

Pressure Mounts to Disclose Fracking Chemicals

Wyoming leads the way, although regulators are allowing some protections for trade secrets.

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For the past several years, parties have disagreed about the disclosure of hydraulic fracturing, or “fracking,” chemicals that are injected into the subsurface as part of the drilling process. Typically, water is mixed with chemicals and small grains of proppant (sand or aluminum oxide), and the mixture is injected at high pressure into a wellbore to create small fractures. After the hydraulic pressure is removed from the well, the small proppant grains hold these fractures open to create pathways for the gas to be extracted.

Companies involved in hydraulic fracturing traditionally have sought to avoid disclosure of the chemicals used in the fracturing process, citing industry competition and intellectual property concerns. Antifracking groups and plaintiffs have fought for mandatory disclosure rules, arguing that the information is necessary for any risk analysis or causation inquiry.

An increasing number of states have enacted rules requiring the disclosure of chemicals used in the fracking process. But many of these chemical disclosure rules allow companies to claim trade-secret protection over chemicals, additives and formulas used in well stimulation. To fall under these exemptions, companies arguing for protection need to ensure they take adequate steps to protect such trade secrets, even as they proceed to disclose the information necessary to avoid running afoul of disclosure rules.

Although the federal government has not yet issued any chemical disclosure



Some states allow companies to claim trade-secret protection over fracking chemicals, if they prove the information represents true business secrets. Above, a fracking site in California.

rules relating to fracking, the U.S. Environmental Protection Agency sent a “prerule” notice to the White House Office of Management and Budget on March 13 as part of an effort to determine what sorts of disclosures EPA will require with respect to fracking, potentially starting the countdown to federal regulation of chemical disclosures relating to fracking. And late last year, the Department of the Interior proposed regulations for allowing fracking on federal lands that would require fracking chemical disclosure through the FracFocus Chemical Disclosure Registry, a joint effort by the Groundwater Protection Council and the Interstate Oil and Gas Compact Commission.

Until any federal guidance is provided, however, companies face various compliance regimes in different states. In 2010, Wyoming issued the first fracking chemical disclosure rule nationwide. Since then, more than 20 states have followed suit. Most chemical disclosure rules require companies to disclose detailed information about the chemicals and additives used in well stimulation, such as the trade name of any additives, chemicals used in the fracking process, the maximum concentrations of chemicals intentionally added to the base fluid and the chemical abstract service number for chemicals used.

Most disclosure rules, however, also permit companies to claim some sort of

trade-secret protection over such data. Some states, like North Dakota, South Dakota and Michigan, do not require any disclosure of trade secrets. And earlier this year, North Carolina's Mining and Energy Commission approved a rule that would let companies keep confidential the makeup of the chemical mixture used in the fracking process.

Other states require limited disclosure of trade secrets but retain discretion in determining whether the claim of trade secret is valid. Illinois, for example, requires companies to disclose chemicals used in high-volume fracking to the state Department of Natural Resources, but permits a company to designate certain information a trade secret. The company must also provide a written justification of the trade-secret claim, which must include "the procedures used by the person to safeguard the information from becoming available" to others. If the department decides that the information has been adequately protected from disclosure and has competitive value, then it will consider it a protected trade secret and will not disclose it publicly.

PUBLIC CHALLENGES

While some states, such as Louisiana and Ohio, allow companies to claim trade-secret protection over chemicals used in the fracking process, such states also permit public challenges to any trade-secret assertion and place the burden on the claimant to prove that the information withheld is a trade secret.

California's S.B. 4 is particularly stringent. S.B. 4 requires companies to disclose data relating to the fracking fluid used by operators, including the identities of chemical constituents of additives, chemical abstract service numbers and additive concentrations, and does not afford trade-secret protection to these data. California is also one of the states that require companies to provide written justification of any trade-secret protection claimed, requiring companies, within 60 days of a request for release of information, to obtain either a declaratory judgment that the information sought is subject to trade-secret protection or a preliminary injunction prohibiting public disclosure of the information sought.

With the exception of Wyoming, courts have not yet addressed the issue

of trade-secret protection afforded to companies under fracking chemical disclosure rules. On March 12, the Wyoming Supreme Court in *Powder River Basin Resource Council v. Wyoming Oil & Gas Conservation Commission* provided some guidance as to what will be considered a trade secret for purposes of Wyoming's fracking chemical disclosure rule. The court held that the phrase "trade secret" should be defined as developed in federal case law under the Freedom of Information Act. Citing federal cases, the court said that a trade secret in this context is "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." The court also required that there be a " 'direct relationship' between the trade secret and the productive process." This definition is narrower than what industry parties had argued should apply and may result in additional burdens for Wyoming fracking operators to ensure that trade secrets are protected. Given that Wyoming was a leader in passing the first chemical disclosure rule nationwide, this opinion is likely to provide some guidance to courts facing this issue in other states.

In view of this vast landscape of chemical disclosure regulation, companies need to ensure that they are taking care to protect trade secrets in the fracking field. A trade secret is basically confidential business information that helps a company stay ahead of its competitors. The most famous example of a trade secret is perhaps the formula for Coca-Cola, which is rumored to be kept in a vault and known only to two people at The Coca-Cola Co. at a time.

Fracking operators do not have to go to such extents to maintain confidentiality of chemicals, additives and formulas used in fracking; however, prudence is warranted.

Trade secrets are protected by maintaining confidentiality. Companies consider the makeup of chemicals used in fracking trade secrets because the composition of fracking fluid used in a particular well can help to increase production. As a result, the make-up of the fluid is a valuable commodity and companies spend millions developing its fracking products.

Although companies may not be able to prevent a state from requiring disclosure of its fracking formulas, particularly through the public's use of records-access statutes, they can take certain steps to place themselves in the best position for protecting this valuable resource.

First, companies may want to consider putting in place a formal trade-secret policy. Such a policy would help the company ensure that rules about confidentiality and access to trade-secret information are followed. Second, companies need to ensure that employees maintain confidentiality. The use of confidentiality agreements and clauses in employee contracts may help to ensure that the protected information is not disseminated outside the company. Additionally, because the hallmark of a protected trade secret is confidentiality, companies might also want to consider limiting the disclosure of chemicals, additives and formulas within the company itself, so that only individuals who need to know the protected information are privy to it. Such limited access helps to maintain confidentiality. Third, and perhaps most simply, companies may want to consider identifying trade-secret information as such in all internal documents. The use of words such as "confidential," "trade secret" or "proprietary information" on documents containing fracking fluid formulas may help to establish for regulators that this information is indeed a competitive trade secret.

Although these suggestions may not necessarily prevent ultimate disclosure of trade secrets, having these internal rules in place may help a company fend off allegations that it did not undertake sufficient efforts to protect the chemical mixtures it uses in fracking operations.

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