



# HARVARD LAW SCHOOL

Environmental Law Program  
POLICY INITIATIVE

January 11, 2013

## **Via Electronic Mail and First Class Mail**

Mr. Joseph Martens, Commissioner  
Attn: Draft HVHF Regulations Comments  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-6510

Dear Commissioner Martens:

Harvard Law School's Environmental Policy Initiative submits the following comments in response to the Department of Environmental Conservation's High Volume Hydraulic Fracturing Proposed Regulations ("proposed regulations"). The Policy Initiative focuses its comments on the chemical disclosure provisions of the proposed regulations.

The proposed chemical disclosure requirements represent an important step in informing the public about the chemical compounds used in hydraulic fracturing. However, some additions and clarifications to the proposed regulations are required to ensure that this information is disclosed in an accessible and usable manner. Specifically, the Department should: (1) clarify that all trade secret disclosure exemptions asserted to FracFocus must have been substantiated and approved by the Department at the permitting phase; (2) provide a procedure by which medical professionals can access trade secret chemical information to diagnose and treat patients; (3) explain in more detail how publically-accessible information will be made available to the public; and (4) require notification of landowners and residents when hydraulic fracturing will be occurring near their property.

**1. The Department should clarify that all trade secret disclosure exemptions asserted to FracFocus must have been substantiated and approved by the Department at the permitting phase.**

Sections 560.3(d)(2) and 560.5(h)(2) of the proposed regulations state that an operator “may request such records be exempt from disclosure as trade secrets” as described in New York’s Freedom of Information Law, which requires trade secret requests to be substantiated and approved at the permitting stage. However, Section 560.5(i) states that if a chemical constituent and/or concentration is asserted to be a trade secret, the operator must “indicate this on the chemical disclosure registry form” that it submits to FracFocus. It is not clear from this statement if an operator is required to limit its trade secret assertions on the FracFocus form to those claims that have been approved by the Department . The Department should make clear that an operator cannot avoid having to substantiate trade secret claims when submitting disclosures to FracFocus.<sup>1</sup>

**2. The Department should require the disclosure of trade secret information to medical professionals.**

Second, the disclosure provisions in the proposed regulations should be amended to permit medical professionals access to trade secret information that is required for diagnosis and treatment of patients. Most state hydraulic fracturing laws and regulations providing explicit disclosure exemptions for trade secrets require that trade secret information be provided to medical professionals for these purposes. The proposed regulations should establish a procedure to provide medical professionals with timely access to information about chemical compounds otherwise protected as trade secrets. This will protect trade secrets without unnecessarily jeopardizing the health of patients who may have been exposed to hydraulic fracturing chemicals.

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<sup>1</sup> The Department should also require operators to provide to the Department copies of all disclosure forms they submit to FracFocus in order to confirm that an operator has complied with this requirement.

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Laws that permit medical professionals to access trade secret information generally fall into three categories: those that do not explicitly require confidentiality, those that explicitly require confidentiality, and those that explicitly require confidentiality and require the medical professional to submit a confidentiality statement.

Many states do not explicitly require confidentiality agreements in order for medical professionals to access trade secret information. For instance, Arkansas does not require confidentiality agreements for health care professionals who request and receive information on a trade secret chemical.<sup>2</sup> In Louisiana and Mississippi, trade secret information must be provided to health care professionals if required by state or federal law.<sup>3</sup>

Other state statutes do have explicit confidentiality requirements, but may not require a signed confidentiality form. For example, in Ohio, medical professionals may receive the exact chemical composition of each product, fluid, or substance labeled a trade secret if needed to assist in diagnosis or treatment. They must keep the information confidential for any purpose unrelated to diagnosis or treatment.<sup>4</sup>

Finally, some states require medical providers who access trade secret information to sign confidentiality agreements. For example, in Colorado, during non-emergency medical and research situations, a health professional must submit a statement of need and sign a confidentiality agreement before obtaining chemical information. During health emergency, first responders and health care providers may access chemical information claimed as trade secrets without signing confidentiality agreements.<sup>5</sup> However, they must sign confidentiality agreements after the emergency has passed. Similarly, in Montana, trade secret information must

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<sup>2</sup> Ark. Admin. Code 178.00.1-B-19.

<sup>3</sup> La. Admin Code. tit. 43, pt. XIX, § 118.

<sup>4</sup> Ohio rev. Code. § 1509.10 (H)(2).

<sup>5</sup> 2 Colo. Code Regs. 404-1:205A.

be disclosed to a medical professional who provides a written statement that the information is needed for diagnosis or treatment, although this requirement can be delayed or waived in the event of an emergency. A medical professional may not otherwise use the information, and will be required to sign a nondisclosure form after the emergency has passed if the operator requests.<sup>6</sup>

Required statements of need and confidentiality statements could be unduly burdensome to medical providers, particularly medical providers working in underserved rural areas who likely do not have the staff and resources to handle additional paperwork requirements. However, if the Department concludes that it is necessary to require a confidentiality statement, there must be a provision permitting the medical provider to delay submitting the form in the case of an emergency.

In addition, the Department should describe in the regulations exactly how medical professionals can request and obtain access to trade secret chemical information in a timely manner, particularly in the event of an emergency. A clear procedure is essential to ensure timely treatment and minimize time, financial, and resource burdens on medical providers' access to information required for diagnosis and treatment of patients.

Finally, the Department should implement a provision found in Colorado's law, which permits disclosure of trade secrets to medical researchers.<sup>7</sup> In light of the dearth of studies about potential human health and environmental impacts of hydraulic fracturing, this provision is necessary to ensure that rigorous scientific research continues to inform the hydraulic fracturing process to protect public health and safety.

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<sup>6</sup> Mont. Admin. R. 36.22.1016(3)-(4).

<sup>7</sup> 2 Colo. Code Regs. 404-1:205A.

**3. Disclosures posted to the Department’s website must be fully searchable by chemical, well, and address to provide true public accessibility.**

The draft regulations 560.3(d) and 560.5(h) are vague as to the medium and format Hydraulic Fracturing Fluid Disclosure and Hydraulic Fracturing Fluid Disclosure Following Well Completion will be disclosed to the public. It is essential that these provisions be clarified.

Sections 560.3(d)(2) and 560.5(h)(2) state that the information will be “disclose[d] to the public” but the procedures by which this will be done are unclear. In response to Comment 6117 of the initial comments, the Department states that, “all of the non-trade secret hydraulic fracturing fluid additive information will be available on Department’s website prior to commencement of a hydraulic fracturing operation and following well completion....” This requirement should be codified in the regulations in order to memorialize the Department’s intent. Specifically, in 560.3(d)(2), “disclose to the public,” should be amended to read “post on the Department’s website as part of an online database that is fully searchable by chemical, well number, and address.” Section 560.5(h)(2) should also be so amended.

Further, the comment’s statement that the information “will be available” is vague, and leaves open the question of whether disclosures will in practice be usable by the public. It is important that the Department provides disclosures in a manner that is accessible and comprehensible to the general public. Requiring operators to submit their disclosures to FracFocus as well as to the Department does not satisfy this goal. First, FracFocus only collects a very limited amount of information on its standardized disclosure form; currently FracFocus does not contain all of the information required by state law for *any* state, and in some situations state disclosure requirements are in explicit conflict with FracFocus requirements.<sup>8</sup> Second, FracFocus is not fully searchable and users may only retrieve a static file about one well at a

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<sup>8</sup> MATTHEW MCFEELEY, STATE HYDRAULIC FRACTURING DISCLOSURE RULES AND ENFORCEMENT 8 (2012), available at <http://www.nrdc.org/energy/files/Fracking-Disclosure-IB.pdf>.

time. Third, FracFocus does not disclose its entire database and therefore does not enable broad analysis of the information it discloses. Posting disclosure forms in PDF format in a manner similar to FracFocus does not provide interested parties with useful information unless they are able to devote substantial time and resources to reading through thousands of forms; an interested party would be required to download individually over 17,000 PDF documents and create her own database if she wished to analyze all the information provided on FracFocus.<sup>9</sup> Finally, identifying wells by latitude and longitude, as FracFocus does, is not useful to the average resident who identifies his property by address or nearest county road rather than latitudinal and longitudinal coordinates.

The Department should post complete on its website, taking care to avoid some of the shortcomings of the FracFocus website. For instance, posting Material Safety Data Sheets (MSDS) or a list of chemicals in use in the state is not sufficient to inform landowners and residents of the chemicals being used on or in close proximity to their property. Instead, disclosures should be searchable by chemical, well, and address to provide accessible disclosure to landowners and other interested parties. Disclosures should also be available in the form of a database that interested parties may access to analyze aggregated data.

In addition, the Department should explicitly call on FracFocus in the regulations to make its information fully searchable by well, chemical, and address, as well as disclose its entire database. Even if the Department's website provides all this information for New York wells, the citizens of New York have a strong interest in obtaining information on hydraulic fracturing in other states. For instance, this information would likely be of interest to landowners and residents who live near the state border, or who wish to investigate the activities of operators who conduct hydraulic fracturing in New York as well as other states. States such as Colorado and

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<sup>9</sup> *Id.*

Pennsylvania have recognized the limitations of FracFocus; Colorado’s hydraulic fracturing disclosure law requires that the state create an online searchable database if FracFocus is not searchable by January 1, 2013.<sup>10</sup>

Finally, the Department’s hydraulic fracturing chemical disclosure website should clearly explain the procedures for challenging a trade secret determination. The combination of these adjustments to the disclosure provisions should ensure that hydraulic fracturing chemical disclosures are accessible and transparent to the public.

**4. Land owners and residents should be notified before drilling begins.**

Information posted to the Department’s website and/or FracFocus is not sufficient to notify landowners that hydraulic fracturing is or will be occurring near their property. It is unreasonable to expect landowners and/or residents to search these platforms and attempt to determine where in the vicinity hydraulic fracturing is set to occur. Particularly if interested parties must search FracFocus as opposed to a highly-accessible Department database to obtain this information, they would be required to search FracFocus for all the wells in their county or in adjacent counties if they live or own property on the edge of a county, individually download all of the PDFs for each of the wells, and convert the latitude and longitudinal information on the PDFs into an address, intersection, or landmark so as to make the location information comprehensible. A party would need to go through all these steps regularly to keep abreast of new developments or new disclosures to FracFocus, and even in doing this, would lack information about when hydraulic fracturing would occur. These cumbersome requirements do not satisfy the goals of full and transparent disclosure.

Section 560.5(d) requires operators, with permission of the landowner, to conduct water sampling on wells within 1,000 feet of the well pad prior to site disturbance.<sup>11</sup> This requirement

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<sup>10</sup> 2 Colo. Code Regs. 404-1:205A.

certainly will serve to notify some landowners that hydraulic fracturing is proposed in the vicinity of their property. However, it only serves to notify landowners and residents who have wells on their property that are within 1,000 feet of the well site. Nearby landowners and residents without wells on their property nevertheless may wish to conduct baseline studies of air or soil quality on their property prior to the commencement of hydraulic fracturing. Publication in the Environmental Notice Bulletin of notice of a draft permit with a fifteen day comment period is not sufficient to provide actual notice to landowners and residents. It is unreasonable to expect these parties, particularly if they have no indication or reason to believe that hydraulic fracturing is occurring in their area, will read the Bulletin several times per month. While publication in the Bulletin does technically provide notice, it certainly does not serve the interests of maximum disclosure and transparency. Therefore, it is important that the Department require operators to directly notify landowners and residents of the property on which the fracturing will occur and any property bordering the property on which fracturing will occur. The operator must notify these landowners and residents that hydraulic fracturing is set to occur and disclose the chemicals that will be used and/or refer them to the Department's website to access such information.

**5. There appears to be a typographical error in section 560.3(d)(1) of the proposed regulations. The reference to paragraph (vii) should refer to paragraph (viii) instead.**

Section 560.3(d)(1) of the proposed regulations states that paragraph (vii) shall be provided as a separate attachment, but this is likely intended to refer to paragraph (viii). It makes more sense to require the data and studies referred to in paragraph (viii) in a separate attachment than to require identification of the proposed hydraulic fracturing service company as stated in paragraph (vii) in a separate attachment.

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<sup>11</sup> The Department should also amend this section to require the operator to provide the landowner with split samples upon the landowner's request so that she may obtain independent study results.

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In conclusion, Department should: (1) clarify that all trade secret disclosure exemptions asserted to FracFocus must have been substantiated and approved by the Department and the permitting phase; (2) provide a procedure by which medical professionals can access trade secret chemical information in order to treat patients; (3) require notification of landowners and residents when hydraulic fracturing will be occurring near their property; and (4) adequately explain how publically-accessible information will be made available to the public.

Respectfully submitted,

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