

# *Confidentiality*



Delaware Department of Natural Resources and  
Environmental Control

Air Quality Management Section

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Presenters:

Dawn Minor, AQM Paralegal; Sue Baker, SHWMB Paralegal

*Blue Skies Delaware; Clean Air for Life*

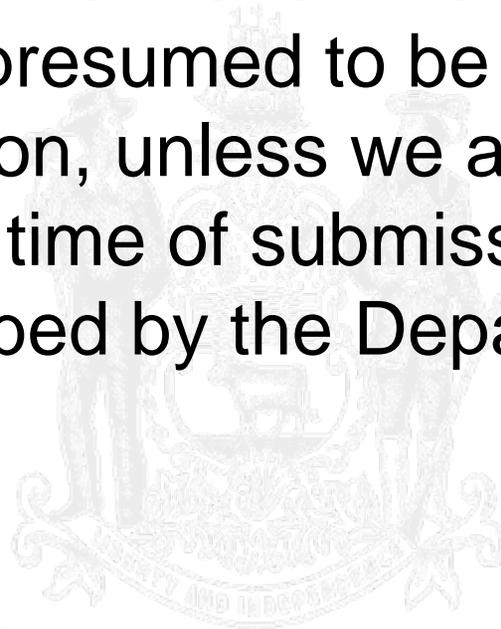
# ***Confidentiality***

- The Department of Natural Resources and Environmental Control (“Department”) is a public agency of the State of Delaware, and is, therefore, subject to Delaware’s Freedom of Information Act (“FOIA”), 29 *Del. C.* Chapter 100.
- FOIA provides the public the right to access public records (the type of records maintained by the Department, or any state agency), in the interest of promoting an open form of government.



# ***Confidentiality***

- Therefore, any information that you submit to the Department is presumed to be and treated as public information, unless we are informed to the contrary, at the time of submission, in the manner prescribed by the Department.



# ***Confidentiality***

- The Department's Freedom of Information Act ("FOIA") Regulation sets forth a procedure for requesting confidential treatment of information submitted to the Department.
- The FOIA Regulation can be found on the Department's website at:

<http://www.dnrec.state.de.us/dnrec2000/FOIA/FOIA.pdf>



# ***Confidentiality***

- Section 6 of the FOIA Regulation addresses requests for confidentiality
- Section 6.1 – Procedure
  - It is important to note that the request for confidentiality must be made in writing at the same time the alleged confidential information is submitted and must include the following:
    - Substantiation
    - 2 public & 2 confidential versions
    - Notarized affidavit



# ***Confidentiality***

- Section 6.1.a.(1-4) - Substantiation
  - (1) The measures taken to guard against undesired disclosure of the information to others
    - What steps does your company take to insure the alleged confidential information is not disclosed to unauthorized persons?
  - (2) The extent to which the information has been disclosed to others, and the precautions taken in connection therewith
    - Who is authorized to have access to the information and what steps are taken to insure those persons protect the information from disclosure to unauthorized persons?



# ***Confidentiality***

- Section 6.1.a.(1-4) - Substantiation (continued)
  - (3) Whether disclosure of the information would be likely to result in substantial harmful effects on their competitive position, and if so, what those harmful effects would be, why the effects should be viewed as substantial, and an explanation of how the disclosure would cause such harmful effects
    - This is an important part of the substantiation & should consist of a detailed description addressing everything requested. A simple statement that release of the information would be harmful to your company's competitive position is not sufficient.



# ***Confidentiality***

- Section 6.1.a.(1-4) - Substantiation (continued)
  - (4) Verification that significant effort or money has been expended in developing the information
    - While this may be difficult to quantify, your company should make an attempt to do so.
    - Part of your verification can include a statement to that effect in the notarized affidavit.
    - Please note, if the Department approves your company's request for confidentiality and is subsequently sued by someone seeking disclosure of the information, your company will be required to assist the Department in defending its decision which may include providing more detailed proof that significant effort or money was expended in developing the information.



# ***Confidentiality***

## ■ Section 6.1.b.(1-3) Public & Confidential Versions

- (1) Two public versions of the entire package of information that is submitted for determination, with alleged confidential information redacted (this version will be made available for public review). The public versions shall correspond page for page with the confidential versions, with the confidential portions having been redacted
  - Only redact the exact information alleged to be confidential as opposed to the entire page.
  - Please stamp or identify each page as “public”, the identifier “confidential” should not be on this version.
  - An example of a properly redacted page is included in the binder provided to you for this workshop.



# ***Confidentiality***

- Section 6.1.b.(1-3) Public & Confidential Versions (cont'd.)
  - (2) Two confidential versions of the entire package of information that is submitted for determination, that includes the alleged confidential information (this version will be used internally for technical review)
    - Please be sure to stamp or identify each page as “confidential”.



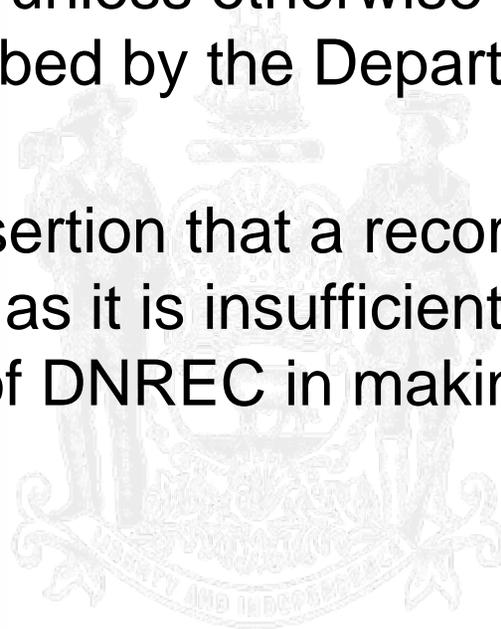
# ***Confidentiality***

- Section 6.1.b.(1-3) Public & Confidential Versions (cont'd.)
  - (3) Certification through a separate, notarized affidavit that the information is either trade secret, or commercial/financial information that is of a confidential nature. The affidavit will be signed by the Responsible Official.
    - Responsible Official is defined at the beginning of the FOIA Regulation.
    - Must be notarized.
    - Again, you can include a statement as part of your verification significant effort or money was expended in developing the alleged confidential information.



# ***Confidentiality***

- Some things to remember:
  - Anything you submit to the Department is considered a public record unless otherwise identified in the manner prescribed by the Department in its FOIA Regulation
  - A unilateral assertion that a record is confidential is not acceptable as it is insufficient evidence to support the Secretary of DNREC in making a determination



# ***Confidentiality***

- Some things to remember (continued)
  - It is important to note that the request for confidentiality must be made in writing at the same time the alleged confidential information is submitted and must include all of the information required by Section 6.1.a. & 6.1.b.
  - If you have submitted the information to the Department before without asserting a claim of confidentiality, please don't try to assert confidentiality after the fact.
  - Emissions are public information



# ***Confidentiality***

- Some things to remember (continued)
  - Be mindful of submitting information to the Department that has been prepared by a 3rd party (i.e., consultants, laboratory). Sometimes the 3rd party includes confidential disclaimers on the documents. It is your responsibility to confirm the validity of those disclaimers and if valid, your company must submit a written confidentiality request in the manner prescribed by the Department in its FOIA Regulation. If the disclaimers are not valid, they must be removed prior to submission of the information to the Department.



# ***Confidentiality***

- Some things to remember (continued)
  - The Secretary may determine that the information submitted is entitled to confidential treatment if all the criteria set forth in Section 6.2 of the FOIA Regulation are met.
  - Your company will be notified in writing of the Secretary's determination and until then, the information will be treated as confidential.



# ***Confidentiality***

- Some things to remember (continued)
  - If the information is deemed confidential by the Secretary, any future submittals of the information must reference the determination as well as include the elements of Section 6.1.b. (public and confidential versions and notarized affidavit)
  - If the information is deemed confidential by the Secretary and the Department is subsequently sued by someone for disclosure of the information, your company will be required to assist the Secretary in defending the determination.



# ***Confidentiality***

- Some things to remember (continued)
  - If, in the future, the information is no longer considered confidential by your company, it is your company's responsibility to inform the Department in writing of such changes.
  - Questions?
  - Should your company have questions about this process in the future, please contact the staff person assigned to your company who can consult with a paralegal for additional guidance if needed.

