

Singh, Angela K (DOA)

From: Colombie, Jody J (DOA)
Sent: Tuesday, April 02, 2013 8:42 AM
To: Singh, Angela K (DOA)
Subject: FW: Proposed Hydraulic Fracturing Regulations - UTROG Comment
Attachments: UTROG Comment on AOGCC Rules.pdf

From: Jeremy Brown [<mailto:jeremybrown@law.utexas.edu>]
Sent: Monday, April 01, 2013 1:36 PM
To: Colombie, Jody J (DOA)
Cc: Wagner, Wendy E
Subject: Proposed Hydraulic Fracturing Regulations - UTROG Comment

Dear Ms. Colombie:

Attached please find a comment on the proposed hydraulic fracturing regulations from the University of Texas Regulatory Oversight Group.

Please let me know if you have questions.

Thanks,
Jeremy

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April 1, 2013

John K. Norman, Commissioner
Alaska Oil and Gas Conservation Commission
333 West 7th Avenue
Anchorage, Alaska 99501

Re: Comments on Proposed 20 AAC 25.283 – Fracing

Dear Commissioner Norman:

The University of Texas Regulatory Oversight Group (UTROG) appreciates the opportunity to comment on the proposed new 20 AAC 25.283 (rules) regarding hydraulic fracturing (fracing). Alaska has vast shale deposits¹ that the oil and gas industry has expressed interest in developing.² UTROG applauds the Alaska Oil and Gas Conservation Commission (AOGCC) for anticipatorily updating its regulations to ensure that unconventional drilling in the state is conducted in a safe and efficient manner. In this letter, UTROG focuses on the disclosure provisions of the proposed 20 AAC 25.283(h) & (i) and offers comments only on those provisions.

About the UTROG

UTROG is comprised of graduate students from law, science, engineering and geosciences at the University of Texas at Austin who work with law professors to identify opportunities to ensure greater public engagement and participation in federal and state regulatory programs. UTROG's goal is to provide an independent, balanced, and rigorous analysis of important regulatory issues.

Through its experience in studying fracing in Texas – where fracing was pioneered and where precedential regulations were subsequently implemented – UTROG has developed expertise in fracing regulations and in particular in disclosure provisions. UTROG believes that Alaska is uniquely positioned to benefit from the experiences that Texas and other states have had in regulating fracing and from the best practices that have emerged.

Summary of Comments

UTROG has two principal comments regarding 25.283(h) and (i). First, although in 20 AAC 25.283(h), the draft rules set out chemical disclosure requirements, such disclosure requirements are inadequate. UTROG believes that in order to promote public disclosure and environmental protection, the draft rules should be amended to require that operators disclose the concentration of each chemical ingredient.

¹ U.S. GEOLOGICAL SURVEY, NATIONAL OIL AND GAS ASSESSMENT PROJECT: ASSESSMENT OF POTENTIAL OIL AND GAS RESOURCES IN SOURCE ROCKS OF THE ALASKA NORTH SLOPE, 2012, FACT SHEET 2012-3013 (February 2012), available at <http://pubs.usgs.gov/fs/2012/3013/pdf/fs2012-3013.pdf>.

² E.g., Juliet Eilperin, *Alaska Explores Extracting Oil from North Slope's Shale Rock*, SEATTLE TIMES, Sept. 1 2012, available at http://seattletimes.com/html/nationworld/2019041570_alaskashale02.html; Pat Forgey, 'Fracing' for Oil Likely to Grow in Alaska, JUNEAU EMPIRE, Mar. 23, 2012, available at <http://juneauempire.com/state/2012-03-23/fracking-oil-likely-grow-alaska>.

Second, UTROG supports the AOGCC's decision to explicitly leave out provisions regarding trade secret exceptions to the disclosure of fracking chemicals. UTROG, however, does anticipate that other parties will provide comments on this issue, presumably trying to add explicit rules providing trade secret exceptions to chemical disclosure.³ UTROG thus suggests a set of minimal requirements that should accompany any trade secret claiming regime that might be adopted by AOGCC.

This comment is divided into three parts. The first part briefly reviews the risks inherent in fracking operations and the general importance of disclosure. With this context in mind, the second part addresses 25.283(h) and recommends that AOGCC revise that provision to require operators to disclose chemical content by total fluid levels rather than by additive levels. The third part proposes that, if the AOGCC decides to add further trade secret provisions to the final version of the rules, it should require that: operators demonstrate the genuine confidentiality of claimed trade secrets; operators pay filing fees for each trade secret claimed; trade secret protections automatically sunset at the end of an established time period; operators disclose trade secrets to health care providers; operators comply with medical ethical standards regarding nondisclosure agreements; and operators disclose certain information to the public through either improved version of Fracfocus.org or another website that is useable, searchable and comprehensive.

PART I – FRACING RISKS AND VALUE OF DISCLOSURE

A. Fracing Chemicals May Pose Risks to Human Health and the Environment

For decades, operators have used fracking to access conventional reserves, including in Alaska. In recent years, advances such as horizontal drilling have dramatically increased the potential application of fracking techniques and provided a means of producing previously unreachable stores of oil and gas. The resulting supplies of natural gas have been extraordinary. Fracing⁴ has stoked production⁵ to such a degree that the media has proclaimed a Fracing Revolution. The International Energy Agency (IEA) has projected that, due to fracking, the United States will

³ The omission of trade secret provisions has already attracted significant media and industry attention. *E.g.*, Yereth Rosen, *Alaskan Regulators Consider New Well-Fracing Rules*, REUTERS, Feb. 21, 2013, *available at* <http://www.reuters.com/article/2013/02/22/alaska-fracking-idUSL1N0BM08620130222>; Ellen M. Gilmer, *Fracking Trade Secrets Would Get No Protection under Draft Alaska Rule*, ENERGY WIRE, Jan. 3, 2013, *available at* <http://www.eenews.net/public/energywire/2013/01/03/1>.

⁴ The term “fracing” has been loosely used in popular media, often to encompass all operations associated with unconventional drilling. This letter intends for fracing to have the same meaning given to it by the Environmental Protection Agency: “Hydraulic fracturing involves the injection of fluids under pressures great enough to fracture the oil- and gas-producing formations. The resulting fractures are held open using ‘proppants,’ such as fine grains of sand or ceramic beads, to allow oil and gas to flow from small pores within the rock to the production well.” EPA, PROGRESS REPORT: STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES (Dec. 2012).

⁵ Minority Staff of H. Comm. on Energy and Commerce, 112th Cong., *Chemicals Used in Fracing 1*, (2011) [hereinafter House Committee Report], *available at* <http://democrats.energycommerce.house.gov/sites/default/files/documents/-Fracing-Chemicals-2011-4-18.pdf>.

become the leading producer of natural gas by 2015 and of oil by 2017. By 2035, the IEA has predicted, the country will become almost entirely self-sufficient for energy.⁶

In Alaska, geologists have identified 42 trillion feet of cubic natural gas in North Slope shale formations that could be produced using current technologies. While these reserves present Alaska with tremendous opportunity, the AOGCC should be mindful of the experiences that Texas and other states in the Lower 48 have encountered in developing their shale resources. Like many energy activities, fracking carries environmental and health risks. Some risks are similar to those that accompany conventional oil and gas production; others follow from modern fracking methods.

Fracking involves pumping large quantities of fracking fluid—typically containing mostly fresh water, sand, and chemical additives—into shale formations to crack the rock and extract natural gas.⁷ Although some of these chemical additives may be harmless, others may be hazardous to human health and the environment.⁸

Multiple studies have found that the chemicals used in fracking fluids, the fluids themselves or the operations associated with fracking may pose hazards. By one count, between 2005 and 2009, “the oil and gas service companies used fracking products containing 29 chemicals that are (1) known or possible human carcinogens, (2) regulated under the Safe Drinking Water Act for their risks to human health, or (3) listed as hazardous air pollutants under the Clean Air Act.”⁹

A study from the New York State Department of Environmental Conservation (NYSDEC) attempted to assess the health risks associated with over 260 chemical substances that make up 152 products likely to be used in fracking fluids in New York State. NYSDEC concluded that many of the substances posed a variety of serious health risks and included several carcinogens and substances that adversely affect the nervous system.¹⁰ Along these same lines, the EPA is conducting a study of the impact of fracking on drinking water and recently named a panel to peer review its findings.¹¹

Given these chemical makeups, some of the fracking chemicals, if allowed to leach into the underground drinking water supply, could damage the environment or pose a risk to human health.¹² During fracking, when fluids containing chemicals are injected deep underground, their

⁶ IEA, 2012 ANNUAL REPORT (2012), available at

http://www.iea.org/publications/freepublications/publication/IEA_Annual_Report_publicversion.pdf.

⁷ Dep’t of Energy, Modern Shale Gas Development in the United States: A Primer, ES-4 (2009), available at http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf.

⁸ *Id.* at 62. See also House Committee Report, *supra* note 5, at 1 (“Some of the components used in the fracking products were common and generally harmless And some were extremely toxic, such as benzene and lead.”).

⁹ House Committee Report, *supra* note 5, at 1.

¹⁰ NYSDEC, WELL PERMIT ISSUANCE FOR HORIZONTAL DRILLING AND HIGH-VOLUME HYDRAULIC FRACTURING TO DEVELOP THE MARCELLUS SHALE AND OTHER LOW-PERMEABILITY GAS RESERVOIRS, at 5-52 to 5-62 (2009).

¹¹ The EPA recently published PROGRESS REPORT: STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES (Dec. 2012). For an overview of the review panel, see *EPA Announces Expert Panel to Review Fracking Study*, REUTERS, Mar. 25, 2013.

¹² See, e.g., Hannah Wiseman, *Trade Secrets, Disclosure, and Dissent in a Fracking Energy Revolution*, 111 Columbia L. Rev. Sidebar 1, 9 (2011) (stating that in Pennsylvania, families have sued fracking companies, alleging that the companies contaminated their water supplies with methane). See also *id.* at 8–9 (stating that New York City

migration is not entirely predictable. Well failures, due to, for example, insufficient well casing or improper cementing, could lead to the release of fracturing chemicals at shallower depths, closer to drinking water supplies.¹³ In addition, despite the fracturing fluids normally being removed at the end of the fracturing process, a substantial amount of fracturing fluids remains underground, which could be a source of subsequent underground water contamination.¹⁴

More importantly, fracturing chemicals are present in water that comes to the surface from wells. During a fracturing job, an operator injects a large volume (typically several millions of gallons) of water into the well.¹⁵ After the fractures have been created, injection ceases and fracturing fluids begin to flow back to the surface. Materials called proppants (e.g., sand or ceramic beads), which were injected as part of the fracturing fluid mixture, remain in the target formation to hold open the fractures.¹⁶ However, the fluids that back up to the surface sometimes carry potentially hazardous substances such as sulfur, bromine, and arsenic.¹⁷ In addition, the volume of the fluids that back up to the surface is large (13.5% to 70% of the injected water).¹⁸ At surface, managing such a large amount of fluid that contains potentially hazardous chemicals is challenging. The spill of wastewater at the surface is possible.¹⁹

Operators can reduce the risks of spills and other incidents by acting cautiously, but they cannot completely eliminate those risks. While fracturing operations in Alaska would generally occur in more isolated locations than has been the case in states such as Texas or Pennsylvania,²⁰ and the human health risks would be comparatively lower, there would still be risks to workers, health professionals,²¹ rural communities, and of course the natural environment.²²

has strongly opposed fracturing in the watershed of its unfiltered drinking water supply for fear of contamination, and that a federal lawsuit filed in Pennsylvania by families alleging that oil companies have contaminated their water supplies following drilling and fracturing).

¹³ House Committee Report, *supra* note 5, at 3 (citing Officials in Three States Pin Water Woes on Gas Drilling, ProPublica (Apr. 26, 2009), available at <http://www.propublica.org/article/officials-in-three-states-pin-water-woes-on-gas-drilling-426>).

¹⁴ *Id.*

¹⁵ JOHN A. VEIL, ARGONNE NATIONAL LABORATORY, WATER MANAGEMENT TECHNOLOGIES USED BY MARCELLUS SHALE GAS PRODUCERS, 40 (July 2010), available at http://www.evs.anl.gov/pub/dsp_detail.cfm?PubID=2537.

¹⁶ *Fracing 101*, EARTHWORKSACTION.ORG,

http://www.earthworksaction.org/issues/detail/_fracing_101#.UUdI5b_A5u8 (last visited Mar. 25, 2013).

¹⁷ Dan Ferber, *Will Ohio Legislation reveal Secret FracingChemicals*, MIDWESTENERGYNEWS.COM (Dec 10, 2012), available at <http://www.midwestenergynews.com/2012/12/10/will-ohio-legislation-reveal-secret-fracing-chemicals/>.

¹⁸ See e.g., Veil, *supra* note 16, at 13.

¹⁹ House Committee Report, *supra* note 5, at 3 (citing EPA, *Draft Fracing Study Plan* (Feb. 7, 2011), at 37; Ian Urbina, *Regulation Lax as Gas Wells' Tainted Water Hits Rivers*, N.Y. TIMES (Feb. 26, 2011), available at <http://www.nytimes.com/2011/02/27/us/27gas.html?pagewanted=all>).

²⁰ For a discussion of the localized impacts of fracturing and the influence those impacts have had on the national fracturing debate, see David Spence, *Backyard Politics, National Policies: Understanding the Opportunity Costs of National Fracking Bans*, 30 YALE J. ON REG. ONLINE 30 (2013), available at <http://jreg.common.yale.edu/backyard-politics-national-policies-understanding-the-opportunity-costs-of-national-fracking-bans>.

²¹ See, e.g., *Regulation Lax*, *supra* note 19 (stating that in Colorado, a nurse alleged experiencing serious health issues after treating a worker involved in the spill).

²² See, e.g., Wiseman, *supra* note 12, at 9 (stating that in Pennsylvania, natural gas companies have spilled fracturing chemicals at well sites, forcing removal of the soil).

B. Disclosure of Fracing Chemicals Provides Great Benefits to the Regulators, the Health Care Professionals, and the General Public.

The disclosure provisions in the proposed rules lead UTROG to believe that the AOGCC recognizes the practical value of disclosure. In fact, UTROG takes the wording of the proposed disclosure provisions as a sign that the commission appreciates the role that disclosure could play in assisting regulators, health care professionals, oil and gas operators/service providers and their general ability to “promote individual autonomy by facilitating the ability of individuals to make choices about the risks to which they are exposed.”²³

In this section, UTROG wishes to generally emphasize the varied benefits that flow from disclosure that the AOGCC should keep in mind as it weighs comments from other stakeholders.

1. Benefit to Regulators

Adequate disclosure of fracing chemicals to regulators allows them to effectively assess any impact that the use of these chemicals may have on the environment or public health. With information regarding the contents of the fracing fluids, concentration of the chemicals, and the volume of fluids, regulators may perform baseline water testing, track potential groundwater contamination, and respond effectively if the contamination does occur. But without this information, regulators will be hampered.

In the NYSDEC study mentioned above, 45 products were found with unknown chemical compositions. It is possible²⁴ that some of these unknown products contain chemicals that pose health risks similar to the known chemicals above.²⁵ That these chemicals are unknown to the public increases the risks associated with them; if an accident involving a trade-secret-protected chemical were to occur, proper treatment would not be available.

2. Benefit to Health Care Professionals

As discussed in greater detail in Part III.D below, adequate disclosure of fracing chemicals to health care professionals allows them to better respond to medical emergencies involving human exposure to the chemicals and also assists researchers in conducting health studies on shale gas production.

3. Benefit to General Public

Finally, adequate disclosure of fracing chemicals to the public serves important policy purposes. In the United States, Congress and state legislatures have traditionally relied, in part, upon citizen participation to control industrial activity and its effects on public welfare. To enable

²³ *Id.* at 10 (quoting Albert C. Lin, Deciphering the Chemical Soup: Using Public Nuisance to Compel Chemical Testing, 85 Notre Dame L. Rev. 955, 989 (2010)).

²⁴ The possibility of unknown products posing health risks is not merely theoretical. *See, e.g.,* Jim, Moscou, *A Toxic Spew*, NEWSWEEK, Aug. 19, 2008.

²⁵ Joe Hanel, *S. Ute Land Was Site of Frac Fluid Spill*, DURANGO HERALD, Aug. 1, 2008.

quality citizen participation, Congress and state legislatures have required industry to disclose certain information to the public.²⁶

Part II – DISCLOSURES SHOULD BE REQUIRED FOR FRACING FLUID INGREDIENTS TO PROMOTE THE NECESSARY TRANSPARENCY AND MEDICAL RESPONSE EFFORTS

Rather than target disclosures of additive ingredients, AOGCC should require the operator to disclose the amount, chemical ingredient name, and CAS number for each ingredient of the total fracing fluid used for the interval. This change would provide more helpful and complete information and may even provide greater protection to those features of fracing fluid that have the greatest trade secret value.

In the proposed rule, 20 AAC 25.283(h)(2)(B), an operator must disclose to the AOGCC the amount, chemical ingredient name, and Chemical Abstract Service Registry (CAS) number for each ingredient *of the additive used* for the fracing interval. CAS numbers are published by the American Chemical Society (www.cas.org) and effectively standardize the identification of specific molecules. Under 20 AAC 25.283(i), operators must also disclose information to the public through the industry-funded website Fracfocus.org and adhere to its disclosure requirements. The Fracfocus.org requirements effectively direct that operators disclose to the public the same information that Section (h)(2)(B) mandates operators provide to the AOGCC. The source of public disclosure required by subsection (i) in the proposed regulations reaches a similar end result, as operators appear to be required to disclose the amount of ingredients *of the additive used*.

By focusing on the additives, rather than disclosing the aggregate ingredients in the fluids themselves, the proposed rules make it more difficult than necessary for emergency responders, medical professionals, and the public to understand the content of the fracing fluids in emergency situations or in identifying potential risks. Under such circumstances, the critical issue will not be *what has been added to* but rather *what is in* the fracing fluids since it is the impacts of the fluids rather than the impacts of the additives that emergency responders and others will be addressing.²⁷

Additionally, requiring disclosure of ingredients in the total fracing fluid, rather than in individual additives seems to present fewer competitive risks, as reverse engineering proprietary formulas would require competitors to take the extra and chemically difficult step of isolating and distilling additives from the greater fluid. As a result, a disclosure provision oriented around fluids instead of additives could offer benefits to both the greater public and to operators that have invested in developing and protecting proprietary information. Such a provision would have precedent: Other states, like Colorado, have permitted operators to not link the chemical

²⁶ *Id.* at 1.

²⁷ For further discussion of the importance of public disclosure to the public and to medical professionals, please see Parts III.B through III.E below.

ingredients to their respective additives, citing the possibility of competitors reverse engineering proprietary formulas of additives.²⁸

PART III – A MINIMUM SET OF REQUIREMENTS ARE NEEDED IF ADDITIONAL TRADE SECRET PROTECTIONS ARE ALLOWED

A. Operators Should Demonstrate that Information Warrants Trade Secret Protection

If the AOGCC adds trade secret protections to the final version of the rules, it should include provisions that discourage inappropriate use and over-filing of trade secret claims. Without a check on what operators can mark as a trade secret, operators may either deliberately or inadvertently claim trade secret protections for undeserving information.

Since disclosure of chemical compositions for fracturing fluids could at times expose operators to greater public and regulatory scrutiny or even to greater liability, operators and others may use trade secret claims solely to protect themselves from these legal risks rather than out of a legitimate concern for protecting significant trade secrets. Thus the trade secret protections that are intended to protect intellectual property assets and promote innovation may have the unfortunate effect of creating preserve incentives that encourage operators to over-claim trade secrets to escape responsibility.

Due to the ease with which trade secret protections can be made, there is evidence that suggests firms will over-claim trade secret protections and assert protection “even when doing so is clearly without merit.”²⁹ Indeed, under the current regulatory structure, “firms openly concede that it is more cost-effective for them to routinely stamp as much internal information as [confidential].”³⁰ Additionally, even well-intentioned operators may not allot adequate resources to vetting prospective trade secrets and filtering out the documents and information that often surround proprietary information but would not themselves meet trade secret prerequisites.

While unjustified trade secret claims can be overturned by the agency, this is less likely because it is the agency’s responsibility to prove the misclaim (as opposed to the firm’s responsibility to prove a proper claim). Given the large number of trade secret protections in shale states in the Lower 48, it is unlikely that agencies will be able to keep up with their review of incoming trade secret claims. In Texas, for example, a firm may claim trade secret protections for any chemical additive or ingredient; in the first eight months of 2012, drilling companies claimed some 19,000 trade secret protections in the state.³¹ And this trend is not limited specifically to Texas. In Wyoming, in 2010 and 2011, more than 96% of all trade secret applications were approved.³² And nationally, 22% of all fracturing chemicals are trade secret protected.

²⁸ Colorado Oil and Gas Conservation Commission, Final Modified Staff Proposal, Docket No. 1112-RM-04 http://cogcc.state.co.us/RR_HF2011/FinalModifiedStaffProposal001.pdf.

²⁹ Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 AM. J. LAW & MED. 119, 133 (2004).

³⁰ *Id.* at 131.

³¹ Ben Elgin, Benjamin Haas & Phil Kuntz, *Fracing Secrets by Thousands Keep U.S. Clueless on Wells*, BLOOMBERG (Nov. 29, 2012), available at <http://www.bloomberg.com/news/2012-11-30/frack-secrets-by-thousands-keep-u-s-clueless-on-wells.html>.

³² Mead Gruver, *Wyoming: Environmentalists Sue over Fracing Fluid*, BUSINESS WEEK (Mar. 27, 2012).

In order to ensure that only trade secrets are marked confidential, the AOGCC should adopt rules that either require the operator to justify why the trade secrets protections are needed during the application process or automatically grant trade secret protections but provide for sanctions when an operator demonstrates a pattern of misclassifying information as trade secret protected.

To discourage over-claiming, the AOGCC should adopt regulations that require an operator to justify at the time of an application why the chemicals used in fracking are confidential business information and deserve trade secret protections. AOGCC would then have the opportunity to approve or deny protections based on the merits of the justification. Placing the burden on operators to initially justify confidentiality makes sense because it would ensure that only truly confidential information obtains trade secret protection. Alaska already requires applicants in other circumstances to demonstrate that information is actually confidential before they receive trade secret protections. *See* ALASKA STAT. § 43.82.310(b) (procedures to obtain trade secret protections when applying to develop stranded gas). Enacting similar regulations for fracking chemicals would maintain a high burden of proof for trade secret protections.

In fact, studies have shown that requiring up-front substantiation can decrease the number of claims significantly.³³ Hampshire Research Associates compared the reporting of information to the Environmental Protection Agency's Toxics Release Inventory ("TRI") and Toxic Substance Control Act's Preliminary Assessment Information Rule ("PAIR"). The study learned that confidentiality claims were 10 times more likely to be made under PAIR than under TRI. The reason for this, the study concluded, was that confidentiality claims under TRI are much more restrictive, requiring, among other things, up-front substantiation at the time the claims are made.

UTROG suggests requiring a level of substantiation similar to TRI for trade secret applications. The TRI application is a five page document that requires applicants to answer questions about the measures taken to protect the confidentiality of the trade secret, what the trade secret will be used for, how competitors could gain from learning the trade secret, the harm that would befall the firm should its competitors learn its trade secret, and includes other questions related to the underlying justification for the trade secret claim.³⁴

Alternatively, if the AOGCC decides not to require operators to justify why the chemicals are confidential before receiving trade secret protections, the AOGCC should impose sanctions on companies that have been found to wrongly and repeatedly over-claim. The threat of penalties would help ensure that operators only claim protections for truly confidential business information. In order to deter repeat offenders, sanctions should be set at a non-trivial level and increase with the frequency of violations. By imposing a financial penalty on operators for abusing the trade secret protections program, the AOGCC would have an additional

³³ SHEILA A. FERGUSON ET AL., HAMPSHIRE RESEARCH ASSOCIATES, INFLUENCE OF CBI REQUIREMENTS ON TSCA IMPLEMENTATION (1992).

³⁴ U.S. Environmental Protection Agency, Substantiation to Accompany Claims of Trade Secrecy Under the Emergency Planning and Community Right-To-Know Act of 1986, OMB No. 2050-0078, *available at* <http://www.epa.gov/osweroel/docs/chem/ts-form.pdf>

enforcement mechanism to ensure that only truly confidential information is granted protections.
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B. Operators Should Pay Filing Fees for Each Trade Secret Claimed

If AOGCC decides to add trade secret provisions to the final version of the rules, UTROG urges AOGCC to require an application fee – for example, \$500 for each trade secret claim. Like upfront substantiations, filing fees could prompt operators to more carefully screen documents and information for which they are inclined to seek trade secret protections. This will discourage firms from making frivolous trade secret claims and decrease the number of trade secret applications since firms will not want to waste funds on undeserving information and since the greater financial stakes will encourage the firms to more diligently review prospective trade secret claims internally. This plan will create greater disclosure between the public and the oil and gas industry and also continue to protect firms from rival firms so that competitive advantages are not compromised.

An application fee of \$500 is a fraction of the cost to search and file a patent application (roughly \$5,000 before legal fees, according to several estimates). The application fee would therefore strike a careful balance: ideally, it would not discourage firms from applying for needed trade secret protections, but it would discourage meritless trade secret claims.

Additionally, the fees will increase the revenue received by the governing agency and diminish the costs associated with overseeing trade secret protections. An application fee also acts as a speed bump on over-claiming; at least the claimants will need to pay for the agency's processing costs and may find it is more economical to screen the need for trade secret protections on their own.

C. Trade Secrets Should Automatically Sunset

Trade secret protections keep confidential business information from competitors, but this information should not stay confidential forever. The public has a right to know about the chemicals being used in the fracking process if those chemicals pose risks to health or the environment.

Additionally, in a field where technology is rapidly increasing, the value of confidential information diminishes and disappears over time. Protections should therefore not extend beyond the life of a product and should be tailored to encourage further technological innovations but not economic rent-seeking. Alaska law already recognizes that the benefits of protection fade over time and come to be outweighed by the benefits of full disclosure. Under the Alaska Stranded Gas Act, trade secret protections should last “only so long as is necessary to protect the competitive position of the applicant, to prevent the significant diminution of the commercial value of the information, or to protect the long-term fiscal interests of the state.”³⁶

³⁵ An added benefit of having a process to rigorously weed out undeserving information is that the trade secret protections for the information that does qualify will have greater credibility and, it is likely, be entitled to greater deference.

³⁶ See ALASKA STAT. § 43.82.310(c).

For these reasons, **information about chemicals in fracking fluid should be made public after a certain period of time.** Certain information may warrant shorter or longer sunsets. **To avoid the high administrative costs of conducting endless ad hoc determinations, UTROG proposes an across-the-board five-year sunset period.** This bright line would not perfectly suit all trade secrets but it would offer a fair and workable means of balancing competing interests – specifically, the competitive advantage of operators against the public’s right to know which chemicals are being injected into wells. Additionally, a fixed period for protections would provide certainty to both the applicant and the public about the length of protections.

UTROG recommends creating one exception to this standard sunset period: a company’s trade secret protections should expire when a release, spill, or accident occurs. Alaska should make confidential information available to first responders, the AOGCC and the general public after a spill or release occurs. Such a policy would have two major benefits. First, it would allow the public to have information about an incident that may affect public health. As discussed in Part III.D below, other states have already adopted provisions that in the event of an emergency require disclosure to health professionals, generally with the health professionals verbally agreeing to maintain confidentiality and then signing non-disclosure documentation after the fact. The proposed post-accident disclosure provision would serve similar policy interests but would promote disclosure more aggressively, as the disclosures would be to the public at large and would be unqualified. Further, removing a company’s trade secret protections following a spill or release would provide incentives to the company to take the utmost care when undertaking fracking.³⁷

D. Operators Should Disclose Trade Secrets to Health Care Providers

Despite the inherent benefits associated with fracking, the chemicals released by fracking may pose a health risk to individuals working or living near these operations. Researchers at the Colorado School of Public Health have found, for instance, that air pollution caused by fracking might contribute to acute health problems for those living near natural gas drilling sites. Moreover, these researchers have found benzene (a carcinogen) and chemicals that can irritate eyes and cause headaches, sore throats or difficulty breathing in air close to the fracking wells, although researchers were not sure whether fracking was the source of some or all of these chemicals.³⁸

Out of concern for such risks, the Occupational Safety Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) recently issued a hazard alert related to drilling workers’ inhalation of high levels of crystalline silica (silicon dioxide), a byproduct of fracking through sand, which may cause silicosis. Silicosis occurs when silica

³⁷ Operators already have numerous incentives to avoid spills, including legal liability, public relations and investor relations. Mandatory post-accident disclosure of relevant trade secrets would create another layer of incentives.

³⁸ Press Release, David Kelly, Univ. of Colo. Denver Anschutz Med. Campus, Study Shows Air Emissions Near Fracking Sites May Pose Health Risks, (Mar 19, 2012), available at <http://www.ucdenver.edu/about/newsroom/newsreleases/Pages/health-impacts-of-fracking-emissions.aspx>.

particles are trapped in lung tissue, causing inflammation and scarring and ultimately reducing the lungs' ability to take in oxygen.³⁹

While OSHA already allows for some disclosure of trade secret chemical to medical professionals,⁴⁰ these requirements are limited and apply only to workers. States like Texas, Colorado, Pennsylvania and Ohio have gone further to require disclosures not only for medical care needed for incidents that happen in the workplace, but also for any individual adversely affected by fracing, regardless of the individual's contractual relation with the fracing operator. These state requirements are modeled in large part on OSHA's workplace regulations.⁴¹

If AOGCC provides greater trade secret protection, it should ensure that its program includes rigorous medical disclosure for trade secret protected information in all situations involving health risks, regardless of whether the exposed person is a worker or a general member of the public. AOGCC should also ensure that a health professional is provided with the information needed in order to provide medical care during both medical emergencies and non-emergencies. Finally, the final rules should require both operators and the AOGCC itself to release a wide range of pertinent information to healthcare providers upon request, including but not limited to the specific identity, concentration and amount of chemicals that the patient may have been exposed to if the healthcare provider deems such information necessary or beneficial to the diagnosis and treatment of the patient.

The following basic assurances for adequate medical response are essential in any expanded trade secret program:

- 1) **Clear procedures by which a health professional may learn of the composition of trade-secret ingredients in fracing fluid when that fluid is implicated in health risks:** OSHA has developed procedures by which a health professional may access the information for a specific chemical that is otherwise withheld by a fracing operator as trade secret in 29 C.F.R. § 1910.1200 (i). OSHA's regulation creates rights and obligations for both operators and health professionals regarding this subject. AOGCC should borrow some of the 29 C.F.R. § 1910.1200 (i) standards to draft a trade secret disclosure state rule that covers any individual who may need medical attention in an emergency or a non-emergency situation.
- 2) **In medical emergencies or first-aid treatment, medical professionals must have immediate access to information regarding chemical identity and concentration:** In medical emergencies, OSHA requires fracing operators to immediately disclose the specific chemical identity or percentage composition of a trade secret chemical to a health professional, regardless of the existence of a "written statement of need" or a "confidentiality agreement." In fact, while a fracing operator may withhold a specific

³⁹ Occupational Safety and Health Admin., *Worker Exposure to Silica During Fracing*, OSHA.GOV (2012), http://www.osha.gov/dts/hazardalerts/_frac_hazard_alert.pdf.

⁴⁰ Jonathan Groves, *Comment: Rule 29 OR: How the Railroad Commission Learned to Stop Worrying and Love Fracing*, 14 TEX. TECH. ADMIN L. J. 195, 198 (2012).

⁴¹ 29 C.F.R. § 1910.1200 (i).

chemical identity, including the chemical name, other specific identification of a hazardous chemical, or the exact percentage of the substance in a mixture from the Material Safety Data Sheet (MSDS), this same information must be made available to health professionals according to OSHA regulations.⁴²

- 3) **In non-emergency situations, medical professionals should also have access to information regarding chemical identity and concentration of fracking fluids that are implicated in fracking-related illness or injuries:** Under OSHA's regulation, a fracking operator, upon request, may disclose a specific chemical identity or percentage composition (otherwise permitted to be withheld) to a health professional that is providing medical or other occupational health services to exposed employees. OSHA's regulation requires that the before-mentioned request be in writing; describe the occupational health needs; explain why the disclosure of the specific chemical identity or percentage composition is essential; and, include a description of the procedures to be used to maintain the confidentiality of the disclosed information. Somewhat similarly, in Colorado, vendors, service companies, and operators must 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, but they may require in return that the health professional execute a confidentiality agreement.⁴³ The written statement of need should 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. UTROG urges AOGCC to ensure that medical professionals have the information they need to provide medical care in emergency and non-emergency situations related to fracking.
- 4) **AOGCC should establish a medical database that health professionals can maintain to facilitate diagnoses and treatments associated with fracking-related illnesses and injuries:** A database, consisting of data added by physicians in the course of their diagnoses and treatment, would provide information to the larger scientific and medical community as to how various symptoms and illnesses correlate with exposures to fracking fluids and individual chemical ingredients. The database would be made freely available to scientists and health professionals. Since the information would not include specific industry trade secreted information such as locations of fracking projects, operators, precise chemical compositions and concentrations, and other information that could be harmful to the competitive success of the holder of information, it would not jeopardize trade secret protected information. Indeed and regardless of whether AOGCC adds additional trade secret protections into its program, it should consider establishing a database on the health impacts of fracking to advance understanding of this activity's intersection with public and worker health.

E. Non-Disclosure Agreements for Health Professionals Must Adhere to Medical Ethical Standards

⁴² *Id.*

⁴³ COLO. CODE REGS. § 404-1:205A (5).

Operators may seek to cabin health professional disclosures and regulate the flow of trade secreted information through non-disclosure agreements. Under OSHA's regulations and other state programs, operators may require medical professionals to sign confidentiality clauses to ensure protection of the trade secrets either after the disclosure or, in nonemergency contexts, as a prerequisite to disclosure. OSHA, for example, provides that the health professional or emergency responder and the employer or contractor of the services of the health professional may be required to sign a written confidentiality agreement that they will not use the trade secret information for any purpose other than the health needs asserted and will not release the information under any circumstances other than to OSHA. OSHA's regulations also allow for a confidentiality agreement that provides for appropriate legal remedies in the event of a breach of the agreement, including the stipulation of a reasonable pre-estimate of likely damages.⁴⁴

Similarly, Colorado's regulations specify that in immediate medical emergencies, trade secret information must be provided to the 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.⁴⁵

Medical professionals have expressed concern that in certain settings these confidentiality agreements can interfere with their ethical duties to provide the best care possible for their patients.⁴⁶ The agreements can add time and costs to a physician's diagnosis and treatment and unduly limit a physician's ability to consult with others about chemical exposures or share the information more generally with the medical community. When the agreements are not regularized, companies can also draft disclosures that extract unreasonable demands on physicians, who in turn may expend unnecessary monies in assessing the viability of the disclosures. In some cases, physicians may ultimately determine the litigation risks that inhere in these nondisclosure agreements are too substantial and they may proceed without the trade secret information in treating a patient with unknown chemical exposures.

In ongoing litigation in Pennsylvania, one physician is arguing that the confidentiality agreements violate his First Amendment rights to provide competent treatment to patients. "In an emergency situation, you don't have time to litigate about [what] is confidential. The law does not specify how broadly the confidentiality agreement goes" and thus risks conflicting with basic ethical standards for medicine."⁴⁷

In response to these concerns, at least the State of Ohio has added the following amendment to its regulations: "Nothing in this division [regarding confidentiality agreements] precludes a medical professional from making any reports required by law or professional ethical standards."⁴⁸ **UTROG urges AOGCC to similarly include a provision ensuring that confidentiality agreements will not override medical ethical standards.**

⁴⁴ 29 C.F.R. § 1910.1200(i).

⁴⁵ COLO. CODE REGS. § 404-1:205A (5).

⁴⁶ Alicia Gallegos, *Doctors Fight "Gag Orders" Over Fracking Chemicals*, AM. MED. NEWS, Aug. 27, 2012, available at www.amednews.com/article/20120827/government/308279957/1/.

⁴⁷ *Id.*

⁴⁸ OHIO REV. CODE § 1509.10 (H)(2).

In addition to providing medical professionals with assurance that the confidentiality agreements will not conflict with their ethical responsibilities, AOGCC should include the following additional features in any requirement of confidentiality agreements that may be required of medical professionals:

- **AOGCC should prepare forms that standardize the written statement of need and confidentiality agreement:** Even though both documents have been mentioned by several states in their fracing rules, not many of the states have developed forms to guide stakeholders in the process. This omission adds transaction costs and the risk of unjustified requirements being imposed on medical professionals. The AOGCC should provide a written statement of need and confidentiality agreement samples containing the specificities that AOGCC may judge pertinent to provide an adequate protection for the party that discloses trade secret information.
- **Provide for the ready sharing of the information among medical professionals:** AOGCC should add a provision that expressly requires that trade secret information disclosed for medical emergencies and non-emergency situations can be shared from one health professional or emergency responder to another health professional, emergency responder or accredited laboratory. The disclosing health professional or emergency responder would also include with the disclosure a statement of the recipient's confidentiality obligation. In Texas, for example, a confidentiality obligation can be extended to other health professionals receiving the information from the health professional that requested the disclosure in the first place in the course of treating a patient.⁴⁹ This extension goes beyond OSHA's requirements.

F. AOGCC Should Require Public Disclosure Through an Improved Fracfocus or Similarly Robust Site

Section 25.283(i) of proposed the rules requires operators to disclose chemical information to the public by uploading that information to the website Fracfocus.org. The site is a public-private venture that relies on funding from two industry trade groups – America's Natural Gas Alliance and the American Petroleum Institute – for its ongoing operational costs.⁵⁰ Fracfocus has received commendations for encouraging and serving as a central platform for public disclosure. Several states have incorporated Fracfocus into their fracing regulations, as the AOGCC is considering doing. In its proposed regulations for fracing on federally owned lands, the Bureau of Land Management has considered the same.

⁴⁹ 16 TEX. ADMIN. CODE § 3.29 (c)(4).

⁵⁰ The site was created with funds from trade groups and the Department of Energy. The Groundwater Protection Council (a group of state water officials) and the Interstate Oil and Gas Compact Commission (an association of producing states) maintain it. Benjamin Haas, *Fracking Hazards Obscured in Failure to Disclose Wells*, BLOOMBERG, Aug. 14, 2012, available at www.bloomberg.com/news/2012-08-14/fracking-hazards-obscured-in-failure-to-disclose-wells.html. The commission, which operates out of Oklahoma City, has contended that because it is an interstate rather than federal or state agency, it is not subject to the Freedom of Information Act or to the Oklahoma Open Records Act. Mike Soraghan, *Hydraulic Fracturing: Public Disclosure Database Kept Private*, ENERGY WIRE, Aug. 13, 2012, available at www.eenews.net/public/energywire/2012/08/13/2.

Still, Fracfocus has been the subject of criticisms from public interest groups.⁵¹ Currently, its design features limit its functionality and prevent it from serving as a suitable forum for public disclosure. More specifically, the site is missing critical search fields and presents information in overly restrictive formats. The site allows users to search by some combination of state, county, operator, or well API number. For the purposes of finding data on specific chemicals or specific dates (useful for research on environmental impact, potential risk to water tablets, and more) these search fields are too limited. Other search fields that we propose should be available include chemical name, CAS number, and dates of stimulation. Such enhanced search fields will give the public additional avenues of accessing relevant information and facilitate greater cross-referencing.

Additionally, while Fracfocus is generally user-friendly as a site, it provides information only in user-unfriendly PDF formats, which require relatively sophisticated third-party services to collect or “harvest” data from. PDF formats trap data and prevent it from being aggregated or used to run analytics.⁵² The website operators of Fracfocus.org have made recent efforts to develop a more versatile XML-based structure. In January 2013, Fracfocus announced that it successfully beta-tested and launched an upgraded site – Fracfocus 2.0 – and notified stakeholders that, “[o]wing to state regulatory considerations” all operators submitting data must begin using the Fracfocus 2.0 process by June 1.⁵³

UTROG supports the use of Fracfocus so long as the final rule requires that Fracfocus 2.0 is fully phased in by the stated deadline. If Fracfocus 2.0 is not phased in as scheduled or if its functionality does not include the search fields or file formats described above, UTROG urges AOGCC to formally reconsider the use of FracFocus.org as the venue for public disclosure. Disclosing the well data on a website maintained by the AOGCC might be a viable alternative to the use of Fracfocus.org.

Colorado and Pennsylvania have already included similar requirements for Fracfocus in their final rules for fracing liquids. Both require search capabilities substantially identical to those proposed above.⁵⁴

CONCLUSION

UTROG again commends the AOGCC for its forward-thinking adoption of fracing regulations and appreciates its consideration of these comments. If you have questions regarding the comments, please contact Jeremy Brown at 512-232-1408 or jeremybrown@law.utexas.edu.

⁵¹ There have been two principal criticisms. The first, as discussed above, is that design flaws fatally restrict functionality. The second concerns Fracfocus as a form for voluntary (as opposed to mandated) disclosures and is not relevant to the proposed rules. *E.g.*, MATTHEW MCFEELEY, NATURAL RESOURCES DEFENSE COUNCIL STATE HYDRAULIC FRACTURING DISCLOSURE RULES AND ENFORCEMENT: A COMPARISON, IB: 12-06-A, (July 2012).

⁵² Mike Soraghan, *FracFocus Can't Replace Full, Public Disclosure, Groups Say*, Energy Wire (May 21, 2012), available at <http://www.eenews.net/public/energywire/2012/05/21/1>.

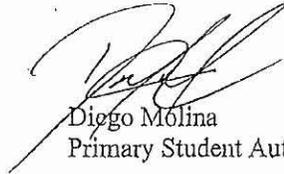
⁵³ Press Release, Groundwater Protection Council, Fracfocus 2.0 Go Live Date (Jan. 30, 2013), available at www.gwpc.org/fracfocus-20-go-live-date.

⁵⁴ However, it should be noted that Colorado's “due date” has already passed on January 1st of this year without the required search capabilities being added to fracfocus.org. Colorado appears to either believe that the Frac Focus operators will update the site's compatibilities within a reasonable amount of time or hasn't enforced the “due date.”

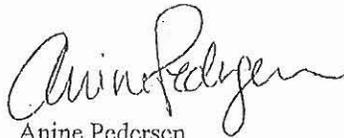
Sincerely,



Anthony Ho
Primary Student Author



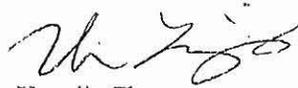
Diego Molina
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Anine Pedersen
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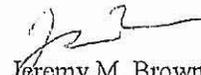
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