provided in §3.73 of this title (relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance) (Rule 73) for violation of this section.

This agency hereby certifies that the sections as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on December 13, 2011.

Filed with the Office of the Secretary of State on December 13, 2011.

RAILROAD COMMISSION OF TEXAS

Elizabeth Ames Jones

Elizabeth Ames Jones, Chairman

David Porter

David Porter, Commissioner

Barry T. Smitherman

Barry T. Smitherman, Commissioner

ATTEST:

Kathy Way

Secretary of the Commission

Mary Ross McDonald

Mary Ross McDonald
Texas Register Liaison/Certifying Official
Railroad Commission of Texas

Figure: 16 TAC §3.29(f)(3)

REQUEST TO CHALLENGE CLAIM OF ENTITLEMENT
TO TRADE SECRET PROTECTION OF HYDRAULIC FRACTURING
TREATMENT CHEMICAL COMPOSITION

I, _____(name)_____, challenge the claim of entitlement to trade secret protection for portions of the chemicals or other substances used in the hydraulic fracturing treatment of the following well:

Operator name: _____
County name: _____
API number: _____
Field Name: _____
Railroad Commission oil lease name and number: _____
Railroad Commission gas identification number: _____
Well Number: _____

The following is to be completed if the requestor is a landowner:

I certify that I am listed on the appraisal roll as owning the property on which the relevant wellhead is located or I am listed on the appraisal roll as owning property adjacent to the property on which the relevant wellhead is located.

Name of requestor: _____
Mailing address of Requestor: _____
_____
Phone number of requestor: _____
Email address of requestor (optional): _____

EMAIL ADDRESS: YOU ARE NOT REQUIRED TO PROVIDE AN EMAIL ADDRESS when completing and filing this form. Please be aware that information provided to any governmental body may be subject to disclosure pursuant to the Texas Public Information Act or other applicable federal or state legislation. IF YOU PROVIDE AN EMAIL ADDRESS, YOU AFFIRMATIVELY CONSENT TO THE RELEASE OF THAT EMAIL ADDRESS TO THIRD PARTIES. Other departments within the Railroad Commission also may use the email address you provide to communicate with you.

Signature of Requestor: _____

Date: _____

The Railroad Commission of Texas (Commission) adopts new §3.29, relating to Hydraulic Fracturing Chemical Disclosure Requirements, with changes to the proposed version published in the September 9, 2011, issue of the *Texas Register* (36 TexReg 5765). The Commission adopts the new rule to implement Texas Natural Resources Code, Chapter 91, Subchapter S, §91.851, relating to Disclosure of Composition of Hydraulic Fracturing Fluids, as enacted by House Bill (HB) 3328 (82nd Legislature, Regular Session, 2011).

The Commission has been very active from the beginning on the issue of disclosure of hydraulic fracturing chemicals through the Interstate Oil and Gas Compact Commission (IOGCC) and the Ground Water Protection Council (GWPC), as well as other avenues. Commission staff was active in the development of FracFocus. In addition, Texas was the first state in the nation to enact disclosure legislation.

The Commission received 19 comments on the proposal, including six from associations (jointly-filed comments from Texas Oil and Gas Association (TxOGA) and Texas Independent Producers and Royalty Owners (TIPRO); the Environmental Defense Fund (EDF); the Sierra Club (both the Lone Star Chapter and the Environmental Law Program in Washington, D.C.); the American Exploration & Production Council (AXPC); the North Central Texas Communities Alliance (NCTCA); and Earthworks). In addition, the Commission held a public hearing to receive public comments on Wednesday, October 5, 2011, at the Commission's headquarters in Austin, Texas. Thirty people signed in and eight offered oral comments.

General comments

Representative Lon Burnam, as a co-sponsor of HB 3328, and on behalf of the residents in House District 90 in Fort Worth, commented that he generally supports the rule and commended the Commission for the expeditious manner in which this rule was drafted and proposed. Representative Burnam further stated that the rule is of great importance to his constituents in Fort Worth and to residents around North Texas, given the expansion of drilling activity in the Barnett Shale in recent years and the increase in the number of hydraulic fracturing treatments performed, and that he appreciated the diligence in ensuring that Texans are informed about the chemicals used in hydraulic fracturing as soon as possible. The Commission appreciates this comment.

Representative Burnam recommended that the Commission include a requirement that the Commission post the supplemental list of ingredients on a publicly available website. Representative Burnam noted that Texas Natural Resources Code, §91.851(a)(1)(E), the section of code amended by

HB 3328, requires that operators provide to the Commission a list of chemicals used in the fracturing treatments that are not subject to federal hazardous chemical regulations pertaining to the maintenance of "material safety data sheets" ("non-MSDS chemicals"). Consistent with the amended statute, the proposed rule does not require these non-MSDS chemicals to be posted on the Chemical Disclosure Registry maintained by GWPC. That section does, however, require that the "supplemental list" of chemicals "be made available on a publicly accessible website." Although the discussion of the state fiscal implications in the preamble of the proposed rule implies that the Commission will post the supplemental list on the Commission's website along with other attachments to the well completion report submitted by the well operator, there is no explicit, corresponding provision in the text of the rule itself. In order to clarify that the law requires that the supplemental list must be readily available to the public, Representative Burnam recommends that the rule include a provision requiring that the supplemental list be made available either on the Commission's website (along with the well completion report) or on another website.

The Commission agrees with this comment. The FracFocus form currently allows an operator to include "non-OSHA" chemical constituents of hydraulic fracturing fluid. In fact, many operators already are including this information. However, as discussed below, the Commission is revising the proposed language to require that operators include all chemical information required to be entered on the FracFocus form, as well as chemical information that was to be included on the supplemental list ("non-OSHA" chemicals).

Representative Burnam recommended consolidating disclosure to the Chemical Disclosure Registry. Representative Burnam stated that the proposed rule requires that information on certain chemicals (Material Safety Data Sheet or MSDS chemicals) used in the hydraulic fracturing treatment be disclosed by posting on the Chemical Disclosure Registry and that the rule requires that information on other chemicals (non-MSDS chemicals) be provided to the Commission and be made available on a publicly accessible website. Representative Burnam stated that this bifurcated disclosure unnecessarily complicates disclosure for operators. Representative Burnam understands that GWPC is already in the process of modifying the registry to allow for posting of non-MSDS chemicals, and to reduce administrative costs associated with disclosure, recommends requiring that both groups of chemicals be posted on the Chemical Disclosure Registry, rather than on two different websites. This change will reduce operators' costs associated with the required disclosure while simultaneously making it easier for members of the public to access the information.

The Commission agrees with Representative Burnam's comments and fully intended to make a

copy of the FracFocus registry form, as well as the supplemental list of chemicals, available on the Commission's website as an attachment to the completion report. However, as discussed in subsequent paragraphs of this preamble, the Commission has revised the proposed rule to require that all information required to be disclosed be uploaded to the Chemical Disclosure Registry. The Commission proposes to add to the "Oil & Gas Completions Query" for a particular well a link to FracFocus with instructions stating that the chemical disclosure information may be found by entering the API number in "Find a Well" on the FracFocus Internet website. A landowner or other interested person could then go to the Commission's "Public GIS Map Viewer for Oil, Gas, and Pipeline Data," find the well and note the API number, and then enter the API number or other identifying information into the "Oil & Gas Completions Query" to obtain the completion report for the well and enter the API number of other identifying information for the well into FracFocus to obtain hydraulic fracturing fluid chemical information.

EDF commented that the Commission is moving to implement HB 3328, the state's landmark hydraulic fracturing chemical disclosure bill, much more quickly than expected, and that the proposed new rule generally does a good job of addressing the statute's provisions. The Commission appreciates this comment.

EDF commented that any weakening of the proposed rule could hurt, rather than help, public confidence. In particular, EDF urged the Commission to be on guard against proposals to weaken the ability of landowners and adjacent landowners to challenge trade secret claims; interfere with the ability of health professionals and emergency responders to perform their jobs effectively; or report fewer chemicals than the law contemplates and the public expects. The Commission does not intent to "weaken" the rule. The Commission made no change in response to this comment.

EDF recommended that the adoption preamble include a discussion of the Commission's plans to publish on a publicly accessible website the information required to be filed by operators under proposed subsection (c)(2)(C)(ii). EDF stated that such publication is required by statute, but because it is a duty of the Commission rather than the operator, publication on a publicly accessible Internet website does not necessarily need to be mentioned in the body of the rule. The Commission agrees with this comment and has included discussion in this preamble of its plans to make the information publicly available.

The Sierra Club Lone Star Chapter ("Lone Star Sierra Club") expressed general agreement with the proposed rule and offered some specific recommendations. The Lone Star Sierra Club stated that it supports the Commission's plan to adopt the new rule earlier than the July 2013 deadline allowed by the Legislature. The Commission appreciates this comment.

The Lone Star Sierra Club recommended that the Commission work with GWPC to continue

improving FracFocus and to add fields for reporting non-OSHA chemicals. The Lone Star Sierra Club recommended that the commission add language to subsection (c)(1) that the Commission will create a monthly well-by-well report on non-OSHA chemicals and make that report available on its website to ensure that, if operators do not enter this information into FracFocus, there will be an alternative venue for the public to research non-OSHA chemicals.

Commission staff continues to work with GWPC and IOGCC in their efforts to improve FracFocus. The form currently allows an operator to include "non-OSHA" chemical constituents of hydraulic fracturing fluid. In fact, many operators already are including this information. However, as discussed below, the Commission is revising the proposed language to require that operators include all chemical information required to be entered on the FracFocus form, as well as chemical information that was to be included on the supplemental list (non-OSHA chemicals). In light of this change, and because, after the effective date of this rule, it will be a violation not to include the required information on the FracFocus form for each well subject to the rule on which hydraulic fracturing treatments are performed, the Commission sees no need for a monthly well-by-well report.

The Sierra Club Environmental Law Program in Washington D.C. ("Sierra Club-D.C.") stated that it strongly supports complete disclosure of hydraulic fracturing chemicals and is pleased to see the Commission take the first step toward disclosure. The Commission appreciates this comment.

Esther McElfish, with the NCTCA, commented that the Commission should have given more notice of the October 5, 2011, public comment hearing. The Commission made no change to the rule in response to this comment. The Commissioners said from their initial discussion of this rulemaking proceeding that it is of the highest priority; that this rulemaking would be on a fast track; and that they welcomed input and comments from all interested persons, as demonstrated by the following actions: (1) this item was the only matter on the agenda of the Commission's June 15, 2011, open meeting; Chairman Jones discussed the significance and priority of this rulemaking; (2) the time line and procedure were discussed at the July 11, 2011, open meeting (item #162); and (3) there was an open meeting devoted almost exclusively to discussion of the proposed rule on August 29, 2011 (item #1). In addition, the proposed rule was posted on the Commission's web site on August 30, 2011, which was 10 days prior to the publication of the proposed rule in the *Texas Register*. The public hearing date of October 5, 2011, was published in that proposal preamble. In addition, news of the rule proposal was picked up by the Associated Press. News articles appeared in major newspapers in Austin, Lufkin, Tyler, Baytown, Dallas, Houston, Nacogdoches, Lubbock, San Antonio, Midland, and other areas across the state. The story also was aired through radio and television in the Austin, Tyler/Longview/Jacksonville, Lufkin, Nacogdoches,

and Houston areas.

AXPC, a national trade association representing 31 of America's largest independent upstream natural gas and oil exploration and production companies, strongly advocated for disclosure of chemicals used in hydraulic fracturing and supported the creation of the FracFocus website as a vehicle for public disclosure since its inception by IOGCC and GWPC. AXPC companies made nearly all of the early voluntary disclosures to the website. AXPC agrees with the Commission's estimate that hydraulic fracturing chemical information for half of all wells on which hydraulic fracturing treatment(s) have been performed in Texas have been voluntarily posted since the inception of the FracFocus website. AXPC commended the Legislature for its demonstrated leadership in this area and for having passed legislation requiring disclosure, and the Commission for acting quickly and efficiently to promulgate regulations. AXPC stated that it believes that the Commission's model will quickly become the benchmark standard of excellence for other regulators in the United States, and will likely serve as a reference in many other countries. The Commission appreciates this comment.

BG Group, a natural gas company with operations in more than 25 countries over five continents, stated that it strongly supports the Commission's proposed new rule, and believes it is critical for producers of U.S. natural gas to address the public desire to be fully informed of the content of hydraulic fracturing fluids. BG Group, through its operating partner EXCO Resources, has been voluntarily disclosing fracturing treatments via the FracFocus website since its inception. BG Group stated that the proposed rule will provide transparency for chemicals and reporting of water quantities used in hydraulic fracturing operations, and is pleased that the Commission has expeditiously created the sensible and workable rule. The Commission appreciates this comment.

TIPRO expressed its support for hydraulic fracturing chemical disclosure and the increased transparency that it will provide to the citizens of Texas and commended the Commission for this rule. TIPRO worked with TxOGA and other oil and gas trade associations to develop some comments and revisions, as submitted by TxOGA. TIPRO stated that industry joined together in supporting these revisions, and this unity is no small feat, considering the diversity of interests involved in the process. TxOGA also commented that it appreciates the Commission for moving swiftly in this rulemaking and recognizes the Commission's exemplary record regulating oil and natural gas production in Texas. TxOGA supports disclosure of the chemical ingredients used in hydraulic fracturing treatments, while recognizing appropriate protections for trade secrets. The Commission appreciates this comment.

Apache Corporation ("Apache"), an independent energy company that explores for, develops, and produces natural gas, crude oil, and natural gas liquids, stated that it appreciates the Legislature's

leadership on this issue and applauds the Commission in swiftly promulgating the rule. Apache further stated that it supports the new requirements to disclose chemicals used in the process of hydraulic fracturing and believes the new requirements will demonstrate that states and oil and gas producers can work together to increase public confidence in the industry as it develops abundant, cleaner-burning natural gas resources. Apache also stated that it believes that the Commission's model will quickly become the benchmark standard of excellence for other regulators in the United States, and will likely serve as a reference in many other countries. Apache has been a vocal and strong advocate for public disclosure of chemicals used in hydraulic fracturing and supported the creation of the FracFocus website as a vehicle for public disclosure since its inception by IOGCC and GWPC. The Commission appreciates these comments.

EXCO Resources, Inc., ("EXCO") a producer of natural gas in East Texas, stated that it supports the proposed new rule and has been voluntarily disclosing fracturing treatments via FracFocus since the website's inception for all areas where EXCO is actively drilling.

Exxon Mobil Corporation and XTO Energy Inc. ("Exxon") offered some general comments, and supported the specific comments of the TxOGA (discussed in subsequent paragraphs of this preamble). Exxon commended Texas lawmakers for developing a workable state legislative solution for operators, service providers, and the public on the disclosure of ingredients used in hydraulic fracturing fluids, and appreciated the Commission for its expeditious rulemaking process. Exxon stated that public interest is growing due to a lack of familiarity and understanding of the industry. Exxon stated that it has been working with several industry associations and state agencies, including the Commission, to design a system that provides regulators, first responders, and the public the information they desire about hydraulic fracturing fluid ingredients. The GWPC/IOGCC's FracFocus website is the state-based reporting system that fulfills that need and Exxon supports Commission use of this valuable database. The Commission appreciates these comments.

Halliburton Energy Services, Inc. ("Halliburton") stated that it supports the Commission's efforts to develop balanced and effective regulations for hydraulic fracturing operations that ensure the safe and effective development of the State's oil and natural gas resources. Halliburton supports the comments submitted by TxOGA, including public disclosure of the ingredients used in hydraulic fracturing, while ensuring the integrity of its intellectual property rights and appropriate protection for trade secrets.

Pioneer Natural Resources USA, Inc. ("Pioneer") commented that it strongly supports mandatory public disclosure of the chemical ingredients used in hydraulic fracturing and that, in conjunction with many companies and other industry stakeholders, Pioneer worked with GWPC and IOGCC to develop

FracFocus.org, the public registry of hydraulic fracturing fluids, on a well-by-well basis, and has voluntarily disclosed the chemical ingredients used since the inception of the website in April 2011. Pioneer strongly supported HB 3328 introduced this past session by State Representative Jim Keffer, Chairman of the House Energy Resources Committee. Pioneer stated that it believes that the Commission's proposed rule to implement this legislation must ensure the achievement of the legislation's intent, which is full public disclosure. The Commission appreciates these comments.

Pioneer commented that it is concerned that the Commission will promulgate a rule that gives too much discretion to suppliers, service companies, and operators to claim trade secret protection for the chemical ingredients used in their hydraulic fracturing products and processes. While the burden of filing a disclosure form on FracFocus.org and with the final well report to the Commission falls on the operator, the suppliers and service companies will necessarily provide most of the information regarding any particular hydraulic fracturing treatment, creating a possible disconnect between those responsible for providing the detailed information relating to a hydraulic fracturing treatment and the operator charged with disclosing that information to the public. Pioneer has integrated its own well services and pumping services subsidiaries, and anticipates these subsidiaries will drill and hydraulically fracture the majority of its wells in Texas over the next several years. Pioneer does not anticipate attempting to claim trade secret protection for any chemical ingredients provided in either capacity as a service company or as an operator. Pioneer notes, however, that it will not have the same control over information related to products provided to it by its suppliers. This situation reinforces Pioneer's support for a rule that favors disclosure of all chemical ingredients over claims of trade secret protection. If the rule allows for too easy a claim of trade secret protection while making the ability to challenge those claims too difficult, the potential effect would be to undermine the law's intent to mandate full public disclosure. In Pioneer's view, such a situation would be a disservice not only to the public and State of Texas, but also to the industry itself. Pioneer recognizes the necessity of providing a meaningful opportunity for suppliers, service companies, and operators to protect true intellectual property. However, with regard to the chemical ingredients used in hydraulic fracturing treatments, such claims should be the exception rather than the rule.

The Commission does not agree with this comment. The rule is consistent with the legislative intent of HB 3328. The Commission made no changes in response to this comment.

An individual, Rosemary Reed, commented that, although the rule will allow industry to resist disclosure of proprietary chemicals unless a claim is made or an emergency health situation exists, the rule is better than nothing. Ms. Reed also expressed concern that small business or micro-business entities

might be exempted. Mr. Gary Hogan, vice president of NCTCA, also commented that he disagrees with any exemption for small businesses or micro-businesses, as inconsistent with the health, safety, and environmental and economic welfare of the state. The Commission is not exempting from the requirements of this rule any entities, regardless of their classification as small businesses or micro-businesses. The Commission included the analysis regarding potential impacts to such entities in the proposal preamble because it is required by Chapter 2006 of the Texas Government Code. The Commission also expressly stated in the proposal preamble that "there are no additional alternative regulatory methods that will achieve the purpose of the statutes while minimizing the adverse impacts on small businesses and micro-businesses; exempting small businesses and micro-businesses from the requirements of the rules would not be consistent with the health, safety, and environmental and economic welfare of the state." The Commission made no change in response to this comment.

Subsection (a), Definitions

The Lone Star Sierra Club recommended that the Commission include a definition for "adjacent properties" to avoid legal issues, even though HB 3328 did not define the term. The Lone Star Sierra Club commented that it is not clear whether an adjacent landowner must be on land physically touching the property line of the primary landowner or merely near it. The Lone Star Sierra Club stated that one approach might be to clarify that only those landowners whose property lines actually physically touch the property line of a landowner on which a well is located be considered adjacent landowners. The Lone Star Sierra Club stated that another approach might be to include in the definition of "adjacent properties" some distance in feet from the property line.

The Sierra Club-D.C. recommended that the term "adjacent property" be defined as "property which either directly borders the property on which a well site has been hydraulically fractured or which is within 5,000 feet from such a well site," or some other reasonable distance to ensure that all affected landowners may seek disclosures, as the Legislature intended. The Sierra Club-D.C. stated that, in the context of hydraulic fracturing, nearby, or "adjacent," properties might well be affected by a hydraulic fracturing treatment, even though they do not share a direct border with the property where a treatment occurs.

Ms. McElfish, with the NCTCA, stated that she supports comments from the Sierra Club-D.C. regarding the definition of "adjacent" in determining who may challenge a claim of trade secret eligibility. NCTCA stated that one of the biggest concerns expressed by citizens is the right of affected parties to be able to challenge the trade secrets provision. NCTCA stated that the proposed rule does not

allow for situations witnessed in the Barnett Shale area where a well is drilled on a city park property, but there are affected residents/property owners within 1,000 to 5,000 feet, who would not be considered "adjacent" property owners, as the rule now states.

TxOGA recommended that the Commission add a definition of "adjacent property" and define that term as "a property with a contiguous, adjoining surface boundary to another" to provide clarity of term and consistency with other Commission rules.

The Commission agrees that a definition for the term "adjacent property" would be helpful and has defined that term in subsection (a) to mean "a tract of property next to the tract of property on which the subject wellhead is located, including a tract that meets only at a corner point." In as much as one plain meaning of "adjacent" is "adjoining," the Commission has decided to use language consistent with an existing definition of "adjoining" for the purpose of clarifying the scope of the rule. The adopted definition of "adjacent property" is consistent with the definition of "adjoining" in §4.204 of this title (relating to Definitions).

EDF recommended that the Commission revise the definition of "health professional or emergency responder" in subsection (a) to include "anyone whose legally permitted scope of practice allows him or her to independently provide or be delegated the responsibility to provide, some or all of a particular service" to be at least as robust as the Occupational Health and Safety Act (OSHA) (see 29 Code of Federal Regulations (CFR) §1910.134). The Commission has room under the statute to devise reasonable provisions to govern sharing of information with health professionals and other persons helping to respond to possible chemical exposure.

The Commission does not agree with this comment. The federal regulations at 29 CFR §1910.134 concern personal protective equipment for respiratory protection. HB 3328 is very specific that the process be consistent with 29 CFR §1910.1200. The Commission finds that the proposed definition is consistent with 29 CFR Section §1910.1200. Furthermore, the definition is sufficiently broad to cover those persons who might offer health care treatment or respond to an emergency. The Commission made no change in response to this comment.

TxOGA also recommended that the Commission revise the definition of "health professional or emergency responder" by specifying providers that actually provide treatment. TxOGA further recommended that the Commission include physician assistant and nurse practitioner, but delete industrial hygienist, toxicologist, and epidemiologist from the definition. And, TxOGA recommended that the Commission replace the word "providing" with the phrase "who needs information in order to provide."

The Commission partly agrees with this comment. The Commission has added to the definition

"physician's assistant" and "nurse practitioner" and has added the phrase "who needs information in order to provide," but sees no reason to delete from the definition the terms "industrial hygienist," "toxicologist," or "epidemiologist" as these terms are used as examples in 29 CFR §1910.1200(i).

Pioneer recommended that the Commission revise the definition of "hydraulic fracturing treatment" to read: "The act of stimulating a well by the application of hydraulic fracturing fluid under pressure *that is expressly designed to exceed the fracturing gradient* for the purpose of creating fractures in a target geologic formation to enhance production of oil and/or natural gas." Pioneer believes this wording more clearly differentiates true hydraulic fracturing activities, which require chemical disclosure, from other well-related work.

AXPC recommends that the definition of "hydraulic fracturing treatment" be modified to read: "the act of stimulating a well by the application of hydraulic fracturing fluid *at a pressure designed to initiate and propagate fractures or fracture networks* in a target geologic formation to enhance production of oil and /or natural gas." AXPC supports inclusion and reporting of "acid frac jobs," but believes the modified definition better excludes simple acid stimulation jobs, which by design dissolve and create pore space especially in natural fractures or any pre-existing fractures. Including acid stimulation information in FracFocus would distort any statistical analysis of hydraulic fracturing practices, particularly related to chemical ingredients and water usage figures.

TxOGA recommended that the Commission revise the definition of "hydraulic fracturing treatment" to read: "The *treatment of* a well by the application of hydraulic fracturing fluid under pressure *that is expressly designed to initiate or propagate a fracture* in a target geologic formation to enhance production of oil and/or natural gas." The Commission agrees that the definition of "hydraulic fracturing treatment" should be clarified, but used language other than the recommended language. "Hydraulic fracturing treatment--The *treatment of* a well by the application of hydraulic fracturing fluid under pressure for the *express* purpose of *initiating or propagating* fractures in a target geologic formation to enhance production of oil and/or natural gas."

TxOGA recommended that the Commission clarify the definition of "landowner" by revising the definition as follows: "Landowner--The person listed on the *applicable county* appraisal roll as owning the real property on which the relevant wellhead is located." The Commission agrees with this comment and has made the recommended change.

TxOGA recommended that the Commission include a definition for Material Safety Data Sheet or MSDS because, while the term is only implicit in this rule, it is specific to FracFocus and fundamental to disclosure. The Commission does not agree with this comment. Although the term "Material Safety

Data Sheet" is used on the FracFocus website, the term is not used in this rule. The Commission made no change in response to this comment.

TxOGA recommended that the Commission revise the definition of "person" by simply referring to the statutory definition in Texas Government Code, Chapter 311. The Commission does not agree with this comment. The definition in Chapter 311 of "person" includes "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." The definition in the proposed rule is the same definition found in §3.8(a)(21) of this title (relating to Water Protection) ("natural person, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity"). The Commission has determined that this definition is appropriate for this rule. The Commission made no change in response to this comment.

TxOGA recommended that the Commission revise the definition of "requestor" as follows to provide specificity and consistency with the statute: "*A landowner on whose property a wellhead is located; a landowner listed on the appraisal roll as owning adjacent property adjacent to the property on which the relevant wellhead is located and has been directly affected by hydraulic fracturing treatment of a well; or an agency of the state with jurisdiction over an environmental, public health or safety matter to which a claimed trade secret is relevant.*" The Commission does not agree with this comment. The language in the proposed rule appropriately ties the term "requestor" to the statutory language describing persons eligible to make a request for information claimed to be eligible for trade secret protection. The Commission made no change in response to this comment.

TxOGA recommended that the Commission revise the definition of "service company" as follows to clarify that rule relates only to hydraulic fracturing treatments and not all well stimulation practices: "A *company* that performs hydraulic fracturing treatments for *an operator* in this state." The Commission partly agrees with this comment. The Commission has deleted the phrase "well stimulation services, including" to clarify that the rule involves hydraulic fracturing treatments, as opposed to other types of well treatments. However, the Commission declines to replace the word "person" with "company" because the Commission has defined the term "person" to include a company. In addition, the Commission sees no reason to insert the phrase "for an operator."

Pioneer recommended that the Commission revise the definition of "total water volume" to match the definition used by FracFocus.org, which is "The total amount of water in gallons used as the carrier fluid for the hydraulic fracturing job. It may include recycled water and newly acquired water." The Commission agrees with this comment and has made the recommended change.

Earthworks commented that the factors that must be shown for an operator to meet the definition of a "trade secret" highlight one of the weaknesses of the proposed rule. Earthworks stated that its experience in other states has shown that operators claim exemptions from disclosure without a specific factual showing for each of the six listed factors. Although Earthworks has yet to see an exemption claim in any state that makes more than a generic showing of "the value of the information to the company and its competitors," this factor is the crux of the trade secret claim - that disclosure will somehow cause the company economic harm. Earthworks recommended that the Commission compile and publish a quarterly summary of the number of exemptions claimed, the companies claiming them, and a summary of the information provided under proposed §3.29(c)(2)(E), "the chemical family or other similar descriptor" for the exempt chemical to ensure that the use of this exemption provision is minimal, as called for by the Department of Energy Shale Gas Production Subcommittee 90-Day Report, August 18, 2011, p. 24, available at http://shalegas.energy.gov/index.html. The Commission disagrees with this comment. The rule is consistent with the intent of HB 3328. However, the Commission does plan to review the information uploaded to FracFocus to determine, among other things, how often entitlement to trade secret protection is claimed.

TxOGA recommended that the Commission revise the definition of "trade secret" by moving language relating to challenging a trade secret to body of rule and defining trade secret to mean "Any formula, pattern, device, or compilation of information that is used in a person's business, and that gives the person an opportunity to obtain an advantage over competitors who do not know *and* use it." The Commission does not agree with this comment. However, the Commission has revised the language in the definition so that it does not imply that a factual showing is required unless there is a challenge.

Subsection (b), Applicability

Representative Burnam recommended that the Commission make the rule effective as soon as possible because the rule makes use of existing infrastructure and processes at the Commission, the GWPC/IOGCC Chemical Disclosure Registry, and the Office of the Attorney General, and because well operators and service providers already should be maintaining records with the chemical information required to be disclosed under the proposed rule. Representative Burnam further commented that, in light of the vast number of hydraulic fracturing treatments being performed each month in Texas and the number of Texans living near and depending on fresh groundwater resources in proximity to those treatments, the Commission should be expeditious with the rule's effective date, and recommended that the rule take effect on January 1, 2012, or at the latest, February 1, 2012.

The Commission agrees with the comment and has revised subsection (b) to make the rule effective for a hydraulic fracturing treatment performed on a well in the State of Texas for which the Commission has issued an initial drilling permit on or after February 1, 2012, to allow sufficient time for all operators and their authorized agents to register with FracFocus to be able to upload information.

The Lone Star Sierra Club commented that the proposed rule appears to consider only a single hydraulic fracturing treatment and does not consider re-fracturing of the well. The Lone Star Sierra Club stated that wells not subject to the rule at the time of drilling could be re-fractured after the effective date of the rule. The Lone Star Sierra Club recommended that the Commission require the operator of such a well to disclose the hydraulic fracturing chemicals used in the re-fracturing treatment and any future re-fracturing treatments.

The Commission does not agree with the comment. The language in SECTION 2 of HB 3328 was very clear on this issue: "Subchapter S, Chapter 91, Natural Resources Code, as added by this Act, applies only to a hydraulic fracturing treatment performed on a well for which an initial drilling permit is issued on or after the date the initial rules adopted by the Railroad Commission of Texas under that subchapter take effect. A hydraulic fracturing treatment performed on a well for which an initial drilling permit is issued before the date the initial rules take effect is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose." Therefore, the Commission cannot include the recommended requirement. However, in response to other comments, the Commission has clarified that a well that is subject to this rule and that is subsequently re-fractured remains subject to the requirements of the rule with any subsequent re-fracturing treatments.

Earthworks recommended that the Commission clarify the language in subsection (b) that re-stimulations on wells that have a permit also are subject to the disclosure requirements of the rule.

The Commission does not agree that the language needs to be clarified. The language tracks the wording of the statute and makes clear that the rule applies whenever a hydraulic fracturing treatment is performed on a well for which the Commission has issued a drilling permit after the effective date of the rule. The Commission made no change in response to this comment.

Subsection (c), Required Disclosures

Ms. McElfish, president of NCTCA, stated that she generally supports the proposed rule and the disclosure of ingredients on the FracFocus website, but recommended that both the Chemical Abstract Service (CAS) number for chemicals and the chemical name be included, which the rule appears to require. The Commission agrees that the rule requires both the chemical name and the CAS number for

those chemical ingredients not eligible for trade secret protection. The Commission made no change to the rule in response to this comment.

Mr. Hogan commented that disclosure of proprietary chemicals should be made to the Commission (with a non-disclosure agreement) as needed to prove or disprove groundwater contamination. In the alternative, the commenter and Ms. Reed recommended that the Commission require that operators include and disclose tracer chemicals or dye for each well for use in determining whether or not hydraulic fracturing has caused pollution of groundwater. The Commission does not agree with this comment as it is beyond the scope of this rulemaking. In addition, such a requirement was proposed in the 82nd Texas Legislature, but did not pass. The Commission has the authority to require disclosure of information for which a claim of entitlement to trade secret protection has been made (with the appropriate non-disclosure agreement) in any contamination investigation. The Commission made no change in response to this comment.

An individual, Mr. Carl Dimon, a retired Registered Professional Engineer in petroleum engineering in Texas, stated his full support in the effort to make public the generic names and concentrations of all ingredients in hydraulic fracturing fluids, but recommended that the following specific information be provided for any ingredient for which an entity has claimed trade secret protection: (1) certification by a governmental agency that the compounds are not toxic; (2) a generic description of the chemical nature of the compound including the names of toxic functional groups which are not present (for example, chlorides, fluorides, benzene and condensed-ring aromatics); and (3) the range of concentrations and total weight of compounds used.

The Commission does not agree with this comment. HB 3328 prohibits the Commission from requiring the disclosure of some of the recommended information. The remaining information was not included in the proposed rule and cannot subsequently be added to the rule without republication and public comment. The Commission made no change in response to this comment.

Mr. Dimon also recommended that the Commission require that no well may be hydraulically fractured: (1) without first making public a wellbore sketch emphasizing how the well is cemented; (2) without making public a well deviation trajectory; (3) in any interval whose horizontal distance from a school, nursing home or shopping center is less than 1,000 feet; (4) in any interval whose horizontal distance is less than 3,000 feet from a dam site; and (5) in any interval whose horizontal distance from a set of homes is less than 1,000 feet and 30 percent of the homeowners protest this in writing within a 90-day period. In addition, Mr. Dimon recommended that the Commission require the operator to report certain data obtained by the operator's contract service companies, including (1) surface pressure at initial

breakdown and throughout the hydraulic fracturing treatment, pumping rates versus time for water, sand, and slurry; (2) calculated downhole "net" fracturing pressure at the leading edge of the fracture; (3) certification that a responsible company representative was present on site for the entire hydraulic fracturing treatment; and (4) report all volumes transported for disposal by injection on a truckload-by-truckload basis. Mr. Dimon also recommended that the Commission require the following for salt water disposal: (1) two initial samples of transported fluids from each well held for chemical analysis; (2) two later samples of transported fluids from each well during a period of not less than two weeks and not more than six months; (3) quarterly, unannounced samples at each disposal well or at each disposal well complex; and (4) continuous monitoring of injection rates and surface injection pressure at each disposal well to insure that injection pressure does not exceed fracture pressure for the disposal well.

The Commission does not agree with these comments because they are beyond the scope of this rulemaking.

EXCO commented on the filing time requirements in subsection (c)(1) and pointed out a discrepancy with another Commission rule, §3.16 of this title (relating to Log and Completion or Plugging Report). EXCO commented that, as written, §3.29(c)(1) would require the service company to provide the information necessary to disclose hydraulic fracturing treatments within 30 days of the treatment, while §3.29(c)(2) requires the operator to submit the disclosure form to FracFocus within 30 days and to the Commission within 30 days. Section 3.16(b) requires the operator to file the completion report "within 30 days after completion of the well or within 90 days after the date on which the drilling operation is completed, whichever is earlier." EXCO commented that, if a service company files the required information with an operator on the 30th day, the 30-day deadline imposed on an operator in proposed 3.29 would be impossible to meet. EXCO recommends that the Commission either reduce the service company's 30 day limit in §3.29(c)(1) to 15 days, or change the filing requirement in §3.16(b) to require the filing of the completion reports within 60 days of completion.

The Commission agrees with this comment and has revised §3.29(c)(1) to require that the service company provide the necessary information to the operator as soon as possible or within 15 days of the date of the hydraulic fracturing treatment(s).

Fasken Oil and Ranch, Ltd. ("Fasken") stated that subsection (c)(1) requires the supplier and service company to disclose each chemical ingredient intentionally added to the hydraulic fracturing fluid as soon as possible, but no later than 30 days following the completion of the treatment(s). If the supplier/service company waits until day 30, the operator must be ready and able to immediately load the information into the Chemical Disclosure Registry, print out a confirmation from the Registry, and then

deliver the completion paperwork and confirmation to the Commission. Otherwise, the operator will be in violation of the rule requiring filing the completion paperwork within 30 days of completion of the well. Fasken recommended that the Commission revise the rule to require that the completion paperwork is due within 60 days of the completion of the well.

The Commission partially agrees with this comment. The recommended timing for submission of the completion report to the Commission by the operator (60 days) would require amendment of §3.13 of this title (relating to Casing, Cementing, Drilling, and Completion Requirements), and would change the submission date for all wells, not just those on which a hydraulic fracturing treatment is performed. However, the Commission agrees that the language of the proposal could present a timing issue for operators, and therefore has revised §3.29(c)(1) to require that the service company provide the necessary information to the operator as soon as possible or within 15 days of the date of the hydraulic fracturing treatment(s).

The City of Dallas expressed concern that subsection (c) requires the operator to disclose chemical ingredients "on or before the well completion report" or after the hydraulic fracturing process has been completed. The City of Dallas recommended that the Commission consider making the requirement for disclosure contemporaneous with the permitting process. The Commission does not agree with this comment because the Legislature made it clear that disclosure was to occur after the hydraulic fracturing treatment(s). The Commission made no change to the rule in response to this comment.

Earthworks also commented that the Commission should include a new subsection (c) to provide for 30-day notice prior to the hydraulic fracturing operation to be given to the Commission, to those landowners identified in subsection (f), and to any municipality within whose water supply watershed the well is being drilled. In support of this suggestion, Earthworks points out that the State Review of Oil and Natural Gas Environmental Regulations (STRONGER) guideline on hydraulic fracturing recommends that notice be given to the regulatory agency to allow for observation of the hydraulic fracturing operation.

This comment is beyond the scope of this rulemaking. In addition, Subchapter Q of the Texas Natural Resources Code, related to Notice of Permit for Certain Oil and Gas Operations, already states that "[n]ot later than the 15th business day after the date the commission issues an oil or gas well operator a permit to drill a new oil or gas well or to reenter a plugged and abandoned oil or gas well, the operator shall give written notice of the issuance of the permit to the surface owner of the tract of land on which the well is located or is proposed to be located." The Commission made no change to the rule in response to this comment.

Pioneer recommended clarifying the language in subsection (c)(1)(A) to specify the disclosure of all ingredients by their CAS numbers, because the reference to 29 CFR §1910.1200(g)(2) is insufficient: "(A) each chemical ingredient, *identified by its associated CAS number,* subject to the requirements of 29 Code of Federal Regulations 1910.1200(g)(2)." The Commission generally agrees with this comment, but has added language other than that recommended by Pioneer.

Regarding subsection (c), AXPC and Apache stated that its member companies have encouraged the voluntary disclosure of CAS numbers for all listed chemical ingredients on the FracFocus website when not claimed as trade secrets and that CAS level disclosure is the standard suggested by the statute for those chemicals required to be disclosed. However, to clarify, AXPC and Apache requested that the Commission make public disclosure of CAS numbers explicitly the obligatory minimum standard by adding the "CAS numbers of chemical ingredients" to the requirements reported under §3.29(c). AXPC and Apache assumed the Commission interpreted that 29 Code of Federal Regulations 1910.1200(g)(2) to require the disclosure of CAS numbers. AXPC and Apache read the Code to require disclosure of only chemical and common names without reference to CAS numbers even if CAS numbers are the practical standard of international MSDS sheets. The Commission agrees with these comments and has added the recommended language.

Halliburton commented that for some chemical ingredients, providing the chemical family name could disclose the identity of the chemical and reveal trade secret information. TxOGA's revisions allow the trade secret owner to provide the chemical family name or *other similar description* for chemical ingredients for which trade secret protection is claimed. For proprietary chemical ingredients that are subject to the requirements of 29 CFR §1910.1200(g)(2), the Material Safety Data Sheet (MSDS) will provide information concerning the properties and effects of the proprietary ingredient. Halliburton expressed concern that providing information concerning the properties and effects of proprietary chemical ingredients that are not subject to the requirements of 29 CFR §1910.1200(g)(2) could have the effect of disclosing the identity of the chemical, but notes that this group of chemicals already is not expected to pose a significant threat by virtue of the fact that it does not require an MSDS. Further, where there is a medical need or an emergency need for the claimed trade secret information, the identity of the chemical must be provided under the rule.

The Commission does not agree with this comment. The commenter did not provide the Commission with a proposed definition of the phrase "other similar description" and the Commission could not ascertain from the comment what such a description would entail. However, the Commission recognizes that in a very few instances, indicating the chemical family would result in disclosure of

information protected as a trade secret. Therefore, the Commission has amended subsection (c)(1)(B) to require that the service company or supplier claiming protection as a trade secret for a chemical ingredient or additive provide the chemical family, unless providing the chemical family would result in disclosure of information protected as a trade secret.

TxOGA recommended that the Commission revise the language in subsection (c)(2) to clarify that certain information must be provided by the service company or supplier before it can be reported by operator, to revise the language relating to timing of reporting to reflect the possibility of multiple fracturing treatments, and to provide for the reporting of CAS numbers. TxOGA further recommended that the Commission delete a reference that is inconsistent with the statute in subsection (c)(2)(A)(xii).

The Commission agrees that much of TxOGA's suggested language will clarify the information that a supplier or service company must provide to an operator to ensure that the operator can comply with the operator disclosure requirements of this rule.

Fasken commented that the requirement in subsection (c)(2)(A) that the only party who may legally complete the Chemical Disclosure Registry is the operator of the well will greatly limit the flexibility of operators to partner with suppliers and service companies to find efficiencies in the processing of data to meet these new requirements. Fasken recommended that the Commission allow an operator the ability to use outside resources to meet the requirement of loading this data into the Registry.

The Commission partly agrees with this comment. The Commission did not intend to imply that an operator could not use an agent or third-party contractor to upload information on FracFocus. An operator has the ability to authorize an agent or third-party contractor to enter information into FracFocus on the operator's behalf. However, because the Commission does not control FracFocus, the Commission does not control the assignment of agents or third-party contractors for operators. Therefore, the Commission ultimately must hold the operator responsible for uploading the information on FracFocus. The Commission made no change in response to this comment.

TxOGA recommended that the Commission revise subsection (c)(2)(B) to delete subjective terminology. The Commission partly agrees with this comment and has revised the language to include the potential for multiple hydraulic fracturing treatments. The Commission declines to delete the term "temporarily" because this paragraph specifically deals with the possibility that FracFocus could be "temporarily" out of service. However, the Commission did add language to describe the requirements for disclosure should FracFocus be discontinued or become permanently inoperable.

TxOGA recommended that the Commission revise subsection (c)(2)(C), relating to timing of reporting, to reflect the possibility of multiple fracturing treatments. The Commission agrees that the

proposed language lacks clarity, but has revised the language to delete subsection (c)(2)(C) and to amend subsection (c)(2)(A) to refer to "the well completion report for the well filed after the hydraulic fracturing treatment(s)."

TxOGA recommended that the Commission revise the language in subsection (c)(2)(E) to allow claimed trade secret information to be identified as "confidential business information," "proprietary" or "trade secret," consistent with the FracFocus approach. The Commission does not agree with this comment. The terms do not have the same meaning. Trade secret information is distinct from proprietary information. Addition of the terms as suggested by TxOGA would make the scope of the definition broader than intended by HB 3328. The Commission made no change in response to this comment.

TxOGA also recommended deleting the last sentence of subsection (c)(2)(E), which requires that the operator provide the contact information of the organization claiming entitlement to trade secret protection, because TxOGA believes this to impose an unnecessary burden on the operator. The Commission does not agree with this comment. Because the Commission has only 10 business days after receipt of a request to request a determination by the Office of the Attorney General, the Commission needs this information to be readily accessible. The Commission made no change in response to this comment. However, for other reasons discussed elsewhere in this preamble, the Commission deleted proposed subsections (c)(2)(C) and (c)(2)(D) and redesignated proposed subsections (c)(2)(E) and (c)(2)(F) as subsections (c)(2)(C) and (c)(2)(D), respectively.

Earthworks stated that it supports the requirement in §3.29(c)(2) that the operator file the list of items specified and urged the Commission to ensure that the operators timely file these items, as this section of the rule is the heart of the disclosure requirement. Earthworks further stated that a landowner who believes that his water well has been contaminated by hydraulic fracturing operations on an adjacent oil or gas well must be able to quickly and easily access this chemical disclosure information. If the operator has not filed the necessary report, then the landowner has no direct recourse, other than to appeal to the Commission to enforce the rules. It would only take a few instances for this lack of compliance to undermine any trust that has been regained through the promulgation of this rule. The Commission does not agree with this comment; the Commission has every intention of enforcing this rule. The Commission made no change in response to this comment.

Pioneer recommended that the Commission revise subsection (c)(2)(C)(ii) for consistency: "(ii) a supplemental list of all *chemical ingredients* and their respective CAS numbers, not listed on the Chemical Disclosure Registry, that were intentionally included in and used for the purpose of creating the hydraulic fracturing treatment for the well." The Commission agrees with this comment. However, the

Commission has deleted the language in subsection (c)(2)(C)(ii) for other reasons.

Earthworks noted that §3.29(c)(2)(D) gives operators the option of providing all of the required items on the Chemical Disclosure Registry form. Earthworks urges the Commission to make this mandatory, assuming that the FracFocus website is modified to allow the posting of the required items. One of the ways to regain public trust on this issue is to make the information easily and fully accessible. That requires that the information be consolidated and searchable, which the current FracFocus structure does not allow. Earthworks understands that GWPC has committed to modifying the website to allow this type of posting and searchability, and urges the Commission to follow up with GWPC to ensure that these changes move forward.

The Commission agrees with this comment and has revised the rule to require that all chemical information required by the rule be entered into FracFocus. In addition, the Commission will continue to work with GWPC and IOGCC to improve the website.

With regard to subsection (c), the Sierra Club-D.C. recommended that the Commission guarantee internet disclosure because Texas Natural Resources Code, §91.851(a)(1), directs that "each chemical ingredient" used in a hydraulic fracturing job be posted on the website of FracFocus.org, or, "if the website is discontinued or permanently inoperable," posted on another publicly accessible website. As the Commission recognizes, some chemicals may not be listed (or listable) on FracFocus.org. Texas Natural Resources Code, §91.851(a)(1)(E), requires disclosure of "all other chemical ingredients not listed" on the Chemical Disclosure Registry. For all intents and purposes, the website is "permanently inoperable" for these chemicals, triggering the Commission's obligation to provide for an alternative form of disclosure. Thus, Sierra Club-D.C. understands that the Commission intends to post supplemental lists of these chemicals, along with all other chemical disclosures, on its website. This is a positive step, but the rule itself does not clearly state that these lists will be posted. Therefore, the Sierra Club-D.C. recommended that the Commission affirmatively state that this disclosure will occur.

The Commission agrees with this comment and has added language to subsection (c)(2)(B), as adopted, to state that, if the Chemical Registry known as FracFocus is discontinued or becomes permanently inoperable, the information required by this rule must be filed with the completion report for the well, which will be posted on the Commission's publicly available Internet website as an attachment to the completion report until the Commission amends this rule to specify another publicly accessible Internet website.

The City of Dallas commented that the notice provisions in subsection (c)(4) allow for disclosure of chemical ingredients deemed to be eligible for trade secret protection to health professionals and

emergency responders only in the case of an emergency and limits the definition of a health professional or emergency responder to those rendering medical or other health services "to a person exposed to a chemical ingredient." The City of Dallas commented that this provision does not include an incident in which hydraulic fracturing chemicals are spilled on property and recommended that the Commission include land in this definition, so that health professionals and emergency responders can obtain complete and correct information to respond to incidents that occur on property.

The Commission does not agree with this comment. The Texas Legislature made it clear in HB 3328 the circumstances under which the Commission may require disclosure of information protected by trade secret provisions. HB 3328 requires disclosure to a health professional or emergency responder "who needs the information in accordance with Subsection (i)" of 29 CFR §1910.1200. The Commission made no change in response to this comment.

TxOGA recommended that the Commission revise subsection (c)(4) to distinguish between emergency and non-emergency situations and to clarify the differences in disclosures under each situation. The Commission agrees with this comment and has revised the language in subsection (c)(4) accordingly.

Subsection (d), Disclosures Not Required

TxOGA recommended that the Commission revise the language in subsection (d)(4) to be consistent with the statute. The Commission does not agree that the recommended language is inconsistent with the statute. The Commission used the statutory language. However, the Commission revised the language in paragraph (4) to clarify that information must be disclosed if the Office of the Attorney General, or a court of proper jurisdiction on appeal of a determination by the Office of the Attorney General, determines that the information would not be entitled to protection as trade secret information under Texas Government Code, Chapter 552, if the information had been provided to the Commission.

Subsection (e), Trade Secret Protection

TxOGA recommended that the Commission revise subsection (e) to add "CAS number" throughout the subsection because a trade secret may be connected to the CAS number as well as the specific identity or concentration of a chemical ingredient. The Commission agrees with this comment and has made the recommended changes.

TxOGA recommended that the Commission revise subsection (e)(2) to provide clarity. As

proposed, the Commission conditions the ability to withhold claimed trade secret information on a supplier, service company, or operator, as applicable, providing chemical family information and an indication of the trade secret claim to the Commission. TxOGA commented that this language could be construed to require direct submission of information by suppliers and service companies to the Commission. Because this information would be submitted to the Commission by the operator based on information it receives from service companies and suppliers, TxOGA suggested that instead of "must provide to the Commission," the language read "must provide in its required submittals hereunder."

The Commission does not agree with this comment. The Commission intends that the supplier or service company provide the listed information to the operator so that the operator may comply with the requirements of this rule. The Commission did not make the change suggested by TxOGA, but has made a change to show that the information should be provided to the operator rather than to the Commission.

TxOGA recommended that the Commission revise the language in subsection (e)(2)(B) by allowing claimed trade secret information to be identified as "confidential business information," "proprietary," or "trade secret," which is consistent with the FracFocus approach. The Commission does not agree with this comment. The terms do not have the same meaning. Trade secret information is distinct from proprietary information. Addition of the recommended terms would make the scope of the definition broader than was intended by HB 3328. The Commission made no change in response to this comment.

TxOGA recommended that the Commission revise subsection (e)(2) to require service companies or suppliers claiming trade secret protection to provide a designated contact for notice of a trade secret challenge to avoid notification issues at the time of a challenge. The Commission does not agree with this comment. Proposed subsection (c)(2)(D), adopted as subsection (c)(2)(C), requires that the operator of the well on which the hydraulic fracturing treatment(s) were performed provide the contact information, including the name, authorized representative, mailing address, and phone number of the business organization claiming entitlement to trade secret protection. Such a requirement ensures that the contact information is current and ties the information to a specific well. Such requirement also does not shift the burden to the Commission. The Commission made no change in response to this comment.

Regarding subsection (e), Halliburton commented that it agrees with TxOGA's proposal to move the criteria to be used by the Office of the Attorney General in making determinations on whether information claimed as a trade secret is entitled to trade secret protection from the definition of "trade secret" to the trade secret challenge process. As noted previously, the Commission does not agree with this comment. The Commission made no change in response to this comment.

In subsection (e), the Lone Star Sierra Club suggested that the Commission require entities requesting trade secret protection to submit the request directly to the Office of the Attorney General and have them determine whether it meets the guidelines. The Commission does not agree with this comment. The Legislature's clear intent was to bring in the Office of the Attorney General when there is a challenge to a claim of entitlement to trade secret protection that meets the eligibility requirements of the legislation and the Commission can timely make the required preliminary determinations, including a determination of the date the operator filed with the Commission the completion report for the well as required by HB 3328. The Commission made no changes in response to this comment.

Subsection (f), Trade Secret Challenge

The Sierra Club-D.C. recommended that the Commission clarify in subsection (f) that all affected landowners may challenge trade secret withholding. In Texas Natural Resources Code, §91.851(a)(5), the Texas Legislature provided that landowners may challenge a claim of trade secret protection for hydraulic fracturing fluid constituents. Under proposed subsection (f)(4), a request for trade secret protected information must be filed "no later than 24 months from the date the operator filed the final well completion report." Landownership may change during that period, but all affected landowners have a vital interest in chemical disclosures. For instance, landowners who have since moved may be concerned with exposure to chemicals contained in hydraulic fracturing fluid during the time they resided on their property, and wish to review this information. The Commission can ensure as much by defining in subsection (a) that "landowners" are the "person or persons listed on the appraisal rolls as owning the real property on which the relevant wellhead is located *beginning at the time the hydraulic fracturing treatment is conducted.*" The Commission generally agrees with this comment but has added language to address this concern in subsection (c)(4).

TxOGA recommended that the Commission simplify subsection (f)(1) by using the term "requestor" as TxOGA proposed to redefine it. The Commission does not agree for the reasons discussed previously in this preamble.

The City of Dallas also expressed concern with the limited list of people allowed to challenge the claim of entitlement to trade secret protection; the timing of these disclosures, including when an "incident" requires disclosure to a health professional or emergency responder; and the omission of "place" from the definition of incidents in subsection (f). As drafted, only entities that fall into the category of landowner and "adjacent land owner" are entitled to appeal claim of trade secrets. While a municipality will typically fall under the category of "adjacent land owner" in light of adjoining public

rights of way, the City of Dallas recommended that the Commission also recognize the broad authority of municipalities to provide for the health, safety, and welfare of their citizens under traditional police powers by allowing municipal authorities to appeal a claim of trade secrets.

The Commission does not agree with this comment. The Legislature made it clear in HB 3328 when the Commission may require disclosure of information eligible for trade secret protection. The Commission maintains, however, that the Commission has the authority to request such information in the course of an investigation. The Commission made no change in response to this comment.

Fasken recommended that the Commission revise subsection (f)(1)(B), which allows any landowner who is adjacent to the land where a fracture treatment is located to have the right to challenge the trade secret protection. Fasken stated that in much of the Permian Basin, large land areas are owned by a single owner and are developed by one operator. For example, Fasken's largest ranch runs through the heart of the Wolfberry play in Midland, Ector, and Andrews Counties and is many miles long and wide. The rule as proposed implies that an adjacent landowner who may be many miles away from a hydraulic fracturing treatment would have the right to challenge the trade secret protection under this provision, even though there is no chance of any negative ramifications on his property. Fasken recommended that the Commission revise the language to limit how far away an adjacent operator can be and still have the right to make a challenge of this protection. Fasken cited the Commission's routine use of one mile in making decisions concerning who has the right to protest, and suggested that one mile should be used in this rule as well.

As discussed above, the Commission agrees that the definition for the term "adjacent property" would be helpful and has defined that term to mean "a tract of property next to the tract of property on which the subject wellhead is located, including a tract that meets only at a corner point." As noted previously, one plain meaning of "adjacent" is "adjoining" and the Commission used a definition consistent with the existing definition of "adjoining" in §4.204 of this title (relating to Definitions).

TxOGA recommended that the Commission revise subsection (f)(1)(C) to require that the state department or agency provide the reason for requesting the information. The Commission does not agree with this comment. In the normal situation, the Public Information Act (Open Records Act) prohibits a governmental entity from asking a requestor for the reason the requested information is being sought. The Commission made no change in response to this comment.

TxOGA recommended that the Commission revise subsection (f)(3) to revise the form to clarify that it would only apply to landowner requestors and not government agencies. The Commission agrees with this comment and has made the recommended changes.

TxOGA recommended that the Commission revise subsection (f)(4) to provide clarity by tying the requirement to the "relevant well." The Commission agrees with this comment, but has used language other than that recommended. In addition, as noted previously, the Commission deleted the word "final."

TxOGA recommended that the Commission revise subsection (f)(5), as adopted, to provide notice to the operator and to any service company or supplier identified as the person claiming the trade secret. The Commission agrees with this comment and has made the recommended revision.

TxOGA recommended that the Commission revise subsection (f)(6) to provide a process for challenging the eligibility of a person challenging a claim of trade secret protection. Halliburton also expressed agreement with TxOGA's comments regarding the ability to challenge the eligibility of a requestor to make a trade secret challenge. The proposed rule does not specify whether and how a trade secret owner could challenge the eligibility of the requestor. The revisions proposed by TxOGA would afford the trade secret owner a short, ten-business day period to make such a challenge and stay action by the Office of the Attorney General pending the eligibility challenge. Because this is a Commission rule rather than a rule of the Office of the Attorney General, the Commission may appropriately serve as the agency to consider any challenge to the eligibility of the requestor.

The Commission declines at this time to include such a provision in the adopted rule, but would entertain comments on the issue at such time as the Commission has more experience with fracturing fluid disclosure and has determined that the eligibility of requestors is an issue that needs to be addressed. First, the proposed rule did not include such a provision and inclusion of such a provision would be a sufficiently substantial change to require that the Commission republish the proposed rule for further comment. In addition, at this point the Commission is not sure which agency would have the authority to hear a dispute over a person's eligibility to challenge a request for information claimed as trade secret under Texas Government Code, Chapter 552. The Commission made no changes to the rule in response to this comment. However, the Commission did include language to indicate that the Commission would determine whether the request has been made within the allowed 24-month period, and language that indicates that if the Commission determines that the request has been received within the allowed 24-month period and the certification is properly completed and signed, the Commission will consider this sufficient for the purpose of forwarding the request to the Office of the Attorney General.

TxOGA recommended that the Commission revise subsection (f)(7), as adopted, to establish a procedure for providing information to Office of the Attorney General during challenge process without making the information subject to open records and delete the requirement to provide a physical copy of the trade secret information to the Office of the Attorney General. As proposed, subsection (f)(5)(B),

adopted as subsection (f)(6)(B), requires the trade secret owner to submit the claimed secret information marked "confidential" to the Office of the Attorney General as part of the challenge review process. While it may be necessary for the Office of the Attorney General to receive or have access to this information as part of the review, TxOGA is concerned that providing a copy of the information as proposed could allow it to be requested by any member of the public, not just a requestor, under the Texas Public Information Act. Instead, provisions to make the information available to the Office of the Attorney General during the challenge review process are included in subsection (f)(7) of TxOGA's proposed revisions. Halliburton commented that proposed subsection (f)(5)(B) would require the trade secret owner to submit the claimed secret information marked "confidential" to the Office of the Attorney General as part of the challenge review process. While it may be necessary for the Office of the Attorney General to receive or have access to this information as part of the review, it should not thereby become information that any member of the public could request under the Texas Public Information Act.

The Commission does not agree with these comments. HB 3328 requires disclosure of information held by a third party supplier, service company, or operator, rather than a state agency (the Commission). Normally, when a governmental entity receives information that is considered entitled to trade secret protection, and subsequently receives an open records request for that information, the Office of the Attorney General requires that the governmental entity provide the information to the Office of the Attorney General. The Office of the Attorney General holds that information confidential until is has made a determination regarding whether or not the information is public information. The Commission sees no reason to deviate from such a requirement and place an additional burden on the Office of the Attorney General. The Commission made no change in response to these comments.

TxOGA recommended that the Commission add new wording to provide a process for challenging a claim of trade secret protection. The Commission generally agrees with this comment, but did not use the recommended language.

TxOGA recommended that the Commission add new wording to recognize that there may be circumstances where a determination is unnecessary or the challenge is withdrawn. Halliburton stated that it agrees with TxOGA regarding withdrawal of a challenge, as it is not appropriate to continue to task the time and resources of the Office of the Attorney General when the challenge becomes moot. Accordingly, provisions have been suggested that would allow for withdrawal of a challenge by a landowner or in the event the trade secret owner provides the information being requested by a government agency requestor under a claim of confidential business information.

The Commission generally agrees with this comment. The Commission agrees that there may be

situations in which a request may be withdrawn or that made a determination by the Office of the Attorney General moot. The Commission did revise the language in response to this comment, but did not use the recommended language.

TxOGA recommended that the Commission revise proposed subsection (f)(6) and (8), adopted as subsection (f)(7) and (10), to conform language to be consistent with Texas Government Code, Chapter 552. The Commission agrees with this comment and has made the recommended changes.

Subsection (h), Penalties

The Lone Star Sierra Club also recommended that subsection (h), which specifies the enforcement, compliance, and penalty provisions, include specific penalty amounts for failure to comply with the rules.

The Commission does not agree with this comment. The Commission did not include a specific amount for penalties in the proposed rule. Therefore, it cannot include such a number in the adopted rule. However, the Commission recently directed staff to begin work on a penalty rule and the commenter may wish to comment on that proposed rule. The Commission made no changes in response to this comment.

TxOGA requested that the Commission clarify against whom the Commission would pursue enforcement action in a situation where an operator is unable to obtain information from a supplier or service company necessary to comply with the disclosure requirements of the rule.

If such a situation were to arise, the Commission would require the operator to document its attempts to obtain the required information and would require the supplier or service company to document why it did not provide the required information. After review of this documentation, the Commission would pursue enforcement action against the entity or entities that did not provide adequate documentation. If an operator continued to use the services of a supplier or service company that consistently failed to provide the operator with information in compliance with the disclosure requirements of this rule, the Commission most likely would pursue enforcement action against both the operator and the supplier or service company.

The Commission adopts new §3.29(a), relating to definitions, to define terms used in the proposed new rule. The Commission added a definition and modified other definitions in response to comments. The Commission added a definition for "adjacent property" to mean "a tract of property next to the tract of property on which the subject wellhead is located, including a tract that meets only at a corner point." The Commission also revised the definition of "health professional or emergency responder" to include physician's assistant and nurse practitioner and to replace the word "providing"

with the phrase "who needs information in order to provide." The Commission revised the definition of "service company" to delete the phrase "well stimulation services, including" to clarify that the rule concerns hydraulic fracturing treatments. The Commission also revised the definition of "total water volume" to conform to the FracFocus definition of the term.

The Commission adopts new §3.29(b), relating to applicability, with changes. The Commission revised this subsection to state that this new section applies to a hydraulic fracturing treatment performed on a well in this state for which the Commission has issued an initial drilling permit on or after February 1, 2012. The Commission selected the February 1, 2012, date to allow operators and their agents sufficient time to register with GWPC to be able to upload information on the FracFocus Internet website. In addition, this date will allow suppliers, service companies, and operators sufficient time to prepare for compliance with the requirements of this new rule.

The Commission adopts new §3.29(c), relating to required disclosures, to detail the hydraulic fracturing treatment chemical disclosure requirements for suppliers, services companies, and operators. Consistent with the provisions of HB 3328, subsection (c) requires an operator to submit information about the chemical ingredients and volume of water used in the hydraulic fracturing treatment of a well to the hydraulic fracturing chemical registry Internet website of the Ground Water Protection Council (GWPC) and the Interstate Oil and Gas Compact Commission (IOGCC) known as "FracFocus." Should this website be discontinued or become permanently inoperable, the Commission will amend the new rule to specify another publicly accessible Internet website on which this information must be posted.

In response to comments, the Commission revised subsection (c)(1) to change the time for a supplier or service company to provide required information to the operator to not later than 15 days, rather than 30 days, following the completion of hydraulic fracturing treatment(s) on a well. In addition, the Commission clarified the information that a supplier or service company must provide to the operator of a well to allow the operator to comply with the requirements of the rule. The Commission also added language that requires the supplier or service company to supply the operator with a written statement that the specific identity and CAS number or amount of any additive or chemical ingredient used in the hydraulic fracturing treatment of the operator's well is entitled to protection as trade secret information pursuant to the criteria provided by Texas Government Code, Chapter 552.

In response to comments, the Commission revised subsection (c)(2), relating to operator disclosures, to add clarifying phrases and words. In addition, the Commission revised the language to require that all information required by this rule, including the information on the supplemental list, as well as the information required to be uploaded on the FracFocus website in the proposed version, be

uploaded to the FracFocus website. Such a requirement will consolidate all of the information on the FracFocus Internet website, and will simplify the procedure for operators by eliminating the need for an operator to upload information on FracFocus and make and submit a hard copy of that information with the supplemental list and the completion report for the well. This change also will make the information more easily accessible and less confusing to the public.

Also in response to comments, the Commission modified subsection (c)(4) to clarify the requirements for disclosure of information to health professionals and emergency responders during emergency and non-emergency situations.

The Commission adopts §3.29(d), relating to disclosures not required, which states that a supplier, service company, or operator is not required to disclose ingredients that are not disclosed to it by the manufacturer, supplier, or service company; disclose ingredients that were not intentionally added to the hydraulic fracturing treatment; disclose ingredients that occur incidentally or are otherwise unintentionally present which may be present in trace amounts, may be the incidental result of a chemical reaction or chemical process, or may be constituents of naturally occurring materials that become part of a hydraulic fracturing fluid; or identify specific chemical ingredients that are eligible for trade secret protection based on the additive in which they are found or provide the concentration of such ingredients. In response to comments, the Commission inserted the phrase "and/or CAS numbers" after the phrase "specific identity" because the CAS number may be information for which a claim of trade secret protection has been made. The Commission also added language to clarify that this information must be disclosed if the Office of the Attorney General, or a court of proper jurisdiction on appeal of a determination of the Office of the Attorney General, determines that the information would not be entitled to trade secret protection under Texas Government Code, Chapter 552, if the information had been provided to the Commission.

The Commission adopts §3.29(e), relating to trade secret protection, which states that a supplier, service company, or operator is not required to disclosure information that is entitled to trade secret protection, unless the claim has been successfully challenged under Texas Government Code, Chapter 552. The Commission included the phrase "or CAS number" after the phrase "specific identity" because the CAS number may be information for which a claim of trade secret protection has been made.

The Commission adopts §3.29(f), relating to trade secret challenge, which codifies the eligibility requirements in Texas Natural Resources Code, §91.851, of a person who may challenge a claim of entitlement to trade secret protection, and outlines the procedures and requirements for such a challenge. The Commission revised the language in subsection (f)(1) to clarify that certain persons may submit a

request to challenge a claim of entitlement to trade secret protection and to more clearly identify that the request would challenge such a claim for information related to chemical ingredients used in the hydraulic fracturing treatment(s) of a well.

In response to a comment, the Commission also added to the format in Figure 16 TAC §3.29(f)(3) a sentence that identifies that the second part of the form is to be completed by a landowner or adjacent landowner making a request to challenge a claim of entitlement to trade secret information.

The Commission also revised subsection (f)(4) to clarify that a landowner who owned the property on which the wellhead is located, or owned adjacent property, on or after the date the operator filed with the Commission the completion report for the subject well may challenge a claim of entitlement to trade secret protection within that 24-month period only. In addition, the Commission inserted language that clarifies that the Commission will determine whether or not the request has been received within the allowed 24-month period.

The Commission also inserted a new subsection (f)(5) to clarify that, if the Commission determines that the request has been received within the allowed 24-month period and the certification is properly completed and signed, the Commission will consider this sufficient for the purpose of forwarding the request to the Office of the Attorney General.

The Commission also revised subsection (f)(6), proposed as subsection (f)(5), to state that the Commission also will notify the operator of the subject well that the Commission has received a request to challenge a claim of entitlement to trade secret protection for information related to chemical ingredients used in the hydraulic fracturing treatment(s) of the operator's well.

The Commission revised subsection (f)(6) (now subsection (f)(7)) and subsection (f)(8) (now subsection (f)(10)) to make the language consistent with Chapter 552 of the Government Code.
In response to comments, the Commission inserted new subsection (f)(8), which provides for withdrawal of a request to challenge a claim of entitlement to trade secret protection.

The Commission adopts without change §3.29(g), relating to trade secret confidentiality, which requires that a health professional or emergency responder to whom trade secret information is disclosed under new subsection (f) must hold the information confidential, except that the health professional or emergency responder may, for diagnostic or treatment purposes, disclose information provided under that subsection to another health professional, emergency responder, or accredited lab.

The Commission adopts without change §3.29(h), relating to penalties, which states that violations of this new section may subject a person to penalties and remedies specified in the Texas Natural Resources Code, Title 3, and any other statutes administered by the Commission, and that the

certificate of compliance for a well may be revoked in the manner provided in §3.73 of this title (relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance) (Rule 73) for violation of this section.

The Commission adopts the new rule pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter S, as enacted by HB 3328, relating to Disclosure of Composition of Hydraulic Fracturing Fluids; Texas Natural Resources Code, §91.101, which gives the Railroad Commission authority to adopt rules and orders governing the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the Commission; and Texas Government Code, §2001.006, which authorizes a state agency, in preparation for the implementation of legislation that has become law but has not taken effect, to adopt a rule or take other administrative action that the agency determines is necessary or appropriate and that the agency would have been authorized to take had the legislation been in effect at the time of the action.

Texas Natural Resources Code, §§81.051, 81.052, and 91.851 are affected by the new rule.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, and 91.851; Texas Government Code, §2001.006.

Cross reference to statute: Texas Natural Resources Code, Chapters 81 and 91.

§3.29. Hydraulic Fracturing Chemical Disclosure Requirements.

(a) Definitions. The following words and terms when used in this section shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accredited laboratory--A laboratory as defined in Texas Water Code, §5.801.

(2) Additive--Any chemical substance or combination of substances, including a proppant, contained in a hydraulic fracturing fluid that is intentionally added to a base fluid for a specific purpose whether or not the purpose of any such substance or combination of substances is to create fractures in a formation.

(3) Adjacent property--A tract of property next to the tract of property on which the subject wellhead is located, including a tract that meets only at a corner point.

(4) API number--A unique, permanent, numeric identifier assigned to each well drilled for oil or gas in the United States.

(5) Base fluid--The continuous phase fluid type, such as water, used in a particular hydraulic fracturing treatment.

(6) Chemical Abstracts Service--The division of the American Chemical Society that is the globally recognized authority for information on chemical substances.

(7) Chemical Abstracts Service number or CAS number--The unique identification number assigned to a chemical by the Chemical Abstracts Service.

(8) Chemical Disclosure Registry--The chemical registry website known as FracFocus developed by the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission.

(9) Chemical family--A group of chemical ingredients that share similar chemical properties and have a common general name.

(10) Chemical ingredient--A discrete chemical constituent with its own specific name or identity, such as a CAS number, that is contained in an additive.

(11) Commission--The Railroad Commission of Texas.

(12) Delegate--The person authorized by the director to take action on behalf of the Railroad Commission of Texas under this section.

(13) Director--The director of the Oil and Gas Division of the Railroad Commission of Texas or the director's delegate.

(14) Health professional or emergency responder--A physician, physician's assistant, industrial hygienist, toxicologist, epidemiologist, nurse, nurse practitioner, or emergency responder who needs information in order to provide medical or other health services to a person exposed to a chemical ingredient.

(15) Hydraulic fracturing fluid--The fluid, including the applicable base fluid and all additives, used to perform a particular hydraulic fracturing treatment.

(16) Hydraulic fracturing treatment--The treatment of a well by the application of hydraulic fracturing fluid under pressure for the express purpose of initiating or propagating fractures in a target geologic formation to enhance production of oil and/or natural gas.

(17) Landowner--The person listed on the applicable county appraisal roll as owning the real property on which the relevant wellhead is located.

(18) Operator--An operator as defined in Texas Natural Resources Code, Chapter 89.

(19) Person--Natural person, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(20) Proppant--Sand or any natural or man-made material that is used in a hydraulic

fracturing treatment to prop open the artificially created or enhanced fractures once the treatment is completed.

(21) Requestor--A person who is eligible to request information claimed to be entitled to trade secret protection in accordance with Texas Natural Resources Code, §91.851(a)(5).

(22) Service company--A person that performs hydraulic fracturing treatments on a well in this state.

(23) Supplier--A company that sells or provides an additive for use in a hydraulic fracturing treatment.

(24) Total water volume-- The total amount of water in gallons used as the carrier fluid for the hydraulic fracturing job. It may include recycled water and newly acquired water.

(25) Trade name--The name given to an additive or a hydraulic fracturing fluid system under which that additive or hydraulic fracturing fluid system is sold or marketed.

(26) Trade secret--Any formula, pattern, device, or compilation of information that is used in a person's business, and that gives the person an opportunity to obtain an advantage over competitors who do not know or use it. The six factors considered in determining whether information qualifies as a trade secret, in accordance with the definition of "trade secret" in the Restatement of Torts, Comment B to Section 757 (1939), as adopted by the Texas Supreme Court in *Hyde Corp. v. Huffines,* 314 S.W.2d 763, 776 (Tex. 1958), include:

(A) the extent to which the information is known outside of the company;

(B) the extent to which it is known by employees and others involved in the company's business;

(C) the extent of measures taken by the company to guard the secrecy of the information;

(D) the value of the information to the company and its competitors;

(E) the amount of effort or money expended by the company in developing the information; and

(F) the ease or difficulty with which the information could be properly acquired or duplicated by others.

(27) Well--A well as defined in Texas Natural Resources Code, Chapter 89.

(28) Well completion report--The report an operator is required to file with the Commission following the completion or recompletion of a well, if applicable, in accordance with §3.16(b) of this title (relating to Log and Completion or Plugging Report.)

(b) Applicability. This section applies to a hydraulic fracturing treatment performed on a well in the State of Texas for which the Commission has issued an initial drilling permit on or after February 1, 2012.

(c) Required disclosures.

(1) Supplier and service company disclosures.

(A) As soon as possible, but not later than 15 days following the completion of hydraulic fracturing treatment(s) on a well, the supplier or the service company must provide to the operator of the well the following information concerning each chemical ingredient intentionally added to the hydraulic fracturing fluid:

(i) each additive used in the hydraulic fracturing fluid and the trade name, supplier, and a brief description of the intended use or function of each additive in the hydraulic fracturing treatment;

(ii) each chemical ingredient subject to the requirements of 29 Code of Federal Regulations §1910.1200(g)(2);

(iii) all other chemical ingredients not submitted under subparagraph (A) of this paragraph that were intentionally included in, and used for the purpose of creating, hydraulic fracturing treatment(s) for the well;

(iv) the actual or maximum concentration of each chemical ingredient listed under clause (i) or clause (ii) of this subparagraph in percent by mass; and

(v) the CAS number for each chemical ingredient, if applicable.

(B) The supplier or service company must provide the operator of the well a written statement that the specific identity and/or CAS number or amount of any additive or chemical ingredient used in the hydraulic fracturing treatment(s) of the operator's well is claimed to be entitled to protection as trade secret information pursuant to Texas Government Code, Chapter 552. If the chemical ingredient name and/or CAS number is claimed as trade secret information, the supplier or service company making the claim must provide:

(i) the supplier's or service company's contact information, including the name, authorized representative, mailing address, and telephone number; and

(ii) the chemical family, unless providing the chemical family would disclose information protected as a trade secret.

(2) Operator disclosures.

(A) On or before the date the well completion report for a well on which a

hydraulic fracturing treatment(s) was/were conducted is submitted to the Commission in accordance with §3.16(b) of this title, the operator of the well must complete the Chemical Disclosure Registry form and upload the form on the Chemical Disclosure Registry, including:

(i) the operator name;

(ii) the date of completion of the hydraulic fracturing treatment(s);

(iii) the county in which the well is located;

(iv) the API number for the well;

(v) the well name and number;

(vi) the longitude and latitude of the wellhead;

(vii) the total vertical depth of the well;

(viii) the total volume of water used in the hydraulic fracturing treatment(s) of the well or the type and total volume of the base fluid used in the hydraulic fracturing treatment(s), if something other than water;

(ix) each additive used in the hydraulic fracturing treatment(s) and the trade name, supplier, and a brief description of the intended use or function of each additive in the hydraulic fracturing treatment(s);

(x) each chemical ingredient used in the hydraulic fracturing treatment(s) of the well that is subject to the requirements of 29 Code of Federal Regulations §1910.1200(g)(2), as provided by the chemical supplier or service company or by the operator, if the operator provides its own chemical ingredients;

(xi) the actual or maximum concentration of each chemical ingredient listed under clause (x) of this subparagraph in percent by mass;

(xii) the CAS number for each chemical ingredient listed, if applicable; and

(xiii) a supplemental list of all chemicals and their respective CAS numbers, not subject to the requirements of 29 Code of Federal Regulations §1910.120(g)(2), that were intentionally included in and used for the purpose of creating the hydraulic fracturing treatment(s) for the well.

(B) If the Chemical Disclosure Registry known as FracFocus is temporarily inoperable, the operator of a well on which hydraulic fracturing treatment(s) were performed must supply the Commission with the required information with the well completion report and must upload the information on the FracFocus Internet website when the website is again operable. If the Chemical

Registry known as FracFocus is discontinued or becomes permanently inoperable, the information required by this rule must be filed as an attachment to the completion report for the well, which is posted, along with all attachments, on the Commission's Internet website, until the Commission amends this rule to specify another publicly accessible Internet website.

(C) If the supplier, service company, or operator claim that the specific identity and/or CAS number or amount of any additive or chemical ingredient used in the hydraulic fracturing treatment(s) is entitled to protection as trade secret information pursuant to Texas Government Code, Chapter 552, the operator of the well must indicate on the Chemical Disclosure Registry form or the supplemental list that the additive or chemical ingredient is claimed to be entitled to trade secret protection. If a chemical ingredient name and/or CAS number is claimed to be entitled to trade secret protection, the chemical family or other similar description associated with such chemical ingredient must be provided. The operator of the well on which the hydraulic fracturing treatment(s) were performed must provide the contact information, including the name, authorized representative, mailing address, and phone number of the business organization claiming entitlement to trade secret protection.

(D) Unless the information is entitled to protection as a trade secret under Texas Government Code, Chapter 552, information submitted to the Commission or uploaded on the Chemical Disclosure Registry is public information.

(3) Inaccuracies in information. A supplier is not responsible for any inaccuracy in information that is provided to the supplier by a third party manufacturer of the additives. A service company is not responsible for any inaccuracy in information that is provided to the service company by the supplier. An operator is not responsible for any inaccuracy in information provided to the operator by the supplier or service company.

(4) Disclosure to health professionals and emergency responders. A supplier, service company or operator may not withhold information related to chemical ingredients used in a hydraulic fracturing treatment, including information identified as a trade secret, from any health professional or emergency responder who needs the information for diagnostic, treatment or other emergency response purposes subject to procedures set forth in 29 Code of Federal Regulations §1910.1200(i). A supplier, service company or operator must provide directly to a health professional or emergency responder, all information in the person's possession that is required by the health professional or emergency responder, whether or not the information may qualify for trade secret protection under subsection (e) of this section. The person disclosing information to a health professional or emergency responder must include with the disclosure, as soon as circumstances permit, a statement of the health professional's confidentiality

obligation. In an emergency situation, the supplier, service company or operator must provide the information immediately upon request to the person who determines that the information is necessary for emergency response or treatment. The disclosures required by this subsection must be made in accordance with the procedures in 29 Code of Federal Regulations §1910.1200(i) with respect to a written statement of need and confidentiality agreements, as applicable.

(d) Disclosures not required. A supplier, service company, or operator is not required to:

(1) disclose ingredients that are not disclosed to it by the manufacturer, supplier, or service company;

(2) disclose ingredients that were not intentionally added to the hydraulic fracturing treatment;

(3) disclose ingredients that occur incidentally or are otherwise unintentionally present which may be present in trace amounts, may be the incidental result of a chemical reaction or chemical process, or may be constituents of naturally occurring materials that become part of a hydraulic fracturing fluid; or

(4) identify specific chemical ingredients and/or their CAS numbers that are claimed as entitled to trade secret protection based on the additive in which they are found or provide the concentration of such ingredients, unless the Office of the Attorney General, or a court of proper jurisdiction on appeal of a determination by the Office of the Attorney General, determines that the information would not be entitled to trade secret protection under Texas Government Code, Chapter 552, if the information had been provided to the Commission.

(e) Trade secret protection.

(1) A supplier, service company, or operator is not required to disclose trade secret information, unless the Office of the Attorney General or a court of proper jurisdiction determines that the information is not entitled to trade secret protection under Texas Government Code, Chapter 552.

(2) If the specific identity and/or CAS number of a chemical ingredient, the concentration of a chemical ingredient, or both the specific identity and/or CAS number and concentration of a chemical ingredient are claimed or have been finally determined to be entitled to protection as a trade secret under Texas Government Code, Chapter 552, the supplier, service company, or operator, as applicable, may withhold the specific identity and/or CAS number, the concentration, or both the specific identity and/or CAS number and concentration, of the chemical ingredient from the information provided to the operator. If the supplier, service company, or operator, as applicable, elects to withhold that information, the supplier, service company, or operator, as applicable, must provide to the operator or the Commission, as

applicable, information that:

(A) indicates that the specific identity and/or CAS number of the chemical ingredient, the concentration of the chemical ingredient, or both the specific identity and/or CAS number and concentration of the chemical ingredient are entitled to protection as trade secret information; and

(B) discloses the chemical family associated with the chemical ingredient; or

(C) discloses the properties and effects of the chemical ingredient(s) the identity of which is withheld.

(f) Trade secret challenge.

(1) The following persons may submit a request challenging a claim of entitlement to trade secret protection for any chemical ingredients and/or CAS numbers used in the hydraulic fracturing treatment(s) of a well:

(A) the landowner on whose property the relevant wellhead is located;

(B) the landowner who owns real property adjacent to property described in subparagraph (A) of this paragraph; or

(C) a department or agency of this state with jurisdiction over a matter to which the claimed trade secret information is relevant.

(2) A requestor must certify in writing to the director, over the requestor's signature, to the following:

(A) the requestor's name, address, and daytime phone number;

(B) if the requestor is a landowner, a statement that the requestor is listed on the county appraisal roll as owning the property on which the relevant wellhead is located or is listed on the county appraisal roll as owning property adjacent to the property on which the relevant wellhead is located;

(C) the county in which the wellhead is located; and

(D) the API number or other Railroad Commission of Texas identifying information, such as field name, oil lease name and number, gas identification number, and well number.

(3) A requestor may use the following format to provide the written certification required by paragraph (2) of this subsection:

Figure: 16 TAC §3.29(f)(3)

(4) A requestor must file a request no later than 24 months from the date the operator filed the well completion report for the well on which the hydraulic fracturing treatment(s) were performed. A landowner who owned the property on which the wellhead is located, or owned adjacent

property, on or after the date the operator filed with the Commission the completion report for the subject well may challenge a claim of entitlement to trade secret protection within that 24-month period only. The Commission will determine whether or not the request has been received within the allowed 24-month period.

(5) If the Commission determines that the request has been received within the allowed 24-month period and the certification is properly completed and signed, the Commission will consider this sufficient for the purpose of forwarding the request to the Office of the Attorney General.

(6) Within 10 business days of receiving a request that complies with paragraph (2) of this subsection, the director must:

(A) submit to Office of the Attorney General, Open Records Division, a request for decision regarding the challenge;

(B) notify the operator of the subject well and the owner of the claimed trade secret information of the submission of the request to the Office of the Attorney General and of the requirement that the owner of the claimed trade secret information submit directly to the Office of Attorney General, Open Records Division, the claimed trade secret information, clearly marked "confidential," submitted under seal; and

(C) inform the owner of the claimed trade secret information of the opportunity to substantiate to the Office of the Attorney General, Open Records Division, its claim of entitlement of trade secret protection, in accordance with Texas Government Code, Chapter 552.

(7) If the Office of the Attorney General determines that the claim of entitlement to trade secret protection is valid under Texas Government Code, Chapter 552, if the information had been provided to the Commission, the owner of the claimed trade secret information shall not be required to disclose the trade secret information, subject to appeal.

(8) The request shall be deemed withdrawn if, prior to the determination of the Office of the Attorney General on the validity of the trade secret claim, the owner of the claimed trade secret information provides confirmation to the Commission and the Office of the Attorney General that the owner of the claimed trade secret information has voluntarily provided the information that is the subject of the request to the requestor subject to a claim of trade secret protection, or the requestor submits to the Commission and the Office of the Attorney General a written notice withdrawing the request.

(9) A final determination by the Office of the Attorney General regarding the challenge to the claim of entitlement of trade secret protection of any withheld information may be appealed within 10 business days to a district court of Travis County pursuant to Texas Government Code, Chapter 552.

(10) If the Office of the Attorney General, or a court of proper jurisdiction on appeal of a determination by the Office of the Attorney General, determines that the withheld information would not be entitled to trade secret protection under Texas Government Code, Chapter 552, if the information had been provided to the Commission, the owner of the claimed trade secret information must disclose such information to the requestor as directed by the Office of the Attorney General or a court of proper jurisdiction on appeal.

(g) Trade secret confidentiality. A health professional or emergency responder to whom information is disclosed under subsection (c)(4) of this section must hold the information confidential, except that the health professional or emergency responder may, for diagnostic or treatment purposes, disclose information provided under that subsection to another health professional, emergency responder, or accredited laboratory. A health professional, emergency responder, or accredited laboratory to which information is disclosed by another health professional or emergency responder under this subsection must hold the information confidential and the disclosing health professional or emergency responder must include with the disclosure, or in a medical emergency, as soon as circumstances permit, a statement of the recipient's confidentiality obligation pursuant to this subsection.

(h) Penalties. A violation of this section may subject a person to any penalty or remedy specified in the Texas Natural Resources Code, Title 3, and any other statutes administered by the Commission. The certificate of compliance for any oil, gas, or geothermal resource well may be revoked in the manner