



Instructions for Completing the EPCRA Trade Secret Substantiation Form

General Information

Facilities that wish to claim trade secrets for chemicals reported under the Emergency Planning and Community Right-to-Know Act (EPCRA) are required to submit a substantiation to justify the claim of trade secrecy as specified in the regulations at 40 CFR part 350. At the time an EPCRA report is submitted, the submitter is required to provide responses to the six questions on the substantiation form, as well as certify the assertions made in the claim. Details on the proper procedures to submit a trade secret package are described below.

What May Be Withheld

Only the specific chemical identity required to be disclosed in EPCRA sections 303, 311, 312, and 313 submissions may be claimed trade secret on the EPCRA report. (Other trade secret or confidential business information (CBI) included in an answer to a question on the substantiation form may be claimed trade secret or confidential, as described below.) The trade secret claim must be submitted to EPA as specified in 40 CFR part 350.

Specifically, facilities may claim specific chemical identity from the following EPCRA reports:

- Sections 303(d)(2) and 303(d)(3) for information related to the development and revision of the emergency response plan;
- Section 311 submission of the Safety Data Sheet (SDS), also known as the Material Safety Data Sheet (MSDS); or the list of hazardous chemicals;

- Section 312 submission of the Emergency and Hazardous Chemical Inventory Form, Tier II; and
- Section 313 submission of Toxic Chemical Release Inventory (TRI) form.

Note: The location information claimed as confidential under EPCRA Section 312 (d) (2) (F) should not be sent to EPA. This information should only be sent to the State Emergency Response Commission (SERC), the Local Emergency Planning Committee (LEPC), and the local fire department.

Trade Secret Claim Package

The trade secret claim package must be submitted to EPA at the same time that an EPCRA report is submitted. For example, the Tier II form is required to be submitted to the SERC, the LEPC and the local fire department on or before March 1, annually. Therefore, the trade secret claim package must be submitted

to EPA at the same time that the Tier II is submitted to the SERC, the LEPC and the fire department. A trade secret claim package must contain all of the following as stated in the regulations at 40 CFR 350.5.

EPA cannot process incomplete packages properly.

- An unsanitized version of the required EPCRA report

Note: If you are submitting an MSDS under EPCRA Section 311, you are not required to submit an unsanitized MSDS. For all other EPCRA reports, an unsanitized version is required to be submitted.

- A sanitized version of the required EPCRA report, which includes a generic class or category name, instead of the specific chemical identity name.

The sanitized version of the EPCRA report must be sent to the appropriate state and local agencies as specified in the regulations at 40 CFR parts 355, 370 and 372.

Note: To avoid confusion, it is suggested that the sanitized and unsanitized copies of the EPCRA report(s) be clearly marked to indicate whether it is the “sanitized” or the “unsanitized” copy.

For Section 312, please submit the ENTIRE sanitized and unsanitized Federal Emergency and Hazardous Chemical Inventory Form, Tier II, not just the page on which the chemical being claimed as trade secret is found upon.

Note: The Federal Emergency and Hazardous Chemical Inventory Form, Tier II, can be accessed on EPA’s website: <http://www2.epa.gov/epcra-tier-i-and-tier-ii-reporting>

- An unsanitized version of the Trade Secret Substantiation Form.
- A sanitized version of the Trade Secret Substantiation Form, which includes a generic class or category name, instead of the specific chemical identity name.

*Note: A separate substantiation form, (sanitized and unsanitized) should be submitted for **each** chemical being claimed trade secret.*

For details on the assertion of claims of trade secrecy, see 40 CFR 350.5.

Sanitized and Unsanitized Copies of the EPCRA Report and Substantiation Form

The unsanitized version of the EPCRA report and the substantiation form **must** contain the specific chemical identity name and CAS number and may include other trade secret or confidential business information (CBI), which should be clearly labeled as such. Failure to claim other information trade secret or confidential will make that information publicly available.

Note: If CAS Number is not available or not assigned for a mixture or product you are claiming trade secret, you may enter N/A.

In the sanitized version of the EPCRA report and the substantiation form, the specific chemical identity name and CAS number **must** be replaced with the chemical's generic class name or category name. Any other trade secret or confidential business information should be deleted.

You should only send the sanitized copies of the EPCRA report and the substantiation form, for each chemical being claimed as trade secret, to the relevant state and local authorities (the SERC, the LEPC, and the local fire department), which would then be made publicly available. If the unsanitized copies of the EPCRA report and substantiation are sent to the state and local authorities, then the trade secret claim is no longer valid.

Each question on the substantiation form **must** be answered. *Submitters are encouraged to answer in the space provided.* If you need more space to answer a particular question, please use additional sheets.

*Note: You **must** submit a sanitized and an unsanitized substantiation form for each chemical (or mixture) you are claiming as trade secret.*

Where to Send the Trade Secrecy Claim

All trade secrecy claims should be sent to the following address:

EPCRA Trade Secrets
c/o CGI Federal, Inc.
P.O. Box 10162
Fairfax, VA 22038

Fed Ex and Courier Packages should be sent to the following address:

EPCRA Trade Secrets
c/o CGI Federal, Inc.
12601 Fair Lakes Circle
Fairfax, VA 22033

How to Obtain Trade Secret Substantiation Form and Other Information

- Visit the EPCRA Tier I and Tier II Reporting website:
<http://www2.epa.gov/epcra/epcra-trade-secret-forms-and-instructions>
- Contact the Superfund, TRI, EPCRA, RMP and Oil Information Center at 800-424-9346 (toll free) or 703-412-9810 (metropolitan DC area)

Substantiation Form: Instructions for Completing Specific Section of the Form

Part 1. Substantiation Category

1.1 Title III Reporting Section. Check the box corresponding to the section for which this particular claim of trade secrecy is being made. Checking off more than one box on one form for a claim is ***not*** permitted.

1.2 Reporting Year. Enter the year to which the reported information applies, not the year in which you are submitting the report.

1.3a Sanitized. If this copy of the submission is the “public” or sanitized version, check this box and complete 1.3.1a, which asks for generic class name or category name. Do *not* complete the information required in the unsanitized box (1.3b.).

1.3.1a Generic class or Category. You must complete this section if you are claiming the specific chemical identity as a trade secret and have marked the box in 1.3a. The generic chemical name must be structurally descriptive of the chemical. Each individual chemical that is submitted should be distinguishable from every other individual chemical that is being submitted. Thus, each generic class or category should be unique.

For example: If a facility wishes to claim ten chemicals that may belong to the same generic class or category, facility may use one generic name, however, each compound or product should have additional labeling such as compound #1, compound #2, etc. (e.g. Amine compound #1, Amine compound #2, etc.)

Note: The sanitized and unsanitized chemical name(s) used on the substantiation form(s) must be the same or correspond to the names used on the sanitized and unsanitized EPCRA reports.

1.3b Unsanitized. Check the box if this version of the form contains the specific chemical identity, the CAS number, or any other trade secret or confidential business information.

1.3.1b CAS Number. You must enter the Chemical Abstract Service (CAS) registry number that appears in the

appropriate section of the rule for the chemical being reported on the unsanitized form only, if one is available. Use leading place holding zeros. If you are reporting a chemical category (e.g., copper compounds), enter N/A in the CAS number space. Also, if a CAS number is not assigned to the chemical or mixture you are claiming trade secret, you may enter N/A.

1.3.2b Specific Chemical Identity. Enter the name of the chemical or chemical category as it is listed in the appropriate section of the reporting rule on the unsanitized form only.

Part 2. Facility Identification Information

2.1-2.3 Facility Name and Location. You must enter the name of your facility (plant site name or appropriate facility designation), street address, city, state and ZIP Code in the space provided. You may not use a post office box number for this location.

2.4 Dun and Bradstreet Number. You must enter the number assigned by Dun and Bradstreet (D&B) for your facility or each establishment within your facility. If the establishment does not have a D&B number, enter N/A in the boxes reserved for those numbers. Use leading place holding zeros.

Part 3. Responses to Substantiation Questions

The six questions posed in this form are based on the four statutory criteria found in section 322(b) of EPCRA. The information you submit in response to these questions is the basis for EPA’s initial determination as to whether the

substantiation is sufficient to support a claim of trade secrecy. EPA has indicated in 40 CFR 350.13 of the final rule the specific criteria that it regards as the legal basis for evaluating whether the answers you have provided are sufficient to warrant protection of the chemical identity. You are urged to review those criteria before preparing answers to the questions on the form.

Part 4. Certification

An *original* signature is required for each trade secret substantiation form (both sanitized and unsanitized), submitted to EPA. The EPCRA report(s) submitted, within the trade secret claim package, should also have the signature of the owner or operator or the authorized representative. The signature indicates that the submitter is certifying that the information provided is complete, true, and accurate, and that it is intended to support the specific trade secret claim being made. Non-compliance with this certification requirement may jeopardize the trade secret claim.

4.1 Name and Official Title. Print or type the name and title of the person who signs the statement at 4.2.

4.2 Signature. This certification must be signed by the owner or operator, or a senior official with management responsibility for the person (or persons) completing the form. An *original* signature is required for each trade secret substantiation submitted to EPA, both sanitized and unsanitized. Since the certification applies to all information supplied on the forms, it should be signed only after the substantiation has been completed.

4.3 Date. Enter the date when the certification was signed.

Definition of trade secret. (Appendix A-Restatement of Torts Section 757.) A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see section 759) in that it is not simply information as a single or ephemeral event in the conduct of the business. For example, a trade secret is not like the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are

completely disclosed by the goods which one markets cannot be his secret.

Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business knows it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Novelty and prior art. A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability.

These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability. The nature of the secret is, however, an important factor in determining the kind of relief that is appropriate against one who is subject to liability under the rule stated in this section. Thus, if the secret consists of a device or process which is a novel invention, one who acquires the secret wrongfully is ordinarily enjoined from further use of it and is required to account for the profits derived from his past use. If, on the other hand, the secret consists of mechanical improvements that a good mechanic can make without resort to the secret, the wrongdoer's liability may be limited to damages, and an injunction against future use of the improvements made with the aid of the secret may be inappropriate.

References

- Trade Secrecy Claims for Emergency Planning and Community Right-to-Know Information; and Trade Secret Disclosures to Health Professionals, July 29, 1988. (53 FR 28814)
- Trade Secrecy Claims for Emergency Planning and Community Right-to-Know Information; and Trade Secret Disclosures to Health Professionals; Amendment, November 14, 2003. (68 FR 64720)