April 1, 2013

VIA EMAIL AND FACSIMILE

Commissioner Cathy P. Foerster
Alaska Oil & Gas Conservation Commission
333 West 7th Avenue
Anchorage, Alaska 99501

Re: Second Revised Notice of Proposed Changes in the Regulations of the Alaska Oil and Gas Conservation Commission dated January 17, 2013, specifically 20 AAC 25.283, Hydraulic Fracturing

Dear Commissioner Foerster:

We, the undersigned law professors who teach and write about intellectual property and trade secrets, write in support of the Alaska Oil and Gas Conservation Commission (AOGCC) proposed hydraulic fracturing regulations that would provide for the disclosure of information that might in other contexts be deemed trade secrets that cannot be disclosed to the public, under proposed regulation 20 ACC 25.283(h).

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 that addresses all significant risks may legitimately outweigh commercial concerns. To impede debate and discussion of the use of public natural resources in the name of commercial secrecy is to put commercial interests above the prior and more general interest in careful stewardship of the environment. Put simply, some trade secrets must give way when broader public interests are at issue.

By writing in support of these regulations, the undersigned take no position on whether hydraulic fracturing should be conducted in the State of

Alaska or whether such activities actually pose any environmental, public health or safety risks. Rather, we write to note that trade secrecy claims should not impede consideration of important public concerns.[1]

We make three arguments in support of these regulations:

First, it is a basic principle in a democracy that the public shall conduct informed debate and discussion of public matters. To do this, there must be broad access to data about potential environmental, health and safety (EHS)

[1] 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 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.

hazards, even when the disclosure of such information might pose some pecuniary risk to the firms that are introducing the possibility of EHS risks. Economic risks are inherent in market activity, but these cannot be reduced by increasing EHS risks to the public and the environment. Instead, environmental law mandates public engagement with regulation and participation in the management of environmental resources.[2] Moreover, the price of serving the public may be that some information that would otherwise be kept private must be made available because of the nature of the commercial activity.

Second, effective environmental management requires broad disclosure of specific data that describes any discharges into the environment — including chemical identity, volume and locations of each chemical discharged – and data on health and ecological effects. For example, although pollution may be abandoned by its commercial source, often the impact does not disappear. It may persist and be active; repeated releases of pollutants will generate wider distribution and more complex interactions.[3] Thus, the social costs of the original secret become greater with the passage of time, as the effect becomes more costly to identify and remedy.[4] Like pollution effects, scientific

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[2] Lyndon, *supra note* 1, *Secrecy and Access in an Innovation Intensive Economy* and *The Environment on the Internet*.

[3] *See* John S. Applegate, *The Temporal Dimension of Land Pollution: Another Perspective on Applying the Breaking the Logjam Principles to Waste Management*, 17 N.Y.U. ENVTL. L.J. 757(2008); Daniel A. Farber, *Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty*, 37 U.C. DAVIS L. REV. 145 (2003) (explaining that complex systems require careful monitoring and repeated interventions as they evolve).

[4] Scientific understanding of the health and environmental costs of pollutants may develop over decades. See Carl F. Cranor, LEGALLY POISONED: HOW THE LAW PUTS US AT RISK FROM TOXICANTS (Harvard University Press 2011); for a review of this book, see *The Toxicity of Low-Dose Chemical Exposures: A Status Report and a Proposal, Reviewing Carl Cranor, Legally Poisoned: How the Law Puts US*

knowledge also evolves over time. Thus, risk management is an iterative process and access to the entire stream of pollution information, not a peek or a snapshot, is needed. Trade secrecy would restrict full understanding of pollution events and their impacts.

Effective environmental management should strive for efficiency, but secrecy produces misallocations. Instead of allowing for full study of pollution's costs by all interested parties at the beginning of a project and of monitoring its costs over time, secrecy shifts costs to the public and to the future. Rather than fully valuing present resources, secrecy enables appropriation of environmental

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at Risk from Toxicants, 52 JURIMETRICS 457 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226672. Secrecy makes scientific research more difficult and more costly. *See, e.g.*, Andrew Vickers, *Cancer Data? Sorry, Can't Have It*, N.Y. TIMES, Jan. 22, 2008, at F8; Barry Meier, *Contracts Keep Drug Research Out of Reach*, N.Y. TIMES, Nov. 29, 2004 (describing effects on data availability of contracts between drug companies and academic researchers); Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 LAW &. CONTEMP. PROBS. 21 (2006). Some key tools, such as mass balance accounting, have been blocked. Resistance to reporting the amounts of chemicals firms discharge has hindered assessment of environmental loading and ecosystem effects. Robert K. Klee, *Enabling Environmental Sustainability in the United States: The Case for a Comprehensive Material Flow Inventory*, 23 STAN. ENVTL. L.J. 131, 156 (2004) (arguing that material flow/mass balance information would enable transition to more efficient system).

Secrecy also can impose costs on individuals and put their health at risk. For instance, in 2009, Cathy Behr, a nurse in Colorado, fell seriously ill after treating a worker who had been injured in a chemical spill. Her doctors diagnosed chemical poisoning, but the manufacturer of the product she was exposed to would not disclose its full ingredients, because it considered them proprietary. Ms. Behr has partially recovered, but she continues to have respiratory problems. She has been left with uncertainty about her future health and an awareness of the limitations on her political options. "I'd really like to know what went wrong", Mr. Behr has said. "As citizens in a democracy, we ought to know what's happening around us." Lyndsey Layton, *Use of Potentially Harmful Chemicals Kept Secret Under Law*, WASH. POST, Jan. 4, 2010, at A1.

resources with limited accountability. To the extent that this distortion may be present in the relation of hydraulic fracturing to the water and wildlife resources it affects, the public should be allowed to fully assess its impact, if any. [5]

This is not an exceptional situation; indeed, communication obligations are pervasive in the common law and environmental statutes have built upon this foundation.[6] Both the common law and regulation affirm the importance of access to information about risks. For example, environmental impacts can follow predictably from a firm's decision to distribute pollution or product ingredients in circumstances that will lead to exposure. Exposure is expected, not a surprise. The choice to release pollutants triggers familiar obligations to communicate, even where there may be a commercial impact on the entity disclosing such information.

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[5] Water is valuable and not truly renewable or even substitutable in many ecosystems. Water use and supply are increasingly discussed in terms of shortages and many believe that globally and in particular regions, we are reaching "peak water." See Peter H. Gleick & Meena Palaniappan, *Peak Water Limits to Freshwater Withdrawal and Use*, 107 PROC. NAT'L ACAD. SCI. 11155 (June 22, 2010), available at http://www.pnas.org/content/107/25/11155.full.pdf.

[6] 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). 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. *Id.* 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). For discussion of the role of public and local participation in environmental regulation, see Lyndon, supra, note 1, *Secrecy and Access in an Innovation Intensive Economy, at 509-515* and *The Environment on the Internet*, at 224-244.

Third, trade secrecy law should not be used as a means to impede public access to EHS information. Trade secrecy's essential functions are established: it serves the dual purposes of incentivizing creation of information by allowing commercial secrecy to be protected, and maintaining fair competition through punishment of misappropriation of information.[7] Thus, it supports incentives to innovate by facilitating data sharing in business relationships and providing control over secret, commercially-valuable information. These functions are not directly served by preventing the disclosure of EHS information necessary for informed debate of fundamental public concerns.

Indeed, trade secret law has little to say about matters outside of its own boundaries.[8] It was not designed to address questions about access to information for reasons other than commercial competition.[9] It says nothing about whether the public might have a general interest in information at all, much less for reasons of environmental, health or safety. Thus, the AOGCC's

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[7] *Supra note* 1; see also Sharon Sandeen & Elizabeth A. Rowe, CASES AND MATERIALS ON TRADE SECRET LAW 13-15 (West 2012).

[8] It is not clear that EHS data can be legitimately claimed as trade secret information. See Lyndon, *Trade Secrets and Information Access in Environmental Law*, supra note 1, discussing perverse effects of allowing trade secrecy to operate within EHS law. For instance, trade secret law is concerned with commercial relationships, not harm to individuals or to public resources; it would seem that discharge of pollutants abandons any secrecy claim that might otherwise attach. Where high-tech reverse engineering is available, "secret" data is more available to commercial rivals than to exposure victims. *See* Lyndon, *Secrecy and Innovation*, *supra note* 1 at 6-10.

[9] Id; *see also* Levine, *Secrecy and Unaccountability, supra note* 1, at 150 ("courts, commentators, and authors of model codes and restatements have developed trade secrecy's parameters by conceptualizing the commercial actor in the business world competing with his rivals for commercially valuable information.")

proposed disclosure regulation, 20 AAC §25.283(h), adopts the correct stance: trade secrecy should not impede disclosure of information when the information describes public risks that the trade secret claimant is itself creating.[10]

Indeed, when trade secret interests conflict with other values, confidentiality interests have been compromised or overridden.[11] Here, a similar result should occur: the fact that a firm's competitors might be interested in information does not insulate a firm from the implications of the activity that the information describes. Trade secret law does not and should not exempt a firm from participation in the larger legal system, including warning and harm prevention.[12]

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[10] Trade secret proponents may claim that they are being deprived of "property," but even full-blown property rights do not legitimate harming third parties or avoiding duties. The literature on the "tragedy of the commons," the fundamental parable of environmental law, laments the barriers to collective action to manage common resources, but secrecy exacerbates this problem by blocking efficient or sustainable allocation of resources. It is, in effect, a claim to unregulated access to resources.

[11] For instance, trade secret law balances the rights of employers to control the use of information and employees' right to work and use their skills and knowledge. Steven Wilf, *Trade Secrets, Property, and Social Relations*, 34 CONN. L. REV. 787 (2002). Administrative agencies are poorly positioned to evaluate and monitor trade secrecy claims and this function is resource intensive. See Lyndon, *supra note* 1, *Secrecy and Access in an Innovation Intensive Economy*, at 502-503, 516-518, and *Secrecy and Innovation in Tort Law and Regulation* at 33-40.

[12] The Third Restatement of Unfair Competition states: "The disclosure of another's trade secret for purposes other than commercial exploitation may implicate the interest in freedom of expression or advance another significant public interest. …[A] privilege is likely to be recognized … in connection with the disclosure that is relevant to public health or safety, or to the commission of a crime or tort, or to other matters of substantial public concern." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 cmt. c (1995) (discussing improper use of disclosure).

However, a trade secret exemption for EHS information would achieve that very outcome: it would shield the holders of this information from informed public scrutiny and examination. Instead of cooperating in the broader system that works to preserve scarce common resources, trade secrecy claimants like those engaging in hydraulic fracturing assert an entitlement to use of natural resources without accountability, perhaps to waste. The key word, however, is *perhaps*, because absent information, the AOGCC and public simply won't know.[13]

Thus, access to EHS information creates enormous public benefits while secrecy impedes efficiency by delaying accountability and response and obscuring risks that become more costly with time. These distortions are particularly significant in environmental risk management, where latent externalities are endemic.[14] Trade secrets must be made available to the AOGCC and the public so that these issues can be addressed.

Conclusion

The AOGCC proposes a regulation that serves the broader public interest in informed decision-making. Trade secrecy should have a limited role in this realm. Instead, the AOGCC's access and disclosure rules should conform to principles of risk communication. Disclosure aligns social needs with market and innovation imperatives and facilitates public best practices in environmental

[13] Indeed, this raises a point often ignored: by disclosing alleged trade secrets, the hydraulic fracturing industry may be able to assure the public that its activities pose no EHS risks. Absent such information, guesswork replaces actual informed decision-making, which serves no one's interests.

[14] While there could be some pecuniary harm to trade secret holders if such secrets were made public through a public records request, the gains associated with public disclosure of this information outweigh those potential losses. Moreover, patents can also serve as an imperfect but valuable substitute in many cases for trade secrecy protection.

risk management. Such should be the state of economic affairs and information flows in an enlightened, modern, technologically-advanced democracy.

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Respectfully submitted,[15]

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