March 25, 2014

Dr. John Deutch
Chair, Secretary of Energy Advisory Board
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

SUBJECT: FracFocus 2.0 Task Force Report Draft

Dear Dr. Deutch:

The American Petroleum Institute ("API"), American's Natural Gas Alliance ("ANGA"), the Independent Petroleum Association of America ("IPAA"), and the American Exploration & Production Council ("AXPC") (collectively, "Associations") are writing to comment on the Secretary of Energy Advisory Board's FracFocus 2.0 Task Force ("Task Force") Report Draft ("Draft").

The Associations strongly support and promote full disclosure of chemical ingredients intentionally added to hydraulic fracturing fluids, with recognition of legitimate claims for protection of intellectual property under applicable laws. The oil and gas industry has furthered the goals of transparency and public disclosure by backing the use of the voluntary disclosure registry, Fracfocus.org ("FracFocus"). As of March 18, 2014, 821 individual companies participate in FracFocus, including 615 reporting companies that have disclosed information regarding over 68,300 oil and gas wells since 2011. In less than three years, FracFocus has

become the disclosure mechanism in at least seventeen states,[1] and is formally under consideration in at least eight others.[2] Together, the seventeen states that use FracFocus produced over 68% of our total crude oil in 2013 and nearly 67% of our total natural gas in 2012, according to EIA data. Overall, every state with significant ongoing or potential unconventional oil and gas production has a disclosure requirement in place, even though some of these states may not expressly require disclosure via FracFocus.[3]

The Associations believe it is telling that according to state regulators, who have been and remain at the front lines of improving regulation of unconventional oil and gas development, chemical disclosure is reportedly not among the issues mostly commonly raised by members of the public. At the Task Force's January 6, 2014 public meeting, regulators from Colorado, North Dakota, and Ohio agreed that "[t]hey do not receive a lot of public inquiries [about chemical disclosure] and in a recent public opinion poll only 6% of the respondents cited hydraulic fracturing and disclosure of chemicals as a concern."[4] This would seem to suggest, as the Task Force agrees, that FracFocus "has accomplished a good deal" and "has greatly improved public disclosure quickly and with a significant degree of uniformity."[5]

In 2011, the SEAB Subcommittee Report made several recommendations to industry, including that there be "continuous improvement … tied to measurement and disclosure."[6] The Associations agree, as they did in 2011, and the development of FracFocus 2.0, combined with the growth in use of FracFocus since 2011, lead to the conclusion that the oil and gas industry has met this challenge in a relatively short period of time.[7] For these reasons and the reasons below, we urge the Task Force to endorse FracFocus 2.0 as an appropriate, transparent, and balanced platform for chemical disclosure, and to make revisions or additions to the Draft that address the Associations' specific concerns.

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[1] Specifically, the seventeen states are Alabama, California, Colorado, Kansas, Louisiana, Mississippi, Montana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and West Virginia.
[2] Specifically, the eight states are Alaska, Florida, Kentucky, Idaho, Michigan, Nebraska, New York, and North Carolina.
[3] The non-FracFocus states with disclosure requirements include Arkansas, Illinois, Maryland, New Mexico, Virginia, and Wyoming.
[4] Minutes of Task Force Public Meeting (Jan. 6, 2014), *available at* http://energy.gov/sites/prod/files/2014/02/f8/FracFocusMinutesJanuary2014Fin.pdf ("Jan. 6 Meeting Minutes"). The regulators' panel went on to note, as the Task Force and the 2011 Subcommittee Report have also noted, "[m]any of the public's concerns are generated by misinformation." *Id*. Because the meeting minutes do not capture the full extent of this important conversation, the Associations request that the Task Force make publicly available a full transcript of the January 6 public meeting.
[5] Draft, at 2.
[6] *Id*. at 3-4 (quoting 2011 Subcommittee Report, at 1-5).
[7] To provide just one other example, the Task Force notes that FracFocus 2.0 followed another related recommendation from the 2011 Subcommittee Report, that all chemicals intentionally added be disclosed, not just those appearing on MSDS. Draft, at 7.

I. Interests of the Associations

API is a national trade association that represents over 580 companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to protecting the environment while economically developing and supplying energy resources for consumers. API members carry out operations for safe and environmentally responsible exploration and production of natural gas, crude oil, and associated liquids, including production via the use of hydraulic fracturing. API is also the worldwide leading standards-making body for the oil and natural gas industry. Accredited by the American National Standards Institute ("ANSI"), API has issued approximately 500 consensus standards governing all segments of the oil and gas industry, including standards and recommended practices on well construction and hydraulic fracturing, which have been incorporated or referenced in numerous regulations and guidance documents by the U.S. Environmental Protection Agency ("EPA") and the U.S. Department of the Interior ("DOI"). As noted in the Draft, API has supported FracFocus since 2011.[8]

Representing North America's leading independent natural gas exploration and production companies, ANGA works with industry, government and customer stakeholders to promote increased demand for our nation's abundant natural gas resource for a cleaner and more secure energy future and to ensure its continued availability. Learn more about ANGA at www.anga.us. As noted in the Draft, ANGA has supported FracFocus since 2011.[9]

IPAA is the national trade organization representing thousands of American oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts. IPAA and its member companies are dedicated to placing a priority on worker safety and maintaining a safe work environment while providing a critical energy resource for the American economy. IPAA member companies drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas.

AXPC is a national trade association representing 32 of America's largest and most active independent oil and natural gas exploration and production companies. AXPC members are "independent" in that their operations are limited to exploration for and production of oil and natural gas. Moreover, our members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC members are leaders in developing and applying the innovative

[8] Draft, at 6 n.6.
[9] *Id.*

and advanced technologies necessary to explore for and produce oil and natural gas, both offshore and onshore, from unconventional sources.

II. The Oil and Gas Industry's Use of Trade Secret Exemptions is Less Extensive Than in Other Industries, and is Subject to Multiple Checks on Inappropriate Use

The Task Force's Response to Question #3 offers that "[t]he Task Force believes that full disclosure of all known constituents added to fracturing fluids is desirable."[10] Importantly, the Task Force's stated desire is not grounded in any identified risk to drinking water sources, human health, or the environment. Indeed, the Task Force endorsed the 2011 Subcommittee Report's appropriate determination that such risks are "remote."[11] The sole basis for the Task Force's desire for full disclosure is to address "public concern, justified or not…"[12] The Task Force further suggests that "[i]t is much to industry's advantage to meet this concern,"[13] and challenges the large number of companies registering wells on FracFocus voluntarily or pursuant to state reporting programs, "to operate in a manner that encourages full disclosure with few, if any trade secret exemptions."[14]

The Associations share the Task Force's interest in highly transparent and detailed disclosure of the constituents of hydraulic fracturing fluid. We agree with the 2011 Subcommittee and the Task Force that a high level of transparency over the constituents of hydraulic fracturing fluid does not necessarily allay any actual environmental or health risk, but is nonetheless important to assuage public perceptions and concerns. The Associations disagree, however, with the implication that FracFocus and its industry participants are not presently addressing those concerns or "operating in a manner that encourages full disclosure with few, if any trade secret exemptions."

FracFocus was created by a consortium of state regulators with the oil and gas industry's voluntary participation to address these exact public perception issues. In less than three years, industry has helped grow FracFocus from a voluntary platform for reporting chemical constituents, to a highly refined program utilized by at least seventeen states, on which over 68,000 wells have been reported, and for which reporting now includes all intentionally added chemicals.

The oil and gas industry recognizes and understands the public concern over hydraulic fracturing fluid disclosure and has made meaningful and concrete steps to address those concerns. Addressing the public perception issue, however, requires more than just additional disclosure of

[10] *Id*. at 10.
[11] *Id*. at 10-11 (quoting 2011 Subcommittee Report, at 3).
[12] *Id*. at 10.
[13] *Id*. at 12.
[14] *Id*. at 10.

information, particularly if such disclosure does not further the shared goals of all stakeholders to improve environmental health and reduce risks to affected communities. Addressing public perception also requires credible and influential independent entities – like the SEAB and this Task Force – to assist the public in understanding the relevant risks and to provide context around the efforts already undertaken by industry and state regulators.

To begin, we urge the Task Force to more precisely describe the primary public concern regarding fluid disclosure. It is a concern focused on the portion of hydraulic fracturing fluid (usually less than 1% of the overall fluid system) that consists of additives formulated to improve the performance of the hydraulic fracturing operation by, for example, reducing friction so less pumping horsepower is required, and preventing corrosion and scale buildup inside the well casing. It should also be noted that these particular additives entail important environmental co-benefits, *e.g.*, reducing energy use and air emissions by requiring less pumping, and protecting underground sources of drinking water from potential hydrocarbon migration through a corroded well casing. The substances that are most commonly found in this fraction of hydraulic fracturing fluid systems are also commonly found in food, cosmetics, detergents, and other household products.

Moreover, specific information on additives is already extensively disclosed, both to the public and to state regulators in all states where hydraulic fracturing is widely used as a well stimulation technique. While there are instances where companies use existing laws and regulations to protect as proprietary certain constituents in their hydraulic fracturing fluid systems, they are commonly protecting specific ingredients within additives that represent a fraction of a percent of the total hydraulic fracturing fluid volume. Even those circumstances where precise chemical identification is not publicly released, the industry typically provides chemical category information that allows the public to identify the class and function of the chemical, and states require that the precise identity of these ingredients be disclosed to regulators (and, if necessary, to physicians and emergency responders) when the information is needed. Additionally, Materials Safety Data Sheets ("MSDS"), which contain safety, health, and environmental information for hazardous ingredients above certain thresholds (including those denoted as proprietary), are available onsite for the substances used in the hydraulic fracturing process. Finally, in most if not all jurisdictions where hydraulic fracturing occurs, regulators have access to proprietary information on chemical additives.[15]

By omitting discussion of this information, and instead presenting an unverified and potentially misleading statistic that 84% of well reports to FracFocus invoke trade secret exemptions,[16] the Draft does not acknowledge that even within that assumed 84% of well reports, over 99% of the total fluid system's composition is known or disclosed. In fact, the Draft omits a key contextual

[15] *See, e.g.*, ARK. OIL & GAS COMMIS., Rule B-19; 2 COLO. CODE REGS. § 404-1:205A; 16 TEX. ADMIN. CODE § 3.29(c).

[16] Draft, at 11. Adding to the confusion, the minutes of the January 6 public meeting cite this statistic as 85%. *See* Jan. 6 Meeting Minutes.

statistic cited in the January 6 public meeting minutes that even when a trade secret is claimed, "it only constitutes on average 0.12% of the overall fluid pumped during the frac job."[17] The Draft also does not explain that where trade secrets are claimed, chemical class and function are disclosed in lieu of the actual chemical name, and that for 100% of oil and gas wells, constituents and information about them are available to workers, physicians, and emergency responders. In failing to adequately characterize the significant amount of information the industry discloses and the very limited amount of proprietary information industry protects, the Draft misses an opportunity to help alleviate the public concerns it is seeking to address.

a. The Draft Does not Place the Oil and Gas Industry's Use of Proprietary Protections in their Proper Context

As with all things, context is essential. As such, the Associations request that to help alleviate the public concerns it purports to address, the final Task Force Report's disclosure discussion provide readers context with respect to: (1) the nature and importance of trade secret protections; (2) how trade secrets are protected in other industries; and (3) how the oil and gas industry's level of transparency exceeds that of other industries. Without additional context, the Associations are concerned that a final report may perpetuate the same public misconceptions it is attempting to address.

i. The Rationales for Proprietary Protections are Strong and Cut Across all Industries

Trade secret laws are designed to protect technological and commercial information against unauthorized commercial use by others. The primary policy consideration underlying trade secret protection is the desire to encourage research and development by providing protection to the originator of business information.[18] A company's trade secrets can be among its most important assets – the key intellectual property that allows it to keep its market position for its products or services and provide value to its shareholders.

Hydraulic fracturing is a highly technical process. Service companies that conduct hydraulic fracturing operations have invested extraordinary amounts of time, money, and effort to develop the processes and materials that optimize their ability to safely, efficiently, and effectively fracture and produce from hydrocarbon reservoirs in a wide variety of geologic formations. Service companies are hired (or not) based on the quality and effectiveness of the services they can provide to well owners and operators. Therefore, the ability of service companies to stay in business depends not just on their ability to provide effective well stimulation services but on

[17] *See* Jan. 6 Meeting Minutes.

[18] *See, e.g., Kewanee Oil Company v. Bicron Corp*., 416 U.S. 470, 480 (1974) ("The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens.").

their ability to provide better services than their competitors. Those processes and materials that provide service companies their competitive advantages – including specific additive formulations – are highly guarded trade secrets. The protection of these trade secrets provides incentives for service companies to continue to invest in research and to develop new and innovative products, including products that address public calls for the use of less fresh water and more environmentally benign substances.

Companies in a variety of industries avail themselves of the benefits of trade secret protection for exactly the same reasons as oil and gas service companies. Some of the most famous examples are Coca-Cola's secret formula, Google's search algorithm, the herbs and spices in KFC's fried chicken, and the composition of WD-40.[19] The rationale for trade secret protection sought by the oil and gas industry is no different from that for proprietary information that is routinely protected by businesses in other industries.

Any final report should make it clear that trade secret laws are not designed to protect information about hazardous chemicals from public disclosure. Much more generally, trade secrets protect innovative products, which may or may not present health risks. For example, a proprietary, innovative new product used in hydraulic fracturing that receives protection from disclosure may be completely benign, while an additive with different toxicity characteristics may be fully disclosed and described on FracFocus. It is the research and development process, not specific characteristics of products, that trade secrets are designed to protect and foster, and FracFocus data contains numerous examples where companies protected as proprietary the precise percentage of a clearly benign substance and other examples where the chemical identity is protected but was described as non-hazardous.

ii. Trade Secret Laws Have Existed at the Federal and State Levels for Four Decades, and Are Commonly Used in a Variety of Industries

Trade secret laws exist at both the state and federal levels and are an outgrowth of the patent system established under the U.S. Constitution. In 1974, the U.S. Supreme Court ruled that states could develop their own trade secrets laws apart from federal patent laws, and today, the Uniform Trade Secrets Act ("UTSA") is the main civil vehicle for protecting trade secrets in the United States.[20] Forty-seven states plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have adopted a version of the UTSA.[21]

The UTSA defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value,

[19] Bruce Watson, "Shhh: 10 Make-or-Break Trade Secrets," Daily Finance (July 4, 2010), available at http://www.dailyfinance.com/2010/07/04/trade-secrets/.
[20] *Kewanee Oil*, 416 U.S. 470.
[21] See http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act.

actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[22] Technical information about a manufacturing process is the most widely utilized type of trade secret, but not the only one. Courts have generally held that the law allows companies to protect any information that is valuable and that provides a potential economic advantage over others who do not possess the information.[23]

At the same time, the U.S. Congress has repeatedly recognized the importance of protecting trade secrets, incorporating protections for confidential business information regarding chemicals in statutes such as the Emergency Planning and Community Right to Know Act ("EPCRA")[24] and providing an explicit exemption for trade secrets from the public disclosure requirements of the Freedom of Information Act.[25]

A wide variety of companies and industries protect trade secrets in the context of reporting and labeling requirements that are directly analogous to the many state disclosure requirements for hydraulic fracturing. Importantly, because many of the substances found in hydraulic fracturing fluids are also found in food, cosmetics, detergents, and household cleaners, proprietary protections for these classes of products are particularly relevant. Some examples include:

> Food – While the FDA generally requires food ingredients to be listed, it does not require "trace" or "incidental" ingredients that have no technical or functional effect on the food to be declared on labels.[26] Further, the FDA permits food manufacturers to protect recipes or formulas as trade secrets, as well as the components and formulations of packaging that is in contact with the food.[27]
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> Cosmetics: The FDA has detailed regulations regarding the disclosure of ingredients on product labels, but those regulations include mechanisms that allow certain proprietary constituents to be identified simply as "other ingredients."[28]

[22] Uniform Trade Secrets Act § 1(4) (1985).
[23] Restatement of Unfair Competition, § 39, cmt. e; *see also In re Midgard Corp*., 107 F.3d 880, 882 (10th Cir. 1997); *Vermont Microsystems, Inc. v. Autodesk, Inc*., 88 F.3d 142, 148 (2d Cir. 1996); *Hoffman-LaRoche Inc. v. Yoder*, 950 F.Supp. 1348, 1365 (S.D.Ohio 1997); *Lasermaster Corp. v. Sentinel Imaging*, 931 F.Supp. 628, 635 (D.Minn. 1996).
[24] 42 U.S.C. § 11042.
[25] 5 U.S.C. § 552(b)(2).
[26] 21 C.F.R. § 101.100(a)(3).
[27] *See id*. §§ 101.100(g), 20.61.
[28] *Id*. § 701.3(a).

Perfumes and Fragrances – Proprietary fragrances and fragrance blends (either alone or in personal care products) can generally be protected as trade secrets by broadly listing them as "fragrances" on the label.[29]

Household Cleaners – While the federal government regulates all types of "hazardous" cleaning and household products under the Federal Hazardous Substances Labeling Act, specific ingredients are not required on labels, and can be protected as trade secrets.[30]

Dietary Supplements – While the FDA requires ingredients to be listed on labels, it permits the maker to protect the formula as a "proprietary blend."[31]

Chemicals in Transport – The Department of Transportation ("DOT") regulates all types of hazardous material and chemical transportation. DOT's labeling, placarding, and manifest requirements require only general descriptions and classifications of the hazards posed by the materials; they do not require disclosure of specific proprietary formulations or ingredients.[32]

iii. Trade Secret Claims Are Subject to Multiple Checks on Abuse

In states that have adopted FracFocus, trade secret laws contain important checks that prevent them from being abused by companies that submit information to FracFocus. For example, an alleged trade secret must, in fact, be kept secret.[33] In evaluating whether information is actually secret, courts examine the extent to which the information is known within the industry or to the company's employees, measures taken to guard the information, the value of the information to competitors, the effort or costs to develop the information, the ease or difficulty with which the information could properly be acquired or duplicated by others, and the novelty of the information sought to be protected.[34] Information that is readily available or ascertainable through proper means will not receive protection as a trade secret.

In the context of some states' hydraulic fracturing regulations, companies submitting information to regulators and seeking trade secret protection must also submit affidavits attesting to the

[29] *Id*. §§ 701.3(a), 701(1)(2)(iii).
[30] 15 U.S.C. § 1261.
[31] 21 C.F.R. §§ 101.36(b), (c).
[32] 49 C.F.R. §§ 172.505, 172.602.
[33] Restatement of Unfair Competition, § 39, cmt. f; *see also Kewanee Oil*, 416 U.S. at 475; *Devon, Indus., Inc. v. American Med. Int'l, Inc.,* 61 F.3d 910, 912 (9th Cir. 1995).
[34] See, e.g., *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996); *Mangren Research & Dev. Corp. v. National Chemical Co*., 87 F.3d 937, 942 (7th Cir. 1996); *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1117 (Fed. Cir. 1996); *Campbell Soup Co. v. Giles*, 47 F.3d 467, 470 (1st Cir. 1995); *Hudson Hotels Corp. v. Choice Hotels Int'l*, 995 F.2d 1173, 1177 (2d Cir. 1993).

validity of the trade secret.[35] If the information turns out to be unsubstantiated, the information will not receive protection, and submitting companies or individuals may be subject to civil or criminal enforcement actions. In addition, states provide mechanisms for certain parties to challenge trade secret claims before state agencies and state courts.[36] And as discussed by state regulators at the January 6 public meeting, "trade secret entitlement [] requires industry … affirmation to verify legitimacy. There is a mechanism for the public to challenge trade secret claims." And as discussed above, regulators have proprietary information at their fingertips.[37]

Importantly, the rights of companies in other industries to protect proprietary information are generally preserved even though their products may also be subject to reporting or labeling requirements. Indeed, the oil and gas industry (as well as products used or produced by the oil and gas industry) is subject to extensive federal reporting programs, including chemical inventory reporting under EPCRA and hazard communication requirements under the Occupational Safety and Health Act ("OSH Act")[38] – both of which balance the right to protect trade secrets with the need to disclose potential hazards to the public. Significantly, the OSH Act, which requires communication to employees of chemical risk and response information, applies to additives used in hydraulic fracturing fluid, as would EPCRA if such chemicals were stored at a well site in sufficient quantities.

b. The Associations Do Not Support a Standard Regulatory Requirement Regarding Disclosure

The oil and gas industry is highly transparent regarding the constituents of hydraulic fracturing fluids, and the Associations would welcome the opportunity to work with the Task Force as well as state regulators to increase disclosure in order dispel myths and misconceptions about hydraulic fracturing. However, the Associations do not support a one-size-fits-all regulatory approach to state disclosure requirements.[39]

i. States Have Already Regulated in this Area, and Should Continue to Have the Flexibility to Tailor Rules to Address Local Concerns

The precipitous increase in state disclosure requirements since 2011 is the result of focused stakeholder activity to develop requirements tailored to the needs and interests of particular states. As this Task Force and the 2011 Subcommittee have noted, the desire for additional disclosure is not necessarily tied to actual environmental, health, or safety risks – increased disclosure is an important means to mitigate public misconceptions and concerns. It should also

[35] *See, e.g.*, 2 COLO. CODE REGS. § 404-1:205A (operator claiming trade secret must certify under penalty of perjury that elements of trade secret are true, correct and complete).
[36] *See, e.g.*, 16 TEX. ADMIN. CODE § 3.29(c).
[37] *See supra* note 15 and accompanying text.
[38] 29 U.S.C. 651 *et seq.*
[39] *See* Draft, at 14.

be acknowledged that populations in different states can have very different levels of understanding of, and concern about, hydraulic fracturing. Factors that may influence popular understanding and concern include a state's history of oil and gas development, a state's history of and experience with other regulated industries, and geographic concentrations of oil and gas activity, all of which necessarily vary from state to state. It is therefore difficult to envision a scenario where uniform disclosure requirements would be preferable to allowing states the flexibility to address their unique constituents' level of concern with a tailored approach – including approaches that are more stringent than any potential mean or baseline approach.

Importantly, as evidenced by the number of new state disclosure requirements and tremendous growth in the number of wells reported via FracFocus, this flexible approach is clearly working. Some states, like Louisiana and New Mexico, enacted reporting requirements for those chemicals for which MSDS are required.[40] The MSDS information already includes the trade secret protections provided under the OSH Act, and has the added benefit of potentially increasing compliance and participation because the MSDS information is already compiled and retained by companies for purposes of the OSH Act and other statutes.

Some states, like Wyoming and Arkansas, require pre-fracture disclosure and substantiation of trade secret claims prior to beginning hydraulic fracturing operations.[41] Texas, on the other hand, does not require up-front substantiation of trade secret claims, but protects against excessive trade secret use by granting standing to landowners and jurisdictional agencies to challenge improper claims.[42] Colorado polices trade secret claims through a combination of sworn substantiation requirements, penalties for erroneous claims, and broad standing to challenge claims.[43]

States also effectively balanced the right to protect intellectual property against safety and environmental concerns by utilizing provisions that eliminate trade secret protections in certain emergency situations. Ohio, for instance, requires full disclosure in the event of a spill.[44] Several other states require disclosure to physicians and other health care providers when such information in necessary for purposes of diagnosis or treatment.[45]

Importantly, all of these states have developed different disclosure programs with unique approaches for protecting proprietary information. That these approaches are different and potentially vary the ease or difficulty of claiming proprietary protections is not justification for a

[40] LA. ADMIN. CODE tit. 43, Pt.XIX §118(C)1(d) (2012); N.M. CODE R. §19.15.16(B) (2012).
[41] Wyoming Oil & Gas Conservation Commis., Ch. 3. WYO. CODE R. § 45(d)(11) (2012); ARK.OIL & GAS COMMIS., Rule B-19(k)(8)(2012).
[42] 16 TEX. ADMIN CODE § 3.29(c) (2013).
[43] 2 COLO. CODE REGS. § 404-1:205A(b)(2)(A)(2012).
[44] OHIO REV. CODE ANN. § 1509.10(J).
[45] *See, e.g.*, 2 COLO. CODE REGS. § 404-1:205A(b)(5); 16 TEX. ADMIN. CODE § 3.29(c)(4); MONT. ADMIN. R. 36.22.1016(3)-(4); OHIO REV. CODE ANN. § 1509.10(H).

uniform program. To the contrary, these differing approaches demonstrate that states are fully capable of using their regulatory authority to establish disclosure requirements and proprietary protections that are tailored to their individual needs and interests. These different approaches reflect the trade-offs, debate, and negotiation that allowed states to succeed in getting disclosure regulations on the books so quickly. Indeed, the reason every state where hydraulic fracturing is used as a well stimulation technology was able to develop disclosure requirements in such a short time was because they were free to craft approaches based on the interests and political realities of their state. If the sole goal of disclosure requirements were to address "public concern, justified or not …," then the Task Force should commend the state-by-state approach that led to a seven-fold increase in state reporting requirements and a four-fold increase in wells registered on FracFocus.[46]

ii. Associations' Recommendations

The Associations urge the Task Force to recognize that in critiquing industry's use of proprietary protections absent appropriate context, it perpetuates the very public perception issue that it is asking industry to address. The SEAB's interest in mitigating public misconceptions over risks from hydraulic fracturing is best served by highlighting that, even when proprietary protections are utilized, they protect only 0.12% of a total fluid system on average.[47]

The Associations do not object to the Task Force's recommendation for further examination of the use of trade secret claims in the oil and gas industry.[48] However, such a study should examine the use of proprietary protections across all industries. Important inquiries to address include: (1) whether, and to what extent, other industries protect proprietary information; (2) whether other industries have been compelled to abandon their intellectual property in order to address perceptions of risk, as opposed to actual risk; (3) what other industries' reporting requirements (including those for food, cosmetics, and fragrances) mandate reporting to the thousandth of a percent; (4) how many wells disclosed via FracFocus protect as proprietary more than 1% of the total hydraulic fracturing fluid system; and (5) what percentage of wells registered on FracFocus provide information that fails to exceed the requirement under EPCRA, the OSH Act, or DOT labeling, placarding, or manifest requirements.

The Associations would fully cooperate with such an examination. We are proud of the success of FracFocus, proud of the transparency efforts we have voluntarily undertaken, and believe our efforts measure quite favorably against any existing occupational health and safety reporting requirement, and against the reporting requirements for, and trade secret use of, all other industries. The Associations and their members are doing their part to increase transparency.

[46] Draft, at 5-6.
[47] *See supra* note 17 and accompanying text.
[48] *See* Draft, at 13-14.

We respectfully ask that the Task Force and any final draft not inadvertently undermine these efforts and the efforts by all affected stakeholders.

III. Responses to Specific Recommendations Made in the Draft

a. Water Disclosure Capability

The Draft suggests that "FracFocus should make provisions for submissions to include more information about the water used as a base fluid …."[49] The Associations disagree, and urge that this recommendation be removed from a final report.

Since 2011, FracFocus has permitted the disclosure of source water information, such as fresh water, brackish water, and recycled water, as a percentage of the fracturing fluid. Therefore, the Task Force's recommendation to make provisions to expand FracFocus' capability to incorporate this information is duplicative of current capabilities. The Draft does not acknowledge this existing capability, nor indicate whether and how it might be deficient. At best, the Associations view this recommendation as redundant and therefore unnecessary.

Moreover, any additional requirements related to base fluid disclosure seem well beyond the scope of FracFocus 2.0 and have not been justified in the Draft. As discussed, the fundamental public concern voluntarily addressed through FracFocus relates to information on chemical additives. To the extent the public is concerned at all about water constituents as part of a hydraulic fracturing fluid system, those concerns have not been detailed in the Draft. Additionally, requiring testing and disclosure of water composition would likely impose onerous costs on operators, produce data of questionable utility for policymakers and the public, and inadvertently shut off important potential sources of base fluids (such as recycled water or non-potable sources of water) as cost prohibitive. It may even jeopardize existing contractual water withdrawal arrangements between operators and landowners, suppliers, etc. With no apparent benefits to balance against these substantial costs, this recommendation seems counterproductive. For similar reasons, the Associations also agree with the Draft's conclusion that FracFocus should not be expanded to "include any water quality data regarding surrounding water sources both before and after hydraulic fracturing drilling activity."[50]

The Associations agree with the Task Force's finding that FracFocus is not the place to attempt to store other information related to state regulatory requirements.[51] Existing state database systems, such as the Risk-Based Data Management System, already provide an excellent venue to obtain that information, make it publicly accessible, and link to associated FracFocus reports, as demonstrated to the Task Force during the January 6, 2014 public meeting.[52]

[49] *Id*. at 8.
[50] *Id*. at 18-19.
[51] *Id*. at 8-9.
[52] *See* Jan. 6 Meeting Minutes.

b. Error Flagging

In the Draft, the Task Force incorrectly assumes that inconsistencies in reported information are errors in records.[53] Partially based on this assumption, the Task Force recommended that error flagging should be posted to the FracFocus website, thereby calling into question the validity of an entire report. The Associations do not support this recommendation.

The existing error checks in FracFocus identify potential inaccuracies in the Chemical Abstract Service ("CAS") number reported as well as potential errors in reported percentages. As states have moved toward more complete disclosure, many have implemented requirements to provide chemical family named or descriptors when the actual chemical name is claimed as a trade secret. This requirement could result in errors under the Task Force's recommended CAS number review system because a particular disclosed CAS number may not be associated with the more general family name. Additional errors could result from minor variations in a chemical name, even variations as small as spaces, as well as group-associated CAS numbers.

c. Audits

The Associations disagree with the recommendation for the Department of Energy to contract with a third party auditor to review FracFocus records for accuracy.[54] However, the Associations would strongly support the individual states that use FracFocus conducting their own audits (or contracting with a third party to conduct audits). Because submissions to FracFocus pursuant to state regulations are state records, a state-led review is likely to be more effective and efficient than one led by a federal government-contracted third party.

d. Funding

The Associations support the Draft's recommendation to secure a stable source of funding for FracFocus.[55]

e. Systems-based Disclosure Model

The Associations have concerns with the Draft's proposed mandatory "systems approach" to disclosure via FracFocus.[56] The Associations believe that to the extent a systems-based disclosure model is adopted by FracFocus or state regulators, the disclosing entity should have the option to use a systems approach or a current FracFocus-type trade secrets approach. In addition, the Associations are concerned that the Draft seems to assert that a systems approach so

[53] Draft, at 8.
[54] *Id*. at 9.
[55] *Id*. at 20-21.
[56] *Id*. at 2, 13.

reduces reverse-engineering concerns that it would eliminate the need to include trade secret protections at all. This is not the case.

In fact, in certain scenarios, a systems approach may not protect trade secrets sufficiently, necessitating traditional trade secret claims to protect proprietary information. Otherwise, the opposite rule could prevent new, more effective, and more environmentally beneficial products from ever coming to market. The systems approach would address both MSDS and non-MSDS ingredients, and many of the "active" ingredients in additives are both common and commonly understood by experts to have been added for one and only one purpose. For example, polyacrylamides always act as friction reducers, guar always acts as a gelling agent, and glutaraldehyde always acts as a biocide. Since MSDS are required at fracturing sites, a knowledgeable person could review the chemicals listed on the MSDS and pull those chemicals out of the system disclosure in order to associate them with particular product systems.[57] Then, when the same provider's general formulation is used on multiple wells and one additive is varied (for example, removing or replacing a single surfactant), a knowledgeable person can simply compare two system disclosures to determine which additive is missing and thereby determine what proprietary ingredients are in a given additive. In other words, a systems approach may only protects trade secret information if the audience from whom they are being protected is a lay audience. This approach may not protect trade secrets against an entity determined to reverse engineer a particular system, unlike traditional trade secrets approaches taken by the states and by FracFocus. Indeed, the Draft seems to implicitly acknowledge the potential flaws in a systems approach, merely noting that it "*generally should* provide adequate protection of trade secrets."[58]

The systems approach is also designed with only a single service provider on a given hydraulic fracturing job in mind. Frequently, operators use multiple sources of chemicals due to formation-specific requirements, availability, and cost. Adoption of a systems approach could result in the revelation of specific product information from each provider and thus reveal trade secret information when, for example, a single additive is provided by a different company.[59] From the operator's perspective, a systems approach could essentially require the sole-sourcing of services from a single service company for each well because other providers would be unwilling to have their specific product information exposed. Such an outcome could limit an operator's ability to try new products or use specialty service companies for particular purposes, including products or purposes that may reduce overall environmental impacts.

[57] An exception to this is when an ingredient is not hazardous or in a high enough concentration to be required to be disclosed on MSDS. These will be few and far between.
[58] Draft, at 2 (emphasis added).
[59] FracFocus does not currently have a mechanism to add third party chemistries under systems or traditional approaches.

Based on these concerns, the Associations urge the Task Force to clarify and revise its recommendation on systems-based disclosure to provide a disclosing entity the option to use a systems approach, noting that in certain cases traditional trade secrets protection would still be required, or the current FracFocus approach.

IV. The Current Proposed BLM Rule on Hydraulic Fracturing's Provisions on Disclosure Meet the Standards Previously Outlined by the 2011 Subcommittee

The Draft erroneously states that recently proposed Bureau of Land Management ("BLM") rules regarding fluid disclosure "do not yet meet the high disclosure standards that the 2011 Subcommittee recommended that BLM adopt."[60] Specifically, these standards are: "disclosure should include all chemicals, not just those that appear on [MSDS], and that chemicals should be reported on a well-by-well basis and posted on a publicly available website that includes tools for searching and aggregating data by chemical, by well, by company and by geography."[61] Additionally, while trade secrets were recognized as needing protection by the 2011 Subcommittee, "the bar for trade secret protection should be high."[62] The Associations believe the proposed BLM rule meets these standards.

In May 2013, BLM proposed amendments to its existing well stimulation regulations to include provisions requiring disclosure of hydraulic fracturing fluid additives. Specifically, proposed section 3162.3-3(i)[63] includes FracFocus as an approved mechanism for disclosure, which in turn offers disclosure of "all chemicals, not just those that appear on [MSDS],"[64] on "a well-by-well basis and posted on a publicly available website." Furthermore, FracFocus 2.0 offers "tools for searching and aggregating data by chemical [name or CAS number], by well [as in FracFocus 1.0], by company [operator] and by geography [state or county]." Finally, as more fully outlined in API's comments on the proposed BLM rule,[65] trade secret claims must be substantiated by operators and are subject to agency discretion, federal criminal liability, and potential challenges by third parties, which provide not one but three "bar[s]" that should be more than sufficiently "high." The Associations request that the Task Force acknowledge that the May 2013 proposed BLM rules on disclosure satisfy the standards in the 2011 Subcommittee Report.

V. Conclusion

For the reasons above, the Associations believe that FracFocus 2.0 is a robust, successful disclosure mechanism. We urge the Task Force to consider this input fully before making any final

[60] Draft, at 15.
[61] 2011 Subcommittee Report, at 5-6.
[62] *Id*. at 6.
[63] *See* 78 Fed. Reg. 31,676-77 (May 24, 2013).
[64] As acknowledged in the Draft, at 7.
[65] *Available at* http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5497 (see pp. 20-25).

recommendations to the SEAB, and to revise and add to the Draft in accord with these comments. Please do not hesitate to contact us if we can be of further assistance.

* * *

Best regards,

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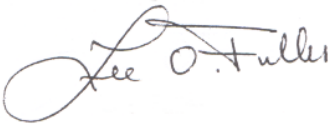

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