

Can you keep a secret?

Trade secret challenges under Act 13

Often lost in the unending debate over Marcellus Shale drilling is the fact that hydraulic fracturing is not a new, unproven technology. Since hydraulic fracturing was first employed by the natural gas industry at Hugoton Field in Kansas in 1947, over 1 million wells have been drilled using this technique. In the more than 65 years that this practice has been used, the drilling industry has demonstrated an ongoing commitment to the safety of the hydrofracking process.

Despite a strong track record of success, debate continues about whether drilling companies should be forced to publicly disclose all chemical additives in frac fluid, including even the disclosure of proprietary trade secrets. At issue: what is the proper balance between drilling companies' interests in keeping their proprietary chemical additives to frac fluid confidential and the public's interest in learning about potential health concerns from exposures to these unknown chemicals? Right now in Pennsylvania, the confidentiality of the proprietary chemical additives to hydrofracking fluid outlined in Act 13 is the subject of significant public debate.

A trade secret is a specific formula, process, design, practice or compilation of information that, if kept secret, confers competitive advantages to the owner of that proprietary information over competitors in the marketplace. If Coca Cola's secret formula or KFC's secret recipe were publicly disclosed, there would be no reason for the general public to drink Coke or patronize KFC, negating the time and financial resources invested in developing their formulations. Trade secret protections, then, reward innovation and encourage the investment of large amounts of time and money in exploring and developing new and better ideas.

In the case of the natural gas industry, natural gas companies have invested millions of dollars in researching and developing a combination of chemical additives to frac fluid that will most efficiently allow for the free flow of oil and gas through the tight geologic formations found in the Marcellus Shale. The use of the "best" chemicals and additives can greatly increase the amount of oil and gas that is able to be produced from a well and, ultimately, the profitability of the drilling operation itself. In light of this background, this article will examine the disclosure requirements in Act 13 relative to these chemicals and additives used in hydraulic fracturing fluids, the trade secret protections afforded to well operators under Pennsylvania law and challenges to the confidentiality provisions set forth in Act 13.

Act 13 chemical disclosure requirements

On February 14, 2012, Governor Tom Corbett signed Act 13 into law. Act 13 set forth comprehensive regulations of the extraction of gas from the Marcellus Shale in Pennsylvania. It also imposed a number of new regulations, including restrictions on the location of well sites, expanding the rebuttable presumption with respect to groundwater contamination from drilling operations and setting forth disclosure requirements with respect to the chemical additives to hydraulic fracturing fluids.

Under Act 13, well operators must submit a well completion report to the Department of Environmental Protection (DEP) within 30 days of completion of the well. This report must contain a list of chemicals and additives, and percent by mass

of each, used in hydrofracking fluids. An operator may designate specific portions of its well completion report as containing trade secrets or confidential proprietary information protected from public disclosure. The operator must submit propriety information regarding the chemical additives used in the drilling process; however, the DEP is prohibited from disclosing this proprietary information. The DEP is required to ensure that it does not disclose any trade secret or confidential proprietary information in responding to Right to Know Law requests made by the general public.

When submitting its well completion report, a company in most instances is not required to submit factual justification in support of a trade secret claim. In fact, as of this time, Arkansas and Wyoming are the only two states that require such information to substantiate a confidentiality claim. However, in Pennsylvania, as discussed below, trade secret designations may be challenged through the Pennsylvania Office of Open Records, requiring the company to demonstrate a legitimate basis for its claim.

In addition to filing a well completion report, Act 13 also requires companies to upload certain data to the website fracfocus.org, an online, searchable registry of chemicals used by companies during the hydraulic fracturing process, within 60 days after fracturing has commenced on a particular well. Companies are not required to disclose trade secrets or confidential proprietary information on this website. Instead, more generic information about these additives may be submitted to the chemical registry. Additionally, chemicals that occur incidentally, unintentionally in trace amounts or that may be constituents of naturally occurring materials are not required to be disclosed either.

While Act 13 ensures the confidentiality of trade secret information, there are certain limited circumstances where this information can be disclosed. Health professionals and emergency personnel can obtain chemical information claimed to be trade secret or confidential proprietary information if the health professional determines that a medical emergency exists that necessitates knowing the information—such as for the proper diagnosis and treatment of a medical patient. In such circumstances, the need for the information must be confirmed in writing and the use of the information must be limited to purposes for which it was sought. The health professional has a specific obligation, once the information is obtained, to maintain it as confidential. Before obtaining access to the information, the medical provider must sign a confidentiality agreement.¹

Health officials and emergency first responders may also obtain trade secret information if the information is needed to respond to a spill or release or a complaint by a person claiming

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to have been affected by a spill or release. In order to obtain this information, the health official or first responder must make a written request for the information, and he or she must maintain the information as confidential.

Challenging trade secret claims

While trade secrets and confidential proprietary information are prohibited from disclosure under the Pennsylvania Right to Know law, trade secret designations can be challenged at the Pennsylvania Office of Open Records. While the authors of this article are unaware of any challenges made to trade secret designations with respect to chemical additives in hydrofracking fluids, it is important for well operators to understand the process in the event that such a challenge is made in the future.

When a challenge of a trade secret designation is made under the Pennsylvania Right to Know law, the DEP must notify the well operator of the request and the party claiming trade secret protection may then provide input on the release of the information. If a trade secret challenge is made, the burden is on the DEP and well operators to prove that the trade secret claim is legitimate by a preponderance of the evidence. Once all information has been submitted by the company claiming confidentiality, the agency will then either deny the request or release the record and must notify the party claiming the trade secret designation of its decision. In addition to order the release of the information, the Office of Open Records may assess a \$1,500 civil penalty if it determines that the DEP denied access to records in bad faith. Additionally, attorney fees may be awarded to the party seeking access to the information. The DEP may be awarded attorney fees as well if it is determined that the challenge to the trade secret designation is frivolous or made in bad faith.

While trade secret designations have not been challenged under the Pennsylvania Right to Know law, challenges to the constitutionality and legality of the Act 13 confidentiality provisions have been made in Pennsylvania courts. One such lawsuit filed by a physician and vocal opponent of the natural gas drilling in the Marcellus Shale alleges that the Act 13 confidentiality provisions act as a medical gag rule inhibiting his ability to treat his patients and share necessary information with other physicians involved in the treatment of his patients. Additionally, this lawsuit claims that the Act 13 confidentiality provisions infringe on his free speech rights to warn the general public about the health hazards posed by exposure to hydrofracking fluids.

Conclusion

While the use of hydraulic fracturing has increased dramatically over the past 65 years, public debate over the confidentiality provisions in Act 13 is just beginning. Act 13 appears to strike an appropriate balance between protecting the competitive advantages of well operators drilling in the Marcellus Shale while providing doctors with access to confidential information in rare instances where such information is necessary for

medical treatment. Nonetheless, challenges to the confidentiality provisions of Act 13 are being made and merit monitoring to see whether Pennsylvania courts will uphold these protections. □

¹ A confidentiality agreement does not need to be signed before the information is released in emergency situations; however the confidentiality agreement will ultimately need to be signed by the medical provider.

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