

CLASS DETERMINATION 1-85

WAIVER OF CLAIM OF BUSINESS CONFIDENTIALITY BY
FAILURE TO SUBMIT TIMELY COMMENTS

Under EPA's regulations governing confidentiality of business information, 40 C.F.R. Part 2, Subpart B, businesses are entitled to have an opportunity to provide comments to EPA on any of their information which may be entitled to confidential treatment before EPA decides whether that information is in fact confidential (40 C.F.R. §2.204(d)(1) and 2.204(e)).

The regulations also state that if a business's comments are not received by a specified due date, the responsible EPA office shall call the business to learn whether its comments have been lost in transmission. If so, the business is requested to send a duplicate (40 C.F.R. §2.205(b)(4)).

The regulations further provide that if a business's comments are found not to have been received by the due date, the EPA legal office will determine that the business has waived its confidentiality claim and that the information is not entitled to confidential treatment (40 C.F.R. §2.205(d)(1)).

Under 40 C.F.R. §2.207, I have authority to issue class determinations concerning entitlement of business information to confidential treatment. I have found that:

- (1) In cases where timely comments on information have not been received, it is proper to treat that information as a class under this determination.
- (2) A class determination will serve a useful purpose by simplifying EPA responses to Freedom of Information Act (FOIA) requests for the information, reducing the burden of individual determinations, and informing both requesters and affected businesses of EPA's position in advance.

Information that has been kept confidential may be entitled to confidential treatment under exemption 4 of the FOIA, 5 U.S.C. §552(b)(4), if disclosure would be likely (1) to impair the Government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the submitter. EPA will make a

determination of entitlement to confidential treatment if a business has satisfactorily shown that the substantive criteria for confidentiality have been met (40 C.F.R. §2.208). If a business fails to respond to EPA's request for comments in support of a confidentiality claim, then, under EPA's regulations, the business has waived the claim (40 C.F.R. §2.205(d)(1)).

I have determined that a business has waived its confidentiality claim, and therefore that no confidentiality claim applies to the relevant information, and that the information may be made available to the public if both of the following conditions are met:

(1) The EPA office designated to receive the business's comments has not received those comments within the specified time period or an approved extension thereof (see 40 C.F.R. §2.205(b)(2)) as defined by EPA's regulations (40 C.F.R. §2.205(b)(1)-(4)) (after making appropriate inquiry on whether the comments were lost in transmission, as required by 40 C.F.R. §2.205(b)(4)), and;

(2) The business was notified in writing at the time comments were solicited that failure to submit timely comments would be construed as a waiver of the business's claim (see 40 C.F.R. §2.204(e)(1)).

Information thus found nonconfidential may be made available to the public with no further notice to the submitter of the information.

This class determination covers only those cases in which a business fails to submit any timely comments. It does not cover cases in which the submitter provides comments which are found to be incomplete, unresponsive, or otherwise insufficient to support a claim of confidentiality, as long as such comments are timely provided. In those cases, the EPA legal office will determine whether the confidentiality claim has been waived.

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Date

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