

Topic L14



Trade Secrets in Oil & Gas

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Trade Secrets: Subject Matter

Requirements:

- Trade secret is not merely information that a business wants to keep secret (e.g., embarrassing information).
- Trade secrets must have independent economic value
- The economic value must be as a result of the secrecy.

Examples:

- formulas
- recipes
- manufacturing methods
- industrial processes
- source code
- geological survey data
- customer lists

DTSA definition of trade secret, 18 U.S.C. §1839(3)

the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including [patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes](#), whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives [independent economic value](#), actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

What does “independent economic value” mean?

On eligible subject matter, the current trend, exemplified by the UTSA, is to protect any valuable information as a trade secret. So long as the information is capable of adding economic value to the plaintiff, it can be protected by trade secret law.

Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets As IP Rights*, 61 STAN. L. REV. 311, 317 (2008)

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Mark A. Lemley, *The Surprising Virtue of Treating Trade Secrets as Property*, 111 HARV. L. REV. 31 (2000).

This seems almost unbounded. Many courts take a narrower view, although the bounds of that narrower view are often not well articulated.

What does “independent economic value” mean?

As a general proposition, to come within the ambit of this definition, the claimant must show that the information: (1) was originally gained at the holder's expense; (2) is still of value to the holder because it provides the holder with a demonstrable, continuing competitive advantage; (3) is not generally known or readily ascertainable by third parties, especially competitors; and (4) has been kept confidential by the holder. The fourth element often proves to be the real battleground over the existence of an alleged trade secret.

§ 9.2.2 Scope of the Privilege, WIGMORE'S EVIDENCE

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§ 9.2.2 Scope

This also seems largely unbounded. The decisions of many courts are narrower than this implies ...

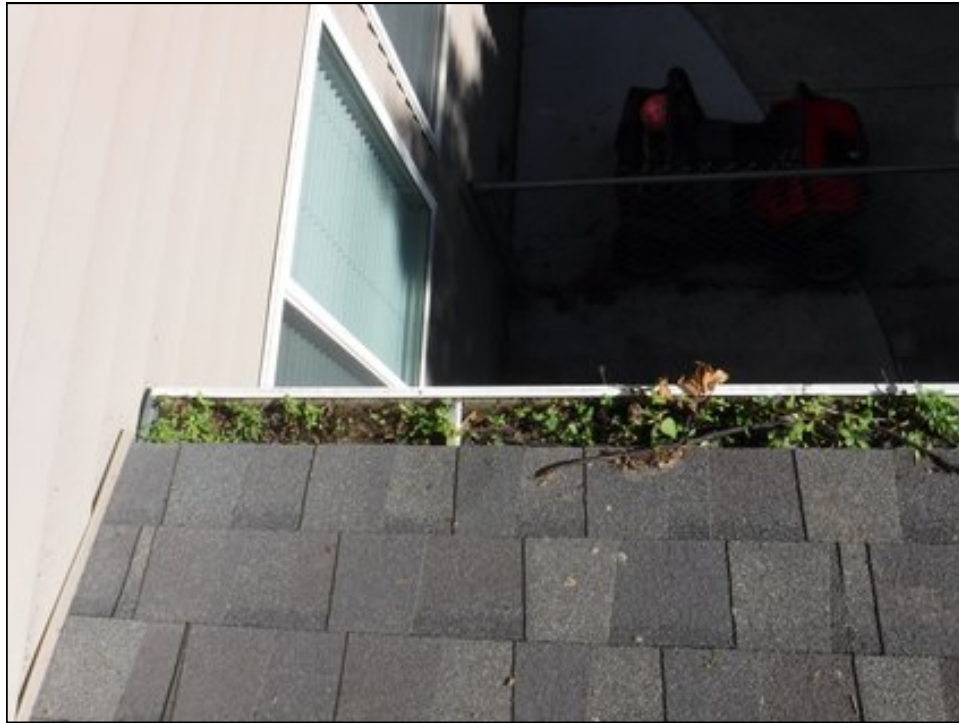
Trade Secret - Subject Matter

What does “independent economic value” mean?

A plausible uniting concept:

- Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

EEJ's way of looking at this ... FWIW



Trade Secret - Subject Matter

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Realothetical: A list of local customers who use gutter-cleaner services. *Is there independent economic value?*

Yes, because competing gutter-cleaners could efficiently target marketing to these customers, the same way the owner could to get a commercial advantage.

(Indeed, probably all courts would hold the customer list to be trade-secret eligible subject matter.)



Trade Secret - Subject Matter

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Realothetical: The financial statements of Mars (candy company), including cash flow, assets, liabilities, profit & loss. *Is there independent economic value?*

No, because the financial statements help C-level officers manage Mars in a general way. Hershey could use them offensively to exploit Mars’s weaknesses.

But courts are split on whether financial statements can be trade secrets.

Key takeaways

- Trade secret is not merely information that a business wants to keep secret (e.g., embarrassing information).
- Trade secrets must have economic value that comes from their secrecy.
- Classic examples are: formulas, recipes, manufacturing methods, industrial processes, source code, geological survey data.
- Uniting concept: Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

Confusion in the doctrine ...

- There is room to argue for a very broad conception of trade secret subject matter.
- This is because:
 - There is a lack of development of the doctrine.
 - Precedent is slippery, since a successful assertion of trade-secret status means a court decision won't say exactly what it is (otherwise, the secret would be out!).
 - Litigants are often non-adverse when courts rule on trade secret subject matter.
 - E.g., both parties to a business dispute want to keep everything away from the press, so they will stipulate to trying to treat a wide swath of discovery as trade secret.

The fuzzy, unchecked boundaries of trade secret subject matter

- Because of doctrinal confusion and a lack of an adversarial dynamic in many proceedings, businesses can sometimes successfully assert trade secret status to avoid public disclosure of things that are not classical trade secrets.
- Examples:
 - Toxic emissions, effluents, pollutants.
 - Regular corporate financial data.
 - And hydraulic fracturing chemicals.

Trade Secrets: Gaining and Losing Protection

Two requirements:

- Must be actually secret.
- Must be the subject of reasonable efforts to maintain secrecy.

Must be an actual secret:

- Secret means "secret" in the ordinary sense.
- Two or even more independent parties can have the same secret.
- If a trade secret becomes generally known, it stops being a protectable trade secret.
 - Trade secret status can be lost by wrongful means
 - E.g., someone steals the secret and publishes it.
 - or non-wrongful means.
 - E.g., disclosure by mistake, or everyone else eventually figures it out independently.

Must be the subject of reasonable efforts
to maintain secrecy

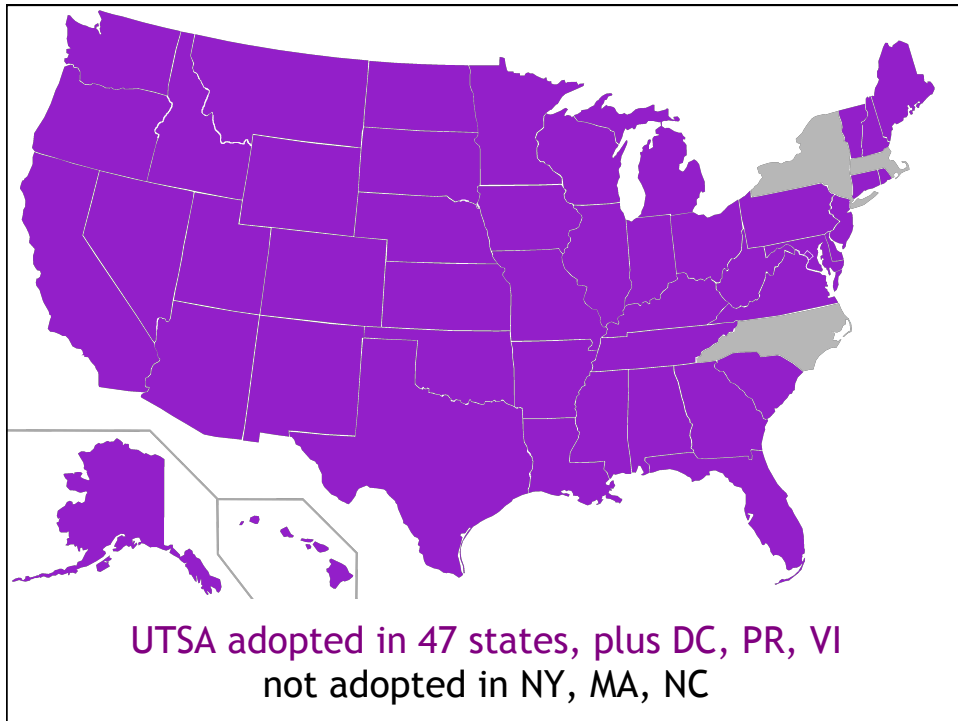
- What's reasonable depends on the circumstances and how valuable the secret is.
- Might include:
 - Locks, fences, security guards, password protection, firewalls
 - Limiting the number of people who know
 - Splitting up knowledge among different people
 - Employee contracts, non-disclosure agreements, non-compete agreements

Trade Secrets: Misappropriation and Remedies

Remedies

Sources of law

- **Uniform Trade Secrets Act**
 - Adopted in 47 states + DC, PR, VI
 - Common law preempted
 - Not adopted in NY, MA, NC
- **Common Law**
 - NY, MA, NC
- **Defend Trade Secrets Act**
 - Federal, new as of May 2016
 - Applies nationally to any secret used in interstate or foreign commerce
 - Does not preempt state law



Trade Secret - Misappropriation and Remedies

Remedies under UTSA:

- Injunctions
 - Can be prophylactic
 - Can be against innocent third parties
- Damages
 - Larger of
 - Plaintiff's losses
 - Defendant's wrongful gains
 - Reasonable royalties as an alternative

Remedies Under the Federal DTSA

- Injunctions
- Ex parte seizure - §1836(b)(2)
 - Powerful new remedy, cf. state law
 - For "seizure of property necessary to prevent the propagation or dissemination of the trade secret" in "extraordinary circumstances"
 - Heavily criticized by scholars
 - Also there's a cause of action for wrongful seizure, meant as a balance to the power of ex parte seizure
- Damages
 - lost profits, cost of materials, loss of goodwill
 - punitive damages if in bad faith
 - attorney's fees unless extenuating circumstances

Misappropriation

With trade secrets ...

- We speak of "misappropriation" rather than "infringement"

Forms of misappropriation:

- Improper disclosure.
 - E.g., violating confidence, breaching contract
- Improper use.
 - E.g., breaching contract, violating business norms, violating reasonable expectations
- Improper acquisition.
 - Includes criminal actions, contract breach, and torts, but need not be any of those

Things that are not improper acquisition:

- Reverse engineering.
- Independent discovery.
- Getting from patent or published patent application.
- Getting through a business deal or license.

2016 TRI Factsheet: City – Grand Forks, ND

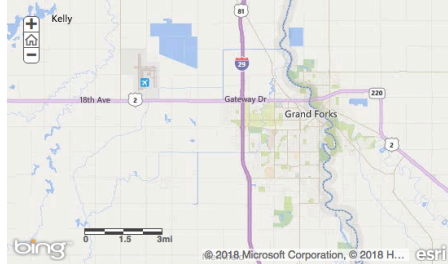
Data Source: 2016 Dataset (released October 2017)

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The [Toxics Release Inventory \(TRI\)](#) tracks the management of certain toxic chemicals that may pose a threat to human health and the environment. Certain industrial facilities in the U.S. must report annually how much of each chemical is recycled, combusted for energy recovery, treated for destruction, and disposed of or otherwise released on- and off-site. This information is collectively referred to as production-related waste managed.

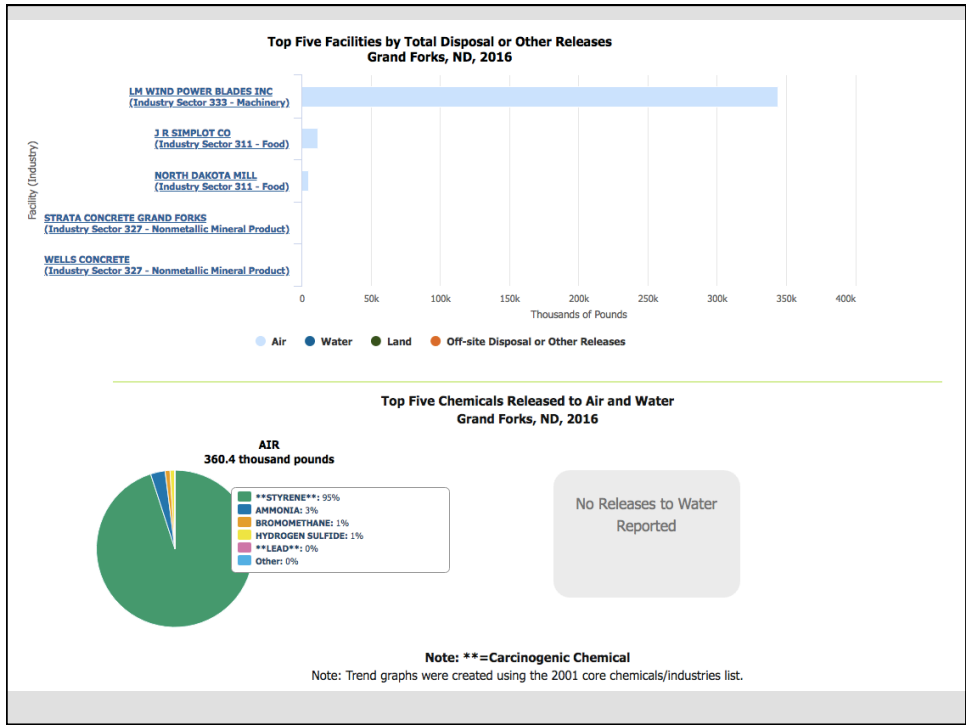
Map of TRI Facilities in Grand Forks, ND



Quick Facts for 2016

	Grand Forks, ND	United States
Number of TRI Facilities:	5	21,629
Total Production-Related Waste Managed:	769.0 thousand lbs	27.7 billion lbs
Total On-site and Off-site Disposal or Other Releases:	360.4 thousand lbs	3.4 billion lbs
Total On-site:	360.4 thousand lbs	3.0 billion lbs
• Air:	360.4 thousand lbs	609.8 million lbs
• Water:	0 lbs	190.7 million lbs
• Land:	2 lbs	2.2 billion lbs
Total Off-Site:	0 lbs	404.1 million lbs

North Dakota ranks **29 out of 56** states/territories nationwide based on total releases per square mile (Rank 1 = highest releases)



2016 TRI Factsheet: City – Bismarck, ND

Data Source: 2016 Dataset (released October 2017)

You are here: EPA Home » Toxics Release Inventory (TRI) Program » 2016 TRI National Analysis: Where You Live » 2016 TRI Factsheet: City – Bismarck, ND

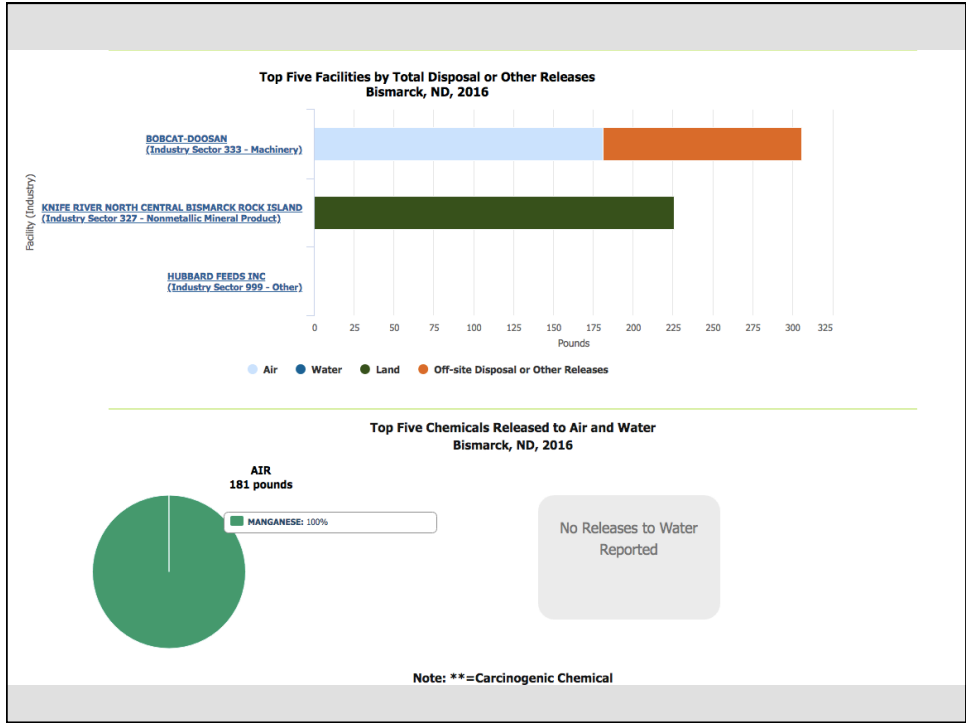
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Map of TRI Facilities in Bismarck, ND

Quick Facts for 2016

	Bismarck, ND	United States
Number of TRI Facilities:	3	21,629
Total Production-Related Waste Managed:	45.0 thousand lbs	27.7 billion lbs
Total On-site and Off-site Disposal or Other Releases:	532 lbs	3.4 billion lbs
Total On-site:	407 lbs	3.0 billion lbs
• Air:	181 lbs	609.8 million lbs
• Water:	0 lbs	190.7 million lbs
• Land:	226 lbs	2.2 billion lbs
Total Off-Site:	125 lbs	404.1 million lbs

North Dakota ranks **29 out of 56** states/territories nationwide based on total



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Find a Well Map Search

Search Options Show/Hide

STATE: North Dakota	COUNTY: Williams	WELLS IN COUNTY: Choose a Well Name	OPERATOR: Choose One
JOB/SUBMITTED DATE: Job Start Date	DATE RANGE: Between	RANGE START DATE: [Calendar]	RANGE END DATE: [Calendar]
<input type="checkbox"/> FEDERAL WELL:	<input type="checkbox"/> INDIAN WELL:	API WELL NUMBER: [Text]	WELL NAME: [Text]

CAS Number: [Text]

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Displaying 50 of 2063 Records

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API No.	Job Start Dt	Job End Dt	State	County	Operator	WellName
33-105-01693-00-00	12/9/2009	12/9/2009	North Dakota	Williams	Statoil Oil & Gas LP	Olson 10-15 #1H
33-105-01761-00-00	6/11/2010	6/11/2010	North Dakota	Williams	Statoil Oil & Gas LP	Owan 29-32 #1H
33-105-01834-00-00	12/28/2010	12/28/2010	North Dakota	Williams	XTO Energy/ExxonMobil	Helen 11X-5
33-105-01834-00-00	12/29/2010	12/29/2010	North Dakota	Williams	XTO Energy/ExxonMobil	Madisyn State 44x-1
33-105-01945-00-00	1/4/2011	1/4/2011	North Dakota	Williams	EOG Resources, Inc.	Round Prairie 010-1819H
33-105-01925-00-00	1/6/2011	1/6/2011	North Dakota	Williams	Hess Corporation	Bergstrom 2-28H
33-105-01919-00-00	1/17/2011	1/17/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Almer 31X-6
33-105-01909-00-00	1/17/2011	1/21/2011	North Dakota	Williams	Hess Corporation	Hodenfield 15-23H
33-105-01909-00-00	1/23/2011	1/23/2011	North Dakota	Williams	Hess Corporation	GO-Hodenfield 15-23H
33-105-01942-00-00	2/1/2011	2/1/2011	North Dakota	Williams	Hess Corporation	GO Dahl 15-22H
33-105-01628-00-00	2/7/2011	2/7/2011	North Dakota	Williams	Hess Corporation	BL-Iverson 155-95-1819H-1
33-105-01631-00-00	2/10/2011	2/18/2011	North Dakota	Williams	Hess Corporation	TI-IVES-157-95 0106H-1 2
33-105-01908-00-00	2/10/2011	2/10/2011	North Dakota	Williams	Hess Corporation	Bergstrom 2-27H
33-105-01929-00-00	2/13/2011	2/13/2011	North Dakota	Williams	Hess Corporation	Reid 3-3H
33-105-01631-00-00	2/16/2011	2/16/2011	North Dakota	Williams	Hess Corporation	TI-Ives 157-95-0106H-1
33-105-01773-00-00	2/16/2011	2/16/2011	North Dakota	Williams	EOG Resources, Inc.	Round Prairie 009-3625H
33-105-01899-00-00	2/17/2011	2/17/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Michael State 31X-16
33-105-01951-00-00	2/18/2011	2/18/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Linda 41X-22
33-105-01943-00-00	2/24/2011	2/24/2011	North Dakota	Williams	Hess Corporation	Dustin Brose 2-29H
33-105-01948-00-00	2/26/2011	2/26/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Normark 24X-31
33-105-02361-00-00	3/2/2011	3/2/2011	North Dakota	Williams	Hess Corporation	Go-Hauge-156-97-2116H 1

Hydraulic Fracturing Fluid Product Component Information Disclosure

Fracture Date:	12/9/2009
State:	North Dakota
County:	Williams
API Number:	3310501693
Operator Name:	BRIGHAM OIL & GAS LP
Well Name and Number:	Olson 10-15 #1H
Longitude:	-103.796774
Latitude:	48.182738
Long/Lat Projection:	NAD83
Production Type:	Oil
True Vertical Depth (TVD):	10,670
Total Water Volume (gal):	74,288

Hydraulic Fracturing Fluid Composition:

Trade Name	Supplier	Purpose	Ingredients	Chemical Abstract Service Number (CAS #)	Maximum Ingredient Concentration in Additive (% by mass)**	Maximum Ingredient Concentration in HF Fluid (% by mass)**	Comments
Fresh Water	Operator				100.00%	90.65326%	Density = 8.330
SAND - PREMIUM WHITE	Halliburton	Proppant	Crystalline silica, quartz	14808-60-7	100.00%	2.05092%	
VERSAPROP	Halliburton	Proppant	Aluminum silicate	1302-76-7	65.00%	4.66585%	
			Corundum	1302-44-56	65.00%	4.66585%	
CL-22 UC	Halliburton	Crosslinker	Potassium formate	590-29-4	60.00%	0.00000%	
CL-31 CROSSLINKER	Halliburton	Crosslinker	Potassium hydroxide	1310-58-3	5.00%	0.00000%	
			Potassium metaborate	13709-64-9	60.00%	0.00000%	
MO-67	Halliburton	Buffer	Sodium hydroxide	1310-73-2	30.00%	0.00000%	
FR-66	Halliburton	Friction Reducer	Hydrotreated light petroleum distillate	64742-47-8	30.00%	0.00582%	
LOSURF-300M™	Halliburton	Surfactant	1,2,4 Trimethylbenzene	95-63-6	1.00%	0.00095%	
			Ethanol	64-17-5	60.00%	0.05715%	
			Heavy aromatic petroleum naphtha	64742-94-5	30.00%	0.02838%	
			Naphthalene	91-20-3	1.00%	0.00095%	
			Poly(oxy-1,2-ethanediyl), alpha-(4-nonylphenyl)-omega-hydroxy-, branched	127087-87-0	10.00%	0.00953%	
ALDACCIDE® G ANTIMICROBIAL	Halliburton	Corrosion Inhibitor	Glutaraldehyde	111-30-8	100.00%	0.00000%	
OptiKleen-WF™	Halliburton	Surfactant	Sodium perborate tetrahydrate	10488-00-7	100.00%	0.00293%	
OPTIFLO-III DELAYED RELEASE BREAKER	Halliburton	Breaker	Ammonium persulfate	7727-54-0	100.00%	0.00000%	
			Crystalline silica, quartz	14808-60-7	30.00%	0.00000%	
WG-38 GELLING AGENT	Halliburton	Gelling Agent	Guar gum	9000-30-0	100.00%	0.00000%	
Bioceid 5000	JACAM	Antibacterial	Glutaraldehyde	111-30-8	50.00%	0.08339%	

			Water	7732-18-5	50.00%	0.08359%	
			Methanol	67-56-1	0.50%	0.00084%	
WSI 3607	JACAM	Scale Inhibitor	Proprietary Component	Proprietary Component	100.00%	1.62880%	
			Ethylene Glycol	107-21-1	100.00%	1.62880%	
			Methanol	67-56-1	100.00%	1.62880%	
WOS 1N	JACAM	Oxygen Scavenger	Proprietary Component	Proprietary Component	100.00%	0.06731%	
			Ethylene Glycol	107-21-1	100.00%	0.06731%	
<p>* Total Water Volume sources may include fresh water, produced water, and/or recycled water ** Information is based on the maximum potential for concentration and thus the total may be over 100%</p> <p>Ingredient information for chemicals subject to 29 CFR 1910.1200(i) and Appendix D are obtained from suppliers Material Safety Data Sheets (MSDS)</p>							