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ENERGY IN THE LAW

State of Wyoming, Environmental Groups Agree to OGCC Trade Secret Guidelines

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Background on Wyoming OGCC's 2010 Disclosure Requirement

In 2010, Wyoming became the first state to require oil and gas companies to disclose the chemicals used in hydraulic fracturing operations to regulators at the Wyoming Oil and Gas Conservation Commission (the "Commission"). In response to public concerns about the environmental impacts of hydraulic fracturing and the negative public perception generated by the apparent non-disclosure of hydraulic fracturing fluids, the Commission amended its rules and regulations to require companies engaged in hydraulic fracturing to disclose the identity of chemicals used for well stimulation prior to operations. In an effort to balance the public's interest in transparency with the industry's desire to protect proprietary information and competitive advantage, the rules provided a mechanism whereby an applicant could request a trade secret exemption from public disclosure consistent with Wyo. Stat. Ann. § 16-4-203(d)(v) of the Wyoming Public Records Act ("WPRA") for qualifying chemicals and constituents.

District Court Challenge of Public Records Denial

In 2011, the Supervisor of the Commission denied public records requests of certain environmental interest groups seeking disclosure of chemicals and constituents previously granted trade secret exemptions by the Commission. On March 22, 2012 the Powder River Basin Resource Counsel, Wyoming Outdoor Council, Earthworks, and Center for Effective Government ("Plaintiffs") filed a lawsuit against the Commission in Wyoming district court challenging the denial of their disclosure request and the Commission's determinations process to provide confidentiality protection to hydraulic fracturing chemicals and constituents. The district court issued an order and judgment in favor of the Commission. On appeal, the Wyoming Supreme Court reversed the district court judgment and remanded the case for further proceedings. With the case pending, the parties announced that a Stipulated Settlement Agreement had been reached in January 2015.

Summary of Settlement Agreement

The Stipulated Settlement Agreement requires the Commission to immediately adopt and implement agreed upon procedures and guidelines for the trade secret application and approval process. In addition, the settlement requires certain operators reapply for trade secret protection under the new application and approval process.

Specifically, the Stipulated Settlement Agreement requires the Commission, within seven days of its effective date, to adopt and thereafter apply the form and guidelines attached as Exhibit A and B to govern applications for confidentiality protection and the Commission's determinations regarding such applications.¹ With respect to retroactive application of the Stipulated Settlement Agreement, Operators required to resubmit challenged trade secret exemptions must do so within ninety days or risk forfeiting their use in Wyoming oil and gas operations.

Exhibit B of the Stipulated Settlement Agreement provides the agreed upon Trade Secret/CCI Guidelines to be adopted and implemented by the Commission. The guidelines detail the substantive requirements for substantiating a confidentiality request for trade secret protection applications to the Commission. To demonstrate that the information for which confidentiality is sought constitutes trade secrets or confidential commercial information under the WPRA, an applicant must answer five questions and provide the information specified and any supporting documentation related thereto to the Commission. The questions require the applicant to address:

- (1) Prior public disclosure, including previous disclosure via the FracFocus database or trade publications by the applicant-company or anyone else;
- (2) The extent to which the identity of the ingredient is known within the applicant-company and steps taken to safeguard the information;
- (3) Prior determinations by other federal, state, tribal or local regulatory bodies that the ingredient identity is not entitled to protection from public disclosure as a trade secret;
- (4) The commercial value of the ingredient to the applicant-company; and
- (5) The ease or difficulty with which the formula for the additive product could be determined from public disclosure of the ingredient identity.

In responding to question one, applicants are required to take those steps that are reasonable and appropriate under the circumstances to determine the knowledge of relevant individuals within the applicant company, as well as provide the Commission a description of the investigation undertaken to respond to the questions. The Stipulated Settlement Agreement is unclear as to whether the parties intended this standard of care to be equally applicable to questions two through five.

¹ District Court Judge Catherine E. Wilking approved the Stipulated Settlement Agreement and dismissed the action on January 23, 2015. The Commission subsequently posted the agreed upon rules and guidelines on <http://wogcc.state.wy.us/>.

Based on the information provided by the applicant, and such other information the Commission may request, the Supervisor will determine whether the information is exempt from disclosure under the Commission rules and the WPRA.

Effect of Settlement Agreement

While heralded as groundbreaking reform by the Plaintiffs, it is far more likely that the Stipulated Settlement Agreement will serve only to clarify and supplement Wyoming's existing public disclosure law as it relates to disclosure of hydraulic fracturing fluids. By providing applicants and the Commission with a more regimented procedure, the Stipulated Settlement Agreement resolves, to some degree, ambiguity previously inherent in the application and approval process.

For further information regarding Wyoming OGCC rules and regulations, please contact [Samuel R. Yemington](#).