

Transparency Failures of the Third Kind in Unconventional Gas Drilling (UGD)

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Transparency and citizen involvement are hallmarks of modern governance of emerging technologies. The usual typology of transparency failures divides into those that keep information secret, and those that cause impediments to obtaining information. Both have been at play in relation to the public health risks of UGD. We believe that the typology of transparency failures should be expanded to include a third type, the “ostrich” way. We describe how thwarting transparency through failure to develop information, as well as other transparency issues, have been part of the national approach to UGD, and have been particularly pertinent to the recent Pennsylvania Supreme Court decision invalidating core provisions of the PA Marcellus Shale law (Act 13). Other states have UGD statutes with similar transparency provisions, so the Pennsylvania outcome is being closely watched.

Of the three kinds of transparency failures, the most obvious is outright nondisclosure of information, whether based on national security, trade secrets, or other rationales. A second kind of nontransparency consists of obfuscation of information. This can occur through limiting time and location of access; burying information in reams of paperwork; misleading spin; etc. For example, Act 13 imposes onerous conditions – including the risk of huge liability – for a health practitioner to learn what chemicals a patient may have been exposed to from UGD.

A third kind of transparency failure consists of simply not doing the research. You can't disclose information that you don't have. Willful ignorance is thus another way to undermine transparency, and it is an approach sadly prevalent in the UGD context.

Surveys demonstrate public concern about adverse human health consequences from UGD. Yet governments have avoided utilizing health expertise. The three state and federal advisory committees established in 2011 to evaluate UGD all were tasked with providing advice about potential public health impact, yet none of the 52 members of these three committees had any health expertise whatsoever. In Pennsylvania the Governor failed to fund health surveillance or other activities by the PA Department of Health, despite the advice of his own advisory commission.

The Governor's decisions appear to have come back to bite him. The Pennsylvania Supreme Court recently held core provisions of Act 13 unconstitutional and cited anecdotal evidence of adverse health impact. The Governor has asked the Pennsylvania Supreme Court to reconsider its decision, arguing that the Court should consider scientific data, not mere anecdotal evidence. But the ostrich approach left the Governor with no data to cite. The Court pointedly remarked that “the Commonwealth does not specify whether any independent scientific study has been commissioned or what data will be used to assess the impact. . . .”

Existing transparency rules are based on public expectation to know whatever government and industry know about potential health risks. These rules should be extended to require a full faith effort to discover health risks due to an emerging technology