

Recent Changes/Hurdles in Claiming Confidentiality on Applications

AWMA – Midwest Chapter Tech Conference

May 4, 2022 – Air Technical Track – Day 2



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Overview

- What is a Trade Secret / CBI?
- EPA Confidentiality Provisions
- Dow Chemical Title V Permit – 2020 EPA Decision
- Missouri DNR – 2022 Rule Amendment
- Tips/Considerations in Confidentiality Requests

What is a Trade Secret / CBI?

- "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
 - (i) 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
 - (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- Source - Uniform Trade Secrets Act 1985
 - <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e58f19a0-6a5e-c90f-67c1-ac1f747ad47b&forceDialog=0>

What is a Trade Secret / CBI?

- In simple terms:
 - Information that is commercially valuable
 - Provides your business a competitive advantage
 - Disclosure of the information would be a competitive disadvantage
- Property right, but does not require a patent be issued
- “Special Sauce”



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EPA Confidentiality Provisions

- 40 CFR Part 2, Subpart B - protects
 - Confidential Business Information
 - Proprietary Information
 - Trade Secrets
- Process for Submitting CBI – 40 CFR 2.203(b)
 - Substantiation may be required
 - Also note certification obligation for RMP – 40 CFR 68.152

The owner, operator, or senior official with management responsibility of the stationary source shall sign a certification that the signer has personally examined the information submitted and that based on inquiry of the persons who compiled the information, the information is true, accurate, and complete, and that those portions of the substantiation claimed as confidential business information would, if disclosed, reveal trade secrets or other confidential business information.

Emissions Data Not Protected

- Clean Air Act
 - Section 114(c), 42 USC 7414(c) – covers “methods or processes entitled to protection as trade secrets”
 - 40 CFR 2.301
 - “emissions data” is NOT entitled to confidential treatment, including:
 - emissions standards; and
 - emissions limitations.

Limitations on CBI

- 40 CFR 2.208
 - Claimant 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
 - The information is not, and has not been, reasonably obtainable without the business's consent by other persons

Dow Chemical Title V Permit

- Dow salt dome facility in Brazoria Co., Texas
- Title V Permit issued by TCEQ
- Hourly and annual injection rates for
 - liquefied petroleum gas, pyrolysis gasoline, propane, and naphtha

Dow Chemical Title V Permit

- Environmental Integrity Project challenged the confidentiality claim of the injection rates
 - Operating limits which are confidential are not practically enforceable
 - Injection rates shall be limited to the quantities specified in Table 2 of a “confidential application submitted October 18, 2006.”
- TCEQ’s position
 - referenced injection rates are not emissions limits, are not necessary for calculating emissions rates and therefore not emission data as defined by 40 C.F.R. §2.301(a)(2)(i)

Dow Chemical Title V Permit

- EPA's rationale
 - CAA Section 503(e) – Congress intended Title V permits including emissions limits to be available to the public
 - Agreed that short-term emission limits were based on injection rates
 - “Confidential information that is referenced in Special Condition 2 of the NSR Permit and subsequently incorporated into the title V permit establishes binding requirements governing operations during the filling of specified wells.”
 - Limitations are applicable requirements in Title V permits, because “the public does not know what these applicable requirements are, significantly hampering the ability of citizens to enforce these conditions.”

Missouri

- CBI defined at 10 CSR 6.020

57. Confidential business information—
Defined as follows:

A. For the purpose of 10 CSR 10-6.300, information that has been determined by a federal agency, in accordance with its applicable regulations, to be a trade secret, or commercial or financial information obtained from a person and privileged or confidential and is exempt from required disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(4)); and

B. For all other purposes, secret processes, secret methods of manufacture or production, trade secrets, and other information possessed by a business that, under existing legal concepts, the business has a right to preserve as confidential and to limit its use by not disclosing it to others in order that the business may obtain or retain business advantages it derives from its rights in the information.



Missouri

- 10 CSR 6.210(3)(A)8.E.

E. The information is not emission data that is required to be reported to the U.S. Environmental Protection Agency under 40 CFR 51.15 with the exception of the following data elements which can be claimed to be confidential with justification the department approves:

- (I) Activity/throughput (for each period reported);
- (II) Emission factor;
- (III) Winter throughput (percent);
- (IV) Spring throughput (percent);
- (V) Summer throughput (percent);
- (VI) Fall throughput (percent);
- (VII) Design capacity (including boiler capacity, if applicable) (MHDR);
- (VIII) Primary capture and control efficiencies (percent); and
- (IX) Total capture and control efficiency (percent); and

2022 Missouri Rule Amendment

- The purpose of this proposed amendment is to add definitions and remove the listing of specific emission data elements that could be considered confidential business information from (3)(A)8.E.
- MDNR added the list of emission data elements in a 2016 amendment and submitted it to EPA in November 2016, to replace the current rule in the Missouri State Implementation Plan.
- However, EPA questioned the listing of the emission data elements in the rule and suggested that this will prevent the amendment from being SIP approvable.

2022 Missouri Rule Amendment

- Missouri Register – Feb. 15, 2022, Vol. 47, p. 235
- Public Comment Period, Feb. 15, 2022 to April 7, 2022

E. The information is not emission data[*that is required to be reported to the U. S. Environmental Protection Agency under 40 CFR 51.15 with the exception of the following data elements which can be claimed to be confidential with justification the department approves:*

(I) Activity/throughput (for each period reported);

(II) Emission factor;

(III) Winter throughput (percent);

(IV) Spring throughput (percent);

(V) Summer throughput (percent);

(VI) Fall throughput (percent);

(VII) Design capacity (including boiler capacity, if applicable) (MHDR);

(VIII) Primary capture and control efficiencies (percent); and

(IX) Total capture and control efficiency (percent)];

and

Missouri Rule Amendment

(A) Confidential business information—Secret processes, secret methods of manufacture or production, trade secrets, and other information possessed by a business that, under existing legal concepts, the business has a right to preserve as confidential, and to limit its use by not disclosing it to others in order that the business may obtain or retain business advantages it derives from its rights in the information.

(B) Emission data—

1. The identity, amount, frequency, concentration, or other characteristics (related to air quality) of any air contaminant which—

A. Has been emitted from an emission unit;

B. Results from any emission by the emissions unit;

C. Under an applicable standard or limitation, the emissions unit was authorized to emit; or

D. Is a combination of any of the subparagraphs

(2)(B)1.A., B., or C. of this rule;

2. The name, address (or description of the location), and the nature of the emissions unit necessary to identify the emission units including a description of the device, equipment, or operation constituting the emissions unit; and

3. The results of any emission testing or monitoring required to be reported under this rule or other rules of the commission.

(C) Definitions of certain terms specified in this rule, other than those defined in this rule section, may be found in 10 CSR 10-6.020.



Kansas

- KSA 65-3015

65-3015. Records and information open; trade secret exception. (a) Except as provided in subsection (b), any records, reports or information obtained pursuant to this act shall be available to the public.

(b) Upon a showing satisfactory to the secretary by any person that records, reports or information, or a particular part thereof (other than emission data), to which the secretary has access under this act, if made public, would divulge methods or processes entitled to protection as trade secrets of such person under the uniform trade secrets act (K.S.A. [60-3320](#) et seq., and amendments thereto), the secretary shall consider such record, report or information, or particular portion thereof, confidential, except that: (1) Such record, report or information may be disclosed to officers, employees or authorized representatives of the United States government concerned with carrying out responsibilities under the federal clean air act and amendments thereto; and (2) this subsection shall not apply to any provision in any air quality approval or permit issued by the secretary and the public shall have access to such approvals and permits in their entirety.

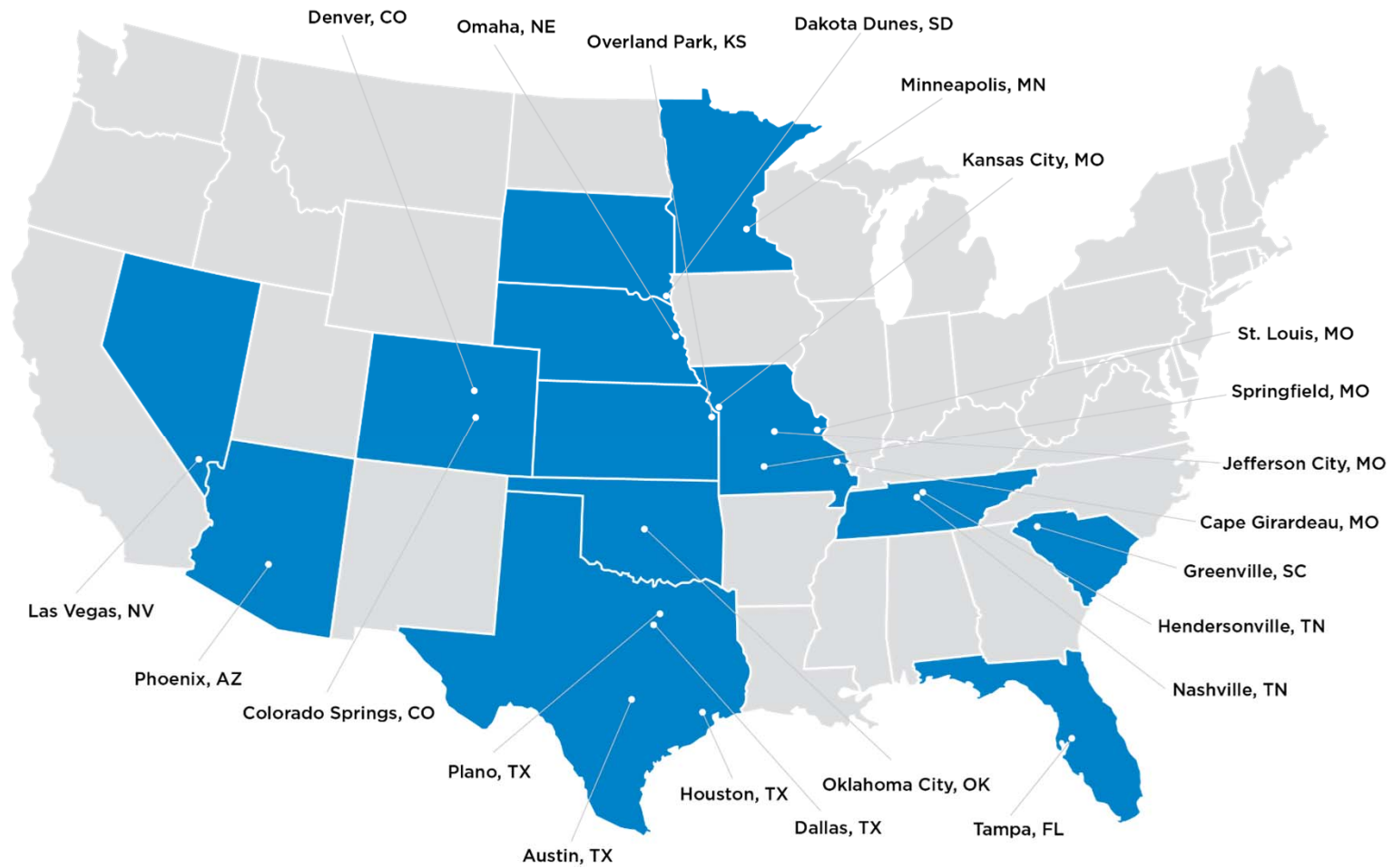
History: L. 1967, ch. 347, § 15; L. 1970, ch. 261, § 15; L. 1973, ch. 254, § 1; L. 1974, ch. 352, § 147; L. 1993, ch. 13, § 13; L. 2005, ch. 67, § 7; July 1.



Tips/Considerations for Claiming Confidentiality

- Ask yourself - what would a competitor or someone other than an individual inside your business do with the data and would it provide an unfair advantage?
- Has the company taken steps in the past to protect this information?
- Is the information otherwise readily available or in the public domain already?
- What steps will the company take in the permit application to protect the CBI?
 - Limit application to only the CBI portions

Our Locations



Questions?



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