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Division of Air Quality

B. Keith Overcash, P.E.

Director

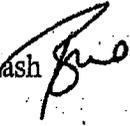
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## NORTH CAROLINA DIVISION OF AIR QUALITY

### MEMORANDUM

**TO:** Regional Supervisors  
Section Chiefs

**FROM:** B. Keith Overcash 

**DATE:** July 30, 2009

**SUBJECT:** Procedure for Handling Confidential Information Requests

### I. Introduction

This document explains how to handle information received by the Division of Air Quality for which confidential treatment is requested. This applies to permit applications, emission inventories, stack tests, quarterly/annual reports, and any other information submitted to the Division. This policy supersedes the February 9, 1998 policy memo from Laura Butler titled, "Internal Confidentiality Policies and Procedures for Air Permit Applications."

The North Carolina General Statutes (NCGS) and 15A NCAC 2Q.0107 require all information submitted to DAQ to be disclosed to the public unless it is entitled to confidential treatment under NCGS 143-215.3C. The NCGS allows confidential treatment of "trade secrets" as referenced in NCGS 132-1.2 with the exception of "emissions data" as defined under 40 CFR 2.301 (July 1993 edition).

"Emissions data" is defined in 40 CFR 2.301 as:

- A. *Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emissions which has been emitted by the source (or any pollutant resulting from any emission by the source), or any combination of the foregoing"*
- B. *Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and*
- C. *A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including,*

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*to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).*

"Trade secret" is referenced in NCGS 132-1.2 and defined in NCGS 66-152(2) as follows:

*"Trade secret" means business or technical information, including but not limited to a formula, pattern, device, compilation of information, method, technique, or process that:*

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by 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.*

*The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person or licensed to other persons.*

Given the above rules and definitions (all attached to this memo), procedures for handling information for which confidentiality has been requested are as follows:

## **II. Receipt of Confidential Information Requests:**

**Rule 2Q .0107(c) requires the Director (or his delegate) to notify the applicant of the decision whether or not to treat the information as confidential within 180 days of receipt of the request.**

The response is a letter under the Director's signature for which Regional Supervisors (and others) have delegated signature authority. **The review engineer is responsible for tracking the 180-day clock.** Since these types of requests may ultimately involve the AG's office, it is very important to get the required information up front to support the request to allow time for additional legal review if needed. DAQ requires the following in order to issue a determination on a request for confidential treatment of information:

1. The information for which confidentiality is requested must be marked as such (each page must be clearly marked "confidential").
2. The applicant must submit a written justification for the confidentiality claim. Note that this written justification is a publicly viewable document, so obviously the confidential information cannot be included in this document. This written justification must explain the following:
  - a. how the information is protected by the applicant and how its disclosure would affect the applicant,
  - b. how the information meets the definition of "Trade Secret," and
  - c. how the information is not "Emissions data."
3. A publicly viewable version of the document which would include the confidential information must be provided which shows where the information has been removed.

Any request not meeting the first two requirements is considered invalid under 2Q .0107. If a request is lacking any of the preceding, the review engineer should contact the applicant and give them the opportunity to correct or amend the request. While waiting for the additional information, the review engineer should either maintain the information as if it were "confidential," or return the information to the applicant, as appropriate.

If a request for confidential treatment of information is received and a request to view the information is received from a third party before a determination is issued, the information should continue to be treated as confidential and the AG's office should be contacted immediately (see section III of this memo).

### III. Review and Respond to Request for Confidential Treatment:

Rule 2Q .0107(c) requires the Director (or his delegate) to notify the applicant of the decision whether or not to treat the information as confidential within 180 days of receipt of the request.

1. The review engineer should evaluate the information to see that it is both "trade secret" (also referred to as "confidential business information" or "CBI") and not "emissions data" according to the definitions above. If the information meets both of these criteria, it should be documented in a letter to the applicant listing each page that will be treated as confidential (e.g. "pages 2-6 of application, Appendix A, Table 1, and Plant Layout Diagram"). For permit applications, the acknowledgement letter has this as an optional feature. The letter listing the confidential pages is necessary documentation for the later transmission of the information to Confidential Central Files.
2. If the information does not meet the criteria for confidential treatment, then the review engineer should contact the applicant and inform them of their findings. If the applicant agrees the information is not confidential, they need to resubmit it with the confidentiality claim and notations removed. If the applicant disagrees and can send additional information to substantiate their claim, this can be evaluated. If the review engineer and the applicant cannot reach agreement, then the engineer should get their supervisor involved in the discussions. If consensus still cannot be reached, the Director, DAQ, and the Special Deputy who is section head of the Air & Natural Resources Section (currently Allen Jernigan) of the Attorney General's (AG's) office should be contacted to advise them of the situation. Supervisors with delegated signature authority for confidentiality claim acceptance or denial letters shall not deny a confidentiality claim over the objections of the applicant without both the AG's and the Director's approval. After consultation with the AG's office, the Director (or his delegate) shall issue a letter denying the confidentiality request.

**Notice to the applicant that DAQ has determined that information is not entitled to confidential treatment is very important. Improper disclosure of a trade secret can result in liability for DAQ.**

3. Under NCGS 143-215.C(d), if the applicant is dissatisfied with DAQ's denial of a confidentiality claim, they have ten days after receipt of the denial to request a declaratory ruling from the Environmental Management Commission in accordance with NCGS 150B. Any information that is in contention shall be maintained as confidential for at least fifteen days after the applicant has received the denial notification via certified mail. If the applicant chooses to pursue further legal proceedings, the information for which a determination is sought shall be treated as confidential until the administrative and judicial process concludes.
4. Information deemed confidential shall be maintained in a locked file cabinet for the duration of its use, and then forwarded to Central Files, Confidential Section in accordance with the retention and disposition schedules.
5. **Third Party Requests:** Any person denied a request to view information on the basis of confidentiality may request a declaratory ruling from the Commission.

Cc: Sheila Holman  
Local Programs  
Edythe McKinney

**Attachment – Rules Governing Confidentiality**

**15A NCAC 02Q .0107 CONFIDENTIAL INFORMATION**

- (a) All information required to be submitted to the Commission or the Director under this Subchapter or Subchapter 2D of this Title shall be disclosed to the public unless the person submitting the information can demonstrate that the information is entitled to confidential treatment under G.S. 143-215.3C.
- (b) A request that information be treated as confidential shall be made by the person submitting the information at the time that the information is submitted. The request shall state in writing reasons why the information should be held confidential. Any request not meeting these requirements shall be invalid.
- (c) The Director shall decide which information is entitled to confidential treatment and shall notify the person requesting confidential treatment of his decision within 180 days of receipt of a request to treat information as confidential.
- (d) Information for which a request has been made under Paragraph (b) of this Rule to treat as confidential shall be treated as confidential until the Director decides that it is not confidential.

*History Note: Filed as a Temporary Adoption Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Authority G.S. 143-215.3(a)(1); 143-215.3C; Eff. July 1, 1994; Amended Eff. April 1, 1999; July 1, 1997.*

**G.S. 143-215.3c**

**§ 143-215.3C. Confidential information protected.**

- (a) Information obtained under this Article or Article 21A or 21B of this Chapter shall be available to the public except that, upon a showing satisfactory to the Commission by any person that information to which the Commission has access, if made public, would divulge methods or processes entitled to protection as trade secrets pursuant to G.S. 132-1.2, the Commission shall consider the information confidential.
- (b) Effluent data, as defined in 40 Code of Federal Regulations § 2.302 (1 July 1993 Edition) and emission data, as defined in 40 Code of Federal Regulations § 2.301 (1 July 1993 Edition) is not entitled to confidential treatment under this section.
- (c) Confidential information may be disclosed to any officer, employee, or authorized representative of any federal or state agency if disclosure is necessary to carry out a proper function of the Department or other agency or when relevant in any proceeding under this Article or Article 21A or Article 21B of this Chapter.
- (d) The Commission shall provide for adequate notice to any person who submits information of any decision that the information is not entitled to confidential treatment and of any decision to release information that the person who submits the information contends is entitled to confidential treatment. Any person who requests information and any person who submits information who is dissatisfied with a decision of the Commission to withhold or release information may request a declaratory ruling from the Commission under G.S. 150B-4 within 10 days after the Commission notifies the person of its decision. The information may not be released by the Commission until the Commission issues a declaratory ruling or, if judicial review of the final agency decision is

sought by any party, the information may not be released by the Commission until a final judicial determination has been made. (1993 (Reg. Sess., 1994), c. 694, s. 2.)

**§ 132-1.2. Confidential information**

Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

(1) Meets all of the following conditions:

- a. Constitutes a "trade secret" as defined in G.S. 66-152(3).
- b. Is the property of a private "person" as defined in G.S. 66-152(2).
- c. Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.
- d. Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

(2) Reveals an account number for electronic payment as defined in G.S. 147-86.20 and obtained pursuant to Articles 6A or 6B of Chapter 147 of the General Statutes or G.S. 159-32.1.

(3) Reveals a document, file number, password, or any other information maintained by the Secretary of State pursuant to Article 21 of Chapter 130A of the General Statutes.

(4) Reveals the electronically captured image of an individual's signature, date of birth, drivers license number, or a portion of an individual's social security number if the agency has those items because they are on a voter registration document.

**Article 24.**

**Trade Secrets Protection Act.**

**§ 66-152. Definitions.**

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

(1) "Misappropriation" means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.

(2) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity.

(3) "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that: NC General Statutes - Chapter 66 69

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or

reverse engineering by 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.

The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons. (1981, c. 890, s. 1.)

#### 40 CFR 2.301 Special rules governing certain information obtained under the Clean Air Act.

(a) *Definitions.* For the purpose of this section:

(1) *Act* means the Clean Air Act, as amended, 42 U.S.C. 7401 et seq.

(2) (i) *Emission data* means, with reference to any source of emission of any substance into the air—

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be *emission data* only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.