

Preliminary Draft Negotiated Rule (Draft No. 1), Docket No. 58-0123-2101

Dated June 2 , 2021

This rule has been drafted in accordance with [Executive Order No. 2020-01, Zero-Based Regulation](#) and is negotiated in conjunction with Docket No. 58-0123-2101.

Written comment deadline for this draft – June 24, 2021

~~**58.01.21—RULES GOVERNING THE PROTECTION AND DISCLOSURE OF RECORDS
IN THE POSSESSION OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY**~~

~~**000.—LEGAL AUTHORITY.**~~

~~The Idaho Legislature has given the Board of Environmental Quality the authority to promulgate these rules pursuant to Sections 74-114(8), 39-105, and 39-107, Idaho Code. (4-5-00)~~

~~**001.—TITLE AND SCOPE.**~~

~~**01.—Title.** These rules are titled IDAPA 58.01.21, “Rules Governing the Protection and Disclosure of Records in the Possession of the Department of Environmental Quality”. (4-5-00)~~

~~**02.—Scope.** These rules adopt measures governing the disclosure and protection of records in the possession of the Idaho Department of Environmental Quality, in accordance with Section 9-342A, Idaho Code. These rules affect members of the public submitting records to the Department of Environmental Quality as well as members of the public seeking access to Department of Environmental Quality records. (4-5-00)~~

~~**002.—WRITTEN POLICIES AND GUIDANCE.**~~

~~As described in Section 67-5201(19)(b)(iv), Idaho Code, the Idaho Department of Environmental Quality may have written policies or guidance pertaining to the interpretation and implementation of these rules and the underlying statutes. Such written statements can be inspected and copied at cost at the Idaho Department of Environmental Quality, 1410 N. Hilton, Boise, Idaho 83706-1255. (4-5-00)~~

~~**003.—APPEALS.**~~

~~Persons may be entitled to appeal agency actions under these rules pursuant to Sections 74-114(6)(b) or 74-115, Idaho Code, or the IDAPA 58.01.23, “Rules of Administrative Procedure Before the Board of Environmental Quality”. (3-15-02)~~

~~**004.—009. (RESERVED).**~~

~~**010.—DEFINITIONS AND ABBREVIATIONS.**~~

~~**01.—Air Pollution Emission Data.** The definition set forth in 40 CFR 2.301(a)(2),~~

revised as of July 1, 1998, as follows with reference to any source of emission of any substance into the air: (4-5-00)

~~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; (4-5-00)~~

~~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 (4-5-00)~~

~~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). (4-5-00)~~

~~d. Notwithstanding Subsections 010.01.a., 010.01.b., and 010.01.c., the following information shall be considered to be emission data only to the extent necessary to allow DEQ to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow DEQ to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation: (4-5-00)~~

~~i. 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 (4-5-00)~~

~~ii. 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. (4-5-00)~~

~~e. For purposes of the definition of emission data, standard or limitation means any emission standard or limitation established or publicly proposed pursuant to the CAA or any program administered by DEQ under authority delegated to the state of Idaho under the CAA. (4-5-00)~~

~~02. CAA. The federal Clean Air Act, 42 U.S.C. Sections 7401, et seq. (4-5-00)~~

~~03. CFR. The United States Code of Federal Regulations. (4-5-00)~~

~~04. DEQ. The Idaho Department of Environmental Quality. (4-5-00)~~

~~05. EPA. The United States Environmental Protection Agency. (4-5-00)~~

~~06. RCRA. The federal Resource Conservation and Recovery Act, 42 U.S.C., Sections 6901, et seq. (4-5-00)~~

~~07. Trade Secret. The definition set forth in Section 9-342A(2), Idaho Code, which is information, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:~~

~~a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (4-5-00)~~

~~b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (4-5-00)~~

~~c. The definition of trade secret includes commercial or financial information the disclosure of which could cause substantial competitive harm to the person from whom the record was obtained. (4-5-00)~~

~~08. Trade Secret Claim. Notice by a person submitting a record to DEQ that a record or a portion of a record is claimed to be a trade secret subject to protection from public disclosure by DEQ. (4-5-00)~~

~~011. RECORDS SUBJECT TO DISCLOSURE.~~

~~01. Trade Secrets Subject To Disclosure. Upon receipt of a request pursuant to Chapter 3, Title 9, Idaho Code, or to comply with public notice, comment or hearing requirements established in state statutes or rules implementing programs delegated or authorized to the state of Idaho under the CAA or RCRA, and after DEQ has followed the procedures set forth in Section 9-342A(6), Idaho Code, for information subject to a trade secret claim, DEQ shall disclose: (4-5-00)~~

~~a. Air pollution emission data required to be submitted to or obtained by DEQ pursuant the CAA or any program administered by DEQ under authority delegated to the state of Idaho under the CAA; (4-5-00)~~

~~b. The contents of any Title V operating permit; and (4-5-00)~~

~~c. The name and address of any applicant or permittee for hazardous waste treatment, storage, or disposal facility permit pursuant to Chapter 44, Title 39, Idaho Code. (4-5-00)~~

~~02. Other Program Records. All DEQ records not listed in Subsection 011.01 and required to be submitted to DEQ, or which DEQ could compel the submission of, under the state statutes and rules implementing programs delegated or authorized to the state of Idaho~~

~~under the CAA or RCRA, shall be made available for public inspection and copying except to the extent to which such records are a trade secret in which case the record shall be kept confidential according to the procedures set forth in Section 9-342A, Idaho Code, and these rules. (4-5-00)~~

~~**012. NOTICE OF TRADE SECRET CLAIM.**~~

~~**01. Notice To Be Included In Submittals.** (4-5-00)~~

~~a. It shall be the responsibility of any person providing a record to DEQ to give notice of the existence of a trade secret claim on each page or other portion of information at the time of submittal by the placement of a stamped, typed, or other notation employing such language as "trade secret," "proprietary," or "confidential". Such person shall have the burden of demonstrating that the information is a trade secret subject to protection from disclosure by DEQ. (4-5-00)~~

~~b. To expedite any subsequent trade secret determinations, persons making a claim are encouraged to include supporting information substantiating a trade secret claim with the original submittal. (4-5-00)~~

~~**02. Portions Of Records.** If a portion of a record or a portion of a page is non-confidential and the other portion is subject to a trade secret claim, the two (2) portions shall be clearly identified by the person making the claim at the time of submittal. Information for which a trade secret claim is made is encouraged to be submitted separately if feasible and if such segregation would facilitate identification and handling by DEQ. (4-5-00)~~

~~**03. Absence Of Trade Secret Claim.** (4-5-00)~~

~~a. If no trade secret claim accompanies a record received by DEQ, the record is subject to disclosure to the public by DEQ in accordance with applicable state law and policy without further notice to the person making the submittal. (4-5-00)~~

~~b. If a person has not asserted a trade secret claim for a record for which it might be expected to assert a trade secret claim, DEQ may inquire whether the person asserts a trade secret claim covering the information. (4-5-00)~~

~~**04. Subsequent Trade Secret Claim.** If a trade secret claim covering a record or portion of a record is made after the information is initially submitted to DEQ, DEQ will make such efforts as are practicable in light of prior disclosure, to associate the late trade secret claim with the previously submitted record. (4-5-00)~~

~~**05. Handling Of Records.** DEQ records, or portions of records, for which a trade secret claim has been asserted shall be treated as being entitled to confidential treatment until there has been a determination in accordance with the procedures set out in Section 9-342A(6),~~

Idaho Code, that the information is not entitled to confidential treatment. (4-5-00)

013. NOTIFICATION TO PERSON REQUESTING DISCLOSURE.

At the time that DEQ provides a request for substantiation to a person making a trade secret claim, DEQ may furnish a notice to the person whose request for release of the record is pending that the information requested may be entitled to protection from public disclosure under these rules and Section 9-342A, Idaho Code, that further inquiry by DEQ is required, that the person making the request will be notified when a final confidentiality determination is made, and the approximate time frame within which the determination will occur. (4-5-00)

014. REQUEST FOR SUBSTANTIATION.

01. Timing Of Determination. Even though no request for disclosure of the record has been received, DEQ may at any time request substantiation of a trade secret claim. (4-5-00)

02. Preliminary Determination. If request is received by DEQ from a member of the public seeking disclosure of information subject to a trade secret claim or if DEQ determines that information subject to a trade secret claim may be disclosed pursuant to public notice, comment or hearing, and the DEQ Director determines such information may be subject to disclosure, DEQ shall send a written request for substantiation to the person making the claim pursuant to Section 9-342A(6), Idaho Code. The request shall inform the person that a public records request is pending or that a public notice, comment or hearing is pending. (4-5-00)

03. Contents Of Request For Substantiation. The written request for substantiation shall invite the person making the trade secret claim to comment on the following points: (4-5-00)

a. The specific portions of the record, including portions of each page, which are alleged to be entitled to confidential treatment; (4-5-00)

b. Measures taken by the person making the claim to guard against nonconsensual disclosure of the information to others, and the means by which such measures will be continued in the future; (4-5-00)

c. The extent to which the information has been consensually disclosed to others and the precautions taken in connection therewith; (4-5-00)

d. Pertinent confidentiality determinations, if any, by EPA or other state and federal agencies; (4-5-00)

e. Any relevant facts which would support the claim that the information meets the definition of "trade secret" set out in Section 010 above; and (4-5-00)

f. If appropriate, the reason that the information is not required to be disclosed by state or federal statute including Section 9-342A(1), Idaho Code. (4-5-00)

~~04. Submittal Of Substantiation Response. A response to a request for substantiation of a trade secret claim shall be submitted to DEQ by the person claiming the trade secret protection within ten (10) working days after receipt of the request for substantiation or the information subject to the claim shall be disclosed without further notice. (4-5-00)~~

~~05. Confidentiality Of Substantiation Response. A response to a request for substantiation of a trade secret claim may itself contain information subject to protection from public disclosure. (4-5-00)~~

~~015. FINAL DETERMINATION OF TRADE SECRET CLAIM.~~

~~01. Final Determination. Within three (3) working days after receipt of the business's timely response to a request for substantiation, the DEQ Director shall make a final determination concerning whether the information is protected from public disclosure pursuant to Section 9-342A, Idaho Code, and shall notify the person requesting the information and the person asserting the trade secret claim of the determination. (4-5-00)~~

~~02. Criteria For Determination. In making a final determination whether a record or portion of a record is a trade secret, the DEQ Director shall consider whether: (4-5-00)~~

~~a. A trade secret claim has been asserted which has not expired by its terms, nor been waived or withdrawn; (4-5-00)~~

~~b. The person has satisfactorily shown that reasonable measures to protect the confidentiality of the information have been taken, and that such measures will continue to be taken; (4-5-00)~~

~~c. The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding); (4-5-00)~~

~~d. A state or federal statute does not specifically require disclosure of the information; and (4-5-00)~~

~~e. The person has satisfactorily shown that the information meets the definition of "trade secret" set out in Section 010 above. (4-5-00)~~

~~016. DISCLOSURE OF RECORDS TO CERTAIN PERSONS UNDER A CONTINUING CLAIM.~~

~~01. Situations For A Continuing Claim. DEQ may disclose a record which is a trade secret or which is subject to a trade secret claim under a continuing claim in accordance with Section 9-342A(4), Idaho Code, as follows: (4-5-00)~~

~~_____ a. _____ To any officer, employee, or authorized representative of the state or the United States as necessary to carry out the provisions of state or federal law, or when relevant to any proceeding thereunder; _____ (4-5-00)~~

~~_____ b. _____ As determined necessary by the DEQ Director to protect the public health and safety from imminent and substantial endangerment; and _____ (4-5-00)~~

~~_____ c. _____ As required by state or federal law including for discovery in the normal course of judicial or administrative adjudicatory proceedings, subject to the law and rules of evidence and of discovery governing such proceedings. _____ (4-5-00)~~

~~_____ **02. Notice Of A Continuing Claim.** _____ (4-5-00)~~

~~_____ a. _____ DEQ shall give notice of a continuing trade secret claim by noting its existence in a cover letter, or by other effective means if a cover letter is impractical, at the time the record is disclosed. _____ (4-5-00)~~

~~_____ b. _____ DEQ shall notify the person receiving the information subject to a continuing trade secret claim that DEQ's disclosure does not waive the claim nor authorize any further disclosure by the person receiving the record. _____ (4-5-00)~~

~~_____ c. _____ DEQ shall disclose a record under Subsections 016.01.a. and 016.01.b. only if the person receiving the record agrees in writing to exercise all means legally available to protect the relevant record or portion of the record from further disclosure. _____ (4-5-00)~~

~~_____ **03. Record Of Disclosures.** DEQ shall adopt a procedure to maintain a record of any disclosures of records or portion of records subject to a continuing trade secret claim. _____ (4-5-00)~~

~~**017. SAFEGUARDING OF TRADE SECRET INFORMATION.**~~

~~_____ **01. Prohibition On Disclosure.** No DEQ officer or employee may disclose any information subject to a trade secret claim except as specifically mandated by statute. _____ (4-5-00)~~

~~_____ **02. Dissemination Within DEQ.** Access to information subject to a trade secret claim by DEQ employees, contractors, or other representatives shall be limited to access required to carry out the person's duties on behalf of DEQ. _____ (4-5-00)~~

~~_____ **03. Segregation Of Information.** Any information subject to a trade secret claim and received by DEQ after the effective date of these rules shall be placed in a clearly marked, confidential section of the relevant file. _____ (4-5-00)~~

~~_____ **04. Training.** DEQ shall train all new employees, and periodically train existing employees, in the proper filing, tracking and physical handling of records subject to a trade~~

~~secret claim, and in the procedures established by these rules, Section 9-342A, Idaho Code, and any relevant policies adopted by DEQ. Training shall be as frequent and extensive as deemed necessary by the DEQ Director. (4-5-00)~~

~~018. 999. (RESERVED).~~