

August 23, 2013

VIA REGULATIONS.GOV

U.S. Department of the Interior
Director (630)
Bureau of Land Management
Mail Stop 2134LM
1849 C Street NW
Washington, DC 20240

Attention: 1004–AE26; Hydraulic Fracturing Regulations
and Trade Secrecy

To the Bureau of Land Management:

We, the undersigned law professors who teach and write about intellectual property and trade secrets, write in opposition to the proposed Bureau of Land Management (“BLM”) regulations of hydraulic fracturing (also known as “fracking”) contained in the Federal Register dated May 24, 2013, particularly proposed regulations 3 CFR 3162.3–3(j)(1) through (4) (the “Regulations”). As we understand them, in sum, the Regulations would allow entities engaged in hydraulic fracturing to withhold purported chemical information trade secrets from the BLM, and by extension, the public. Specifically, the BLM takes the position that to require submission of such information “would increase paperwork burdens on operators, and custodial requirements for the BLM.”¹ Instead, the Regulations favor requiring trade secret holders to submit “an affidavit ... to affirm that the undisclosed information is entitled to protection from public disclosure.”² The BLM thus proposes to cede to regulated firms a substantial part of its own regulatory responsibility.

While businesses engaged in hydraulic fracturing may have legitimate trade secrets, the public’s interest in assuring that hydraulic fracturing is managed in a manner

¹ “Oil and Natural Gas; Hydraulic Fracturing on Federal and Indian Lands; Bureau of Land Management, Interior; Supplemental Notice of Proposed Rulemaking and Request for Comment,” 78 Fed. Reg. 101 (May 24, 2013), p. 31660.

² *Id.*

that addresses all significant potential risks may legitimately outweigh commercial concerns. Indeed, hydraulic fracturing must be managed and regulated in a manner that truly merits the name “best practices.” As the BLM states on its website homepage, “The [BLM] may best be described as a small agency with a big mission: To sustain the health, diversity, and productivity of America’s public lands for the use and enjoyment of present and future generations.”³ To impede the BLM’s laudable goal of proper stewardship of our natural resources, not to mention debate and discussion of the use of public natural resources in the name of commercial secrecy, regulatory efficiency, and perhaps most egregiously, “paperwork burdens,” is to put commercial interests far above the prior and more general interest in careful stewardship of the environment. The BLM’s obligation to require best practices, including transparent baseline water quality testing, outweighs commercial competition concerns that trade secret law addresses. Put simply, some trade secrets must give way when broader public interests are at issue.

By writing in opposition to the Regulations, the undersigned take no position on whether hydraulic fracturing should be conducted or whether such activities actually pose any environmental, health or safety (EHS) risks. Any contrary suggestion is unintentional. Rather, we write to note that trade secrecy claims should not impede regulation and consideration of important public concerns.⁴

³ *The Bureau of Land Management: Who We Are, What We Do*, U.S. Department of the Interior Bureau of Land Management, available at http://www.blm.gov/wo/st/en/info/About_BLM.html.

⁴ David S. Levine, *Secrecy and Accountability: Trade Secrets in Our Public Infrastructure*, 59 FL. L. REV. 135, 162 (2007) (conflict between the values of trade secrecy and accountability and transparency are traditionally present in public infrastructure development; “once there is a deviation from purely commercial concerns towards other goals for which trade secrecy was not designed, like the quasi-governmental activity of providing public infrastructure, the disconnect becomes severe;”) *see also* David S. Levine, *The People’s Trade Secrets?*, 18 MICH. TELECOMM. AND TECH. L. REV. 61, 84 (2012) (discussing government-created trade secrets, and noting that “[r]egardless of the theoretical rationale, the concept of a ‘government trade secret’ is an anomaly because its existence is not an incentive to encourage innovation (under the utilitarian theory) and has not been used as a weapon to prevent illegal misappropriation (as in a tort-based theory of trade secrecy). Instead, the government trade secret has a developing track record as a last-ditch basis to deny disclosure of information to the public. No proffered theory of trade secrecy, and especially no utilitarian construct, can justify or even explain such an application.”) For discussion of trade secrecy in the context of environmental management and further references, see Mary L. Lyndon, *Trade Secrets and Information Access in Environmental Law*, in *THE LAW AND THEORY OF TRADE SECRECY, A HANDBOOK OF CONTEMPORARY RESEARCH*, Ed. Rochelle C. Dreyfuss and Katherine J. Strandburg (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947514; *Secrecy and Access in an Innovation*

The Role of Trade Secrecy in the Regulation of Hydraulic Fracturing

Our letter outlines the limited operation of trade secret law in the context of shale gas production and hydraulic fracturing. We focus on a single issue: the legal effect of trade secret law on disclosure of information that describes the ingredients, volume and location of fracturing fluid and its use. The Regulations raise a very specific question: Assuming that information describing the chemical composition of such fluids qualifies for trade secret status in the traditional commercial setting of competition, should this reality insulate this data from disclosure when the information relates to use of common resources and raises concerns about EHS risks?

We take the position that, based solely on the parameters of trade secret law as applied to environmental risk management, the answer must be “no.” As a general matter, secrecy undermines environmental risk management, which is conducted not only by businesses and administrative agencies, but also by other interested parties, from local residents to scientists, public health researchers, and medical providers. Secrecy blocks analysis of externalities and undermines readiness to prevent and remedy harms. It also truncates assessment of market and technology distortions. Economic risks are inherent in market activity, but these cannot be reduced by increasing risks to the public and the environment.⁵

Intensive Economy: Reordering Information Privileges in Environmental, Health and Safety Law, 78 UNIVERSITY OF COLORADO LAW REVIEW 465 (2007); *Secrecy and Innovation in Tort Law and Regulation*, 23 N.M. L. Rev. 1 (1993); *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 Mich. L. Rev. 1795 (1989). On the importance of public participation in environmental management see Mary Lyndon, *The Environment on the Internet: The Case of the BP Oil Spill*, 3 ELON L. REV. 211 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188605.

⁵ The price of market participation may be that some information that would otherwise be kept private must be made public because of the nature of the commercial activity. Put simply, some trade secrets must give way when broader public interests are at issue. See David S. Levine, in *THE LAW AND THEORY OF TRADE SECRETS: A HANDBOOK OF CONTEMPORARY RESEARCH*, Ed. Rochelle C. Dreyfuss and Katherine J. Strandburg (2011); Mary L. Lyndon, *Trade Secrets and Information Access in Environmental Law*, in *THE LAW AND THEORY OF TRADE SECRECY*; David S. Levine, *Secrecy and Accountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007) (conflict between the values of trade secrecy and accountability and transparency are traditionally present in public infrastructure development); David S. Levine, *The People's Trade Secrets?*, 18 MICH. TELECOMM. AND TECH. L. REV. 61 (2011); Mary L. Lyndon, *Secrecy and Access in an Innovation Intensive Economy: Reordering Information Privileges in Environmental, Health and Safety Law*, 78 UNIVERSITY OF COLORADO LAW REVIEW 465 (2007); *Secrecy and Innovation in Tort Law and Regulation*, 23 N.M. L. Rev. 1 (1993); Thomas O. McGarity & Sidney A.

In fact, as referred to earlier, trade secret claims may interfere with the development of best practices for hydraulic fracturing technology. For example, the kind of baseline testing that can be done to protect and monitor water quality may depend on access to information.⁶ Approaches to baseline testing vary in the prescribed scope and timing of testing. Some consider testing for common background water conditions and “signature” chemicals sufficient⁷ while others argue that adequate testing must determine the presence, level or absence of fracking fluid chemicals specific to each particular well or well type in an area.⁸

The appropriate timing of testing is also debated. For example, some suggest that testing for signature chemicals can be done after the well is fractured while others recommend that it be done beforehand.⁹ Trade secrecy interferes because deferring to trade secrecy assertions may interfere with choosing the best approach.

While we do not take any position on the content of best practices in baseline testing or any other aspect of hydraulic fracturing, we believe that trade secret claims

Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARV. L. REV. 837 (1980); David Michaels & Neil Vidmar, eds., *Symposium on Sequestered Science: The Consequences of Undisclosed Knowledge*, 69 LAW & CONTEMP. PROBS. 1 (2006); Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 Duke L.J. 1619 (2004).

⁶ *Baseline water testing proposal under scrutiny*, Wyoming Tribune-Eagle (July 21, 2012), available at http://www.wyomingnews.com/articles/2013/07/21/news/19local_07-21-13.txt

⁷ *See Responses of Halliburton Energy Services, Inc. to Selected Questions for the Record from Chairman Wyden*, Senate Committee on Energy and Natural Resources Full Committee Forum on Environmental Impacts of Shale Gas Development and Best Practices, May 23, 2013, available at http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=98913ecc-ad16-440f-bffd-ee0a491bc1cb.

⁸ “Baseline water quality testing comes in many sizes. There are tests that will check for the minimum contaminants that can be associated with drilling and there are tests that look specifically for chemicals that are involved in the fracking process. It is recommended that you opt for the most complete water test you can afford to maximize legal protections.” *Baseline Water Quality Testing*, Tip of the Mitt Watershed Council, available at <http://www.watershedcouncil.org/learn/hydraulic-fracturing/baseline-testing>. *See also* Kiparsky, M., and J.F. Hein, *Regulation of hydraulic fracturing in California: A wastewater and water quality perspective*, Wheeler Institute for Water Law & Policy, UC Berkeley School of Law (2013).

⁹ Sofia Plagakis, *Illinois Introduces Strongest Fracking Disclosure Rule in the Country*, Center for Effective Government (March 11, 2013), available at <http://www.foreffectivegov.org/illinois-introduces-strongest-fracking-disclosure-bill-in-the-country>.

should have no role in these best practices decisions. Hydraulic fracturing regulations should provide for disclosure of all information that supports the best assessment and oversight of natural gas extraction.

In fact, trade secret law itself compels this conclusion. Trade secrecy is a narrow doctrine whose essential functions are established: it creates incentives to innovate by providing limited control over secret, commercially-valuable information, and it maintains fair competition through punishment of misappropriation of that information.¹⁰ To that significant extent, it is an essential tool in our national innovation policy.

However, trade secret law does not support withholding EHS data that describes physical risks caused by the trade secret claimant. Trade secret law facilitates sharing in business relationships, but it has little to say about matters outside of its own boundaries. It was not designed to address questions about access to information for reasons other than commercial competition.¹¹ When trade secret interests conflict with other values, confidentiality has often been compromised or overridden.¹²

Nowhere is the mismatch between trade secret law and environmental law and policy more apparent than in the regulation of hydraulic fracturing. Environmental law establishes an expectation that data describing EHS effects will be disclosed.¹³ This principle is standard operating procedure in environmental law, is ethical and provides an important support and stimulus to innovation. Communication obligations are pervasive in the common law and environmental statutes have built upon this foundation. Specific and comprehensive disclosure of pollutants is essential to environmental management. Market players must work within this legal framework.

¹⁰ See Levine *et seq.*, *supra* note 4.

¹¹ *Id.*

¹² See Lyndon, *supra* note 4, *Secrecy and Access* at 466-67 and *Secrecy and Innovation in Tort Law and Regulation* at 7.

¹³ See Lyndon *et seq.*, *supra* note 4.

Indeed, environmental law finds support for its robust disclosure policies in the tort and criminal law upon which it is built. For example, it is hornbook law that one has a duty to take reasonable steps to protect and warn those who are exposed to the risks one creates.¹⁴ Legal duties to transfer risk information appear throughout the law and these duties are to be waived only by the risk bearers, not the risk creator. Access to EHS data is justified in these laws as fair, moral and efficient.

Economists and law makers have supported disclosure as a non-intrusive way to correct market failures that cause health and environmental risks and harms.¹⁵ Access facilitates an array of essential social and market responses that depend upon information production and sharing. Disclosure and warning enable people to know what choices they are making and to protect themselves. Maintaining chemical risk secrecy shifts the burden of uncertainty to those with little capacity to bear it and then compounds the problem by withholding the data necessary to study and respond to the exposure.

In sum, the imposition of trade secret law into environmental regulation hinders a forty-year effort to build the capacity to perceive and understand EHS impacts and to guide the economy toward a less costly relationship with our ecological infrastructure. This has been especially true with respect to chemicals. In the past century, the use of petrochemicals has increased in scale and dramatically new monitoring and detection technologies have developed. These methods now support the ability to reverse engineer the components of many chemical mixtures, though perhaps not the method of producing

¹⁴ Risk communication is a strong requirement in tort law. For example, negligence law imposes a duty to act with reasonable care with respect to third parties. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 7 (2005) (an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm); *Id.* § 12, there is a duty to warn those who may be affected by one's actions. *Id.* §18. Even if adequate warning is given, the defendant can fail to exercise reasonable care by failing to adopt further precautions to protect against the risk if it is foreseeable that despite the warning some risk of harm remains. Warning obligations have been strengthened by case law and also retained as a strong requirement in the RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 2(c), 10, 13, & 18 (1998). *See also* RESTATEMENT (SECOND) OF TORTS §§297(b), 388-405 (1965); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §18 (Proposed Final Draft No. 1, 2005); RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 16 (Discussion Draft 1999).

¹⁵ *See* Lyndon, *The Environment on the Internet*, *supra* note 4 at 225-230 (overview of informational regulation and policy in the environmental context).

them. Commercial rivals will often have the ability to use this technology, whereas, individuals and many government agencies will not have this capacity.

Conclusion

The BLM has the power to write regulations that require disclosure of trade secrets to the BLM, and it should wield that power to serve the public's interest in proper stewardship of our common resources. While intellectual property law like trade secrecy offers innovators some control over market use of valuable information, it does not assure unlimited or even long-lasting control over descriptive data. As a new technology is put to work in the world, it should be evaluated. While agencies may try to accommodate the legitimate commercial concerns of trade secret owners, the assertion of trade secrecy should not wrap the technology in an "invisibility cloak."

Intellectual property law assumes the existence of the broader framework of law, including the common law of torts and environmental law. The law is clear that trade secrecy claims should not be allowed to hinder the BLM in carrying out its goals. To abdicate the responsibility of stewarding our common resources in the name of burdensome regulation would be a high-watermark for the elevation of commercial concerns above all. That cannot, and should not, be the position of an agency as critical to environmental regulation as BLM. Therefore, the Regulations should be amended to require disclosure of all purported trade secrets to the BLM, in advance of the commencement of hydraulic fracturing and with adequate time for the BLM to fulfill its goal to effectively and thoroughly steward our natural resources.

If you have any questions or require further information, please contact the authors of this letter, Mary L. Lyndon (lyndonm@stjohns.edu) or David S. Levine (dlevine3@elon.edu).

Respectfully submitted,¹⁶

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