



North Carolina Mining and Energy Commission

MEMORANDUM

TO: Protection of Trade Secrets and Proprietary Information Study Group

FROM: Layla Cummings, Legal Specialist
Department of Environment and Natural Resources

SUBJECT: Protection of Trade Secrets and Proprietary Information

DATE: November 14, 2013

I. Introduction

The Protection of Trade Secrets and Proprietary Information Study Group of the Mining and Energy Commission (MEC) was created to address the protection of trade secrets in the context of chemical disclosure and other proprietary information such as maps and seismic data.

As a Study Group created by the MEC, as opposed to one created by a legislative mandate, there is no statutory requirement to complete a report. The Study Group, however, will release a report on its findings and recommendations in an effort to be transparent in the process of making any amendments to its current chemical disclosure draft rule or making recommendations for legislative proposals.

As a part of that process, Department of Environment and Natural Resources (DENR) staff including representatives from the Division of Air Quality, the Division of Water Resources (formerly the Division of Water Quality), and the Division of Energy, Mineral, and Land Resources have provided background research at the request of the MEC.

This memorandum summarizes research presented to the Commission on the following meeting dates: June 7, 2013, July 28, 2013 and August 6, 2013. Part II of this memorandum will summarize the currently existing process and protections for trade secrets within two DENR divisions. Part III and Part IV of this memorandum will summarize the research presented to the Study Group on protection of trade secret and proprietary information for various oil and gas producing states with regards to chemical disclosure and other proprietary information.

II. Existing Protections of Trade Secrets and Proprietary Information

The North Carolina Public Records Act provides that written materials and other information created or received by state and local governments is the property of North Carolinians and gives the people a means of enforcing their right to see government records.¹

The law does not require all information be disclosed. Under the Act, records containing certain communications between attorneys and their government clients, state tax information, trade secrets, certain lawsuit settlements, criminal investigation records, and records about industrial expansion are not public records and not subject to public disclosure requirements.²

The Trade Secrets Protection Act defines trade secret as business or technical information that has commercial value because it is not generally known or not easily discoverable through independent development or reverse engineering. Trade secrets may include formulas, patterns, programs, devices, compilations of information, methods, and techniques or processes.³

A request to treat information as confidential based on the trade secret exception to disclosure must meet all of the following conditions:

1. Constitute a trade secret as defined in G.S. 66-152(3).
2. Is the property of a private “person” as defined in G.S. 66-152(2).
3. Is disclosed or furnished to the public agency in connection with the owner’s performance of a public contract or in connections with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.
4. Is designated or indicated as “confidential” or as a ‘trade secret’ at the time of its initial disclosure to the agency.⁴

A. Division of Water Resources

Several years ago the Division of Water Quality, now the Division of Water Resources, adopted a process to respond to requests to keep certain information submitted confidential.⁵ The process has allowed the Division to keep as much information public as possible while also protecting confidential information and avoiding unnecessary delays in the review and issuance of permits and approvals.

When an applicant requests that certain information be kept from disclosure, the applicant is asked to separate and clearly mark those portions of the package that merit trade secret protections, and to provide brief justification of the trade secret claim. The Division will generally accept the claim as long as it is deemed to be a serious and legitimate claim by those reviewing the permit. The reviewer then attaches a cover memo explaining that trade secret

¹ NC Gen Stat. Chapter § 132-1, *et seq.* (2012).

² *Id.*

³ N.C.Gen. Stat. § 66-152.

⁴ *Id.* § 132-1.2(1).

⁵ Evan Kane, Division of Water Resources, provided the information for this section.

protection has been claimed and that the information attached to the cover memo must not be copied or released to the public. When not under active review, the trade secret information is stored in a locked filing cabinet in the appropriate supervisor's office.

B. Division of Air Quality

The confidential information provision of the Public Records Act is the exemption most often exercised in the normal course of business by the Division of Air Quality.⁶

Pursuant to the Water and Air Resources statutes, if a person submits information as outlined above, then DAQ will treat the information confidential.⁷ There are three exceptions to the confidentiality provision as summarized below.

1. Emission data, defined at 40 CFR 2.301, are not entitled to confidential treatment. Emission data include, but are not limited to, information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission that has been emitted by the source.
2. Confidential information may be disclosed to a state agency if disclosure is necessary to carry out a proper function of the Department.
3. Confidential information may be released if DAQ decides that the information is not entitled to confidential treatment. DAQ will provide adequate notice to any person who submits information of any decision that it is not entitled to confidential treatment and of any decision to release the information. Any person who is dissatisfied with a decision to withhold or release information may request a declaratory ruling from the Environmental Management Commission (EMC) under G.S. 150B-4. The information may not be released until the EMC issues a declaratory ruling and, if any appeal, a final judicial determination has been made. It is important to note that once information is received, the Public Records Law prohibits the unlawful return of that information. If it is determined that the information for which confidential treatment was sought is not a trade secret, that information cannot be returned to the requestor and it will be maintained by the State as a public record subject to disclosure upon request by the public.

III. Chemical Disclosure Laws in Various States

Within the last several years, several states have promulgated regulations, often referred to as chemical disclosure rules or laws, concerning the chemicals and concentrations used in

⁶ Mike Abrizinskas, Deputy Director, Division of Air Quality, provided the information for this section.

⁷ N.C. Gen. Stat. 143-215.3C.

fracturing fluids. Related to what must be submitted under a chemical disclosure regulation, are the protections provided for trade secrets. While certain rules and regulations may require the disclosure of chemical ingredients, chemical abstracts service (CAS) numbers,⁸ and concentrations, those disclosures will not necessarily be available to the public because they are protected as a trade secret.

In some states, such as Wyoming and Illinois, the disclosure will be held confidential by the state oil and gas commission or the environmental regulatory agency. In other states, such as Colorado and Louisiana, the operator or owner does not have to disclose the full description of chemical additives to the state but rather a less detailed description such as the chemical family.

A. Wyoming

In 2010, Wyoming became the first state to pass a chemical disclosure regulation.⁹ Under the regulation, before hydraulic fracturing, the following must be disclosed to the Supervisor of the Wyoming Oil and Gas Conservation Commission by the owner or operator: “the chemical additives, compounds, and concentrations or rates proposed to be mixed or injected.”¹⁰ After the hydraulic fracturing operation, the owner or operator must disclose the total volume of fluid pumped and the “actual chemical additive name, type, concentration, or amounts.”¹¹

Trade secrets are protected by the Wyoming Public Records Act and Commission regulations.¹² The Supervisor of the Wyoming Oil and Gas Conservation Commission determines whether information received is a trade secret.¹³ The Supervisor uses a multi-factor test to evaluate trade secrets.¹⁴ The factors are as follows:

1. The extent to which the information is known outside the business of the person submitting the information;
 2. The extent to which it is known by the person’s employees and others involved in the business;
 3. The extent of measures taken by the person to guard the secrecy of the information;
 4. The value of the information to the person and his competitors;
 5. The amount of effort or money expended by the person in developing the information;
- and

⁸ The chemical abstracts service number or CAS number is a unique identification number assigned to a chemical by the chemical abstracts service.

⁹ Wyo. Code Rules & Regs. Oil Gen § 45(d) (2013).

¹⁰ Id.

¹¹ Id.

¹² Id. at § 45(f); Wyo. Stat. Ann. § 16-4-203(d)(v) (2013).

¹³ Wyo. Stat. Ann. § 16-4-203(d).

¹⁴ Powder River Basin Resource Council et al. v. Wyoming Oil and Gas Conservation Commission et al., Docket No. 2012-94650-C (Wyo. Dist. March 21, 2013), at 4-5, *citing* Agency Record (AR) Trade Secret Correspondence (TSC) 000004-5.

6. The ease and difficulty with which the information could be properly acquired or duplicated by others.¹⁵

Disclosure must be made prior to the start of hydraulic fracturing and the applicant must disclose the chemical additives, compounds and concentrations or rates to be mixed and injected.¹⁶ After the stimulation, the parties must disclose the chemicals actually used.¹⁷

After a request for public disclosure was partially denied in 2011, environmental groups brought suit against the state. In *Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Commission*, the state district court held the Commission had acted properly in granting trade secret protection.¹⁸ The court found that petitioners failed to establish that the Commission's decision to grant trade secret protection requests were arbitrary, capricious, or not in accordance with the law.¹⁹ The court also noted that the environmental policy concerns would be best addressed through legislative action or further rule promulgation and is not properly within the court's purview.²⁰ Environmental groups are appealing the ruling to the Wyoming Supreme Court.²¹

B. Illinois

Illinois recently passed the Hydraulic Fracturing Regulatory Act.²² The legislation requires the operator to disclose the chemical additive, CAS number, and concentration of the fracturing fluid at all stages of operation to the Illinois Department of Natural Resources.²³ The operator would give the state agency two copies of the information: one redacted and one un-redacted. The agency would require a factual justification for withholding the trade secret. If the agency approves of the trade secret classification, then only the redacted documents would be publicly disclosed.

The law requires the person claiming a trade secret shall provide a factual justification of the claim containing the following elements within 5 calendar days of submission:

1. A detailed description of the procedures used by the person to safeguard the information from becoming available to persons other than those selected by the person to have access to the information for limited purposes;

¹⁵ Id.

¹⁶ Wyo. Code Rules Regs. Oil Gen. § 45(d).

¹⁷ Id. § 45(h).

¹⁸ *Powder River Basin Resource Council*, Docket No. 2012-94650-C, at 17.

¹⁹ Id.

²⁰ Id.

²¹ Mead Gruver, "Wyo. High Court to Hear Fracking Disclosure Suit," *The Denver Post*, Oct. 17, 2013, http://www.denverpost.com/news/ci_24332140/wyo-high-court-hear-frack-disclosure-lawsuit.

²² Illinois House Bill 2615 (Session 2013-2014).

²³ Id. § 77.

2. A detailed statement identifying the persons or class of persons to whom the information has been disclosed;
3. A certification that the person has no knowledge that the information has ever been published or disseminated or has otherwise become a matter of general public knowledge;
4. A detailed discussion of why the person believes the information to be of competitive value; and
5. Any other information used to support the claim.²⁴

The information disclosed will be protected as a trade secret if the Illinois Department of Natural Resources finds that:

1. The information has not been published, disseminated, or otherwise become a matter of general public knowledge; and
2. The information has competitive value.²⁵

There is a rebuttable presumption that the information is not a matter of general public knowledge if the person has taken reasonable measures to prevent the information from becoming generally known and there is a statement that the applicant has no knowledge of the information being published, disseminated, or has otherwise become a matter of general public knowledge.²⁶

The law also directs the Illinois Department of Natural Resources to develop rules for informing medical professionals of confidential information who state a need for the information.²⁷ That information may be shared with others as professionally needed for medical reasons and will not be considered publicly available at any time.²⁸ The rules will be developed for both emergency and non-emergency situations.²⁹

In the event of a release or spill of hydraulic fracturing fluid and when necessary to prevent public health or the environment, the Illinois Department of Natural Resources may disclose confidential information to relevant county public health director or emergency manager, the Director of the Illinois Department of Public Health, the Director of the Illinois Department of Agriculture, and the Director of the Illinois Environmental Protection Agency.³⁰ The holder of

²⁴ Id. § 77(g).

²⁵ Id. § 77(h).

²⁶ Id.

²⁷ Id. at § 77(l).

²⁸ Id.

²⁹ Id.

³⁰ Id. § 77(m).

the trade secret information may request a confidentiality agreement from public officials when circumstances permit.³¹

C. Arkansas

Arkansas Oil and Gas Commission Rule B-19 requires operators to disclose the identity of compounds contained in hydraulic fracturing fluid.³² The disclosures must include the names of additives, chemicals, and CAS numbers. Disclosures must be made before and after each fracturing treatment.³³

The operator can make a written claim that the identity of a chemical is entitled to trade secret status. Upon making a trade secret claim, the operator must provide the name of the chemical family to the Director of the Commission. The Director of the Commission will hold confidential the chemical constituent that is claimed as a trade secret if it complies with criteria set forth under federal law. Those requirements state a person is entitled to withhold information if that person submits an explanation of the reasons why information is claimed based on the following factors:

1. Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee, an officer or employee of the United States or a State or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.
2. The information is not required to be disclosed, or otherwise made available to the public under any other Federal or State law.
3. Disclosure of the information is likely to cause substantial harm to the competitive position of such person.
4. The chemical identity is not readily discoverable through reverse engineering.³⁴

To make a claim for a trade secret, the applicant will have to fill out a statutory form that asks the operator to identify the chemical family associated with the chemical constituent and to verify that the above factors are met under penalty of perjury.

Arkansas does not have a process to challenge the trade secret designation in its oil and gas regulations, but a person who is denied a public records request in whole or in part due to a claim of confidentiality may bring suit to challenge under the Arkansas Freedom of Information Act.³⁵

³¹ Id.

³² 178 Code Ark. Rules & Reg. 001-B-19 (2011).

³³ Id. at B-19(k), (l)(3).

³⁴ 42 U.S.C. § 11042(a-b).

³⁵ Ark. Code Ann. § 15-19-102.

D. Colorado

Colorado requires operators to make disclosures by submitting the information directly to FracFocus rather than to regulators. The operator does not have to disclose trade secrets.³⁶ If a trade secret is claimed, the operator has to fill out a form justifying the classification of a trade secret under penalty of perjury. The Colorado regulation states:

If the vendor, service provider, or operator claim that the specific identity of a chemical, the concentration of a chemical, or both the specific identity and concentration of a chemical is/are claimed to be a trade secret, the operator of the well must so indicate on the chemical disclosure registry form and, as applicable, the vendor, service provider, or operator shall submit to the Director a Form 41 claim of entitlement to have the specific identity of a chemical, the concentration of a chemical, or both withheld as a trade secret. . . . If a chemical is claimed to be a trade secret, the operator must also include in the chemical registry form the chemical family or other similar descriptor associated with such chemical.³⁷

Colorado's statutory form is similar to Arkansas' statutory form in that it requires the operator to verify that: (1) the operator has not disclosed the information claimed to be a trade secret to others; (2) no law requires disclosure of the claimed information; (3) the disclosure would harm the competitive position of the operator; and (4) the information is not readily accessible through reverse engineering.

Colorado's oil and gas rules do not provide for challenges to the specific provisions above but they do contain a general citizen suit provision for anyone "adversely affected" by the violation of the state's oil and gas laws.³⁸

E. Texas

State regulations define a trade secret as any "formula, pattern, device, or compilation of information that is used in a person's business, and that gives that person an opportunity to obtain an advantage over competitors who do not know or use it."³⁹ The six factors used in determining whether information qualifies as a trade secret are:

1. the extent to which the information is known outside of the company;
2. the extent to which it is known by employees and others involved in the company's business;
3. the extent of measures taken by the company to guard the secrecy of the information;
4. the value of the information to the company and its competitors;

³⁶ 2 Code Colo. Reg. § 404-1: 205A (2012).

³⁷ Id.

³⁸ Colo. Rev. Stat. § 30-60-114 (2013).

³⁹ 16 Tex. Admin. Code § 3.29(a)(26) (2013).

5. the amount of effort or money expended by the company in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.⁴⁰

The regulations require the operator to disclose to FracFocus each additive used in treatment, the CAS numbers, and the actual or maximum concentration each chemical used.⁴¹ The operator is not required to disclose information that is claimed as a trade secret to either FracFocus or the Texas Railroad Commission.⁴²

The Texas regulation provides that certain persons may challenge the designation of a trade secret claim.⁴³ Those people are: (1) the landowner whose property the relevant wellhead is located; (2) the landowner who owns real property adjacent to the property where the wellhead is located; and (3) a department or agency of the state with jurisdiction over the matter to which the claimed trade secret information is relevant.⁴⁴

IV. Other Proprietary Information in Various States

Other than chemical constituents used in the hydraulic fracturing process, operators may request to keep other information confidential in the permit review process. Examples of such information include seismic data and maps.

A. Arkansas

Regulations of the Arkansas Oil and Gas Commission provide protections for seismic information and maps submitted with an application. For seismic data, the applicant “may also file a request, in writing, that the application with all information and maps be kept confidential for a period not to exceed 12 months.”⁴⁵ The application and maps may still be used as evidence in a public hearing before the Commission.⁴⁶ The applicant, however, has the right to object to the admissibility of such information and to seek a hearing or a protective order before the information is shared in a public hearing.⁴⁷

B. Colorado

⁴⁰ Id.

⁴¹ Id. § 3.29(c)(2)(A-B).

⁴² Id. § 3.29(c)(2)(C).

⁴³ Id.

⁴⁴ Id. § 3.29 (c)(3)(A).

⁴⁵ 178 Code Ark Rules & Reg. 001-B-42.

⁴⁶ Id.

⁴⁷ Id.

Colorado regulations require that operators submit a comprehensive drilling plan. Within the plan, the applicant is allowed to mark certain documents as confidential.⁴⁸ The regulations encourage the applicant to submit detailed plans and provide for confidential information:

Written information obtained or compiled from landowners and operators in conjunction with development of a Comprehensive Drilling Plan is exempt from disclosure to the public, provided that any page containing information subject to withholding under the Colorado Open Records Act is clearly labeled with the words "Confidential Information." The Commission, the Colorado Department of Public Health and Environment, and the Colorado Division of Wildlife will keep all such data and information confidential to the extent allowed by the Colorado Open Records Act.⁴⁹

The Colorado Open Records Act states that "trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person" will not be disclosed.⁵⁰ The state's oil and gas regulation with regard to access to records (including chemical disclosure) states:

Information provided to the Commission or the Director under this section that is entitled to protection under state or federal law, including C.R.S. § 24-72-204 [Colorado Open Records Act], as a trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data shall be kept confidential and protected against public disclosure unless otherwise required, permitted, or authorized by other state or federal law.⁵¹

The regulation further states, that where disclosure is required under state or federal law, it shall only be made to those authorized to receive such information and may be subject to a confidentiality agreement.⁵²

C. Texas

The Texas Public Records Law provides protection for confidential material defined to include "all well logs, geophysical, geochemical, and other similar data, including maps and other interpretations of the material" filed with the state in connection with any administrative application or proceeding.⁵³ Administrative applications and administration proceedings are further defined to "include applications for pooling or unitization, review of shut-in royalty payments, review of leases or other agreements to determine their validity, review of any plan of operations, review of the obligation to drill offset wells, or an application to pay compensatory royalty."⁵⁴

⁴⁸ 2 Colo. Code Reg. § 404-1: 216.

⁴⁹ Id. § 216(d)(6).

⁵⁰ Colo. Rev. Stat. § 24-72-204(3)(a)(IV).

⁵¹ Code Colo. Reg. § 404-1:205(f).

⁵² Id.

⁵³ Texas Gov. Code Ann. 552.113(c)(1).

⁵⁴ Id. 552.113(c)(3).

Confidential material under this provision of the Texas Public Records Law is public information and available for disclosure on or after the later of: “(1) five years from the filing date of the confidential material; or (2) one year from the expiration, termination, or forfeiture of the lease in connection with which the confidential material was filed.”⁵⁵

⁵⁵ Id. 552.113(d).