



California Fracking Rules Plan Stirs Trade Secrets Fight

By Alison Vekshin
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A California proposal to regulate the chemicals used by oil companies in hydraulic fracturing is stirring a battle over industry assertions of trade secrets protection and environmentalist calls for disclosure to shield public health.

State officials developing rules for fracking say they have to walk a fine line to avoid lawsuits by both the public and the industry, circumscribing their proposal.

“What we’re doing with the regulation is limiting how often we would get sued,” said Jason Marshall, chief deputy director of California’s Conservation Department, which oversees oil and natural gas production.

California, the fourth-largest oil-producing state, is wrestling with the potential hazards of fracking to unlock an estimated 15.4 billion barrels of oil in a deposit known as the Monterey shale. The state is the latest attempting to regulate the

fluids used in fracking, which shoots a mixture of water, sand and chemicals underground to access dense rock formations.

Texas, Louisiana, Montana, New Mexico and North Dakota are among those requiring the chemicals to be disclosed, while leaving it to energy companies to decide what they label secret.

The industry “is attempting to exempt itself from the basic regulation of its activities by virtue of arguing that its commercial interests will be damaged if secrets are revealed,” said David Levine, a law professor at Elon University in Greensboro, North Carolina, who specializes in intellectual property.

State Regulations

Dealing with trade secrets is nothing new for states, Levine said, citing regulations that require voting-system vendors to reveal the source code in their machines to election officials, even if it’s privileged information, to assure the integrity of balloting.

California’s initial proposal on fracking, released in December, would call for companies to disclose a trade secret to a public agency if it’s needed to investigate or respond to a spill. It would also require disclosure to a physician to diagnose or treat a patient or respond to a medical emergency.

“We would be having it available when we need it,” Marshall said. “The operators are required to maintain that information, they just don’t have to tell it to us until we need it as regulators.”

California’s constitution requires public access to government records unless exempted by law. The agency could face a lawsuit from the public if it withheld requested data, or a lawsuit from an oil company for violating trade-secret protections if it released the information.

Block Release

Marshall said the agency would prefer to have statutory authority from the Legislature like that employed by the

Toxic Substances Control Department. When the agency responds to a public records request, it gives notice to the company involved. The company can try to persuade a judge that the data is a trade secret and get an injunction to block the release.

Environmental advocates such as Kassie Siegel, a lawyer at the Center for Biological Diversity, argue that regulators can't protect the public from chemicals if they don't know what's being used. Her Tucson, Arizona-based organization sued California in January for allegedly failing to regulate fracking.

"California regulators have proposed to not even receive the information that's claimed as a trade secret from industry in the first place," Siegel said.

Millions Invested

Houston-based Halliburton Co. (HAL), the world's largest provider of hydraulic-fracturing services, spends years and millions of dollars developing its products, spokeswoman Susie McMichael said. There are different fracturing-fluid formulas for different geological formations, she said.

"If disclosure requirements from governing bodies took away protection for this

intellectual property, requiring that certain ingredients and recipes of these products had to be publicly disclosed, Halliburton's competitors could use the information to unlock our proprietary product formulas," McMichael said.

The company is working to come up with an approach that will provide "as much information as possible to the public while still protecting trade secrets in a way that provides incentives for the industry," she said.

'Overly Broad'

Eleven states rely on FracFocus.org, a voluntary registry used by Exxon Mobil Corp. (XOM) and other energy companies, as a compliance tool, according to a Harvard Law School study published April 23. Yet spotty reporting and an "overly broad" allowance for trade secrets make it inadequate, the study said.

The U.S. Bureau of Land Management should establish basic requirements for disclosure and penalties for failure to make reports, the study said.

In Wyoming, environmental groups have asked the state Supreme Court to compel the Oil and Gas Conservation Commission to reveal fracking chemicals, according to an April

17 statement on the website of Earthjustice, a nonprofit law firm based in San Francisco.

The commission has approved more than 50 trade-secret exemption requests since the state adopted disclosure rules in 2010, according to the statement.

Trade secrets, prior notification of fracking activity and water-quality testing are the parts of California's proposed regulations getting the most attention, Mark Nechodom, the Conservation Department's director, said April 19 at a workshop in Santa Barbara to gather public input.

Similar workshops have been held in Los Angeles, Bakersfield and Sacramento on the proposal, which includes rules for storing and handling fracking fluids, well monitoring after fracking and preventing water contamination. A final workshop will be held April 30 in Monterey.

The department hopes to finalize the rules in the next year to 18 months, according to Marshall, the chief deputy director.