
Central Coast Regional Water Quality Control Board

IRRIGATED LANDS REGULATORY PROGRAM

RESOURCES FOR GROWERS

PROTECTION OF TRADE SECRETS AND SECRET PROCESSES

January 4, 2018

One of the most common questions that growers have about Agricultural Order R3-2017-0002 is: How does the Water Board protect trade secret or secret process information reported to them regarding agricultural operations?

Background

The Agricultural Order may require growers to submit information related to trade secrets or secret processes. Members of the public have the ability to review information submitted to the Water Board by submitting a Public Records Act (PRA) request. If the grower-submitted information contains trade secrets or secret processes, the Water Board will withhold those portions of the documents from public disclosure under certain circumstances, as described in this document.

Water Code section 13267, subdivision (b)(2) states that the portions of a report that might disclose trade secrets or secret processes may not be made available for inspection by the public, but shall be made available to governmental agencies for use in making studies. When a Public Records Act request is made, however, a balancing test must occur pursuant to Water Code section 13267, subdivision (b)(2) and Government Code section 6254, subdivision (k). Under this balancing test, the Water Board will refrain from releasing portions of a document if the grower demonstrates that the information submitted to the Water Board meets the definition for trade secrets or secret processes, and the Water Board finds that the benefit of withholding disclosure outweighs the benefit to the public from allowing disclosure of the information. Condition 65 of the Agricultural Order includes an explanation of the process for growers to identify and justify trade secret or secret process claims, and how the Water Board will proceed when such claims are asserted. Condition 65 of the Agricultural Order states:

65. If the Discharger asserts that all or a portion of a report submitted pursuant to this Order is subject to an exemption from public disclosure (e.g., trade secrets or secret processes), the Discharger must provide an explanation of how those portions of the reports are exempt from public disclosure. Also, the Discharger must clearly indicate on the cover of the report (typically an electronic submittal) that the Discharger asserts that all or a portion of the report is exempt from public disclosure, submit a complete report with those portions that are asserted to be exempt in redacted form, submit separately (in a separate electronic file) unredacted pages (to be maintained separately by staff). The Central Coast Water Board staff will determine whether any such report or portion of a report qualifies for an exemption from public disclosure. If the Central Coast Water Board

staff disagrees with the asserted exemption from public disclosure, the Central Coast Water Board staff will notify the Discharger prior to making such report or portions of such report available for public inspection.

Outline of Water Board Trade Secret Review Process

1. Grower submits report to the Water Board, per the requirements of the Agricultural Order.
2. Grower determines if they will assert that the report contains trade secrets or secret processes.
 - a. If the grower does not assert that the report contains trade secrets or secret processes, then no additional information related to trade secrets or secret processes is necessary.
 - b. If the grower does assert that the report contains trade secrets or secret processes, the grower must comply with Step 3.
3. Depending on how the report was submitted to the Water Board, additional information regarding the assertion of trade secrets or secret processes must be submitted **with the original report**.
 - a. Annual Compliance Form (ACF) submitted through GeoTracker must include:
 - i. Marked checkbox in form indicating that the form contains trade secrets or secret processes, and
 - ii. Justification in the form describing how the information in each section where trade secrets are claimed is a trade secret or secret process.
 - b. All other reports:
 - i. Cover sheet indicating that the report contains trade secrets or secret processes,
 - ii. Justification describing how the information each section of the report where trade secrets are claimed is a trade secret or secret process, and
 - iii. Redacted version of the report.
4. Water Board staff will review the assertion of trade secrets or secret processes.
 - a. If all required information from Step 3 was not included with the submittal, the assertion of trade secrets or secret processes will not be considered.
 - b. If all required information from Step 3 was included with the submittal, Water Board staff, in consultation with the Water Board attorney, will review the justification and will determine if the reported information meets the definition of trade secrets or secret processes, and whether it is in the best interest of the public for the information to be disclosed or withheld.
5. Water Board staff will make a determination regarding withholding or disclosing the reported information.
 - a. If Water Board staff agrees with the assertion and also determines that it is in the best interest of the public to withhold disclosure, then only the redacted version of the information will be disclosed in the event of a PRA request.
 - b. If Water Board staff disagrees with the assertion and/or finds that it is in the best interest of the public for the information to be disclosed, **staff will notify the grower of their determination prior to releasing any unredacted documents.** The unredacted version of the reported information will be disclosed in the event of a PRA request.

What to include in a claim

Growers planning to submit a claim of trade secrets or secret processes may want to seek legal counsel regarding what to include in the claim. In general, in order for the Water Board to agree with a trade secret or secret process assertion, the claim must be sufficiently explicit to establish

that the subject matter involved is information that is not generally known, and that reasonable precautions were taken by the claimant to prevent disclosure of the information. The claim should explicitly describe the trade secret nature of each portion of the document that has been identified as containing trade secrets; general statements that the entire document is a trade secret, without adequate justification for each portion of the document are insufficient. Below are several factors used to assess whether submitted information contains trade secrets or secret processes.

1. The extent to which the information is known outside the claimant's business
2. The extent to which it is known by employees and others involved in the business
3. The extent of measures taken by the claimant to guard the secrecy of the information
4. The value of the information to the business and its competitors
5. The amount of effort or money expended by the business in developing the information
6. The ease or difficulty with which the information could be properly acquired or duplicated by others

Decisions relating to Total Nitrogen Applied reporting

In November 2016, following action taken by a subset of growers in response to a PRA request, the Monterey County Superior Court (Court)¹ ruled that the information contained in the Total Nitrogen Applied reports did not contain trade secrets, and that the reports must be released upon request. The Court further found that the benefit to the public of releasing the reports outweighed the benefit of withholding them. The Water Board has also made a determination that the reports do not contain trade secrets and therefore must be released upon request, consistent with the Court's ruling.

For more information about the Irrigated Lands Regulatory Program, including additional resources and guidance for growers, please visit the Water Board's Internet site at: http://www.waterboards.ca.gov/centralcoast/water_issues/programs/ag_waivers/index.shtml

If you have questions regarding the Irrigated Lands Regulatory Program or need additional assistance, please contact the Water Board at AgNOI@waterboards.ca.gov.

¹ Case Nos. 16CV000255 and 16CV000257