

STATE OF WYOMING)
) ss.
COUNTY OF NATRONA)

IN THE DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

Civil Action No. 94650-C

POWDER RIVER BASIN RESOURCE)
COUNCIL, WYOMING OUTDOOR)
COUNCIL, EARTHWORKS, AND)
OMB WATCH,)

Petitioners,)

vs.)

WYOMING OIL AND GAS)
CONSERVATION COMMISSION,)

Respondent,)

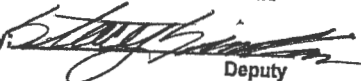
and)

HALLIBURTON ENERGY SERVICES, INC.,)

Respondent-Intervenor.)

FILED
MAR 21 2013

Gen Tuma Clerk of District Court

By:  Deputy

ORDER AFTER HEARING

THE ABOVE-CAPTIONED MATTER comes before the Court on the Petitioners' *Petition for Review of Administrative Action; Complaint for Declaratory Relief*, filed on March 23, 2012. On November 15, 2011, the Petitioners, pursuant to the Wyoming Public Records Act (WPRA), requested the Wyoming Oil and Gas Conservation Commission (WOGCC) provide them with all information the commission had received about the chemical formulations owners and operators (collectively "Operators") of wells were using to stimulate their wells or, in other words, conduct hydraulic fracturing operations. Petitioners sought identifying information about individual chemical ingredients in products, including Chemical Abstract Service (CAS) numbers.

A rule (Rule) promulgated by the WOGCC, effective August 17, 2010, required Operators to submit the chemical formulations of their hydraulic fracturing products to the commission prior to initiating and after completing any well stimulation

activity. Wyo. Admin. Code OIL GEN Ch. 3, § 45(d). The WPRA and the WOGCC Rule exempted this information from disclosure to the public if an Operator requested, and the WOGCC Supervisor found that the information was a trade secret. Wyo. Stat. Ann. § 16-4-203(d)(v) (West 2012); Wyo. Admin. Code OIL GEN Ch. 3 § 45(f).

On January 10, 2012, the WOGCC complied with the Petitioners request. The response referenced filings on the WOGCC website and provided copies of the emails and correspondence related to the confidentiality requests and justifications submitted to the commission by Operators. The WOGCC Supervisor, Thomas E. Doll, redacted documents containing information about chemical formulations and their ingredients that he found to be trade secrets, as mandated by Wyo. Stat. Ann. § 16-4-203(d) (West 2012). The redacted information included the specific chemical compound name, the chemical compound type, the CAS number, and the concentrations for each ingredient in a specific formula. The Supervisor included an explanation of the procedures he used in determining whether to grant trade secret status.

After further correspondence between the parties, the Petitioners filed this action to contest the Supervisor's decision to exempt the trade secrets from public disclosure.

Issue Presented for Review

The Court finds the single issue to be determined is:

I. Did the Wyoming Oil and Gas Conservation Commission Supervisor act arbitrarily and capriciously, or otherwise contrary to law when he found that individual ingredients of hydraulic fracturing formulas constituted trade secrets under the WOGCC public disclosure rule and the Wyoming Public Records Act, and denied the Petitioners the right to inspect those records?

Factual Background

The WOGCC amended its Rules and Regulations in August of 2010. These rules went into effect on September 15, 2010. (Agency Record (AR) Trade Secret Correspondence (TSC) 000003, 0090.) The amendments included a requirement that

Operators submit to the commission “[t]he chemical additives, compounds and concentrations or rates proposed to be mixed” prior to initiating and after completing any well stimulation activity. Wyo. Admin. Code OIL GEN Ch. 3 § 45(d).¹ This information included a chemical compound’s name, the types of ingredients, their CAS numbers, and the concentration of each ingredient. *Id.* CAS numbers are unique and specifically identify a chemical in a formula.

The amendment requiring disclosure of well stimulation fluids included a reference to the WPRA’s exemptions for public disclosure of “trade secrets, privileged information and confidential commercial, financial, geological or geophysical data.” Wyo. Stat. Ann. § 16-4-203(d)(v) (West 2012); Wyo. Admin. Code OIL GEN Ch. 3

¹ Wyo. Admin. Code OIL GEN Ch. 3 § 45(d) provides:

(d) The Owner or Operator shall provide detailed information to the Supervisor as to the base stimulation fluid source. The Owner or Operator or service company shall provide to the Supervisor, for each stage of the well stimulation program, the chemical additives, compounds and concentrations or rates proposed to be mixed and injected, including:

(i) Stimulation fluid identified by additive type (such as but not limited to acid, biocide, breaker, brine, corrosion inhibitor, crosslinker, demulsifier, friction reducer, gel, iron control, oxygen scavenger, pH adjusting agent, proppant, scale inhibitor, surfactant);

(ii) The chemical compound name and Chemical Abstracts Service (CAS) number shall be identified (such as the additive biocide is glutaraldehyde, or the additive breaker is aluminum persulfate, or the proppant is silica or quartz sand, and so on for each additive used);

(iii) The proposed rate or concentration for each additive shall be provided (such as gel as pounds per thousand gallons, or biocide at gallons per thousand gallons, or proppant at pounds per gallon, or expressed as percent by weight or percent by volume, or parts per million, or parts per billion);

(iv) The Owner or Operator or service company may also provide a copy of the contractor's proposed well stimulation program design including the above detail;

(v) The Supervisor may request additional information under this subsection prior to the approval of the Application for Permit to Drill (Form 1) or of the Sundry Notice (Form 4);

(vi) The Supervisor retains discretion to request from the Owner or Operator and/or the service company, the formulary disclosure for the chemical compounds used in the well stimulation(s).

§ 45(f).² The WPRA mandates information that is considered a trade secret be exempted from public disclosure. Wyo. Stat. Ann. § 16-4-203(d) (West 2012) (“[t]he custodian shall deny the right of inspection of the following records, unless otherwise provided by law” (emphasis added)). The WOGCC Supervisor, as custodian of the WOGCC records, determines whether the information the WOGCC has received is a trade secret. *See id.* By statute, the WOGCC Supervisor is a professional petroleum engineer or petroleum geologist. Wyo. Stat. Ann. § 30-5-108 (West 2012).³

After the promulgation of the Rule, the Supervisor, Thomas E. Doll, established various policies and procedures for reviewing trade secret protection requests and informed staff, Operators, and other interested parties of these procedures. (See AR TSC 000004-5, 0107-8.) He used a multi-factor test taken from the State of New York to evaluate trade secret requests. (AR TSC 000004-5.) The factors in the test are:

- a. The extent to which the information is known outside the business of the person submitting the information;
- b. The extent to which it is known by the person’s employees and others involved in the business;
- c. The extent of measures taken by the person to guard the secrecy of the information;

² Wyo. Admin. Code OIL GEN Ch. 3 § 45(f) reads:

(f) Upon prior request via Application for Permit to Drill (Form 1), and/or a comprehensive drilling/completion/recompletion plan, or by Well Completion Report (Form 3), or by Sundry Notice (Form 4), and/or by written letter to the Supervisor justifying and documenting the nature and extent of the proprietary information, confidentiality protection shall be provided consistent with Wyo. Stat. Ann. § 16-4-203(d)(v) of the Wyoming Public Records Act for the following records: “trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person.”

(emphasis added).

³ The Wyoming Legislature recently amended the qualifications for the State Oil and Gas Supervisor position. The amendment requires a person be a “qualified petroleum engineer or petroleum geologist with at least ten (10) years of experience in his respective field of expertise” 2013 Wyo. Sess. Laws. Ch. 4 (S.F. 3). Prior to the amendment, the only qualifications for the position were for a person to be a “qualified and registered professional petroleum engineer or petroleum geologist” Wyo. Stat. Ann. § 30-5-108 (West 2012) (emphasis added).

d. The value of the information to the person and his competitors;

e. The amount of effort or money expended by the person in developing the information; and

f. The ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. Requests for trade secret protection also had to be written and include a separate attachment containing the product name, product type, the CAS number for each chemical component of the product, and their concentration in the product. (See AR TSC 000105, 0148, 0193, 0332, 0668.) If the information was found to be a trade secret, the attachment was redacted (detached from the letter requesting a trade secret exemption) while the rest of information submitted was published on the WOGCC's website and made available to the public. *Id.*

Procedural Background

On November 15, 2011, Petitioners filed a *Public Records Act Request* with the WOGCC. The request asked for the WOGCC to disclose all records "WOCGG has in its possession that list or identify the type, chemical compound name, and/or Chemical Abstract Service (CAS) number of chemicals or other constituents that have been or will be injected" by well Operators conducting hydraulic fracturing operations. (AR TSC 000001.)

Since adoption of the Rule by the commission and until the Petitioners' request, the WOGCC Supervisor granted sixty-four (64) trade secret requests for confidentiality. (AR Approved Trade Secrets (ATS) 000001-0659.) The Petitioners' disclosure request encompassed all of these confidentiality claims.

On January 10, 2012, the Supervisor responded to the Petitioner's request. (AR TSC 000003.) The response included the confidentiality requests and justifications submitted to the commission by fracturing product manufacturers. (AR TSC 000003-5.) The response did not disclose information the Supervisor found to be a trade secret and

outlined the procedures he used in determining whether to grant such status. *Id.* In addition, the response stated, “[t]he application for and justification for confidential status/trade secret status, and the submitted Chemical Abstracts Services (CAS) numbers are not considered confidential.” *Id.*

On January 12, 2012, the Petitioners submitted a second request. The request asked for disclosure of all CAS numbers associated with trade secret approvals. (AR TSC 000006-7.)

On January 20, 2012, the Supervisor declined the second request. He clarified in a letter that:

If a chemical company submits a request for confidentiality under the Wyoming Public Records Act and such a request is granted, then the chemical compound name, chemical compound type, CAS number, and concentration related to the specific trade secret formulations are held confidential.

(AR TSC 000008.)

On February 8, 2012, the Petitioners asked the Supervisor to reconsider his decision. (AR TSC 000010.) They asserted that, “[t]he mere identification of names and CAS numbers of hydraulic fracturing chemicals is not a trade secret pursuant to Wyoming’s Public Records Act.” *Id.* In support, the Petitioners provided a statement from the Environmental Protection Agency explaining why it will no longer consider chemical identities confidential under the Toxic Substances Control Act. (AR TSC 000038-41.) They also provided a memorandum from Carolyn J. Otten, Ph.D, who specializes in reverse engineering. (AR TSC 000026-30.) Dr. Otten explained that deformation (reverse engineering) consists of two steps: (1) identifying the constituent components of a product, and (2) quantifying the amount of each component as a percentage of the product. *Id.* She clarified that a list of ingredients simply helps in the first step, but does not eliminate the quantification step. *Id.* The Petitioners also included two articles: one discussed the public health issues in hydraulic fracturing and

the other examined the deficiencies of MSDS sheets in identifying hazards. (AR TSC 000033-36, 0043-60.)

On February 24, 2012, the Supervisor declined to reconsider his decision and stood by his earlier denial of the Petitioners' request. (AR TSC 000061.) He stated, "[t]he protection from and prevention of reverse engineering through deformation of chemical compounds is the protection that providers of chemical compounds used in well stimulation are seeking. Deformation or reverse engineering of chemical compounds would negatively impact those chemical providers." *Id.*

On March 23, 2012, the Petitioners filed their *Petition for Review of Administrative Action; Complaint for Declaratory Relief* in the Seventh Judicial District Court for the State of Wyoming. The Court issued an *Order Granting Halliburton Energy Services, Inc.'s Motion to Intervene as Intervenor-Respondent* on May 15, 2012.

On May 23, 2012, the Court entered a briefing order in this appeal. All parties subsequently timely filed their briefs.

Standard of Review

Agency decisions are reviewed pursuant to the Wyoming Administrative Procedures Act, it provides:

c) To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

(i) Compel agency action unlawfully withheld or unreasonably delayed; and

(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. . . .

Wyo. Stat. Ann. § 16-3-114(c) (West 2012). The Wyoming Supreme Court has stated the arbitrary and capricious standard requires:

[t]he reviewing court to review the entire record to determine whether the agency reasonably could have made its finding and order based upon all the evidence before it. The arbitrary and capricious standard is more lenient and deferential to the agency than the substantial evidence standard because it requires only that there be a rational basis for the agency's decision.

Northfork Citizens For Responsible Dev. v. Bd. of County Com'rs of Park County, 2010 WY 41, ¶ 17, 228 P.3d 838, 845 (Wyo. 2010) (citing *Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 12, 188 P.3d 554, 5559 (Wyo.2008)).

The issue before the Court is one of statutory interpretation. Prior precedents all agree on the rules of statutory interpretation in Wyoming:

This court interprets statutes by giving effect to the legislature's intent.... We begin by making an inquiry relating to the ordinary and obvious meaning of the words employed according to their arrangement and connection.... We give effect to every word, clause, and sentence and construe together all components of a statute *in pari materia* If a statute is clear and unambiguous, we simply give effect to its plain meaning. Only when we find a statute to be ambiguous do we resort to the general principles of statutory construction. An ambiguous statute is one whose meaning is uncertain because it is susceptible to more than one interpretation.

Bear Cloud v. State, 2013 WY 18, ¶ 30, 294 P.3d 36, 44 (Wyo. 2013) (citation omitted).

An agency's conclusions of law are affirmed only when they are in accordance with the law. *Worker's Comp. Claim of Stallman v. State ex rel. Wyoming Workers' Safety & Comp. Div.*, 2012 WY 147, ¶ 10, 288 P.3d 707, 712 (Wyo. 2012) (quoting *State ex rel. Wyo. Workers' Safety & Comp. Div. v. Singer*, 2011 WY 57, ¶ 5, 248 P.3d 1155, 1157 (Wyo. 2011)). Thus, the Court must correct any error made by the agency in either interpreting or applying the law and it does not grant the agency's determinations any deference. *Id.* While the interpretation of statutes and their implementing regulations is a question of law that is reviewed *de novo*, the Court defers to an agency's interpretation

of its own rules and regulations unless it is clearly erroneous or against the plain language of the rules. *Powder River Basin Res. Council v. Wyoming Dept. of Env'tl. Quality*, 2010 WY 25, ¶ 6, 226 P.3d 809, 813 (Wyo. 2010) (citing *Pinther v. Wyoming Dep't of Admin. and Info.*, 866 P.2d 1300, 1302 (Wyo.1994)); *RME Petroleum Co. v. Wyoming Dep't of Revenue*, 2007 WY 16, ¶ 44, 150 P.3d 673, 689 (Wyo.2007)).

The parties have presented their arguments before the Court as motions for summary judgment. Summary judgment asks a court to foreclose all factual determinations and conduct a purely *de novo* review of the law. *City of Cheyenne v. Bd. of County Com'rs of County of Laramie*, 2012 WY 156, ¶ 4290 P.3d 1057, 1058 (Wyo. 2012). As such, given that the parties have asked the Court to interpret statutory language, which also requires the Court to apply a *de novo* standard, the requested procedural stance of the parties does not change the review to be conducted by the Court.

Discussion

A. WYOMING PUBLIC RECORDS ACT

The WPRA reads in pertinent part:

§ 16-4-202. Right of inspection; rules and regulations; unavailability

(a) All public records shall be open for inspection by any person at reasonable times, during business hours of the state entity or political subdivision, except as provided in this act or as otherwise provided by law, but the official custodian of any public records may make rules and regulations with reference to the inspection of the records as is reasonably necessary for the protection of the records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office.

§ 16-4-203. Right of inspection; grounds for denial; access of news media; order permitting or restricting disclosure; exceptions

(a) The custodian of any public records shall allow any person the right of inspection of the records or any portion thereof except on one (1) or more of the

following grounds or as provided in subsection (b) or (d) of this section

....

....

(d) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law

....

....

....

....

(v) Trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person

....

(f) Any person denied the right to inspect any record covered by this act may apply to the district court of the district wherein the record is found for any order directing the custodian of the record to show cause why he should not permit the inspection of the record.

The Wyoming Supreme Court has stated, "when a demand to inspect public records is made, the custodian of the records must weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 798 (Wyo. 1983) (citation omitted).

The Wyoming Supreme Court has been emphatic that the policy underlying the WPRA is one of disclosure:

the policy behind the WPRA, like that behind FOIA [Freedom of Information Act], is one of disclosure, not secrecy, meaning the exemptions are to be narrowly construed . . . The legislature of this state has stressed the

importance of making available to the public agency records. . . . With some necessary exceptions, recognized by Wyoming's records and meetings acts, state agencies must act in a fishbowl.

Freudenthal v. Cheyenne Newspapers, Inc., 2010 WY 80, ¶ 18, 233 P.3d 933, 938 (Wyo. 2010) (internal quotations and citations omitted); *Laramie County Sch. Dist. No. One v. Cheyenne Newspapers, Inc.*, 2011 WY 55, ¶ 2, 250 P.3d 522, 524 (Wyo. 2011) (“[t]he Supreme Court has thus construed the WPRA to generally guarantee the public's right to access to documents which will reveal the details of operations of governmental entities, with some exceptions”).

B. AGENCY DEFERENCE

Wyoming's jurisprudence has long recognized a need to grant agency decisions deference:

[t]he deference normally accorded to the findings of fact by a trial court is extended to the administrative agency, and the agency's decision as to the facts will not be overturned unless it is clearly contrary to the overwhelming weight of the evidence. Demonstrating evidentiary contradictions in the record does not establish the irrationality of the ruling, but we do examine conflicting evidence to determine if the agency reasonably could have made its finding and order based upon all of the evidence before it.

Sweets v. State ex rel. Wyoming Workers' Safety & Comp. Div., 2002 WY 37, ¶ 13, 42 P.3d 461, 465 (Wyo. 2002) (internal citations omitted) (quoting *Ikenberry v. State ex rel. Wyoming Workers' Compensation Division*, 5 P.3d 799, 802 (Wyo.2000)).

Matters involving the specialized knowledge of an agency are accorded deference as well. “We defer to the Board's specialized knowledge and expertise regarding the use or nonuse of water and the technicalities involved in irrigation... However, we will disturb an agency's decision when it is clearly contrary to the overwhelming weight of the evidence on the record.” *McTiernan v. Scott*, 2001 WY 87, ¶ 16, 31 P.3d 749, 756 (Wyo. 2001) (internal and external citations omitted).

C. DEFINITION OF TRADE SECRETS WITHIN THE WYOMING PUBLIC RECORDS ACT

The WPRA imposes a duty on state agencies to disclose public records. Wyo. Stat. Ann. § 16-4-201 through 16-4-205, 16-4-202(a) (West 2012). Under Chapter 3, Section 45, Subsection (d) of the Wyoming Oil and Gas Conservation Commission's rules and regulations, Operators of wells are required to disclose to the WOGCC the base stimulation fluid they plan to use when stimulating or hydraulic fracturing a well. Wyo. Admin. Code OIL GEN Ch. 3 § 45(d). Accordingly, this information would normally be available to the public via the WPRA.

The WPRA also requires custodians of public records to prevent disclosure of information they deem to be "trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person." Wyo. Stat. Ann. § 16-4-203(d)(v) (West 2012). The WPRA exceptions were incorporated into WOGCC's Rule and were relied upon by the Supervisor in denying the Petitioners' request.

The WPRA does not define trade secrets. Wyo. Stat. Ann. § 16-4-201 (West 2012). Wyoming's case law and that from other jurisdictions is more helpful.

In *Sublette County Rural Health Care Dist. v. Miley*, the Wyoming Supreme Court found the WPRA exceptions for trade secrets and confidential commercial data are similar to comparable exceptions found in the Federal Freedom of Information Act (FOIA). 942 P.2d 1101, 110 (Wyo. 1997). The Court in *Miley* adopted a federal two-part test to determine whether commercial data is confidential. *Id.* (adopting the test articulated in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir.1974) for confidential commercial information). The Parties spend a great deal of time arguing about confidential commercial information, however, the Supervisor's refusal to disclose the requested individual chemical ingredients relied solely upon a finding that they represented trade secrets, not confidential commercial data. (AR ATS

000001-0659.) Therefore, the Court's analysis will focus on trade secrets rather than confidential commercial data.

In *Herrick v. Garvey*, the United States District Court for the District of Wyoming applied the FOIA definition of trade secrets. "[T]rade secrets should be defined in the narrower common law sense, as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." 200 F. Supp. 2d 1321, 1326 (D. Wyo. 2000) *aff'd*, 298 F.3d 1184 (10th Cir. 2002) (citation omitted). The *Herrick* court determined that materials—such as individual blue prints depicting the design, materials, components, and geometry of an aircraft—submitted to the FAA's predecessor were trade secrets. *Id.* at 1328.

In *Briefing, Inc. v. Jones*, the Court cited to the exemptions in the WPRA as proof that trade secret protections are a well-established principle in this State. 2006 WY 16, ¶ 10, 126 P.3d 928 at 934 (Wyo. 2006) (citations omitted). The Court went on to adopt a broad definition of trade secrets as contained in Restatement (Third) of Unfair Competition § 39 (2012) when it recognized a common-law cause of action for misappropriation of trade secrets. *Id.* ¶¶ 8, 15, 126 P.3d at 933, 936. Restatement (Third) of Unfair Competition § 39 (2012) defines trade secrets as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."

Wyoming's legislature adopted a similarly broad definition when it passed the Uniform Trade Secret Act (UTSA) in 2006. The UTSA reads:

(iv) Trade secret means information, including a formula, pattern, compilation, program device, method, technique or process that:

(A) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable

by proper means by other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Wyo. Stat. Ann. § 40-24-101 (West 2012). The Court “[p]resume[s] that the legislature [was] aware of all existing law on a particular subject relating to a newly enacted or amended statute.” *In re DSB*, 2008 WY 15, ¶ 21, 176 P.3d 633, 638 (Wyo. 2008) (citation omitted).

The Supervisor relied on a multi-factor test taken from the State of New York to evaluate trade secret requests. (AR TSC 000004-5.) It included:

- a. The extent to which the information is known outside the business of the person submitting the information;
- b. The extent to which it is known by the person’s employees and others involved in the business;
- c. The extent of measures taken by the person to guard the secrecy of the information;
- d. The value of the information to the person and his competitors;
- e. The amount of effort or money expended by the person in developing the information; and
- f. The ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The record demonstrates the test elicited sufficient information for the Supervisor to rationally determine if trade secret protection was appropriate. Operators often adopted the format of the test when submitting their requests or otherwise included the relevant information within their requests. (See AR ATS 000007-9, 0016-18, 0032-33, 0085-88, 0096-97, 0112-15, 0256, 0300-0303, 0314-16, 0321-24, 0344-46, 0411, 0421, 0521, 0538-39, 0563-64.)

The confidentiality requests by Operators show each company strove to maintain the secrecy of their products from the public, competitors, and in some cases,

their own employees. (e.g. AR TSC 000624, 0677, 0780.) Emails from the Petitioners and the public to the WOGCC further prove that the public was not privy to lists of individual ingredients or CAS numbers that comprised fracturing products. (See AR TSC 000110, 0144, 0335, 0528 0531, 0540.)

The Operators also described the highly competitive nature of the hydraulic fracturing product industry and the substantial danger of competitive injury if the WOGCC were to disclose chemical ingredient information to the public. (See AR ATS 000007-9, 0016-18, 0032-33, 0085-88, 0096-97, 0112-15, 0256, 0300-0303, 0314-16, 0321-24, 0344-46, 0411, 0421, 0521, 0538-39, 0563-64.) Nothing in the record suggests otherwise.

The justification letters included attachments containing the product name, product type, the CAS number for each chemical component of the product, and their concentration in the product. (AR TSC 00105, 0148, 0193, 0332, 0668.) After receiving this information, the Supervisor (a professional petroleum engineer) reviewed the data and determined whether it was a trade secret under the WPRA. As such, the record demonstrates the Supervisor acted rationally when he reviewed highly technical information to determine if a product should be granted trade secret protection. That determination is entitled to deference by the Court.

The Petitioners' expert in reverse engineering, Dr. Otten, suggests the Supervisor acted within the bounds of reasons as well. She asserted that a list of individual ingredients constitutes the first step (out of two) in reverse engineering a product and would simplify the process. (AR TSC 000026.) As stated by the Supervisor, "[t]he protection from and prevention of reverse engineering through deformation of chemical compounds is the protection that providers of chemical compounds used in well stimulation are seeking. Deformation or reverse engineering of chemical compounds would negatively impact those chemical providers." (AR TSC 000061.)

The Petitioners' argue the Supervisor's decisions were arbitrary, capricious, or otherwise not in accordance with the law because they run contrary to federal precedent. They contend federal authority only rarely finds—in the FOIA context—that identifying information for individual ingredients of fracturing stimulants and their CAS numbers constitute trade secrets. (Petitioners' Br. 11-12.)

In support of their position, the Petitioners rely on *Nw. Coal. for Alternatives to Pesticides v. Browner*, 941 F. Supp. 197, 202 (D.D.C. 1996). The *Browner* court considered a challenge to the Environmental Protection Agency's (EPA) refusal to disclose—in response to a FOIA request—the common names and chemical abstract numbers for inert ingredients in pesticides on trade secret and “confidential commercial information” grounds. 941 F. Supp. at 201. It found that the EPA's claim of protection under FOIA's trade secret exemption for CAS numbers and the common name of inert ingredients lacked factual support. *Id.* That court specifically noted:

[n]either defendant has demonstrated, however, that the common name and CAS numbers of inert ingredients are trade secrets. In fact, ACPA's submission effectively acknowledges that the release of general identifying information about inert ingredients does not reveal formulas. Both defendants have also conceded that disclosing the common name of an inert ingredient may not reveal exactly which one of a class of ingredients sharing the same common name is used in a particular pesticide.

Id. at 202 (internal citations omitted). The *Browner* court's findings rest on stipulations and facts not before this Court. In this case, the Operators' justification letters asserted, and the Supervisor agreed, that release of CAS numbers and the identification of individual ingredients would reveal critical information about the hydraulic fracturing products of the Operators. This is unlike the position of the parties in *Browner*, who ostensibly stipulated that the release of general information about inert ingredients would not reveal a formula to competitors. *Id.* Additionally, the *Browner* court did not hold that individual ingredients could not be considered trade secrets under the federal definition. *Id.*

Wyoming federal precedent indicates that individual ingredients may very well constitute trade secrets. For example, the *Herrick* court found that individual materials and components of an aircraft design were trade secrets under the same definition used in *Browner*. 200 F. Supp. 2d at 1326, 1328.

Individual ingredients, including their CAS numbers, would also qualify as trade secrets under the definition in the Restatement (Third) of Unfair Competition § 39 (2012) and in the UTSA. The Restatement definition includes “any information . . .” Restatement (Third) of Unfair Competition § 39 (2012). The UTSA’s definition of trade secrets encompasses information that, like a formula, has economic value and is the subject of efforts at keeping the information secret. Wyo. Stat. Ann. § 40-24-101 (West 2012).

D. CONCLUSIONS

The Court is keenly aware that the divergent positions of the parties implicate important issues of public policy. The Petitioners argue that the identity of hydraulic fracturing chemicals is key to understanding the potential environmental and health impacts of hydraulic fracturing. (Petitioners’ Br. 11-12.) Conversely, the Respondent-Intervenor highlights the positive economic impact hydraulic fracturing has had on the State of Wyoming and the danger disclosure represents to that industry. (Respondent-Intervenor’s Br. 7-8, 30-31.) Both positions have substantial merit, however the Court feels these competing concerns are best addressed through legislative action, or further rule promulgation and are not properly within the Court’s purview.

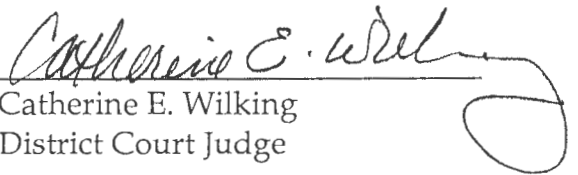
The Court finds that the WOGCC Supervisor acted reasonably when he established a policy for evaluating trade secret protection requests and that policy is in accordance with the Wyoming Public Records Act.

The Court further finds the Petitioners have failed to demonstrate that the Supervisor’s decisions to grant trade secret protection requests were arbitrary, capricious, or not in accordance with the law.

NOW THEREFORE, IT IS HEREBY ORDERED that the decision of the WOGCC Supervisor to withhold the release of information he deemed to be trade secrets is hereby affirmed.

DATED: March 21st, 2013.

BY THE COURT:


Catherine E. Wilking
District Court Judge

copies to: Shannon Anderson
Eric A. Easton
Steven Leifer
John A. Masterson
Timothy J. Preso