**The Florida Senate**

# BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

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| BILL: | SB 1582 |
| INTRODUCER: | Senator Richter |
| SUBJECT: | Public Records/High-pressure Well Stimulation Chemical Disclosure Registry |
| DATE: | April 20, 2015 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Gudeman | Uchino | EP | **Favorable** |
| 2. | Peacock | McVaney | GO | **Favorable** |
| 3. | Howard | Kynoch | AP | **Pre-meeting** |

## I. Summary:

SB 1582 creates a new public records exemption for proprietary business information as defined in sections 377.24075(1)(a) through (e), Florida Statutes, and related to chemical disclosure registry or chemical disclosure information submitted to the Department of Environmental Protection (DEP) as part of a permit for high pressure well stimulation. This information is confidential and exempt from section 119.071(1), Florida Statutes, and Article I, section 24(a) of the Florida Constitution.

Under current law, if someone requests information that is "labelled" trade secret, the requestor must sue in circuit court based on the denial of the public records. Under this bill, if someone requests the otherwise presumed proprietary business information, including trade secrets, the owner of such information must sue in circuit court to ensure the information is not released. The bill provides certain exemptions and noticing requirements for a person who files an action in a circuit court.

The bill provides for repeal of the public records exemption on October 2, 2020, unless reviewed and reenacted by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

Since the bill creates a new public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

There is no fiscal impact to state funds.

The bill shall take effect on the same date that SB 1468, or similar legislation, takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

## II. Present Situation:

### Hydraulic Fracturing

Hydraulic fracturing is a technique that involves stimulating the well to extract oil and gas. Large amounts of fluid under pressure are injected into a wellbore to create and extend fractures in the rock formation. The fractures are held open by a slurry mixture which allows natural gas to flow from the fractures into the production well.[1]

The injected fluid is composed of water, proppants, and chemical additives. The composition of the injected fluid varies between rock formations but the majority of the fluid, 98 to 99.5 percent, is water. The proppants are made of sand, ceramic pellets, or other small incompressible particles that hold the fractures open. The chemical additives include bactericides, buffers, stabilizers, fluid-loss additives, and surfactants that improve the effectiveness of the fracturing process and prevent damage to the rock formation.[2]

The injection of the fracturing fluid is sequenced and the blend and proportions of the additives used vary depending on the characteristics of the rock formation. The acid stage consists of several thousand gallons of water mixed with hydrochloric acid or muriatic acid that work to clear cement debris and create an open path for the fracturing fluids. The pad stage consists of approximately 100,000 gallons of "slick-water," which is a friction reducing agent that reduces the pressure needed to pump fluid into the wellbore and facilitate the flow and placement of the proppant material. The prop sequence stage, which may include several sub-stages, uses several hundred thousand gallons of water mixed with varying sized particulates that keep the fractures open. Finally, there is a flushing stage that consists of enough water to adequately flush the excess proppant from the wellbore.[3]

### Oil and Gas Regulation in Florida

The Oil and Gas Program in the Department of Environmental Protection (DEP) is the permitting authority for oil and gas wells under Part I of ch. 377.01, F.S. Section 377.22, F.S., directs the DEP to establish rules for the Oil and Gas Program that ensure human health, public safety, and the environment are protected from the exploration phase to well completion and abandonment phase. The DEP is also responsible for monitoring and reporting the well drilling and production activities from exploration to well abandonment.[4]

The DEP adopted Rules 62C-25 through 30, Florida Administrative Code (F.A.C.), to implement Part I of ch. 377, F.S. The rules include permitting procedures, bonding requirements, well spacing, well construction, production, injection, workovers, and well abandonment. The rule also requires each operator to submit a spill prevention and cleanup plan pursuant to Rule 62C-28.004(2), F.A.C. The plan must include the potential spill source, the protective measures to prevent a spill, and the location of emergency equipment in the event of a spill.

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[1] FracFocus Chemical Disclosure Registry, *Hydraulic Fracturing: The Process*, http://fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process. (Last visited Mar. 29, 2015).
[2] *Id*.
[3] *Id*.
[4] Section 377.21, F.S.

The requirements and procedures for well stimulation technology is not provided for in rule or statute; however, hydraulic fracturing, acidizing, or other chemical treatments of a well are activities that may be approved in a workover. A workover includes a variety of remedial operations that are conducted in order to increase well production. Rule 62C-25.002(61), F.A.C., defines a "work over" as "an operation involving a deepening, plug back, repair, cement squeeze, perforation, hydraulic fracturing, acidizing, or other chemical treatment which is performed in a production, disposal, or injection well in order to restore, sustain, or increase production, disposal, or injection rates." An operator is required to notify the DEP prior to commencing a workover procedure, unless it is for an emergency operation in which case the operator must notify the DEP during the operation or immediately thereafter.[5] The operator must submit a revised well record to the DEP within 30 days of the workover.[6]

**Emergency Planning and Community Right to Know Act**

In 1986, Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA), which requires federal, local and state governments to report hazardous and toxic chemicals in order to increase the public's knowledge and access to information on chemicals at individual facilities. The EPCRA includes the Toxic Release Inventory (TRI), which is a publicly available database that contains information on chemical releases and waste management reported by certain industries. The U.S. Environmental Protection Agency (EPA) has not included oil and gas extraction as an industry that must report under the TRI because the EPA determined the oil and gas extraction industry is not a high priority for reporting. The decision is based on the fact that most of the information that the TRI requires is already reported by oil and gas providers to the individual state agencies and reporting for the hundreds and thousands of oil and gas sites would overwhelm the system.[7]

In March 2015, the Bureau of Land Management (BLM) published the final rule that would require companies that conduct hydraulic fracturing on lands managed by the BLM to disclose the composition of the fracturing fluid. Congress has also proposed legislation requiring the disclosure of chemicals under the Fracturing Responsibility and Awareness of Chemicals Act.[8]

To date, federal legislation has not been implemented to require the disclosure of chemicals used in hydraulic fracturing; therefore, many states have taken steps to develop their own chemical disclosure laws. The disclosure requirements that have been established in certain states include the information about the chemical additives and whether the disclosures are made to state agencies or available to the public, the composition of the chemicals, the protections provided in trade secrets, and when the disclosure of the chemicals is to take place in relation to the fracturing process.[9]

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[5] Fla. Admin. Code R. 62C-29.006 (1996).
[6] The Well Record is the DEP Oil and Gas Form 8.
[7] Pub. Law No. 99-499, H.R. 2005, 99th Cong. (Oct. 17, 1986).
[8] Fracturing Responsibility and Awareness of Chemicals Act, Final Rule, 80 Fed. Reg. 16128-16222 (Mar. 26, 2015)(to be codified at 43 C.F.R. pt. 3).
[9] Congressional Research Service, *Hydraulic Fracturing: Chemical Disclosure Requirements*, 2 (June 19, 2012), *available at* http://www.fas.org/sgp/crs/misc/R42461.pdf (last visited Mar. 29, 2015).

**FracFocus Chemical Disclosure Registry**

FracFocus is a national hydraulic fracturing chemical registry operated by the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. The registry provides public access to reported chemicals used for hydraulic fracturing. FracFocus does not replace state governmental information systems but is used by ten states as the primary means of state chemical disclosure. Currently there are approximately 95,000 well sites registered with the database.[10]

**Public Records Law**

Article I, s. 24(a) of the Florida Constitution sets the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.[11] The records of the legislative, executive, and judicial branches are specifically included.[12]

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act[13] guarantees every person's right to inspect and copy any state or local government public record[14] at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.[15]

Only the Legislature may create an exemption to public records requirements.[16] This exemption must be created by general law and must specifically state the public necessity justifying the exemption.[17] Relevant to the bill, there is a difference between records the Legislature designates exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances.[18] If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other

[10] *Supra* note 2.
[11] FLA. CONST., art. I, s. 24(a).
[12] *Id.*
[13] Chapter 119, F.S.
[14] Section 119.011(12), F.S., defines "public records" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.011(2), F.S., defines "agency" to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Public Records Act does not apply to legislative or judicial records *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 11.0431, F.S.
[15] Section 119.07(1)(a), F.S.
[16] FLA. CONST., art. I, s. 24(c).
[17] *Id.*
[18] *See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994), *review denied* 651 So.2d 1192 (Fla. 1995); and *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991). *See also* Attorney General Opinion 85-62 (August 1, 1985).

than the persons or entities specifically designated in the statutory exemption.[19] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions[20] and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.[21]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.[22] The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.[23]

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than necessary.[24] An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- Allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;[25]
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals;[26] or
- Protects trade or business secrets.[27]

The OGSR also requires specified questions to be considered during the review process. In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption. The specified questions are:[28]

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

[19] *See WFTV, Inc. v. The School Board of Seminole, supra*, and *Wait v. Florida Power and Light Co*., 372 So.2d 420 (Fla. 1979).
[20] FLA. CONST. art. I, s. 24. However, the bill may contain multiple exemptions that relate to one subject.
[21] FLA. CONST., art. I, s. 24(c).
[22] Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.
[23] Section 119.15(3), F.S.
[24] Section 119.15(6)(b), F.S.
[25] Section 119.15(6)(b)1., F.S.
[26] Section 119.15(6)(b)2., F.S. If this public purpose is cited as the basis of an exemption, only personal identifying information is exempt. *Id.*
[27] Section 119.15(6)(b)3., F.S.
[28] Section 119.15(6)(a)1.-6., F.S.

- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.[29] If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.[30]

**Trade Secrets**

A "trade secret" in accordance with s. 812.081(1)(c), F.S., is "any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains."

Section 812.081, F.S., further defines a "trade secret" as information used in the operation of a business, which provides the business an advantage or an opportunity to obtain an advantage, over those who do not know or use it. The test provided for in statute, requires that a trade secret be actively protected from loss or public availability to any person not selected by the secret's owner to have access thereto, and be:

- Secret;
- Of value;
- For use or in use by the business; and
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it. [31]

Courts similarly use this factor test to determine whether a document is trade secret subject to protection from public records laws. In *Sepro Corp. v. Department of Environmental Protection*,[32] the court held that a document was subject to disclosure because the business failed the first prong of the test (that the document be secret) because it had not actively protected or held out the document as a trade secret.

The term "trade secret" is also defined in s. 688.002(4), F.S., of the Uniform Trade Secrets Act as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

[29] FLA. CONST., art. I, s. 24(c).
[30] Section 119.15(7), F.S.
[31] Section 812.081(1)(c), F.S.
[32] 839 So. 2d 781 (Fla. 1st DCA 2003). The court noted that "[i]t is of no consequence that [a party furnishing information] wishes to maintain the privacy of particular materials filed with the department, unless such materials fall within a legislatively created exemption to Ch. 119, F.S." *Id*. at 784.

> (a) Derives independent economic value, actual or potential, from not being generally known , and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 815.045, F.S., provides that trade secret information as defined in s. 812.081, F.S., and as provided for in s. 815.04(3), F.S., is confidential and exempt from the public records.

Currently, a trade secret owner who provides trade secret information to a state agency must take measures to maintain the secrecy, i.e., designate/label in writing that such documents/ information are a trade secret and should not be disclosed. If this information is requested through a public records request, the agency must not release the information; however, the person or entity requesting such information may file a lawsuit upon denial of the request for a court to determine whether or not the information is a trade secret and should be released.

**Proprietary Business Information**

Section 377.24075, F.S., provides that proprietary business information held by the DEP pursuant to its duties with respect to an application for a natural gas storage facility permit is confidential and exempt from s. 119.07(1), F.S., and Article I, section 24(a) of the Florida Constitution. The term "proprietary business information," means information that:[33]

- Is owned or controlled by the applicant or person affiliated with the applicant;
- Is intended to be private and is treated by the applicant as private;
- Has not been disclosed except as required by law or private agreement;
- Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as requested by the DEP;
- Includes trade secrets as defined in s. 688.002, F.S.;
- Includes leasing plans, real property acquisition plans, exploration budgets, or marketing studies; and
- Includes well design, completion plans, geologic and engineering studies, utilization strategies or operating plans.

## III. Effect of Proposed Changes:

**Section 1** amends s. 377.45, F.S., as created by SB 1468 (2015 Regular Session). The bill specifies that proprietary business information as defined in ss. 377.24075(1)(a) through (e), F.S., relating to the high pressure well stimulation chemical disclosure registry, or submitted to the Department of Environmental Protection (DEP) as part of a permit for high pressure well stimulation is confidential and exempt from s. 119.071(1), F.S., and Article I, section 24(a) of the Florida Constitution. A person submitting the information to the DEP must request the proprietary business information be kept confidential and exempt, inform the DEP of the basis for the claim of proprietary business information, and clearly mark each page of the document as "proprietary business information" to maintain the exemption.

[33] Sections 377.24075(1)(a)-(e), F.S.

The bill requires the DEP to notify the person who submitted a document marked "proprietary business information" if a public records request is made for the document. It provides the person 30 days after receipt of the notice to file an action in circuit court seeking a determination as to whether the document contains proprietary business information and an order barring public disclosure of the document. The DEP may not release the information if the action was timely filed until the pending legal action is concluded. The failure to timely file an action constitutes a waiver of any claim of confidentiality, and the DEP must release the information as requested.

The bill specifies proprietary business information may be disclosed:

- To another governmental entity that agrees in writing to maintain the confidential and exempt status of the information and verifies in writing that it has legal authority to do so; and
- When relevant in any proceeding under this section, a person involved in any proceeding under this section, including, but not limited to, an administrative law judge, a hearing officer, or a judge or justice, must maintain the confidentiality of information revealed at the proceeding.

The bill specifies the public records exemption created by the bill is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and expires on October 2, 2020, unless reenacted by the Legislature.

**Section 2** creates an undesignated section of law to provide legislative findings. The bill finds it is a public necessity that proprietary business information related to high pressure well stimulations provided to the DEP by the applicant or held by the DEP in connection with the online high pressure well stimulation chemical disclosure registry be made confidential and exempt from s 119.15, F.S, and Article I, section 24(a) of the Florida Constitution. The bill further specifies the information must remain confidential to avoid providing an unfair advantage to competitors and to prevent other entities from using the information without compensating or reimbursing the entity whose information was not made confidential and exempt.

**Section 3** provides the act will take effect on the same date that SB 1468, or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

**Vote Requirement**

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

**Public Necessity Statement**

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption. The bill includes a public necessity statement.

**Breadth of Exemption**

Article I, s. 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill makes confidential and exempt from public disclosure proprietary business information relating to high pressure well stimulations, submitted to the DEP as part of a permit application or held by the DEP in connection with the online high pressure well stimulation chemical disclosure registry.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

SB 1582 protects proprietary business information, which may provide a financial benefit to private companies engaged in high pressure well stimulation.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

Section 377.24075, F.S., makes confidential and exempt "proprietary business information" relating to the application for a natural gas storage facility. The definition of "proprietary business information" in s. 377.24075(1)(a)-(e), F.S., is for proprietary business information with respect to an application for a natural gas storage facility permit. Certain parts of the definition may not apply to proprietary business information with respect to high pressure well stimulation.

## VIII. Statutes Affected:

This bill substantially amends section 377.45 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.