely affected" by a chemical may bring a civil suit in the Court of Common Pleas of Franklin County against the company for disclosure.

Comment [TO13]: Colorado's Commission may, in its discretion, receive, investigate, assess and determine claims that a vendor, service company or operator has improperly