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Confidentiality Claims

Facilities in Nebraska may claim confidentiality for specific records or other information furnished to or obtained by the Nebraska Department of Environmental Quality (NDEQ or Department) concerning air, water or land contaminant sources. The owner or operator of the facility wishing to make a confidentiality claim must certify that the records or information relate to methods or processes entitled to protection as trade secrets under the Trade Secrets Act, Neb. Rev. Stat. §87-501 et seq.¹ These claims must be submitted in accordance with Title 115, Chapter 4 – Rules of Practice and Procedure, Confidentiality for Trade Secrets. The Director of NDEQ will evaluate the claim and determine if it will be given confidential status under Neb. Rev. Stat. §81-1527 and §84-712.05.

Under the Public Records laws, the Department may not withhold records as confidential if they have been disclosed in an open court, open administrative proceeding, open meeting, or if they have been disclosed by the Department in its duties. Information that the Department cannot withhold from the public includes: emission data obtained under the Clean Air Act, as amended, 42 U.S.C. 7401 et seq., or effluent data, permit applications, draft permits, and permits as issued, all under the National Pollutant Discharge Elimination System, pursuant to the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act).²

This guidance document will explain the required elements of a proper confidentiality request to ensure timely processing of the request.

1. The confidentiality claim must be declared at the time of document or record submission or it will be deemed waived. The claim may be evaluated again if the facility establishes a just reason for a claim made subsequent to submission. If a confidentiality claim for trade secrets covering the record or information is received after the submission of the record or information itself is received, the agency will make such efforts as are administratively practicable to associate the

¹ Neb. Rev. Stat. §87-502(4) defines "trade secret" as "information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that: (a) Derives independent economic value, actual or potential, from not being known to, and not being 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." State statutes may be viewed on the State of Nebraska's website at www.Nebraska.gov under "Legislative."

² See Neb. Rev. Stat. §81-1527 Records and information; confidential use.

late claim with copies of the previously-submitted information in the agency files, although the agency cannot assure that such efforts will be effective given the possibility of prior disclosure to the public.

2. The facility shall certify the record or information by placing on or attaching at the time of submission a cover sheet with appropriate notice, reasons for asserting the claim, and language, such as trade secret, proprietary, or confidential.
3. The appropriate notice and reasons for asserting the claim shall include:
 - a) Certification that the record or information is entitled to confidentiality as a trade secret and that such claim has not expired by its terms, been waived or withdrawn;
 - b) Description of reasonable measures the claimant has taken to protect the confidentiality of the information or record, and that it intends to continue to take such measures;
 - c) Assurance that the information or record is not, and has not been, reasonably obtainable without the claimant's consent by other persons (other than governmental bodies) by use of legitimate means;
 - d) Reasons why or how disclosure of the information or record is likely to result in substantial harmful effects to the business's competitive position and what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and
 - e) A showing that no statute specifically requires disclosure of the information or record.

Certification of the claim requires a signature by the facility's responsible official. For a definition of responsible official, see the appropriate regulations for the program under which you are applying.

4. The facility must submit a complete copy of the information or record for which the confidentiality claim is being made that is clearly marked "confidential." A second copy of the record or information with the specific portions the facility is requesting to remain confidential blocked out must also be submitted. The Public Records laws require the public have access to the information submitted that has not been withheld as confidential.
5. A confidentiality claim with supporting certification and other information must be submitted each time confidential material is submitted to NDEQ, even if a previous claim has been approved for the same or similar information. The documentation can include, as a reference, copies of prior requests and approvals, but any confidential information submitted to NDEQ must contain its own confidentiality request in order to be processed. Material marked confidential without a proper request may result in the submittal being deemed incomplete.
6. If a claim of confidentiality is denied in whole or in part, the facility will be notified of the Director's determination by certified mail. NDEQ will make the record or information available to

the public on the tenth day after the date of the claimant's receipt of the written notice of denial of its claim.

Confidentiality claims must be resolved before the Department will begin processing the submittal, e.g. permit application. Failure to follow these guidelines may result in review of your submittal being delayed or deemed incomplete.

If you have questions concerning claiming confidentiality, please contact the appropriate NDEQ section or unit (as listed below):

Air quality submittals - Air Quality Division

Industrial/municipal wastewater -- Water Quality Division, Technical Assistance Unit

Livestock waste control -- Water Quality Division, Agriculture Section

Agricultural chemicals -- Water Quality Division, Agriculture Section

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