

MARY ANN TORRENCE, ATTORNEY  
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY  
FIRST ASSISTANT REVISOR

ORDON L. SELF, ATTORNEY  
FIRST ASSISTANT REVISOR



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MEMORANDUM

To: Joint Energy and Environmental Policy Committee  
From: Matt Sterling, Assistant Revisor of Statutes  
Date: October 17, 2011  
Subject: Texas Legislation Concerning Disclosure of Hydraulic Fracturing Components

HB 3328 passed in 2011 by the Texas Legislature requires the state railroad commission to promulgate rules and regulations to require disclosure by suppliers, service companies, and operators involved in hydraulic fracturing operations. On August 29, the commission proposed rules that require operators to submit information to the hydraulic fracturing chemical disclosure registry website of the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission known as "FracFocus," on or before a well completion report is submitted the commission. The information that must be provided includes:

- Operator name;
- date of the hydraulic fracturing treatment; county in which the well is located;
- API number for the well;
- well name and number;
- longitude and latitude of the wellhead;
- total vertical depth of the well; total volume of water used in the hydraulic fracturing treatment or the type and volume of the base fluid, if something other than water is used;
- each additive used in the hydraulic fracturing treatment and the trade name, supplier, and a brief description of the intended use or function of the additive;
- each chemical ingredient used in the hydraulic fracturing treatment for which an MSDS is required;
- all other chemical ingredients intentionally added by the operator; and
- the actual or maximum concentration of each additive and/or chemical ingredient in percent by mass.

In addition to the disclosures above, operators also must submit to the commission, along with the well completion report for each well on which a hydraulic fracturing treatment was conducted: A copy of the disclosure form posted on the Chemical Disclosure Registry; and a supplemental list of all

chemicals and their respective CAS numbers, not listed on the Chemical Disclosure Registry form, that were intentionally included in and used for the purpose of created the hydraulic fracturing treatment for the well.

Suppliers and service companies are required to provide the operator with the identity of each chemical ingredient intentionally used in the fracturing treatment, specifically including any chemical ingredient for which a Material Safety Data Sheet (MSDS) must be prepared pursuant to 29 C.F.R. § 1910.1200(g)(2) and all other chemical ingredients that were intentionally included in the fracturing treatment for the well.

The proposed rule also exempts certain ingredients from disclosure. Specifically, suppliers, service companies, and operators are not required to:

- Disclose ingredients that are not disclosed to it by the manufacturer, supplier, or service company;
- disclose ingredients that are not intentionally added to the hydraulic fracturing treatment;
- disclose ingredients that occur incidentally, are otherwise unintentionally present, may be the incidental result of a chemical reaction or process, or may be constituents of naturally occurring materials that become part of a hydraulic fracturing fluid; or
- identify specific chemical ingredients that are eligible for trade secret protection based on the additive in which they are found or provide the concentration of such ingredients.

The proposed rule provides that a supplier, service company, or operator may claim that the specific identity and/or concentration of any additive or chemical ingredient is entitled to trade secret protection and withhold disclosure of this information on this basis. "Trade secret" is defined in the rule as "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." Establishing that information is a trade secret requires a factual showing to the Office of the Attorney General, Open Records Division, that the information meets specified factors set forth in the proposed rule.

If a supplier, service company, or operator withholds this information based on a claim that it is a trade secret, the withholding party must disclose to the Commission information that:

- Discloses the chemical family associated with the chemical ingredient;
- states that the specific identity and/or concentration of the chemical ingredient are entitled to protection as trade secret information; and
- discloses the properties and effects of the withheld chemical ingredient.

The proposed rule also provides for procedures to challenge the claim of trade secret and provides that only certain parties may seek to challenge a trade secret claim, including: A landowner on whose property the well is located; a landowner who owns property adjacent to where the well is located; and a state agency with jurisdiction over a matter to which the claimed trade secret information is relevant.

1 AN ACT  
2 relating to the disclosure of the composition of hydraulic  
3 fracturing fluids used in hydraulic fracturing treatments.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 91, Natural Resources Code, is amended  
6 by adding Subchapter S to read as follows:

7 SUBCHAPTER S. DISCLOSURE OF COMPOSITION OF HYDRAULIC FRACTURING  
8 FLUIDS

9 Sec. 91.851. DISCLOSURE OF COMPOSITION OF HYDRAULIC  
10 FRACTURING FLUIDS. (a) The commission by rule shall:

11 (1) require an operator of a well on which a hydraulic  
12 fracturing treatment is performed to:

13 (A) complete the form posted on the hydraulic  
14 fracturing chemical registry Internet website of the Ground Water  
15 Protection Council and the Interstate Oil and Gas Compact  
16 Commission with regard to the well;

17 (B) include in the form completed under Paragraph

18 (A):

19 (i) the total volume of water used in the  
20 hydraulic fracturing treatment; and

21 (ii) each chemical ingredient that is  
22 subject to the requirements of 29 C.F.R. Section 1910.1200(g)(2),  
23 as provided by a service company or chemical supplier or by the  
24 operator, if the operator provides its own chemical ingredients;

1                   (C) post the completed form described by  
2 Paragraph (A) on the website described by that paragraph or, if the  
3 website is discontinued or permanently inoperable, post the  
4 completed form on another publicly accessible Internet website  
5 specified by the commission;

6                   (D) submit the completed form described by  
7 Paragraph (A) to the commission with the well completion report for  
8 the well; and

9                   (E) in addition to the completed form specified  
10 in Paragraph (D), provide to the commission a list, to be made  
11 available on a publicly accessible website, of all other chemical  
12 ingredients not listed on the completed form that were  
13 intentionally included and used for the purpose of creating a  
14 hydraulic fracturing treatment for the well. The commission rule  
15 shall ensure that an operator, service company, or supplier is not  
16 responsible for disclosing ingredients that:

17                   (i) were not purposely added to the  
18 hydraulic fracturing treatment;

19                   (ii) occur incidentally or are otherwise  
20 unintentionally present in the treatment; or

21                   (iii) in the case of the operator, are not  
22 disclosed to the operator by a service company or supplier. The  
23 commission rule shall not require that the ingredients be  
24 identified based on the additive in which they are found or that the  
25 concentration of such ingredients be provided;

26                   (2) require a service company that performs a  
27 hydraulic fracturing treatment on a well or a supplier of an

1 additive used in a hydraulic fracturing treatment on a well to  
2 provide the operator of the well with the information necessary for  
3 the operator to comply with Subdivision (1);

4 (3) prescribe a process by which an entity required to  
5 comply with Subdivision (1) or (2) may withhold and declare certain  
6 information as a trade secret for purposes of Section 552.110,  
7 Government Code, including the identity and amount of the chemical  
8 ingredient used in a hydraulic fracturing treatment;

9 (4) require a person who desires to challenge a claim  
10 of entitlement to trade secret protection under Subdivision (3) to  
11 file the challenge not later than the second anniversary of the date  
12 the relevant well completion report is filed with the commission;

13 (5) limit the persons who may challenge a claim of  
14 entitlement to trade secret protection under Subdivision (3) to:

15 (A) the landowner on whose property the relevant  
16 well is located;

17 (B) a landowner who owns property adjacent to  
18 property described by Paragraph (A); or

19 (C) a department or agency of this state with  
20 jurisdiction over a matter to which the claimed trade secret is  
21 relevant;

22 (6) require, in the event of a trade secret challenge,  
23 that the commission promptly notify the service company performing  
24 the hydraulic fracturing treatment on the relevant well, the  
25 supplier of the additive or chemical ingredient for which the trade  
26 secret claim is made, or any other owner of the trade secret being  
27 challenged and provide the owner an opportunity to substantiate its



1 trade secret claim; and

2 (7) prescribe a process, consistent with 29 C.F.R.  
3 Section 1910.1200, for an entity described by Subdivision (1) or  
4 (2) to provide information, including information that is a trade  
5 secret as defined by Appendix D to 29 C.F.R. Section 1910.1200, to a  
6 health professional or emergency responder who needs the  
7 information in accordance with Subsection (i) of that section.

8 (b) The protection and challenge of trade secrets under this  
9 section is governed by Chapter 552, Government Code.

10 SECTION 2. Subchapter S, Chapter 91, Natural Resources  
11 Code, as added by this Act, applies only to a hydraulic fracturing  
12 treatment performed on a well for which an initial drilling permit  
13 is issued on or after the date the initial rules adopted by the  
14 Railroad Commission of Texas under that subchapter take effect. A  
15 hydraulic fracturing treatment performed on a well for which an  
16 initial drilling permit is issued before the date the initial rules  
17 take effect is governed by the law as it existed immediately before  
18 the effective date of this Act, and that law is continued in effect  
19 for that purpose.

20 SECTION 3. The Railroad Commission of Texas shall adopt  
21 rules under Subchapter S, Chapter 91, Natural Resources Code, as  
22 added by this Act, not later than July 1, 2012, with the exception  
23 of those rules under Paragraph (E), which are to be adopted not  
24 later than July 1, 2013.

25 SECTION 4. This Act takes effect September 1, 2011.