HARVARD LAW SCHOOL
Environmental Law Program
POLICY INITIATIVE

COMMENTS ON

Secretary of Energy Advisory Board
Task Force Report on FracFocus 2.0

Kate Konschnik, Director

Harvard Law School Environmental Policy Initiative

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Members of the FracFocus 2.0 Task Force:

Thank you for inviting me to testify before you on January 6, 2014. As I indicated then, I support the disclosure recommendations you made as part of the Secretary of Energy Advisory Board's Shale Gas Development Subcommittee, and applaud your continued engagement on this issue.

I read the Task Force Draft Report with great interest, and I support the substantive recommendations you have made. I offer comments to suggest clarification on several points, and reference state laws that could provide a model for some of the recommendations. I also make additional suggestions for improvement of FracFocus and its interface with the states that use this website for regulatory purposes.

My comments respond to five of the seven questions posed by Secretary Moniz to the Task Force. I limited my comments to those questions that I have focused on in my own research.

If you have additional questions, or if I can provide any support to the audit or trade secret study and state review recommended in this report, please do not hesitate to contact me.

Sincerely,

Kate Konschnik

Kate Konschnik
Director
Harvard Environmental Policy Initiative

COMMENTS

(1) EVOLUTION OF THE OPERATION OF FRACFOCUS 2.0 TOWARD TIMELY, COMPLETE, AND ACCURATE DATA STORAGE.

Task Force Report: While FracFocus initially "directed those using the site to disclose all chemicals used in fracturing fluids that appear on Material Safety Data Sheets," FracFocus 2.0 now asks for "'additional ingredients not listed on MSDS,'" as well.[1]

Comment #1A: When disclosure is limited to those chemicals listed on MSDS, "a large universe of chemicals frequently used in hydraulic fracturing treatments goes unreported."[2] Therefore, it is significant that the FracFocus 2.0 form includes a heading that triggers entry of non-MSDS chemicals.[3]

> Ingredients shown above are subject to 29 CFR 1910.1200(l) and appear on Material Safety Data Sheets (MSDS). Ingredients shown below are non-MSDS.

Perhaps in light of this new heading, the Task Force does not make any recommendations relating to the listing of non-MSDS chemicals. However, three sets of recommendations could better ensure that all non-MSDS chemicals are being reported on FracFocus 2.0 forms:

1. <u>The site should consistently direct companies to list all non-MSDS chemicals on the forms, and to educate site visitors that this is required.</u> Currently, under the site's Frequently Asked Questions, in response to "What Chemicals Are Being Disclosed on this Website?," the following answer is provided:

   > All chemicals that would appear on a Material Safety Data Sheet (MSDS) that are used to hydraulically fracture a well except for those that could be kept proprietary based on the 'Trade Secret' provisions related to MSDS found on the Trade Secret link at 1910.1200(i)(1).

   The persistence of this language may be an oversight. However, it could confuse companies about their reporting obligations, particularly when they are operating in states whose laws do not explicitly direct disclosure of non-MSDS chemicals.[4] Therefore, the Task Force should suggest that FracFocus review all site content to consistently direct companies to disclose all chemicals, whether or not they appear on MSDS.

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[1] Task Force Draft Report, at 6-7.
[2] The Secretary of Energy Advisory Board Shale Gas Production Subcommittee, Ninety-Day Report (Aug. 11, 2011), at 23-24.
[3] The form reads, Ingredients shown above are subject to 29 CFR 1910.1200(l) and appear on Material Safety Data Sheets (MSDS). Ingredients shown below are non-MSDS.
[4] For instance, Utah's rules simply direct that "[t]he amount and type of chemicals used in a hydraulic fracturing operation shall be reported to www.fracfocus.org," Utah R649-3-39.

2. The reporting exception for "Field Developed Products" should be examined. The FracFocus 2.0 form reads along the bottom, "For Field Developed Products (products that being with FDP), MSDS level only information has been provided." Sometimes operators and their service companies must make real-time decisions about the chemicals used in fracturing, to respond to field conditions. However, it is not immediately clear why these decisions should lead to lower disclosure about the chemicals being used. Disclosure is not usually required for at least a month following well completion, giving service companies time to collect documentation about any chemicals or chemical products which may have been added at the site. Moreover, it is not clear how much a product needs to be changed in the field before it may be considered "Field Developed." The Task Force should seek more information about this designation and determine if a universal exemption from reporting non-MSDS chemicals in these products makes sense. In addition, the Task Force might consider including in its audit recommendation that an auditor review the rate of chemical additives reported as "Field Developed," to determine how often operators report products as such.

3. The FracFocus form should require a submitter to list non-MSDS chemicals, or to affirm that the treatments contained only MSDS chemicals. Many FracFocus 2.0 forms list only MSDS chemicals. When this occurs, it is unclear whether that means the operator or service company used only MSDS chemicals in treatments at the well, or whether the submitter does not think there is a legal obligation to list non-MSDS chemicals. It is important, therefore, that the FracFocus form prompt the submitter to list non-MSDS chemicals or to affirm, by checking a box, that the treatments contained only MSDS chemicals. The Task Force might include this recommendation, to make it clear whether all chemicals have been disclosed on the form.

Task Force Report: "Currently [FracFocus] disclosure does not require any information about the chemistry of the make-up water that is traditionally 90% by weight of the fracturing fluid. … FracFocus should make provisions for submissions to include more information about the water used as a base fluid, for example whether it is 100% fresh water or does it contain a percentage of recycled fracturing fluid."[5]

Comment #1B: A number of states require information about recycled water use. These requirements could inform what FracFocus should request. For instance, Pennsylvania requires well operators to report in their completion report the total volume of base fluid, a list of water sources used and their volumes, and the total volume of recycled water used in the stimulation fluid.[6] Ohio not only requires operators to report the amount of recycled water used to stimulate a well, but also "the well that is the source of the recycled fluid or the centralized facility that is

[5] Task Force Draft Report, at 7, 8.
[6] 58 PA. CONST. STAT. § 3222(b.1)(1) (2012).

the source of the recycled fluid."[7] Meanwhile, some states require detailed reporting from companies receiving permits to treat produced water, flow-back water, and drill pit fluid for use and re-use. For instance, Texas has required recycling companies to identify each source well; each well where the recycled water was re-used; dates of recovery and re-use; classification of the water from each well (produced water, fracture flow-back water, drill pit fluid, or a mixture); and analytical results of certain parameters prior to treatment and periodically thereafter (once a week or after every 10,000 barrels collected).[8] In 2013, Texas exempted re-use of recycled water in oil and gas wells from this permitting requirement – and therefore the recordkeeping requirements – indicating the exemption would encourage recycling.[9]

These examples indicate it is possible to request information about recycled water use, such as:

- Amount of recycled water used (as a total and a percentage of the overall base fluid);
- Source wells of the recycled water;
- Type of recycled water (produced water, fracturing fluid flow-back, drill muds, or a mixture); and
- Certain characteristics of or chemical constituents in the recycled water.

The Texas example suggests that a balance may need to be struck, between the interest in information and an administrative burden that might discourage the re-use of water. (Of course, if states required recycling, the burden of reporting about the source and make-up of recycled water would be less of a concern.)

FracFocus might enable operators to link wells, to indicate that produced water or flow-back from one well was re-used in another. While only offering a snapshot (in other words, not reflecting the chemical changes that occur in wastewater over time), this linkage would shed light on additional chemicals that might be found in the new well. Alternatively, the FracFocus form could ask for a recitation of the chemical constituents found in recycled water just prior to its re-use in a new well, without requiring information about the source wells.

Task Force Report: "Examination of a limited sample of records from FracFocus 2.0 indicates a variety of errors, partly due to many different companies contributing data to an individual FracFocus record."[10] To improve this situation, the Task Force recommends that FracFocus (1) "examine the entire data entry workflow and structure" to find ways to simplify the process and assure accuracy; (2) expand and improve the site's "automatic validation system;" for instance,

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[7] OHIO REV. CODE ANN. § 1509.10(A)(9)(b) (2012).
[8] See, e.g., Texas Railroad Commission, Authorization to Treat Produced Water, Fracture Flow-back Water, and Drill Pit Fluid for Use and/or Re-Use, Permit No. MR-0033, http://www.rrc.state.tx.us/environmental/environsupport/disposalfacilitypermits/MR0033.pdf, at 6-7.
[9] Texas Railroad Commission, Amendments to § 3.8, http://www.rrc.state.tx.us/rules/adopt-3-8-SIG-version-March26-2013.pdf.
[10] Task Force Draft Report, at 7.

to assure that the correct Chemical Abstract Service (CAS) numbers are used to identify a chemical; and (3) flag incorrect entries on the FracFocus forms.[11]

Comment #1C: Throughout the draft report, the Task Force notes that robust disclosure can build public confidence in the hydraulic fracturing process. The input of accurate and correct information is critical to this endeavor.

By designing a data entry system that facilitates input of accurate and correct information, FracFocus could significantly enhance the quality of disclosures. One scholar has used the mailbox as a great visual example of this concept.[12] Rules can dictate behavior (for instance, the federal law against mail tampering), but compliance rates can be improved by designing systems that make it physically more difficult to violate a rule than to comply. I can't access a letter that someone has dropped into a blue mailbox at the corner, without large tools and brute force. Therefore, I am much less likely to tamper with that letter than if it were deposited into an open straw basket. Designing compliance encouraging systems is even more helpful when poor data quality is likely the result of mistake rather than an intention to mislead.[13]

The Task Force is right to single out Chemical Abstract Service numbers as a focus of new data entry controls. This would be a good first start. It might also be useful for the system to flag if a product with the same name, supplier, and purpose had previously been entered into the system. This could cut down on data entry time, if the submitter could click on the previously entered list and import it to the list for the current well. This could also cut down on inconsistent trade secret assertions – if all of the ingredients for a product were previously listed, then no ingredient should be shielded from disclosure in the current well.

In addition, the Task Force should consider recommending design enhancements that would discourage the overuse of trade secret assertions.

1. If a chemical must meet the definition of "trade secret" to be protected from disclosure, the data entry system should not allow terms such as "not listed"[14] or "not available" to be entered as a reason not to disclose the name or CAS of a chemical. Unless the term "trade secret" is used, the data entry system could highlight any missing information, to flag to the submitter and to the general public that the form is not complete.

2. States and the developers of FracFocus need to clarify the standards for non-disclosure. If disclosure exemptions are limited to trade secret assertions allowed under OSHA, as

[11] Task Force Draft Report, at 8.
[12] Cheng, E. K., *Structural Laws and the Puzzle of Regulating Behavior*, 100 N.W. U. L. REV. 2 (2006).
[13] At the January 6 Task Force meeting, Apache executive Cal Cooper testified that incorrect entries are often the result of data entry mistakes by clerical staff.
[14] See, e.g., FracFocus form for Well # 05-123-33301. (NOTE: This form predates use of Form 2.0, but nothing has changed on the form regarding trade secret assertions.)

indicated by the FracFocus website, then "proprietary"[15] and "confidential"[16] assertions may not be appropriate. On the other hand, some states allow these terms to be used to protect information from disclosure under general public records laws. As will be discussed in **Comment #2**, it is important to determine what laws govern each submission and rationale for non-disclosure.

3. The data entry system should require a submitter to click through a number of questions for every chemical labeled "trade secret," before making this assertion. The questions might include:
   - Do you know the requirements for asserting a trade secret in the state where your well is located?
   - Have you submitted the trade secret information to the state, if that is required?
   - Have you substantiated this claim to the state, if that is required?
   - Do you concede that the state is in possession of this form, for purposes of triggering the state public information law and any right to challenge trade secret assertions that flows from that law?

The data entry system could further require someone with legal authority to bind the company to click on a certification page, that the state trade secret procedures have been met. It would be important to create a system that discourages over-use of the trade secret exemption, while enabling companies wishing to protect truly proprietary information to do so.

Task Force Report: "In some instances, the FracFocus disclosure form does not explicitly call for information required by state disclosure rules. … The Task Force recommends that states be attentive to ensure compliance with more specific state disclosure requirements, especially where FracFocus requires less or different information."[17]

Comment #1D: It is understandable that the developers of FracFocus may not want to undertake the legal obligation of tracking state disclosure laws and offering state-specific forms that comply with those laws. However, as we pointed out in an April 2013 white paper, *Legal Fractures*,[18] when data entry fields are not available to meet a unique state disclosure requirement, compliance rates for that requirement are low. As discussed in **Comment #1C**, the design of the system may encourage or discourage compliance with state-specific requirements.

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[15] See, e.g., FracFocus form for Well # 17-017-34954. (NOTE: This form predates use of Form 2.0, but nothing has changed on the form regarding trade secret assertions.)
[16] See, e.g., FracFocus form for Well # 42-461-38034. (NOTE: This form predates use of Form 2.0, but nothing has changed on the form regarding trade secret assertions.)
[17] Task Force Draft Report, at 8-9.
[18] K. Konschnik, M. Holden, and A. Shasteen, *Legal Fractures in Chemical Disclosure Laws*, Harvard Law School, Environmental Law Program, April 23, 2013, http://blogs.law.harvard.edu/environmentallawprogram/files/2013/04/4-23-2013-LEGAL-FRACTURES.pdf.

The Task Force suggests that states "be attentive." However, a more concrete recommendation could be made to states and FracFocus: When a state decides to require disclosures through FracFocus, the state should review the FracFocus form and indicate to FracFocus if an additional field may be required. The developers of FracFocus should be receptive to these suggestions for additional fields; alternatively, state disclosure laws could condition use of FracFocus on the inclusion of these additional fields by a date certain. The burden would still be on the submitter to know which fields to complete, but the existence of the fields would flag the potential need to submit a particular piece of information.

In addition, the FracFocus data entry interface should include a warning that the submitter should consult state law to ensure the submittal meets all state-specific requirements.

The version of FracFocus used in Canada suggests another model. There, companies submit information electronically on province-specific forms. The provincial site is directly linked to FracFocus, and provincial entries populate the standard FracFocus.ca form. Therefore, the provinces know they have received the information they requested. Moreover, if companies submit changes to the province – for instance, to reflect a change in well ownership – the update is also sent to FracFocus.ca which updates automatically.[19]

Task Force Report: "The Task Force believes that an understanding of how well this disclosure system is working would be enhanced if an independent audit were conducted to assess the accuracy and compliance of the process." The Task Force recommends that audit cover data quality control and trade secret exemption claims.[20]

Comment #1E: This is an excellent idea. Within the bounds of federal contracting requirements, the Task Force should play some role in receiving and interpreting the results of the independent audit. Given the experience the Task Force has with the issue and the diversity of perspectives that it represents, its analysis would be well-received and accepted by a wide range of stakeholders. I would further suggest that the audit include the following inquiries:

- Prevalence of the use of the term "Field Developed Products" to limit disclosure of chemicals for those products to those listed on MSDS; and
- Inconsistency of trade secret assertions over ingredients of the same fracturing fluid additive, across wells.

The Task Force and DOE may need to clarify what this independent audit, and the trade secret studied proposed in response to Question 3, should cover.

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[19] April 29, 2013 letter from Paul Deakins, Commissioner and Chief Executive Officer, BC Oil and Gas Commission, to Kate Konschnik, Policy Director, Harvard Environmental Law Program.
[20] Task Force Draft Report, at 9.

(2) THE EXTENT TO WHICH STATE AND FEDERAL REGULATORY BODIES ARE USING FRACFOCUS TO MEET REGULATORY DISCLOSURE REQUIREMENTS.

Task Force Report: "FracFocus has evolved beyond a strictly voluntary effort . . . [a]s of November 2013, over 20 states have adopted some level of disclosure requirements, of which 14 states require the use of FracFocus."

Comment #2: The Task Force does not make any recommendations relating to the use of FracFocus as a regulatory tool. However, there are fundamental questions that need to be addressed– namely, who is overseeing the submissions, and which laws govern.

North Dakota provides an interesting example. Under North Dakota's general public records laws, any person may request "records," which includes:

> Recorded information of any kind, … which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.[21]

North Dakota agencies may withhold "trade secret, proprietary, commercial, and financial information" if "it is of a privileged nature and it has not been previously publicly disclosed."[22] (This exemption is somewhat broader than an exemption based solely on the definition of a trade secret.) If a North Dakota agency withholds information on these grounds, the requester may request the attorney general's opinion of the denial, and the attorney general may review the information to form her opinion. The requester may also file a civil action.[23]

North Dakota's hydraulic fracturing disclosure rule makes no reference to the generally applicable public information law. Instead, the rule states that, "the owner, operator, or service company shall post on the fracfocus chemical disclosure registry all elements made viewable by the fracfocus website."[24] As noted above in **Comment #1A**, the FracFocus site states that all chemicals should be disclosed "except for those that could be kept proprietary based on the 'Trade Secret' provisions related to MSDS found on the Trade Secret link at 1910.1200(i)(1)." This citation to OSHA requires that the trade secret claim can be supported.

In this scenario, it is unclear which rules apply to a trade secret claim. North Dakota's public information law applies to records in the possession or custody of a public entity or its agent. Information disclosed to FracFocus may or may not meet this threshold requirement – North Dakota must download or otherwise receive copies of each FracFocus form,[25] or FracFocus must

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[21] N.D. CENT. CODE § 44-04-17.1(16).
[22] N.D. CENT. CODE § 44-04-18.4.
[23] N.D. CENT. CODE § 44-04-21.1(1).
[24] See, e.g., N.D. CENT. CODE § 43-02-03-27.1(1)(g) (for stimulation performed through a frac string run inside the intermediate casing string).
[25] At the January 6 Task Force meeting, North Dakota Department of Mineral Resources official Mark Bohrer testified that state employees download FracFocus forms.

be acting as an agent of North Dakota. Faced with uncertain applicability of the public records law, landowners near a well or other members of the public may not know if they can seek additional information about the chemicals being used, or challenge a trade secret assertion posted on FracFocus. Beyond this, North Dakota's hydraulic fracturing disclosure law merely directs disclosure of all elements "viewable" on fracfocus. This might mean that companies are directed to follow the FracFocus site's reference to OSHA rules, and limit their non-disclosures to those chemicals that meet the definition of a trade secret. North Dakota's situation is by no means unique.[26] It is imperative that states and the developers of FracFocus determine what law should apply to trade secret assertions on the site.

(3) UNDERSTANDING THE BREADTH OF FRACFOCUS, HOW FREQUENTLY COMPANIES ARE USING THE PROPRIETARY EXEMPTION TO AVOID DISCLOSURE OF FRACTURING FLUID COMPOSITION, AND THE STANDARDS FOR THE USE OF THIS EXEMPTION.

Task Force Report: "The Task Force believes that full disclosure of all known constituents added to fracturing fluids is desirable. . . . The Task Force is challenging FracFocus to operate in a manner that encourages full disclosure with few, if any trade secret exceptions."[27]

Comment #3A: These statements echo – and the draft report explicitly endorses – statements made by the SEAB Shale Gas Development Subcommittee in 2011.[28] Given the diversity of backgrounds on the Task Force, this is a strong endorsement of full disclosure. However, to give real meaning to these statements, states and the developers of FracFocus should clarify which trade secret or other proprietary information standards will apply to information disclosed on FracFocus (see **Comment #2**).

Task Force Report: "[T]rade secret protection generally can be accomplished by reporting a list of products and chemicals added without disclosing which chemical is in each product."

Comment #3B: Dis-aggregating the ingredients of chemical product should overcome concerns of reverse-engineering and enable the full disclosure of all chemicals used down hole. Oklahoma[29] and Colorado[30] already follow this format and could serve as useful models for other states and for FracFocus.

Task Force Report: "[T]hree steps should be taken to further explore ways to reduce the use of the trade secret exemption:" *First*, the Task Force proposes a study of FracFocus to determine

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[26] But see WYO. ADC OIL GEN. Ch. 3, § 45(f) (citing WYO. ST. ANN. § 16-4-203(d)(v)). Wyoming explicitly incorporates its generally applicable public information law into the hydraulic fracturing rule.
[27] Task Force Draft Report, at 10.
[28] The Secretary of Energy Advisory Board Shale Gas Production Subcommittee, Ninety-Day Report, at 24. See also Task Force Draft Report, at 14 ("The Task Force believes the standard for disclosure exemption should be very high").
[29] OKLA. ADMIN. CODE § 165:10-3-10(b)(1)(H).
[30] 2 COLO. CODE REGS. § 404-1:205A(b)(2)(A)(xi).

"the nature and extent of trade secrecy claims across chemicals, states, operators, suppliers, and time."[31]

Comment #3C: The proposed study is a critical piece of the puzzle, to document the rate of disclosure on FracFocus, and to determine whether nondisclosure is truly justified under standard trade secret definitions.

However, the study may not capture the full nature and extent of nondisclosures, without tracking the number of chemicals undisclosed for reasons *other than trade secret protection*, as well as the inconsistency of trade secret assertions over the same chemicals from well to well. Further, where the identity of a chemical has been withheld, the study should track the percentage of entries that include an adequate description of the chemical family, which would provide at least some information for medical treatment and long-term public health studies. In my reviews of FracFocus submittals, I have discovered that descriptors are often missing or vague ("surfactant blend,"[32] or "proprietary cross linker,"[33] for example).

Therefore, I would further suggest that the audit include the following inquiries:

- The number of nondisclosures justified as "confidential," "proprietary," "not listed," or some other assertion than "trade secret;"
- Where a chemical's identity is not disclosed, the percentage of entries where a descriptive chemical family name is provided; and
- Inconsistency of trade secret assertions over ingredients of the same fracturing fluid additive, across wells.

The Task Force and DOE may need to clarify what the independent audit proposed in response to Question 1, and this report, should cover.

Task Force Draft Report: *Second*, the Task Force proposes a study by STRONGER of state standards for asserting and confirming trade secret protection for certain chemicals. States could then use the STRONGER "mechanism to craft and adopt stringent criteria for trade secret exemption to disclosure and a process for validating compliance."[34]

Comment #3D: The District of Columbia and 47 of the 50 states have adopted the Uniform Trade Secret Act definition of trade secret, which provides the test for asserting a trade secret:

- ✓ [I]nformation, including a formula, pattern, compilation, program device, method, technique, or process

[31] Task Force Draft Report, at 13-14.
[32] See, e.g. FracFocus form for Well # 42-439-36203. (NOTE: This form predates use of Form 2.0, but nothing has changed on the form regarding chemical family descriptions.)
[33] See, e.g. FracFocus form for Well # 42-127-34857. (NOTE: This form predates use of Form 2.0, but nothing has changed on the form regarding chemical family descriptions.)
[34] Task Force Draft Report, at 14.

- ✓ that derives independent economic value, actual or potential, from
  - o not being generally known to,
  - o and not being readily ascertainable by proper means by,
- ✓ other persons who can obtain economic value from its disclosure or use,
- ✓ and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[35]

What changes from state to state are the *procedural* steps for meeting this test. In some jurisdictions, a company need only write "trade secret" instead of the chemical's identity on the submittal. Other jurisdictions require substantiation of the claim;[36] certification as to the truth and accuracy of the submittal;[37] and submittal of the trade secret information itself.[38] (NOTE: The Task Force mentions the use of certifications as part of its next proposal, but they fit more naturally here, in the submit-and-substantiate phase.)

I would suggest that the STRONGER study include the following inquiries:

- State exceptions to non-disclosure, for medical situations,[39] emergencies,[40] and for remediation and study purposes;[41] and
- Trade secret assertion rates for chemical information submitted directly to states, rather than to FracFocus.

Finally, it appears the Task Force intends to focus this study on the legal justification for asserting trade secret protection in the first instance. I would suggest that the STRONGER study review state law for agency review of trade secret assertions, and public challenge to those assertions, as well. These phases are covered in the Task Force's next proposal.

Task Force Report: *Third*, the Task Force proposes that "state and federal regulators should establish compliance of trade secret claims and challenge mechanisms once a procedure is in place."[42]

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[35] Uniform Trade Secrets Act with 1985 Amendments, drafted by the National Conference of Commissioners on Uniform State Laws, http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf.
[36] WYO. ADC OIL GEN. Ch. 3, § 45(f) (citing WYO. ST. ANN. § 16-4-203(d)(v)). See also Oklahoma Rule 165:10-3-10(b)(4) (authorizing the state to ask for substantiation).
[37] Companies in Colorado must file a state Form 41 "claim of entitlement," setting forth the basis of their trade secret assertion and certifying as to the truth and accuracy of the statement. 2 CCR 404-1:205A(b)(2)(B).
[38] See, e.g., 178 ARK. CODE R. § 1-B-19(l)(8); 58 PA. CONS. STAT. § 3222(b.2); 225 ILL. COMP. STAT. 732/1-77(f); 3 WY. CODE R. § 45(f).
[39] See, e.g., 178 ARK. CODE R. § 1-B-19(l)(9); OHIO REV. CODE ANN. § 1509.10(H); 58 PA. CONS. STAT. § 3222.1(b)(10); TENN. COMP. R. & REGS 0400-53-01-.03(1)(f).
[40] See, e.g., KAN ADMIN. REG.S § 82-3-1402(a)(1)(A), (B).
[41] California law enables state agencies to share confidential business information with other agencies, agency employees, and contractors, in certain specified instances. See, e.g. Cal. Health & Safety § 25511 (for fulfilling contract obligations or ensuring safety and health of employees and contractors), § 25173 (for making studies, and in enforcement proceedings).
[42] Task Force Draft Report, at 15.

Comment #3E: Once a company has made a trade secret assertion, this proposal appears to focus on the response to that assertion. As noted in **Comment #3D**, I would suggest that the STRONGER study also review state law for agency review of trade secret assertions, and public challenge to those assertions. State laws, particularly generally applicable public information statutes, provide a range of methods for reviewing and challenging trade secret and other proprietary assertions. For instance:

- If a company has submitted proprietary records to the state of Mississippi, the state must notify the company if anyone requests to see the documents, "but such records shall be released within a reasonable period of time unless the [companies] shall have obtained a court order protecting such records as confidential."[43]
- Arkansas law explicitly references the federal Emergency Planning and Community Right to Know Act, which enables any person to file a court action to challenge a trade secret assertion.[44]
- Louisiana's public records law requires the state to review all trade secret assertions within 30 days, or sooner if a public records request is pending.[45]

At the very least, state laws should authorize agencies to review trade secret assertions. While states may not have the resources to review every trade secret assertion, even the prospect of review may cut down on the overuse of trade secret assertions.

I strongly support the Task Force's call on the BLM to adopt a robust trade secret procedure, to protect truly proprietary materials while encouraging full disclosure. In *Legal Fractures*, we recommended that the BLM, if it chose to use FracFocus, should:

- Require that companies send copies of FracFocus forms directly to BLM;[46]
- Adopt the trade secret procedures set forth in the Emergency Planning and Community Right to Know Act.[47]
- Require companies to submit a statement to BLM describing and substantiating any trade secret claims made on FracFocus.
- Consider assessing penalties for asserting trade secret over a product that has been fully disclosed elsewhere on FracFocus.[48]

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[43] MISS. CODE ANN. § 25-61-9(1) (2012).
[44] ARK. ADMIN. CODE 178.00.1-B-19 (m)(3)(C) (2013). EPCRA also requires the company to meet a 4 part test, and states that if a chemical is hazardous or toxic, its adverse health and environmental effects must be provided to requesters or entered into TRI, even if the chemical's identity is otherwise protected. 42 U.S.C. § 11042.
[45] 44 LA. REV. CODE § 3.2D.(1).
[46] See, e.g., TX NAT. RES. CODE 91.851(a)(1)(E).
[47] See ARK. ADMIN. CODE 178.00.1-B-19 (m)(3)(C).
[48] This would not be necessary if FracFocus could alert companies to inconsistent trade secret assertions at the time of submission. See **Comment #1C**, at 5.

(5) INCREASING THE UTILITY OF FRACFOCUS BY MAINTAINING IT AS A DATABASE WITH TOOLS SUITABLE FOR ANALYSIS BY REGULATORY BODIES, COMPANIES, AND THE PUBLIC.

Task Force Report: The Task Force suggests "a non-exhaustive list of improvements that FracFocus should consider making," including searching in any field, allowing batch downloads of pdfs, and releasing the full contents of the FracFocus database in "raw, machine-readable form on the FracFocus website."

Comment #5A: I agree with the Task Force's findings that FracFocus does not facilitate analysis of the "information to answer questions of interest to regulators, operating companies, and the general public."[49] This structural flaw undermines one of the strongest selling points for compiling state disclosures on one national site.

It also does not make sense to rely upon third party data scrapers to download information from FracFocus and convert it to a usable format, particularly as there have been reports that FracFocus has been blocking some of these attempts.

The Task Force specifically proposes allowing "batch downloads of PDFs." Instead, the entire site should be converted to an interactive database that enables the user to create and download reports across wells. This would solve the concatenation and record display problems noted in the draft report, and meet the recommendations that all fields be searchable and all information released "in raw, machine-readable form on the FracFocus website."[50]

Task Force Report: "The Task Force recommends that DOE fund FracFocus to upgrade its website to a more usable interactive database."[51]

Comment #5B: I strongly support the recommendation that FracFocus upgrade its website to a more usable interactive database. In *Legal Fractures*, we recommended that DOE and other federal and state agencies condition government funding on FracFocus being made searchable across forms. If providing funds for this explicit purpose achieves the same end, I would support this recommendation.

(6) Expanding the scope of the FracFocus registry to other areas, such as the water quality data in neighboring water wells collected prior to well stimulation or postproduction.

Task Force Report: The Task Force "note[s] that the success of FracFocus to date is very much a consequence of its narrow focus and therefore [it does] not endorse any specific extensions at the present time."[52]

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[49] Task Force Draft Report, at 17.
[50] Task Force Draft Report, at 17-18.
[51] Task Force Draft Report, at 17 (incorporating recommendations from the Shale Gas Development Subcommittee Report, at 13-15).
[52] Task Force Draft Report, at 19.

Comment #6A: I agree that a more general portal could present a wide range of useful information relating to shale oil and gas development. I also agree that FracFocus should remain focused on the chemicals used during the development of a shale oil and gas well. Within this narrower band of disclosures, additional data could be gathered and disclosed, including:

- Chemical disclosures related to drilling muds;
- Links to toxicological information about chemicals, including color-coding to highlight those chemicals that are known carcinogens;
- Emergency contact information, in the event there are non-disclosed chemicals at a well site and first responders or medical professionals seek information about them; and
- Links to source wells for re-used water, and/or reporting of certain characteristics of the re-used water (for instance, presence and levels of naturally occurring radioactive material).

There may be additional pieces of information that could be gathered and displayed through FracFocus, which would enhance utility of the site without causing "mission creep."

Conclusion

Again, I applaud the Task Force's efforts, support the recommendations in the draft report, and stand ready to assist in the improvement of chemical disclosures related to hydraulic fracturing.

[52] Task Force Draft Report, at 19.