

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Notice of Adoption of Final Rule

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION (the “Department” or “DEP”) by Section 1403 of the City Charter and Section 24-716 of the New York City Administrative Code, that the Department has amended its community right-to-know regulations to make them more readily understandable. The proposed rule was published in the City Record and a public hearing was held on September 27, 2017. No comments were received.

Statement of Basis and Purpose

Working with the City’s rulemaking agencies, the Law Department, the Mayor’s Office of Management and Budget, and the Mayor’s Office of Operations conducted a retrospective rules review of the City’s existing rules, identifying those rules that should be repealed or modified to reduce regulatory burdens, increase equity, support small businesses, and simplify and update content to help promote public understanding and compliance. In light of this retrospective rules review, the Department of Environmental Protection is making several changes to its community right-to-know regulations to make them more readily understandable to the public.

The text of the Rules is as follows:

New material is underlined.

[Deleted material is in brackets.]

Section 1. Section 41-03 of Title 15 of the Rules of the City of New York is amended to read as follows:

Covered process. “Covered process” shall mean any process in which there is an [extremely hazardous substance] EHS or regulated toxic substance present in an amount at or above the [threshold planning quantity] TPQ for that substance.

Equipment. "Equipment" shall mean equipment whose failure or improper operation could directly or indirectly result in a release of an [extremely hazardous substance] EHS and/or regulated toxic substance from a covered process.

Extremely hazardous substance (EHS). "Extremely hazardous substance (EHS)" shall mean a hazardous substance listed by the United States Environmental Protection Agency as an extremely hazardous substance pursuant to 42 U.S.C. section 11002(a) of the Emergency Planning and Community Right-to-Know Act, as contained in 40 C.F.R. Part 355 Appendix A.

Flammable. "Flammable" shall mean any liquid having a [flash point] flashpoint below 100 degrees F (37.8 degrees C).

[Flash point] Flashpoint. ["Flash point"] "Flashpoint" shall mean the minimum temperature at which a liquid gives off vapor in a test vessel of sufficient concentration to form an ignitable mixture with air near the surface of the liquid. Such temperature shall be determined: by a Pensky-Martens Closed Cup Tester using the test method specified in ASTM Standard D93-79 or D93-80; or by a Setaflash Closed Cup Tester using the test method specified in ASTM Standard D-327878; or by a Tag Closed Cup Tester using the test method specified in ASTM D-56-79.

Process. "Process" shall mean any activity involving an [extremely hazardous substance] EHS or a regulated toxic substance, including any use, storage, manufacturing, handling, or on-site movement of any such substance, or any combination of the foregoing activities. For the purposes of this definition, any group of vessels that are interconnected, or separate vessels that are located in such close proximity to each other at a facility that a fire, explosion, or other catastrophic accident or event could result in a release of an [extremely hazardous substance] EHS or regulated toxic substance from all such vessels, shall be considered a single process.

[Sanitized] Sanitized. "Sanitized" shall mean a version of a document from which information claimed as trade secret or confidential has been omitted or withheld.

Section 2. Subdivision (b) of Section 41-06 of Title 15 of the Rules of the City of New York is amended to read as follows:

(b) *Procedure for withholding information based on a federal or state claim.*

(1) A responsible party may withhold from the FIF and FIF UPDATE and/or risk management plan the specific chemical identity of a hazardous substance, including the chemical name and other specific identification, and the method or process in which an [extremely hazardous substance] EHS or regulated toxic substance is used, if a trade secret claim has been filed pursuant to § 322 of the Federal Emergency Planning and Community Right-to-Know Act of 1986 or such information has been registered as a trade secret pursuant to Article 48 of the New York State Public Health Law or Article 28 of the New York State Labor Law. The responsible party [shall] must submit a notarized statement [attesting to] verifying the facts of the claim or registration, including the date, place and recipient of the claim or registration, and that the chemical identity, or the method or process in which an [extremely hazardous substance] EHS or regulated toxic substance is used, continues to be treated as confidential by the governmental

authorities with whom such claim or registration has been filed. The responsible party [shall] must also affirm that the claim or registration complied with the requirements for such a submission, that reasonable measures have been taken to safeguard the confidentiality of the chemical identity claimed or registered as a trade secret, and such measures will continue in the future.

(2) The responsible party [shall] must indicate in the manner provided on the FIF, FIF UPDATE and/or risk management plan that information has been withheld because of a trade secret claim or registration.

Section 3. Subdivision (c) of Section 41-06 of Title 15 of the Rules of the City of New York is amended to read as follows:

(c) Procedure for requesting non-disclosure based on DEP determination of trade secret status.

(1) The responsible party requesting DEP determination of trade secret status [shall] must not withhold from the FIF, FIF UPDATE and/or risk management plan any of the information for which trade secret status is sought. Such responsible party [shall] must submit "Trade Secret [Substantiation] Verification" on a form to be prescribed by the Department at the time of the FIF, FIF UPDATE and/or risk management plan filing, containing answers to the questions listed in paragraph (2) of this subdivision (c). Information included in this [Substantiation] Verification or in supplemental information provided at the request of DEP shall be treated as confidential, and therefore shall not be disclosed by DEP, regardless of the ultimate disposition of the specific hazardous substance trade secret claim, provided that the responsible party certifies that such information, if disclosed, would cause [substantial injury to the competitive position of the subject enterprise] economic harm to the responsible party.

(2) The responsible party [shall] must substantiate claims of trade secrecy by providing a specific answer including, where applicable, specific facts, to each of the following questions and requests for information[.]:

(i) Describe the specific [measures] actions you have taken to safeguard the confidentiality of the chemical identity, method or process claimed as trade secret, and indicate whether these [measures] actions will continue in the future.

(ii) 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?

(iii) List any municipal, State, and Federal government entities to which you have disclosed the specific chemical identity, method or processes. For each, indicate whether you asserted a confidentiality claim for the chemical identity, method or process and whether the government entity granted or denied that claim.

(iv) In order to show the validity of a trade secrecy claim, you must identify your specific use of the chemical, method or process claimed as trade secret and explain why it is a secret of interest to competitors.

(A) 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.)

(B) Has your company or facility identity been linked to the specific chemical identity, method or process 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)? If so, explain why this [knowledge does not eliminate the justification for trade secrecy] public information does not eliminate the need for protection of the trade secret.

(C) If this use of the chemical, method or process claimed as trade secret is unknown outside your company, explain how your competitors could [deduce this use] infer the use, method or process from disclosure of the chemical identity, method or process together with other information on the FIF, FIF UPDATE and/or risk management plan.

(D) Explain why your use of the chemical, method or process claimed as trade secret would be valuable information to your competitors.

(v) Indicate the nature of the economic harm [to your competitive position] that would likely result from disclosure of the specific chemical identity, and indicate why such harm would be substantial.

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

(B) 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).

(3) The responsible party [shall] must include and sign the following certification at the end of the [Substantiation] Verification: "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. I acknowledge that I may be asked by DEP to provide further detailed factual [substantiation] evidence 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 knowingly or recklessly making any false statement, representation or certification could subject me to a penalty of \$1000, or imprisonment of up to one year, or both."

(4) A responsible party may request an extension [only for submission of Trade Secret Substantiation by including in the FIF and/or risk management plan filing a notarized statement that such filing is otherwise complete, and that the additional time is needed to fully comply with the substantiation requirements of this section. An extension of 15 business days commencing from the applicable FIF and/or risk management plan filing deadline shall be granted upon receipt by DEP of such notarized statement] of time for the submission of the Trade Secret Verification form by including in the FIF filing or risk management plan filing a notarized statement requesting additional time to fully comply with the verification requirements of this section.

(5) (i) DEP may request supplemental information from the responsible party in support of its trade secret claim. DEP may specify the kind of information to be submitted, or the responsible party may submit any additional detailed information which further supports the truth of the information previously supplied to DEP in its initial [substantiation] verification under this section. Any request for supplemental information must be submitted to DEP.

(ii) Any substantial information submitted by a responsible party [shall] must include a certification pursuant to paragraph (3) of subdivision (c) of this section, and where applicable, a certification pursuant to paragraph (1) of subdivision (c) of this section.

(6) If a trade secret claim is submitted after DEP has received the information to which such claim relates, DEP may make reasonable efforts [that are administratively practicable] to process the late claim with the previously submitted information.

(7) No information claimed as a trade secret shall be disclosed by DEP prior to an affirmative determination by DEP as to the validity of the claim.

(8) (i) The responsible party shall be notified in writing of DEP's determination as to the validity of the claim.

(ii) Within 7 business days of the receipt of written notice denying the claim, the responsible party may file a written appeal with the Commissioner.

(iii) The appeal shall be determined within 20 business days of the receipt of the appeal. Written notice of the Commissioner's determination shall include a statement of the reasons for the determination.

(iv) A proceeding to review an adverse determination may be commenced pursuant to Article 78 of the Civil Practice Law and Rules.

(9) Pursuant to § 24-709(c) of the New York City Community Right-to-Know Law, the Commissioner shall disclose trade secret information in the emergency circumstances specified in paragraph 1 of that section, and the responsible party shall disclose trade secret information for medical diagnosis and treatment purposes specified in paragraph 2 of that section.

Section 4. Subdivision (c) of Section 41-07 of Title 15 of the Rules of the City of New York is amended to read as follows:

(c) A responsible party may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials [in lieu] instead of [affixing] attaching labels to individual [stationary process] containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by subdivision (a) of this section. The written materials [shall] must be readily accessible to the employees in their work area throughout each work shift.

Section 5. Subdivision (a) of Section 41-08 of Title 15 of the Rules of the City of New York is amended to read as follows:

(a) On or before March first of each year beginning in [nineteen hundred ninety-five] 1995 a responsible party of a facility where an EHS or regulated toxic substance is present at or above the TPQ for that substance [shall] must file with the Department a risk management plan. The plan [shall] must be submitted to:

New York City Department of Environmental Protection
Division of [Hazardous Materials Management] Emergency Response and Technical Assessment
Right-to-Know Program
59-17 Junction Boulevard, [3rd] 1st Floor
[Elmhurst] Flushing, New York 11373-5107

Section 6. Subsection (2) of subdivision (b) of Section 41-10 of Title 15 of the Rules of the City of New York is amended to read as follows:

(2) Evaluation of the possibility and effects of a significant accidental release. A responsible party [shall] must examine each covered process and identify the circumstances that may cause a significant accidental release (e.g., pump failure, failure of controls, or operator error), evaluate the likelihood that such a release could occur, and perform a [qualitative] general evaluation of the effects that a significant accidental release [will] would have on public health and the environment.

Section 7. The title of Section 41-13 of Title 15 of the Rules of the City of New York is amended to read as follows:

§41-13 [Compliance with OSHA] Compliance with OSHA.