STATE OF NEW YORK

1732

2017-2018 Regular Sessions

IN ASSEMBLY

January 12, 2017

Introduced by M. of A. ABINANTI -- read once and referred to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to regulation of the extraction of natural gas by means of hydraulic fracturing; and to repeal subdivision 2 of section 23-0303 of such law relating to exclusivity of state authority over mining

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article 23 of the environmental conservation law is amended by adding two new titles 15 and 16 to read as follows:

TITLE 15

DISCLOSURE OF COMPOSITION OF HYDRAULIC FRACTURING FLUIDS

Section 23-1501. Definitions.
23-1503. Information submitted considered public; posting on internet website.
23-1505. Service company disclosures.
23-1507. Operator disclosures.
23-1509. Use of services of noncomplying service company prohibited.
23-1511. Trade secret protection.

§ 23-1501. Definitions.

As used in this title, unless the context otherwise requires:

1. "Additive" means any substance or combination of substances found in a hydraulic fracturing fluid, including a proppant, that is added to a base fluid in the context of a hydraulic fracturing treatment.

2. "Base fluid" means the base fluid type, such as water or nitrogen foam, used in a particular hydraulic fracturing treatment.

3. "Chemical abstracts service" or "CAS" means the chemical registry that is the authoritative collection of disclosed chemical substance information.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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4. "Chemical constituent" means a discrete chemical with its own specific name or identity, such as a CAS number, that is contained in an additive.

5. "Hydraulic fracturing fluid" means the fluid used to perform a particular hydraulic fracturing treatment and includes the applicable base fluid and all additives.

6. "Hydraulic fracturing treatment" means the stimulation of a well by the forceful application of hydraulic fracturing fluid into the relevant geological formation for the purpose of creating fractures in the formation in order to facilitate production of hydrocarbons.

7. "Operator" means the person or entity authorized to conduct operations on a well.

8. "Proppant" means sand or another natural or man-made inert material that is used in a hydraulic fracturing treatment to prevent artificially created or enhanced fractures from closing once the treatment is completed.

9. "Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in a person's or entity's business and that gives such person or entity an opportunity to obtain an advantage over competitors that do not know or use it.

10. "Well" means a hydrocarbon production well.

11. "Well completion report" means the report an operator is required to file with the commission following the completion or recompletion of a well, if applicable.

§ 23-1503. Information submitted considered public; posting on internet website.

Notwithstanding any other provisions of law, unless the information is otherwise authorized to be withheld as a trade secret pursuant to this title, information submitted to the department pursuant to section 23-1505 or 23-1507 of this title is public information, and the department shall post the information on its publicly accessible internet website.

§ 23-1505. Service company disclosures.

1. An operator which authorizes any person or entity to conduct hydraulic fracturing treatments upon any of such operator's wells in this state shall disclose to the department and maintain an updated master list of:

a. all base fluids to be used by such person or entity during any hydraulic fracturing treatment in this state;

b. all additives to be used by such person or entity during any hydraulic fracturing treatment in this state; and

c. all chemical constituents to be used by such person or entity in any hydraulic fracturing treatment in this state and their associated CAS numbers.

2. Notwithstanding the provisions of paragraph c of subdivision one of this section, if the specific identify of any chemical constituent to be used in any hydraulic fracturing treatment in this state is entitled to be withheld as a trade secret pursuant to the criteria provided by 42 U.S.C. Section 11042(a)(2) and section 23-1511 of this title, the department shall protect and hold confidential the identity of the chemical constituent and its associated CAS number. To qualify for trade secret protection, the person performing the hydraulic fracturing treatment must submit to the department on an approved form a formal claim of entitlement to that protection in the manner required by section 23-1511 of this title.

3. A person or entity performing hydraulic fracturing treatments in this state shall provide to the operator of each well for which the person or entity performs a hydraulic fracturing treatment:

a. the maximum pump pressure measured at the surface and the type and volume of base fluid used in each stage of the hydraulic fracturing treatment;

b. a list of all additives used in the hydraulic fracturing fluid, specified by general type, such as acid, biocide, breaker, corrosion inhibitor, crosslinker, demulsifier, friction reducer, gel, iron control, oxygen scavenger, pH adjusting agent, proppant, scale inhibitor and surfactant;

c. for each additive type listed under paragraph b of this subdivision, the specific name of the additive used and the actual rate or concentration of each additive, expressed as pounds per thousand gallons or gallons per thousand gallons and expressed as a percentage by volume of the total hydraulic fracturing fluid used;

d. a list of all the chemical constituents used in the hydraulic fracturing fluid and their associated CAS numbers, except to the extent that the specific identity of any chemical constituent is entitled to be withheld as a trade secret as provided by subdivision two of this section; and

e. for each chemical constituent identified under paragraph d of this subdivision, the actual rate or concentration of each chemical, expressed as pounds per thousand gallons or gallons per thousand gallons and expressed as a percentage by volume of the total hydraulic fracturing fluid used.

4. The provisions of subdivisions two and three of this section shall not be deemed to authorize any operator, person or entity to withhold information that federal or state law, including this section, requires to be provided to any health care professional who needs the information for diagnostic or treatment purposes. The operator and person or entity performing a hydraulic fracturing treatment shall provide directly to a health care professional, immediately in request, all information required by the health care professional, including the percent by volume of the chemical constituents of the hydraulic fracturing fluid and their associated CAS numbers. In a case that is not a medical emergency, the health care professional shall provide the operator and the person or entity performing the hydraulic fracturing treatment a written statement of need for the information before the health care professional is entitled to receive the information. In a medical emergency, the health care professional shall provide the operator and the person or entity performing the hydraulic fracturing treatment a written statement of need for the information as soon as circumstances permit.

5. A health care professional to whom information is disclosed pursuant to subdivision four of this section shall hold the information confidential, except that the health care professional may, for diagnostic or treatment purposes, disclose such information to another health care professional, a laboratory or a third-party testing firm. A health care professional, laboratory or third-party testing firm to which information is disclosed by another health care professional shall hold such information confidential.

§ 23-1507. Operator disclosures.

1. Following the completion of a hydraulic fracturing treatment on a well, the operator shall include in the well completion report, on a form approved by the department:

a. the maximum pump pressure measured at the surface and the type and volume of base fluid used in each stage of the hydraulic fracturing treatment;

b. a list of all additives used in the hydraulic fracturing treatment, specified by general type, such as acid, biocide, breaker, corrosion inhibitor, crosslinker, demulsifier, friction reducer, gel, iron control, oxygen scavenger, pH adjusting agent, proppant, scale inhibitor and surfactant;

c. for each additive type listed under paragraph b of this subdivision, the specific name of the additive used and the actual rate or concentration of each additive, expressed as pounds per thousand gallons or gallons per thousand gallons and expressed as a percentage by volume of the total hydraulic fracturing fluid used;

d. the information provided pursuant to subdivision three of section 23-1505 of this title to the operator by the person or entity who performed the hydraulic fracturing treatment; and

e. if the operator caused any additives to be used during the hydraulic fracturing treatment that are not required to be disclosed pursuant to subdivision three of section 23-1505 of this title to the operator by the person or entity who performed the hydraulic fracturing treatment:

(1) a list of the additives used; and

(2) for each additive listed, the chemical constituents of the additive and their associated CAS numbers and the actual rate or concentration of each additive or chemical, expressed in the manner provided pursuant to subdivision three of section 23-1505 of this title.

2. The operator may supply field service company tickets, excluding pricing information, and reports regarding the hydraulic fracturing treatment, as used in the normal course of business, to satisfy some or all of the requirements of subdivision one of this section.

3. Notwithstanding the provisions of paragraph e of subdivision one of this section, if the specific identity of a chemical constituent contained in an additive is entitled to be withheld as a trade secret pursuant to the criteria provided by 42 U.S.C Section 11042(a)(2) and section 23-1511 of this title, the department shall protect and hold confidential the identity of the chemical constituent and its associated CAS number. To qualify for trade secret protection, the operator shall submit to the department on an approved form a formal claim of entitlement to that protection in the manner required by section 23-1511 of this title.

4. The provisions of subdivision three of this section shall not be deemed to authorize an operator to withhold information that federal or state law, including this section, requires to be provided to any health care professional who needs the information for diagnostic or treatment proposes. An operator shall provide directly to a health care professional, immediately on request, all information required by the health care professional, including the percent by volume of the chemical constituents of the hydraulic fracturing fluid and their associated CAS numbers. In a case that is not a medical emergency, the health care professional shall provide the operator a written statement of need for the information before the person is entitled to receive the information. In a medical emergency, the health care professional shall provide the operator a written statement of need for the information as soon as circumstances permit.

5. A health care professional to whom information is disclosed pursuant to subdivision four of this section shall hold the information confidential, except that the health care professional may, for diagnos-

tic or treatment proposes, disclose such information to another health care professional, a laboratory or a third-party testing firm. A health care professional, laboratory or third-party testing firm to which such information is disclosed by another health care professional shall hold the information confidential.

§ 23-1509. Use of services of noncomplying service company prohibited.

An operator shall not use the services of another person or entity in performing a hydraulic fracturing treatment in this state unless the other person or entity is in compliance with the requirements of section 23-1505 of this title.

§ 23-1511. Trade secret protection.

1. A claim of entitlement to trade secret protection pursuant to this title shall include substantiating facts in the form of the information required by 40 C.F.R. Section 350.7(a). If requested by the trade secret claimant, the department shall treat any such substantiating facts as confidential and shall not disclose them to any third party or the public for any purpose. Until a final determination that the information is not entitled to trade secret protection is made under this section, the department shall treat the information implicated by the claim of trade secret entitlement as a confidential trade secret, and the information is not subject to disclosure pursuant to article six of the public officers law.

2. The commission shall determine a claim of entitlement to trade secret protection made pursuant to this title to be sufficient if the information set forth in the claim supports all the conclusions set forth in 40 C.F.R. Section 350.13(a) and the supporting information is true. In making a determination as to a claim, the department may require the trade secret claimant to submit additional supplemental information if the information is necessary for the department to make its determination under this section. If requested by the trade secret claimant, the department shall treat any supplemental information provided as confidential and may not disclose the information to any third party or the public for any purpose.

3. If the department determines a claim of entitlement to trade secret protection to be insufficient, the department shall notify the trade secret claimant in writing of the determination by certified mail. Not later than the fifteenth day after the date the trade secret claimant receives notice of the determination, the claimant may request another review of the claim. The trade secret claimant must show good cause for the additional review. What constitutes good cause for purposes of this subdivision is solely within the reasonable discretion of the department and may include the availability of new supporting information or a good faith error or omission on the part of the trade secret claimant in the original claim. Not later than the thirtieth day after the date the department receives the request, the department shall provide written notice to the trade secret claimant of the department's acceptance or rejection of the request. If a trade secret claimant makes a request for review under this subdivision, the department shall treat the information implicated by the claim of trade secret entitlement as a confidential trade secret until the department makes a determination with regard to the review request. If the department rejects the review request, the department shall continue to treat the information as a confidential trade secret until the earlier of the thirtieth day after the date the trade secret claimant receives notice that the department has rejected the review request or the date the claimant withdraws the disclosure pursuant to subdivision five of this section.

4. Not later than the thirtieth day after the date the trade secret claimant receives notice from the department that the department has rejected the claim of entitlement to trade secret protection, the claimant may commence an action pursuant to article seventy-eight of the civil practice law and rules. If a trade secret claimant commences such an action, the department shall treat the information implicated by the claim of trade secret entitlement as a confidential trade secret until such action and all appeals thereof are resolved. If the action affirms the department's determination of the insufficiency of the claim, the department shall continue to treat the information as a confidential trade secret until the earlier of the thirtieth day after the date the trade secret claimant receives notice that the action has been resolved or the date the claimant withdraws the disclosure pursuant to subdivision five of this section.

5. Not later than the thirtieth day after the date the trade secret claimant receives notification that the department has rejected the claim of entitlement to trade secret protection or the date a final judgment affirming the department's determination of the insufficiency of the claim is entered, as applicable, and only to the extent that the relevant chemical constituent has not been used by or for the trade secret claimant in any hydraulic fracturing treatment in this state, the trade secret claimant may formally withdraw the disclosure of a chemical constituent by notifying the department of its intent to withdraw the disclosure. If the trade secret claimant withdraws the disclosure of a chemical constituent, the department shall protect and hold confidential the identity of the chemical constituent and any corresponding CAS number, and the information is not subject to disclosure pursuant to article six of the public officers law. After the withdrawal, the chemical constituent shall not be used by or for the trade secret claimant in any hydraulic fracturing treatment in this state unless the trade secret claimant satisfies the requirements of this title relating to the disclosure of information regarding the chemical constituent.

6. Notwithstanding any other provision of this section, the department may:

a. disclose information otherwise subject to trade secret protection under this section to a third-party testing firm in connection with the investigation of a claim of contamination of surface water or groundwater if the firm agrees in writing to keep the information confidential; and

b. use the results of a test conducted by a third-party testing firm in connection with an investigation described in paragraph a of this subdivision in any manner the department considers necessary to protect public health and the environment.

TITLE 16
REGULATION OF HYDRAULIC FRACTURING

Section 23-1601. Definitions.
23-1603. Concession of liability.
23-1605. Agreements with real property owners.
23-1607. Damages.

§ 23-1601. Definitions.

As used in this title, unless the context otherwise requires:

1. "Hydraulic fracturing" means the use of chemicals, water and other substances injected or pumped into a natural gas well to stimulate the extraction of natural gas.

2. "Producer" means any individual or entity engaged in the drilling for or extraction of natural gas through the utilization of hydraulic fracturing.

§ 23-1603. Concession of liability.

1. Every producer, prior to the issuance of any permit, pursuant to this article, to engage in hydraulic fracturing, shall execute and deliver to the department a concession of liability and waiver of all defenses arising out of any cause of action related to property, personal and wrongful death damages alleged to have been caused by hydraulic fracturing conducted by such producer. Such concession and waiver shall be executed in such form and manner as shall be determined by the attorney general, and shall provide for strict liability to the people of the state of New York and every person within the state for any and all damages arising from the conducting of hydraulic fracturing within this state.

2. Every producer which enters into an agreement with an owner of real property in this state which provides for the lease, license or grant of authority to conduct hydraulic fracturing upon such real property, shall include a copy of its concession of liability executed pursuant to subdivision one of this section and a similar concession of liability executed in favor of the real property owner. Such concession of liability in favor of a real property owner shall be in such form as shall be determined by the attorney general.

§ 23-1605. Agreements with real property owners.

1. No agreement for the lease, license or grant of authority to conduct hydraulic fracturing upon real property in this state, shall be executed until three independent appraisals of the value of such real property have been conducted. Such appraisals shall be conducted at the expense of the producer by appraisers selected by the real property owner. Upon completion of such appraisals a copy of each appraisal shall be provided to the real property owner, the producer and the department, and shall be attached to every agreement providing for hydraulic fracturing upon such real property.

2. No agreement for the lease, license or grant of authority to conduct hydraulic fracturing upon real property in this state, shall be executed until the department shall have conducted water and soil contamination testing upon such real property for the presence of hydraulic fracturing fluids. A report of the results of such testing shall be provided to both the real property owner and the producer.

3. Each producer shall include in every agreement it enters into with the owner of real property in this state for the lease, license or grant of authority to conduct hydraulic fracturing upon such real property:

a. a statement of the financial, health and environmental risks posed by or potentially posed by conduct of hydraulic fracturing. Such statement shall be jointly developed and periodically updated by the commissioner, the attorney general and the commissioner of health;

b. a statement of the risks of ground soil and ground water contamination posed by or potentially posed by the conduct of hydraulic fracturing;

c. a statement of the health risks posed by spills of and contamination by hydraulic fracturing fluids; and

d. a statement of the producer's strict liability for any and all damages resulting from the conducting of hydraulic fracturing, and the damages that will be awarded therefor pursuant to this title.

§ 23-1607. Damages.

1. Notwithstanding any other provision of law to the contrary, upon the contamination of ground soil and/or ground water by any producer, such producer shall be liable for the following damages:

a. to the affected real property owner, an amount equal to one hundred fifty percent of the real property value, as determined pursuant to subdivision one of section 23-1605 of this title, and the full cost of remediating the contaminated ground soil and ground water; and

b. to any person affected by such contamination, an amount equal to the cost of the diagnosis, treatment, monitoring and care of such person, for life, related to any disease or condition arising out of such contamination.

2. Under no circumstances shall any amount of damages awarded or paid pursuant to this section be deemed to be income to any person. All such damages shall be reimbursement for losses actually incurred by the recipient thereof.

§ 2. Subdivision 9 of section 8-0109 of the environmental conservation law, as added by chapter 219 of the laws of 1990, is amended to read as follows:

9. An environmental impact statement shall be prepared for any action found to have a significant impact on the special groundwater protection area, as defined in section 55-0107 of this chapter or for any natural gas or oil drilling involving the use of hydraulic fracturing fluid. Such statement shall meet the requirements of the most detailed environmental impact statement required by this section or by any such rule or regulation promulgated pursuant to this section.

§ 3. Subdivision 2 of section 23-0303 of the environmental conservation law is REPEALED and a new subdivision 2 is added to read as follows:

2. For the purposes stated herein, this section shall supersede all other state and local laws relating to the oil, gas and solution mining industries; provided, however, that nothing in this section shall be construed to prevent any local government from:

a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate oil, gas and solution mining regulated by state statute, regulation or permit; or

b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts. Where oil, gas and solution mining is designated a permissible use in a zoning district and allowed by special use permit, conditions placed on such special use permits shall be limited to the following:

(i) ingress and egress to public thoroughfares controlled by the local government;

(ii) routing of drilling and drilling-related transport vehicles on roads controlled by the local government;

(iii) requirements and conditions as specified in the permit issued by the department concerning setback from property boundaries and public thoroughfare rights-of-way, natural or man-made barriers to restrict access, if required, dust control and hours of operation; and

(iv) conformance to road construction standards as may be otherwise provided for by local law; or

c. enacting or enforcing local laws or ordinances regulating oil, gas and solution mining not required to be permitted by the state.

§ 4. This act shall take effect on the first of June next succeeding the date on which it shall have become a law; provided, that the provisions of title 16 of article 23 of the environmental conservation

law, as added by section one of this act, shall apply to every lease, license and grant of authority to conduct hydraulic fracturing which is in effect on or after such effective date; and provided, further that, effective immediately, any actions necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date.