

Chapter 6. EPCRA Section 322: Trade Secrets

EPCRA Section 322(a). Authority to withhold information

(1) General authority

- (A) *With regard to a hazardous chemical, an extremely hazardous substance, or a toxic chemical, any person required under section 303(d)(2), 303(d)(3), 311, 312, or 313 of this title to submit information to any other person may withhold from such submittal the specific chemical identity (including the chemical name and other specific identification), as defined in regulations prescribed by the Administrator under subsection (c), if the person complies with paragraph (2).*
- (B) *Any person withholding the specific chemical identity shall, in the place on the submittal where the chemical identity would normally be included, include the generic class or category of the hazardous chemical, extremely hazardous substance, or toxic chemical (as the case may be).*

(2) Requirements

- (A) *A person is entitled to withhold information under paragraph (1) if such person—*
- (i) claims that such information is a trade secret, on the basis of the factors enumerated in subsection (b),*
 - (ii) includes in the submittal referred to in paragraph (1) an explanation of the reasons why such information is claimed to be a trade secret, based on the factors enumerated in subsection (b), including a specific description of why such factors apply, and*
 - (iii) submits to the Administrator a copy of such submittal, and the information withheld from such submittal.*
- (B) *In submitting to the Administrator the information required by subparagraph (A)(iii), a person withholding information under this subsection may—*
- (i) designate, in writing and in such manner as the Administrator may prescribe by regulation, the information which such person believes is entitled to be withheld under paragraph (1), and*
 - (ii) submit such designated information separately from other information submitted under this subsection.*

(3) Limitation

The authority under this subsection to withhold information shall not apply to information which the Administrator has determined, in accordance with subsection (c), is not a trade secret.

Section 322 allows facilities to claim specific chemical identity as a trade secret from certain EPCRA reports submitted to the SERC, TERC, LEPC, TEPC and the fire department. The statute does not allow facilities to file trade secret claims under Section 304, emergency release notification.

Facilities that wish to file trade secret claims are required to submit the EPCRA report with the chemical identity and the substantiation to EPA. States and local agencies only receive the

sanitized (i.e. trade secret information removed) copies of the EPCRA reports and the substantiation form, and not the trade secret information itself.

EPCRA Section 322(b): Trade secret factors

No person required to provide information under this chapter may claim that the information is entitled to protection as a trade secret under subsection (a) unless such person shows each of the following:

- (1) Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee, an officer or employee of the United States or a State or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.*
- (2) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal or State law.*
- (3) Disclosure of the information is likely to cause substantial harm to the competitive position of such person.*
- (4) The chemical identity is not readily discoverable through reverse engineering.*

Before filing a trade secret claim, a facility must show that the chemical identity has not been disclosed to any other person other than:

- Members of the LEPC.
- A federal government employee or officer.
- A state or local government employee.
- A facility employee or other person bound by a confidentiality agreement.

The facility must also show the following on the substantiation form:

- Reasonable measures have been taken to protect the confidentiality of chemicals.
- Facilities intend to continue to take such measures.
- Information is not required to be disclosed to the public under any other federal or state law.
- Information is likely to cause substantial harm to the competitive position of the person or facility.
- Chemical identity is not readily discoverable through reverse engineering.

6.1 Trade Secret Regulations

EPCRA Section 322(c): Trade secret regulations

*As soon as practicable after October 17, 1986, the Administrator shall prescribe regulations to implement this section. With respect to subsection (b)(4) of this section, such regulations shall be equivalent to comparable provisions in the Occupational Safety and Health Administration Hazard Communication Standard (29 C.F.R. 1910.1200) and any revisions of such standard prescribed by the Secretary of Labor in accordance with the final ruling of the courts of the United States in *United Steelworkers of America, AFL–CIO–CLC v. Thorne G. Auchter*.*

As directed by EPCRA Section 322(c), EPA published *Trade Secret Regulations* on July 29, 1988, in a *Federal Register* notice (53 FR 28772), and subsequently, made minor revisions to these regulations. The implementing regulations are at 40 CFR Part 350, <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-J/part-350?toc=1>

If trade secret claims are submitted to EPA, facilities are required to submit the sanitized copies of the EPCRA reports and the sanitized substantiation at the same time to the state and local authorities according to Section 322(a)(2)(ii) of the statute.

Except for release reporting under EPCRA Section 304, a facility may claim a trade secret for the specific chemical identity from the following EPCRA reports.

6.2 Facilities—Procedures for Filing Trade Secret Claims

The following is a brief description of which EPCRA reports allow a facility to claim specific chemical identity as a trade secret. SERCs, TERCs, LEPCs and TEPCs may check with EPA to find out which facilities in their state/tribe/planning district submitted a trade secret package to EPA. Details on these procedures can be found in the regulations at https://www.ecfr.gov/cgi-bin/text-idx?SID=1fe4d9656fd47e8a4a7d680552747675&mc=true&tpl=/ecfrbrowse/Title40/40cfr350_main_02.tpl.

The instructions and the substantiation forms are available on the EPA website at <https://www.epa.gov/epcra/epcra-trade-secret-forms-and-instructions>.

6.2.1 Trade Secrecy Claim for the Development of an Emergency Plan (EPCRA Section 303)

Under Section 303(d)(2), facilities are required to inform their LEPC or TEPC of any relevant changes to emergency planning that may or are about to occur. Under Section 303(d)(3), LEPCs and TEPCs may request facilities to provide any information for developing and modifying the emergency plan.

EPCRA Sections 303(d)(2) and (d)(3) only apply to facilities subject to emergency planning notification under Section 302—that is, facilities that have EHSs on site at or above their TPQs. The statute does not specify the format or any details of this notification (e.g., name of the EHSs,

the amount stored on site, etc.). Some facilities may volunteer to provide all details about the chemicals stored, location and the amount, etc. If facilities do not provide any details, LEPCs and TEPCs have the authority to request any information under Sections 302(d)(2) and (d)(3). However, due to the provisions under EPCRA Section 322, *Trade Secrets*, facilities can submit the trade secret claim package to EPA for the specific chemical identity.

A facility may claim the specific chemical identity as a trade secret when providing information under these two sections. Instead of providing the actual chemical name, the facility is required to provide LEPCs and TEPCs the generic chemical name, which would be descriptive of the actual identity of the chemical.

If LEPCs and TEPCs wish to know if a particular facility in their planning district has claimed trade secrets, they may contact EPA to confirm.

6.2.2 Trade Secrecy Claim for Hazardous Chemical Inventory Reporting—MSDS, List of Hazardous Chemicals and Tier II Form (EPCRA Sections 311 and 312)

The hazardous chemical inventory reporting provisions require facilities to submit MSDSs, (SDSs), a list of hazardous chemicals, and the inventory form (Tier II form or the state equivalent) to the SERC or TERC, LEPC or TEPC and the local fire department. Facilities may withhold a specific chemical identity from each of these submissions but must submit a trade secrecy claim package to EPA.

6.3 Public Petitions Requesting Disclosure of a Trade Secret Chemical

EPCRA Section 322(d): Petition for review

(1) *In general*

Any person may petition the Administrator for the disclosure of the specific chemical identity of a hazardous chemical, an extremely hazardous substance, or a toxic chemical which is claimed as a trade secret under this section. The Administrator may, in the absence of a petition under this paragraph, initiate a determination, to be carried out in accordance with this subsection, as to whether information withheld constitutes a trade secret.

(2) *Initial review*

Within 30 days after the date of receipt of a petition under paragraph (1) (or upon the Administrator's initiative), the Administrator shall review the explanation filed by a trade secret claimant under subsection (a)(2) and determine whether the explanation presents assertions which, if true, are sufficient to support a finding that the specific chemical identity is a trade secret.

(3) *Finding of sufficient assertions*

(A) If the Administrator determines pursuant to paragraph (2) that the explanation presents sufficient assertions to support a finding that the specific chemical identity is a trade secret, the Administrator shall notify the trade secret claimant that he has 30 days to supplement the explanation with detailed information to support the assertions.

- (B) *If the Administrator determines, after receipt of any supplemental supporting detailed information under subparagraph (A), that the assertions in the explanation are true and that the specific chemical identity is a trade secret, the Administrator shall so notify the petitioner and the petitioner may seek judicial review of the determination.*
- (C) *If the Administrator determines, after receipt of any supplemental supporting detailed information under subparagraph (A), that the assertions in the explanation are not true and that the specific chemical identity is not a trade secret, the Administrator shall notify the trade secret claimant that the Administrator intends to release the specific chemical identity. The trade secret claimant has 30 days in which he may appeal the Administrator's determination under this subparagraph to the Administrator. If the Administrator does not reverse his determination under this subparagraph in such an appeal by the trade secret claimant, the trade secret claimant may seek judicial review of the determination.*

(4) Finding of insufficient assertions

- (A) *If the Administrator determines pursuant to paragraph (2) that the explanation presents insufficient assertions to support a finding that the specific chemical identity is a trade secret, the Administrator shall notify the trade secret claimant that he has 30 days to appeal the determination to the Administrator, or, upon a showing of good cause, amend the original explanation by providing supplementary assertions to support the trade secret claim.*
- (B) *If the Administrator does not reverse his determination under subparagraph (A) after an appeal or an examination of any supplementary assertions under subparagraph (A), the Administrator shall so notify the trade secret claimant and the trade secret claimant may seek judicial review of the determination.*
- (C) *If the Administrator reverses his determination under subparagraph (A) after an appeal or an examination of any supplementary assertions under subparagraph (A), the procedures under paragraph (3) of this subsection apply.*

The public may request from EPA, in writing, the disclosure of the chemical identity claimed as trade secret. EPA will make a determination on the petition within nine months of receipt of such a petition.

EPA may review a trade secret claim to determine its validity upon receipt of a petition or may initiate such a review at any time. EPA will notify the facility if the trade secret claim package contains insufficient information and may request additional information from the submitter. EPA will also notify the submitter if the claim is valid.

6.4 Trade Secret Access for Health Professionals

EPCRA Section 322(e): Exception for information provided to health professionals

Nothing in this section, or regulations adopted pursuant to this section, shall authorize any person to withhold information which is required to be provided to a health professional, a doctor, or a nurse in accordance with section 323 of this title.

While EPCRA Section 322 allows facilities to file trade secret claims for specific chemical identities on certain EPCRA reports, EPCRA Section 323 authorizes health professionals to obtain this information as specified in the statute. Details on this are covered in Chapter 7 of this document.

6.5 Information Provided to the State

EPCRA Section 322(g) Information provided to State

Upon request by a State, acting through the Governor of the State, the Administrator shall provide to the State any information obtained under subsection (a)(2) and subsection (d)(3).

Any state may request access to trade secret claims, substantiations and additional information submitted to EPA. Under Section 322(g) of EPCRA, the governor of the state may request that EPA provide trade secret information, including specific chemical identities and substantiations that the facilities in their state submitted. However, under Section 325(d)(2), the governors are prevented from “knowingly and willfully” disclosing trade secret information to the public. The governor of a state that receives access to trade secret information may disclose it only to state employees.

EPA may provide access to any state if (a) the request is in writing; (b) the request is from the governor of the state; and (c) the state agrees to safeguard the information.

While EPA believes that it would be beneficial to state and local preparedness and planning to access information on trade secrets, it was determined that these potential advantages were outweighed by the possible consequences of unintended disclosure of bona fide trade secrets. Because SERCs, TERCs, LEPCs and TEPCs may include representatives from industry and the public, it could be very difficult to protect trade secrets from wider disclosure. Therefore, EPA determined that only state governors may be provided access to trade secret information.

If LEPCs and TEPCs wish to know which facilities in the planning district submitted trade secret claim packages, they may contact EPA.

6.6 Information on Adverse Effects

EPCRA Section 322(h) Information on adverse effects

- (1) In any case in which the identity of a hazardous chemical or an extremely hazardous substance is claimed as a trade secret, the Governor or State emergency response commission established under section 11001 of this title shall identify the adverse health effects associated with the hazardous chemical or extremely hazardous substance and shall assure that such information is provided to any person requesting information about such hazardous chemical or extremely hazardous substance.*
- (2) In any case in which the identity of a toxic chemical is claimed as a trade secret, the Administrator shall identify the adverse health and environmental effects associated with the toxic chemical and shall assure that such information is included in the computer*

database required by section 313(j) of this title and is provided to any person requesting information about such toxic chemical.

Although a trade secret claim for a chemical is submitted to EPA, if a member of the public requests information on adverse health effects of the chemical, the governor or the SERC shall provide the requestor access to that information.