

**SUBCHAPTER 13. CONFIDENTIALITY OF BUSINESS INFORMATION**

**§ 1301 Definitions**

For the purposes of this subchapter:

**(a)** "Affected business" means, with reference to an item of business information, a business which has asserted (and not waived or withdrawn) a business confidentiality claim covering the information, or a business which could be expected to make such a claim if it were aware that disclosure of the information to the public was proposed.

**(b)** "Attorney General" means the Attorney General of the Navajo Nation or delegate.

**(c)** "Business" means any person engaged in a business, trade, employment, calling or profession, whether or not all or any part of the net earnings derived from such engagement by such person inure (or may lawfully inure) to the benefit of any private shareholder or individual.

**(d)** "Business confidentiality claim" (or, simply, "claim") means a claim or allegation that business information is entitled to confidential treatment for reasons of business confidentiality, or a request for a determination that such information is entitled to such treatment.

**(e)** "Business information" (sometimes referred to simply as "information") means any information which pertains to the interests of any business, which was developed or acquired by that business, and (except where the context otherwise requires) which is possessed by Navajo EPA in recorded form.

**(f)** "Director" mean the Director of Navajo EPA or delegate.

**(g) (1)** "Effluent data" means, with reference to any source of discharge of any pollutant:

**A.** Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source (or of any pollutant resulting from any discharge from the source), or any combination of the foregoing;

**B.** Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of the pollutants which, under an applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, 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).

**(2)** Notwithstanding paragraph (g) (1) of this section, the following information shall be considered to be effluent data only to the extent necessary to allow Navajo EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow Navajo 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 product, 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.

**(h)** "Information which is available to the public" is information in Navajo EPA's possession which Navajo EPA will furnish to any member of the public upon request and which Navajo EPA may make public, release or otherwise make available to any person whether or not its disclosure has been requested. Information which is available to the public specifically includes, but is not limited to, that specified as being available in §§ 303(b) and (c) and 812.

**(i)** "Proceeding" means any rulemaking, adjudication, permitting, or licensing conducted by Navajo EPA or a publicly owned treatment works approved to operate the pretreatment program under the ~~NNPDES Act~~ NNCWA or under regulations which implement the ~~NNPDES Act~~ NNCWA, except for determinations under this subchapter.

**(j)** "Reasons of business confidentiality" include the concept of trade secrecy and other related legal concepts which give (or may give), including certain financial information (except to the extent its release is otherwise required by the ~~NNPDES Act~~ NNCWA and regulations), a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information.

**(k)** "Recorded" means written or otherwise registered in some form for preserving information, including such forms as drawings, photographs, videotape, sound recordings, punched cards, and computer tape or disk.

**(l)** "Standard" or "limitation" means any prohibition, any effluent limitation, or any toxic, pretreatment or new source performance standard established or publicly proposed pursuant to the ~~NNPDES Act~~ NNCWA or pursuant to regulations under the ~~NNPDES Act~~ NNCWA, including limitations or prohibitions in a permit issued or proposed by Navajo EPA or USEPA under the ~~NNPDES Act~~ NNCWA.

**(m)** "Voluntarily submitted information" means business information in Navajo EPA's possession:

**(1)** The submission of which Navajo EPA had no statutory or contractual authority to require; and

**(2)** The submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability, including such regulatory programs as permit, licensing, registration, or certification programs, but excluding programs concerned solely or primarily with the award or administration by Navajo EPA of contracts or grants.

**(n)** A "working day" is any day on which Navajo Nation government offices are open for normal business (8:00 AM - 5:00 PM). Saturdays, Sundays, and official Navajo Nation holidays are not working days; all other days are.

### **§ 1302 Applicability of Subchapter; Records Containing More than One Kind of Information**

**(a)** This subchapter establishes basic rules governing business confidentiality claims, the handling by Navajo EPA of business information which is or may be entitled to confidential treatment, and determinations by Navajo EPA of

whether information is entitled to confidential treatment for reasons of business confidentiality.

(b) For most purposes, a document or other record may usefully be treated as a single unit of information, even though in fact the document or record is comprised of a collection of individual items of information. However, in applying the provisions of this subpart, it will often be necessary to separate the individual items of information into two or more categories, and to afford different treatment to the information in each such category. The need for differentiation of this type may arise, e.g., because a business confidentiality claim covers only a portion of a record, or because only a portion of the record is eligible for confidential treatment.

(c) In taking actions under this subchapter, Navajo EPA should consider whether it is possible to obtain the affected business's consent to disclosure of useful portions of records while protecting the information which is or may be entitled to confidentiality (e.g., by withholding such portions of a record as would identify a business, or by disclosing data in the form of industry-wide aggregates, multi-year averages or totals, or some similar form).

(d) This subpart does not apply to questions concerning entitlement to confidential treatment or information which concerns an individual solely in his or her personal, as opposed to business, capacity.

#### **§ 1303 Action by Navajo EPA**

(a) **Situations Requiring Action.** This section prescribes procedures to be used by Navajo EPA in making determinations of whether business information is entitled to confidential treatment for reasons of business confidentiality. Action shall be taken under this section whenever Navajo EPA:

(1) Learns that it is responsible for responding to a request for the release of business information;

(2) Desires to determine whether business information in its possession is entitled to confidential treatment, even though no request for release of the information has been received; or

(3) Determines that it is likely that Navajo EPA eventually will be requested to disclose the information at some future date and thus will have to determine whether the information is entitled to confidential treatment.

(b) **Determining Existence of Business Confidentiality Claims.** Whenever action under paragraph (a) of this section is required, the Navajo EPA office shall examine the information and records to determine which businesses, if any, are affected businesses, and to determine which businesses if any, have asserted business confidentiality claims which remain applicable to the information. If any business is found to have asserted an applicable claim, the office shall take action under paragraph (c) of this section with respect to each such claim.

(c) **Preliminary Determination.** Whenever action under this section is required on any business's claim, Navajo EPA shall make a preliminary determination with respect to each such claim. Each preliminary determination shall be made after consideration of the applicable substantive criteria in § 1304. After making a preliminary determination with regard to the issue of confidential treatment, Navajo EPA shall furnish the notice of opportunity to submit comments prescribed by paragraph (d) of this section to the business asserting the claim and each business which is known to have asserted an applicable claim and which has not previously been furnished such notice with regard to the information in question. In making such a determination, the Director shall consult with the Attorney General.

**(d) Notice to Affected Businesses; Opportunity to Comment.**

(1) Whenever required by paragraph (c) of this section, Navajo EPA shall promptly furnish each business a written notice stating that Navajo EPA is determining under this subchapter whether the information is entitled to confidential treatment, and affording the business an opportunity to comment. The notice shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact and date of receipt. The notice shall state the address of the office to which the business's comments shall be addressed (the Navajo EPA office furnishing the notice) and the time allowed for comments (which shall be at least 15 working days after receipt of the notice). The notice shall further state that Navajo EPA will construe a business's failure to furnish timely comments as a waiver of the business's claim.

(2) At or about the time the written notice is furnished, Navajo EPA shall orally inform a responsible representative of the business (by telephone or otherwise) that the business should expect to receive the written notice, and shall request the business to contact Navajo EPA if the written notice has not been received within a few days, so that Navajo EPA may furnish a duplicate notice. A responsible representative for receipt of this oral notice includes, but is not limited to, a person authorized to sign applications and reports as provided in §§ 304 and 811(1).

(3) The written notice required by paragraph (d)(1) of this section shall invite the business's comments on all aspects of the preliminary determination.

**(e) Final Determination.** After providing an opportunity to comment under paragraph (d) of this section, the Director shall make a final determination. In making the final determination, the Director shall consider the substantive criteria contained in § 1304 and any comments received. In making such a determination, the Director shall consult with the Attorney General.

(1) The final determination shall be served using the procedures in paragraphs (d)(1) and (d)(2) of this section.

(2) In the final determination, the Director, if the decision is made that the information at issue will be disclosed, shall specify a date upon which the information will be released. This date shall be at least five (5) working days after the date of service of notice to the party that claimed the information confidential.

**(f) Judicial Review.** For purposes of judicial review under section 402(A)-1002(a) of the ~~NNPDES Act~~ NNCWA, final agency action occurs upon issuance of notice of the final determination by the Director.

**§ 1304 Substantive Criteria for Use in Confidentiality Determinations**

(a) A determination issued under § 1303 shall hold that business information is entitled to confidential treatment for the benefit of a particular business if:

(1) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

(2) The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(3) 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) No statute, including the ~~NNPDES Act~~ NNCWA, specifically requires disclosure of the information; and

(5) Either:

**A.** The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

**B.** The information is voluntarily submitted information (see § 1301(m)), and its disclosure would be likely to impair the Navajo Nation's ability to obtain necessary information in the future.

(b) As provided by §§ 303(b) and (c) and 812, effluent data (as defined in § 1301(g)), a standard or limitation (as defined in § 1301(l)), the name and address of any permit applicant or permittee, permit applications, and permits are not eligible for confidential treatment. The Director shall not be required to provide notice before releasing any information covered by this subsection.

**§ 1305 Safeguarding of Business Information; Penalty for Wrongful Disclosure**

(a) No Navajo EPA officer, employee, assignee, authorized representative (including an authorized contractor), or employee of the Navajo Nation who has obtained business information in his or her official capacity, may disclose, or use for his or her private gain or advantage, any business information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position or employment, except as authorized by this Subchapter.

(b) Each Navajo EPA officer, employee, assignee, or authorized representative (including an authorized contractor) who has custody or possession of confidential business information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.

(c) Violation of paragraphs (a) or (b) of this section shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action. Willful violation may result in criminal prosecution under section ~~301(F)~~ 901(c) of the ~~NNPDES Act~~ NNCWA.

(d) **Disclosure to Authorized Representatives.** The Director may disclose information to officers, employees, or authorized representatives of the United States Government as provided in section ~~301(F)~~ 901(c) of the ~~NNPDES Act~~ NNCWA.