



## **Controversy to Compromise: Colorado Adopts New Hydraulic Fracturing Regulations**

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On December 13, 2011, the Colorado Oil and Gas Conservation Commission unanimously approved new Rules that require public disclosure of chemicals used in hydraulic fracturing (“HF”) treatments. The Rules, described by Governor Hickenlooper as “the fairest and most transparent set of HF regulations in the country,” represent a compromise between industry and environmental groups that balances public transparency with the protection of trade secrets. The Rules apply to HF treatments occurring on or after April 1, 2012. Reports are due within 60 days of the conclusion of a HF treatment.

The Rules require an operator to provide detailed information, using the FracFocus website maintained by the Ground Water Protection Council, about HF treatment(s) on a well-by-well basis. The required information includes the location of the well, the volume of water and sand (or other proppant), description of additives, and the identity and concentrations of individual chemicals. The key to addressing the “reverse engineering” concern from HF service providers and vendors is that the chemical information can be reported in a format that “de-links” the chemicals from the HF additives. The Rules are more stringent than those recently adopted in Texas and New Mexico in that operators must disclose all chemicals in their hydraulic fracturing fluids, not just hazardous chemicals subject to OSHA regulation, including the maximum concentration of each chemical in the HF fluid.

The Rules contain important trade secret protections. HF fluids are, in some cases, composed of a proprietary blend of ingredients. Companies often invest substantial research and development efforts into developing effective formulas that, if disclosed, are susceptible to reverse engineering. To prevent this, the Rules provide that a vendor, service provider, or operator may

withhold the identity and/or concentration of a hydraulic fracturing product by asserting that such information is a trade secret. Trade secrets must nonetheless be confidentially disclosed to the Commission and health professionals in certain emergency situations where the ingredients of a product are necessary to respond to a spill, release or public complaint.

The trade secret provision of the Rules was subject to significant debate. Described as a “loophole,” opponents argued that the provision would allow operators to evade disclosure. Proponents maintained that trade secret protection is a legal requirement under the Colorado Uniform Trade Secrets Act. Proponents also argued that only a small percentage of products would be appropriate for trade secret claims and that, without trade secret protection, the Rules would stifle the innovation of new products—including the development of certain “green” hydraulic fracturing products.

To resolve the conflict, the parties developed Form 41. This form requires an entity asserting a trade secret claim to declare under penalty of perjury that their claim is legitimate. Form 41 enables an operator to claim trade secret protection, but also closes the so-called “loophole” by establishing legal consequences for inappropriate trade secret claims.

Ultimately, the Rules represent a pragmatic balance between the interests of the industry, environmental groups, and local governments. They provide transparency and disclosure—each integral to fostering public confidence in the industry and ensuring safe and responsible development. They also establish crucial trade secret protections that respect the rule of law and preserve Colorado’s competitive business environment.

For more information, please contact [Elizabeth Gallaway](#).