

**Commission for Environmental Cooperation (CEC) of North America
North American Pollutant Release and Transfer Register (PRTR) Project**



Issue Papers on Enhancing Comparability Among PRTRs in North America

Issue Paper #2: Confidential Business Information

December 2002

Introduction

The Commission for Environmental Cooperation (CEC) is preparing a series of issue papers on comparability of reporting under the Pollutant Release and Transfer Register (PRTR) programs in the three North American countries: Canada's National Pollutant Release Inventory (NPRI), Mexico's *Registro de Emisiones y Transferencias de Contaminantes* (RETC) which includes data on individual chemicals from Section 5 of the annual certificate of operation, the *Cédula de Operación Anual* (COA), and the United States' Toxics Release Inventory (TRI).

The three governments have been working to enhance the comparability of their national PRTRs through the CEC's PRTR project. In June 1997, the CEC Council, comprised of the top environmental officials in the three North American countries, signed Council Resolution 97-04: Promoting Comparability of Pollutant Release and Transfer Registers. In response to this Resolution, the CEC and representatives of the three governments have developed an *Action Plan to Enhance Comparability Among PRTRs in North America*, which was adopted through Council Resolution 02-05 in June 2002. This issue paper, and others in the series, describes some important areas that are dissimilar among the three countries' PRTRs with the aim to identify actions that could be taken to increase comparability.

Confidential Business Information

This issue paper discusses the process for determining and handling confidential business information under the three PRTR programs in North America. The *Action Plan* calls upon the CEC to prepare a paper describing the ways in which confidentiality claims are handled in NPRI and TRI and experiences to date, to assist Mexico in designing its system for handling information claimed as confidential under the RETC. It also calls upon Mexico to make RETC data publicly available, and for Canada to make the facility name and reported amounts publicly available for reports that have been claimed as confidential.

Any person who provides information to NPRI may submit a written request that it be treated as confidential on the grounds that revealing the information would be revealing trade secrets. Any person who provides information to TRI may submit a written request that the chemical name be treated as confidential on the grounds that revealing the information would be revealing trade

secrets. The request to NPRI or TRI may be denied. A determination of confidentiality is issued by the governing authorities based on criteria laid down in laws and regulations. What specific items of data may be held as confidential differs for TRI and NPRI but in both cases the number of reports deemed trade secret is quite small.

For the current voluntary RETC system, a facility must give written permission to publish information it provides, otherwise the entire facility report is not released to the public. Legislation was passed in December 2001 to establish a mandatory system. The legislation provides that the information submitted by the facilities will be public and that the Ministry will allow access to the information and will disseminate it in a proactive way. The approach to confidential business information under this mandatory system is under discussion.

Mexico is working on a regulation to establish a specific section on confidentiality, and its relationship with other laws regarding this topic, such as the Industrial Property Law and the Federal Law of Transparency and Access to Information, as well as the applicability of Article 159 Bis 4 of the General Law of Environmental Protection, which provides that information on processes, technology and raw materials cannot be disclosed, and only environmental information may be made public.

TRI Confidential Business Information

A trade secret is considered any formula, pattern, device or compilation of information which is used in a business and which gives that business an opportunity to obtain an advantage over competitors who do not know or use it. It is a process or device for continuous use in the operation of the business and must be secret and not a matter of public knowledge or general knowledge in the industry. (See 40 CFR 350.27 of the US Code of Federal Regulations.)

Submitters of TRI information may claim exemption to disclosure to the public of the name of the chemical only. The trade secret claim must include proof that:

- the information is truly secret (that is, that it has not been revealed to others),
- there would be substantial harm in its disclosure to competitors, and
- revelation of the information would enable competitors to deduce the use of the chemical.

EPA Form 9510-1 (included in the Annex) can be used to submit the trade secret claim for TRI or other programs under the *Emergency Planning and Community Right-to-Know Act (EPCRA)*. TRI is Section 313 of this Act.

For TRI, only the name of the chemical may be held confidential. All other information, such as the facility name and address and the amounts of releases and transfers, is included in the public database. A generic name for the chemical is substituted. For the 2000 reporting year, 3 out of 91,513 reports were trade secret reports. The largest number of forms for which trade secret status was allowed is 13 out of 77,941 reports for the 1994 reporting year.

If the EPA disallows the trade secret claim, the decision can be appealed (within 30 days) to the Federal Court. While under consideration or appeal, the information is not disclosed. Examples

of cases where claims have been disallowed include cases where the same information has been released under other EPA programs, for example in applications for air or water permits, and not been claimed as confidential or trade secret.

NPRI Confidential Business Information


According to the *Guide for Reporting to the National Pollutant Release Inventory – 2000*, any person who provides information to the NPRI may submit a written request that it be treated as confidential based on Section 52 of the *Canadian Environmental Protection Act* of 1999. This section provides that a request may be based on any of the following reasons:

- the information constitutes a trade secret;
- the disclosure of the information would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and
- the disclosure of the information would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

To be treated as confidential, the company must demonstrate that it treats the information as confidential and wishes to continue to do so. It must also demonstrate that this information is not available to the general public through legal means, such as obtaining a public copy of a provincial waste permit. If substantiation for the trade secret claim is not provided, or the substantiation provided does not support the claim, the Minister may publish the information.

For NPRI, for each facility and substance, the request for confidentiality must indicate each field in the database for which the request is being made. The entire report is withheld from the public database, however. No information is given on the facility name or the amount of releases or transfers. For the 1999 reporting year, 6 out of 8,595 reports were deemed confidential.

Annex: TRI Form for Submission of Trade Secret Claims

<p>United States Environmental Protection Agency</p>  <p>Washington, DC 20460</p> <p>Substantiation to Accompany Claims of Trade Secrecy Under the Emergency Planning and Community Right-To-Know Act of 1986</p>	<p>Form Approved OMB No. 2050-0078 Approval expires 09/30/2003</p>
<p>Paperwork Reduction Act Notice</p> <p>Public reporting burden for this collection of information is estimated to vary from 16 hours to 38 hours per response, with an average of 26.7 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, including suggestions for reducing this burden to: Director, Office of Environmental Information, Collection Strategies Division, Mail Code 2822, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue N.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, N.W., Washington, D.C. 20503, Attention: Desk Officer for EPA.</p>	
<p>Part 1. Substantiation Category</p> <p>1.1 Title III Reporting Section (check only one)</p> <p><input type="checkbox"/> 303 <input type="checkbox"/> 311 <input type="checkbox"/> 312 <input type="checkbox"/> 313</p> <p>1.2 Reporting Year 19__</p>	
<p>1.3 Indicate Whether This Form is (check only one)</p>	
<p>1.3a <input type="checkbox"/> Sanitized (answers 1.3.1a below)</p> <p>1.3.1a Generic Class or Category</p>	<p>1.3b <input type="checkbox"/> Unsanitized (answer 1.3.1b and 1.3.2b below)</p> <p>1.3.1b CAS Number □□□□□□-□□-□</p> <p>1.3.2b Specific Chemical Identity</p>
<p>Part 2. Facility Identification Information</p>	
<p>2.1 Name</p>	
<p>2.2 Street Address</p>	
<p>2.3 City, State, and Zip Code</p>	
<p>2.4 Dun and Bradstreet Number</p> <p style="text-align: center;">□□-□□□-□□□□</p>	

Part 3 Responses to Substantiation Questions

3.1 Describe the specific measures you have taken to safeguard the confidentiality of the chemical identify claimed as trade secret, and indicate whether these measures will continue in the future.

3.2 Have you disclosed the information claimed as trade secret to any other person (other than a member of a local emergency planning committee, officer or employee of the United States or a State or local government, or your employee) who is not bound by a confidentiality agreement to refrain from disclosing this trade secret information to others?
Yes No

3.3 List all local, State, and Federal government entities to which you have disclosed specific chemical identity. For each, indicate whether you asserted a confidentiality claim for the chemical identity and whether the government entity denied that claim.

Government Entity	Confidentiality Claim Asserted		Confidentiality Claim Denied	
	Yes	No	Yes	No

3.4 In order to show the validity of a trade secrecy claim, you must identify your specific use of the chemical claimed as trade secret and explain why it is a secret of interest to competitors. Therefore:

(i) Describe the specific use of the chemical claimed as trade secret, identifying the product or process in which it is used. (If you use the chemical other than as a component of a product or in a manufacturing process, identify the activity where the chemical is used.)

(ii) Has your company or facility identity been linked to the specific chemical identity claimed as trade secret in a patent, or in publications or other information sources available to the public or your competitors (of which you are aware)?

Yes No

If so, explain why this knowledge does not eliminate the justification for trade secrecy.

(iii) If this use of the chemical claimed as trade secret is unknown outside your company, explain how your competitors could deduce this use from disclosure of the chemical identity together with other information on the Title III submittal form.

3.4 (iv) Explain why your use of the chemical claimed as trade secret would be valuable information to your competitors.

3.5 Indicate the nature of the harm to your competitive position that would likely result from disclosure of the specific chemical identity, and indicate why such harm would be substantial.

3.6 (i) To what extent is the chemical claimed as trade secret available to the public or your competitors in products, articles, or environmental releases?

3.6 (ii) Describe the factors which influence the cost of determining the identity of the chemical claimed as trade secret by chemical analysis of the product, article, or waste which contains the chemical (e.g., whether the chemical is in pure form or is mixed with other substances).

Part 4. Certification (Read and sign after completing all sections)

I certify under penalty of law that I have personally examined the information submitted in this and all attached documents. Based on my inquiry of those individuals responsible for obtaining the information, I certify that the submitted information is true, accurate, and complete, and that those portions of the substantiation claimed as confidential would, if disclosed, reveal the chemical identity being claimed as a trade secret, or would reveal other confidential business or trade secret information. I acknowledge that I may be asked by the Environmental Protection Agency to provide further detailed factual substantiation relating to this claim of trade secrecy, and certify to the best of my knowledge and belief that such information is available. I understand that if it is determined by the Administrator of EPA that this trade secret claim is frivolous, EPA may assess a penalty of up to \$25,000 per claim.

I acknowledge that any knowingly false or misleading statement may be punishable by fine or imprisonment or both under applicable law.

4.1 Name and official title of owner or operator or senior management official

4.2 Signature (All signatures must be original)

4.3 Date Signed