

## Memorandum

### Confidential Business Information

Set out below are the federal statutory provisions and regulations that control how confidential business information is handled under the Clean Water Act (CWA). These statutes and regulations also dictate what information must be available to the public, notwithstanding a claim that the information is otherwise confidential as a trade secret. In addition, a section from the Idaho Public Records Law, Idaho Code § 9-342D, is included below. This section addresses information that must be made public under Idaho's delegated RCRA and CAA programs. DEQ proposes amending this section of the Public Records Law to address CWA documents.

These laws and rules are the basis for the proposed IPDES rule section addressing confidential business information.

1. 33 USC 1318(a) and (b), CWA 308(a) and (b):

(a) Authorize EPA to require owners and operators of any point source to establish and maintain such records, make such reports and install use and maintain such monitoring equipment or methods, samples of such effluents and provide such other information as EPA deems necessary to develop any effluent limitations or other limitation, prohibition or effluent standard, determine whether any person is in violation of any effluent limitation, etc., or other requirements under CWA.

(b) Any records, reports or information obtained under section (a) shall be available to the public, except for upon a showing to EPA, any person may claim information that is entitled to protection as a trade secret as confidential. This does not include effluent data that must be made available.

2. 33 USC 1342(b)(2)(B). For state program approval, the state must have authority to gather information to the same extent as authorized under 33 USC 1318.

3. 33 USC 1342(j). Copies of each permit application and each permit issued under CWA shall be available to the public.
4. 40 CFR 123.25(a)(3) requires states to have legal authority to implement 40 CFR 122.7(a) and (b).
5. 40 CFR 122.7(a) and (b) provide that claims of confidentiality will be denied for the names and addresses of any permit applicant or permittee; permit applications, permit and effluent data, and information required by NPDES application forms, including information submitted on the forms and any attachments.
6. 40 CFR 2.201 *et seq.* provides authority and procedures for persons to claim information as confidential business information (CBI), and for EPA to make determinations and hold such information confidential. 2.201(e) explains that CBI includes the concept of trade secrecy and other related legal concepts which give 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.
7. 40 CFR 2.302 specifically applies to CWA records, and defines effluent data as information necessary to determine the identity, amount, frequency, concentration, temperature or other characteristics of any pollutant which has been discharged by the source, and information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics of the pollutants which, under any applicable standard or limitation, the source was authorized to discharge and 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.

2.302(a)(2)(ii) provides that certain information is effluent 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. This includes the following:

Information concerning research or the results of research on any product, method, device or installation which was produced, developed, installed, and used only for research purposes, and information concerning any product, method, device or installation designed and intended to be marketed or used commercially but not yet so marketed or used.

2.302(e) provides that effluent data and a standard or limitation is not eligible to be claimed as confidential. Standard or limitation is also defined.

8. 40 CFR 123.41 provides that any information obtained or used in the administration of a state NPDES program must be made available to EPA without restriction. If it is claimed CBI under state law, EPA will handle it as CBI as provided under 40 CFR 2.

9. Idaho Code § 9-342D provides that trade secrets are exempt from disclosure.

10. Idaho Code § 9-342A provides that certain records that are required to be made public in order to for the state to obtain primacy under CAA and RCRA must be produced, even if otherwise exempt from disclosure. This section also provides a process for a company to claim trade secret protection, and provides that information can be provided to EPA under a continuing claim of confidentiality. This section will need to be amended to address CWA information as required to obtain approval of the Idaho program.