
Texas Law Requires Disclosure of Hydraulic Fracturing Chemicals as of February 1, 2012

by Anthony B. Cavender

By enacting House Bill 3328, the Texas Legislature added a new Subchapter S to Chapter 91 of the Texas Natural Resources Code. The new law directed the Texas Railroad Commission (hereinafter "Commission") to promulgate new rules requiring the disclosure of the composition of the hydraulic fracturing fluids used in wells for which drilling permits are issued by the Commission on or after February 1, 2012, when the new rules take effect.

Well operators covered by these rules must complete the information form posted on the hydraulic fracturing chemical registry website operated by the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. The required information includes data on the total volume of water used in the hydraulic fracturing treatment, and the identity of each chemical ingredient that is subject to the Material Safety Data Sheet (MSDS) rules of OSHA, which are published at 29 CFR Section 1910.1200(g)(2). The form must then be submitted to the Commission along with the well completion form. The new disclosure requirements also affect service companies and chemical providers involved in the management of the chemical ingredients used in hydraulic fracturing.

House Bill 3328 also requires the Commission to develop a process by which a regulated entity can withhold and declare certain information to be a trade secret under Section 552 of the Texas Government Code, along with procedures by which the owner can substantiate the trade secret claim. The law provides that a claim for trade secret protection regarding a chemical ingredient used in hydraulic fracturing can be challenged by the landowner on whose property the well is located, the landowner who owns property adjacent to that property, or a department or agency of the State of Texas with jurisdiction over the matter to which the claimed trade secret is relevant.¹

The Commission published the rules it proposed to implement House Bill 3328 in the Texas Register on Sept. 9, 2011, and invited comments. See 36 Tex Reg 5765. The Commission noted that 15,466 drilling permits were issued in 2010, and fully 85 percent of these wells utilized hydraulic fracturing techniques, meaning that 13,000 wells would undergo hydraulic fracturing on an annual basis. On Dec. 12, 2011, the Commission approved the final version of these rules, which will be embodied

¹ The law specifically refers to Section 552.110 of the Government Code, which is a statutory exception against disclosure for trade secrets. If the exception is challenged, then the Attorney General will be asked to review the challenge.

in new Section 3.29 (to be codified as 16 TAC §3.29). The chemical disclosure requirements will be applicable to all wells receiving a drilling permit from the Commission on or after Feb. 1, 2012.

The rules adopted by the Commission provide as follows:

(a) Section 3.29(a) defines the terms that will be used to administer the new disclosure requirements, including regulatory definitions for "additive," "chemical ingredients," "chemical disclosure registry," "proppant," "total water volume," and "trade secret."

(b) Section 3.29(b) states that the new rules apply to a hydraulic fracturing treatment performed on a well that receives a drilling permit on or after February 1, 2012.

(c) Section 3.29(c) describes the chemical ingredient disclosures that will apply to well operators, suppliers and service companies. Again, the operator must submit the specified information about the chemical ingredients and volume of water used in hydraulic fracturing to the Hydraulic Fracturing Chemical Disclosure Registry website of the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. The supplier or service company must provide the required information to the well operator no later than 15 days after the completion of the hydraulic treatment, and the operator must submit this data on or before the date the well completion report must be filed. In the event of an emergency, the chemical treatment information must be provided to health professionals or emergency responders who require this information to make an emergency response, subject to appropriate confidentiality protections.

(d) Section 3.29(d) sets forth the data that need not be disclosed, e.g., ingredients that are not disclosed to the supplier, service company or operator; ingredients that are present only in trace amounts; and constituents of naturally occurring materials.

(e) Section 3.29(e) provides that a supplier, service company or well operator is not required to disclose trade secret information unless the Attorney General or a court determines that the information is not entitled to trade secret protection under Section 552 of the Government Code.

(f) Section 3.29(f) identifies those persons who are authorized by law to challenge a trade secret claim: i.e., the landowners described above, or a department or agency of the State of Texas with jurisdiction over the matter for which the claimed trade secret information is relevant. A challenge to a trade secret claim must be filed no later than 24 months from the date the operator filed a well completion report with the Commission. Timely-filed protests will be forwarded to the Attorney General for a determination as to whether the information qualifies for trade secret protection. The decision of the Attorney General may be appealed to a state district court sitting in Travis County.

(g) Section 3.29(h) provides that a violation of Section 3.29 is subject to any penalty or remedy specified in Title 3 of the Natural Resources Code. While no specific penalties are set forth in the rule, the Commission states that it has directed the staff to prepare a proposed "penalty rule" for the consideration of the Commissioners. The final rule also provides that the certificate of compliance issued to any oil, gas, or geothermal resource well may be revoked for violating Section 3.29 pursuant to 16 TAC §3.73.

These rules should be published in the Texas Register before the end of 2011.²

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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² It should be noted that on December 13, 2011, the Colorado Oil and Gas Conservation Commission adopted rules requesting the disclosure of all chemicals used in hydraulic fracturing by oil and gas companies. These rules become effective on April 1, 2012, and are also subject to trade secret claims.

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