COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: **Land Protection & Revitalization Guidance Memo No. LPR-SW-2013-03**
WASTE INFORMATION REQUEST AND TRADE SECRET PROTECTION

To: Regional Land Protection Program Managers and Waste Program Staff

From: Justin Williams,
Director, Office of Waste Permitting & Compliance

Date: August 15, 2013

Copies: Deputy Director, Land Protection & Revitalization Division Director, Regional Directors, Deputy Regional Directors, Enforcement, FOIA Coordinators

Summary:

This guidance addresses information request authority for the Department under the Virginia Waste Management Act. This guidance also provides overview of trade secret protection of information submitted to the Department under the Virginia Waste Management Act. It outlines procedures for requesting and staff handling of trade secret protected information.

Electronic Copy:

An electronic copy of this guidance is available on Virginia's Town Hall website at http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/LawsRegulationsGuidance/Guidance.aspx.

Contact Information:

Please contact Justin Williams at (804) 698-4185 or Justin.Williams@deq.virginia.gov with any questions regarding the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. Introduction

Effective July 1, 2013, the Virginia Waste Management Act provides explicit authority for the Department to request information from people who generate, store, transport, treat, or dispose of waste. This provision also provides for trade secret protection of information submitted by the Department in response to a Freedom of Information Act Request. It does allow further disclosure to the U.S. Environmental Protection Agency (EPA) and where otherwise required by law.

This Guidance addresses information requests issued by the Department as well as trade secret protection request and subsequent handling of trade secret protected information.

II. Background

Effective July 1, 2013, the Virginia Waste Management Act provides explicit authority for the Department to request information from people who generate, store, transport, treat, or dispose of waste. This provision also provides for trade secret protection of information submitted by the Department in response to a request.

Department staff will have to properly address requests for trade secret protection and properly manage information protected as a trade secret. Department staff will have to evaluate a claim for trade secret protection. Granting trade secret protection to information will require limiting accessing of this information and excluding this information in response to a FOIA request.

III. Authority

Virginia Code § 10.1-1458 provides that every person that DEQ has reason to believe is generating, storing, transporting, disposing of, or treating waste shall, on request of DEQ, furnish such plans, specifications, and information as the Department may require in the discharge of its duties under the Virginia Waste Management Act.

Virginia Code § 10.1-1458 provides that trade secret information included within any plans, specifications, or information submitted pursuant to that section shall be excluded from the production under the Virginia Freedom of Information Act, provided that you: (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary. *See* Va. Code § 2.2-3705.6(26). DEQ may disclose such trade secret information to the appropriate officials of the Environmental Protection Agency pursuant to the requirements of the federal Solid Waste Disposal Act, 42 U.S.C. § 3251, *et seq.*, or as otherwise required by law.

IV. Definitions

The definitions in § 10.1-1400 of the Code of Virginia (Virginia Waste Management Act), § 59.1-336 (Uniform Trade Secrets Act), and § 2.2-3701 (Virginia Freedom of Information Act), respectively, apply to this guidance document except as otherwise noted:

"Department" means the Department of Environmental Quality.

"Director" means the Director of the Department of Environmental Quality.

"Person" includes an individual, corporation, partnership, association, a governmental body, a municipal corporation or any other legal entity.

"Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

V. Guidance Document

The following outlines the basis for a request for trade secret protection submitted to the Department. It also outlines the decision process for a request for trade secret protection as well as staff management of trade secret protected information. This statute also provided clear statutory authority for the Department to request information. A template Information Request Letter is provided in Attachment A.

A. Request for Trade Secret Protection

There are three requirements that must be met in order for information to be protected as a trade secret. First, the requesting party must invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought. Second, the requesting party must identify the data or materials for which protection is sought. Third, the requesting party must state the reasons why protection is necessary.

In order to invoke the protection, the requesting party must do so at the time the information is provided. Therefore, the party should include the request along with the information being submitted to the Department. This can be accomplished by providing a completed Trade Protection Request Form (Attachment B) in the information submittal. If a form is not provided, the requesting party should at minimum provide written notification clearly and explicating stating that trade secret protection is being sought.

The requesting party must also be clear on what portions of the information are to be protected. This should not be a generic statement that "all or some information contained should be protected." Rather, the requesting party should clearly indicate what pages, portions, sections, etc. are being

sought to be protected. For example, a requesting party may submit a 20 page information request response and indicate that the information on pages 5-10 are being sought to be protected. Additionally, in a permit application, the requesting party may state the portions of a particular section which includes information sought to be protected.

By providing a redacted response excluding the information sought to be protected along with a full response, this can provide the clearest demonstration of the information sought to be protected.

As this is a FOIA exemption, it should be narrowly construed and therefore a requesting party should not request protection for any more information than is necessary or seek to have any and all information submitted to the Department to be protected unless it is clearly needed.

The requesting party should be clear as why this information qualifies as a trade secret. This basis should speak directly to how the information meets the definition of a trade secret. A statement that the information is "confidential," "priority," or "not well-known" is not sufficient.

Each of the elements is provided for in the attached Trade Secret Protection Request Form (Attachment A). The requesting party should utilize this form in making a request. The requesting party should also submit two responses: 1. A redacted response which excludes the information sought to be protected and 2. A full response which includes all information.

B. Scope of Trade Secret Protection

Given that the trade secret protection is a FOIA exemption, it will be narrowly construed by the Department. Only that information which is essential to be protected and clearly meets the definition of a trade secret as demonstrated by the requestor will be granted protection.

Examples of information that would not be granted protection include, but are not limited to, emissions, compliance, or reporting data such as information required to be provided under the Superfund Amendment and Reauthorization Act, groundwater monitoring data submitted in a groundwater monitoring report, the results of a contamination investigation due to a release, a hazardous waste manifest, and similar information, and information that had been previously disclosed in a patent application and is viewable by the public.

Examples of information that may be granted protection include, but are not limited to, the formula used to derive a product that is examined during an inspection or provided during a permit process, waste management contract information detailing customers and negotiated contract prices, or information regarding a recovery or product process that are unique, specific to the entity, and not known or reproducible by others.

As indicated in the statutory provision, the Department may disclose information protected as a trade secret to EPA pursuant to the federal Solid Waste Disposal Act, 42 U.S.C. § 3251, *et seq*[1]

[1] The Federal Solid Waste Disposal Act (SWDA) was originally codified at 42 U.S.C. § 3251. The Resource Conservation and Recovery Act amended the SWDA and is codified at 42 U.S.C. § 6901. Therefore, disclosure to EPA would include any disclosure required under RCRA.

The Department implements a delegated program for the Resource Conservation and Recovery Act (RCRA) Subtitle C and has an approved RCRA Subtitle D program. Pursuant to this, the Department may be required to provide information to EPA. An example of this requirement is for review of RCRA Subtitle C hazardous waste permits or pursuant to a file review under the State Review Framework. EPA has its own regulations under RCRA governing confidential business information. When trade secret information is provided to EPA, the Department will notify EPA that it contains such information and coordinate its transmission.

Additionally, as noted in the statute, the protection is only extended to information submitted pursuant to the statute. The Department will not retroactively apply trade secret protection to information previously submitted. Only new information submitted to the Department as requested or required will be eligible for the protection.

C. Decision Process and Staff Management Of Trade Secret Request and Information

Department staff who receives a trade secret protection request should forward the request to the Office of Waste Permitting and Compliance (OWPC) along with the information that is being sought to be protected. Department staff should request that the party provide the request using the Trade Secret Protection Request Form (Attachment B) and to provide a redacted copy of the submission, if the party did not already do so.

OWPC will then evaluate the protection claim and make a decision regarding whether the information should be protected. OWPC will notify the requestor and the region of the decision regarding whether the trade secret protection request applies, the basis for the decision, and the next steps, if any, a party may take regarding the decision.

At all times during this process, access to the information should be limited. Regional office staff may maintain a copy of the information but should do so only to the extent necessary and should limit the staff that has access to the information.

If the request was submitted electronically, then once regional office staff have finished reviewing the necessary information, the information should be deleted. OWPC will maintain a copy of the information and request long-term as described below. If the request was submitted in hard-copy, then the regional office may copy the submission but should forward the original to OWPC. The copy should be deleted or destroyed once the regional office no longer needs to review the information.

Regional office staff should not scan into ECM any information that is subject to a trade secret protection request. Scanning should only occur after a decision on the request has occurred and only redacted copies of submission should be scanned into ECM with the cover sheet provided (Attachment C) in the region. Hard copies of the protected information will be tagged as appropriate and scanned into ECM with the cover sheet provided.

VI. Collaboration Process

No project team was formed to develop this guidance.

VII. Attachments

A. Template Information Request Letter
B. Trade Secret Protection Request Form
C. Cover Sheet for Redacted Documents for ECM
D. Cover Sheet for Non-redacted Documents for ECM

ATTACHMENT A

INFORMATION REQUEST LETTER
[LETTERHEAD]

[Date]

DELIVERY CONFIRMATION #

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

REQUEST FOR INFORMATION

RE:
[Facility name]
[DEQ Identification Number]

Dear [Facility Contact]:

This letter seeks your cooperation in providing certain information to the Department of Environmental Quality ("Department") to assist DEQ in its implementation and enforcement of the Waste Management Act and regulations. Please give this matter immediate attention and provide a complete response to this request for information and documents within [insert # of days] days of receipt of this letter.

BACKGROUND

[Provide summary information concerning previous compliance and enforcement actions including the date of relevant inspections, date and content of any Warning Letters or Notices of Violations, and effective date and relevant requirements of any Orders. The summary should provide the factual information based upon which DEQ believes that a violation of the relevant law, regulation, permit or order may have occurred or upon which DEQ has initiated an

investigation to determine the Facility's compliance with the law, regulation or order. Do not describe the facts in terms of violations or conclusions of law.]

AUTHORITY FOR REQUEST

While DEQ prefers your cooperation in providing the information requested below, compliance with this information request is required by law. Failure to respond in a timely manner or to supply complete and truthful responses to this request may result in an enforcement action to obtain the requested information, and may result in the imposition of penalties for noncompliance.

Code § 10.1-1402 authorizes the Virginia Waste Management Board ("Board") to collect data necessary to conduct the state waste programs, including data on resource recovery and the identification of and amounts of waste generated, transported, stored, treated or disposed. The Board is also authorized to require any person who generates, collects, transports, stores or provides treatment or disposal of a hazardous waste to maintain records, manifests, and reporting systems required pursuant to federal statutes or regulation.

Code § 10.1-1458 provides that every person that DEQ has reason to believe is generating, storing, transporting, disposing of, or treating waste shall, on request of DEQ, furnish such plans, specifications, and information as the Department may require in the discharge of its duties under the Virginia Waste Management Act.

Code § 10.1.-1409 provides that any permit issued by the Director may be revoked, amended or suspended if the applicant has knowingly or willfully misrepresented or failed to disclose a material fact in applying for a permit or in his disclosure statement, or in any other report or certification required under the law or under the regulations of the Board.

Code § 10.1-1455 of the Waste Management Act provides for an injunction for any violation of the Act, any Waste Management Board regulation, any condition of a permit or certification, or order. The same statute provides for a judicially imposed civil penalty up to $25,000 per day of such violation. Code § 10.1-1455 also authorizes the Board to issue orders to address such violations and impose penalties up to $25,000 per violation. In addition, Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Act and regulations and to impose a civil penalty of not more than $10,000.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

[Also include this for Hazardous Waste cases:]

Code § 10.1-1455 provides that any person who knowingly makes any false statements or representation in any application, disclosure statement, label, manifest record, report, permit, or other document filed, maintained, or used for purposes of hazardous waste program compliance shall be guilty of a felony punishable by a term or imprisonment of not less than one year nor more than five years and a fine of not more than $25,000 for each violation, either or both.

Section 3007 of the Solid Waste Disposal Act (42 USC § 6927) provides that, for the purposes of enforcing the provisions of that chapter, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handles hazardous waste shall, upon request of any duly designated officer, employee, or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. Virginia has an authorized state hazardous waste program.

[For Permitted Facilities:]

[Check to see if the permit contains a requirement to provide information. If so, reference this also.]

CONFIDENTIALITY OF INFORMATION

Code § 10.1-1458 provides that trade secret information included within any plans, specifications, or information submitted pursuant to that section shall be excluded from the production under the Virginia Freedom of Information Act, provided that you: (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary. *See* Va. Code § 2.2-3705.6(26). DEQ may disclose such trade secret information to the appropriate officials of the Environmental Protection Agency pursuant to the requirements of the federal Solid Waste Disposal Act, 42 U.S.C. § 3251, *et seq.*, or as otherwise required by law.

If you request all or portion of the information submitted as a trade secret, please see DEQ's Guidance on Trade Secret Protection Requests under the Virginia Waste Management Act. The guidance can be found at:
http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/LawsRegulationsGuidance/

Guidance.aspx. The Guidance contains a form that should be submitted along with your information to claim this protection.

REQUEST FOR INFORMATION AND DOCUMENTS

Terms used in this request shall have the meaning set forth in the Virginia Waste Management Act § 10.1-1400 and accompanying regulations at 9 VAC 20-60-10 and 9 VAC 20-80-10.

[Identify here the information or documents you are seeking. Questions should be clear and specific and phrased to minimize the likelihood of a nonresponsive submission.]

Your point of contact for this matter is [DEQ staff member] at (XXX) XXX-XXXX. Please submit your response to [her/him] within [thirty] days of the date of this letter. Questions concerning the information requested herein, or other information that DEQ should consider should also be directed to this contact.

Sincerely,

[Name]
[Title]

cc:

ATTACHMENT B

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Trade Secret Protection Request
Virginia Waste Management Act

I. REQUESTOR INFORMATION

A. Requestor Information					
Name:					
Address:					
City:		State:		Zip:	

B. Contact Information			
Contact Person:		Title:	
Contact Phone:		E-mail:	

C. Facility Information (if applicable)			SWP#/EPA HW ID#		
Facility Name:					
Address:					
City:		State:		Zip:	

II. BASIS FOR REQUEST

A. Information Sought to be Protected

B. Reason Information Qualifies as a Trade Secret

C. Additional Information/Certification
This information derives independent economic value by virtue of being protected as a trade secret ☐NO ☐YES This information is not a part of the public domain or otherwise easily ascertained by the public ☐NO ☐YES Has this information has been deemed a trade secret by another agency, court, or governmental/judicial entity: ☐N/A ☐NO:_____ ☐YES:_____ This information is covered in a registered trademark or patent: ☐N/A ☐NO ☐YES:_____

III. REQUESTOR SIGNATURE

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete.

Name:	Title:
Signature:	Date:

----------PLEASE INCLUDE WITH INFORMATION SUBMITTED----------

----------INCLUDE A REDACTED COPY OF SUBMISSION WITHOUT TRADE SECRET INFORMATION---------

ATTACHMENT B

Instructions for Completing DEQ Form Trade Secret Protection

I. REQUESTOR INFORMATION

A. Requestor Information

Name: Enter the name of the requestor. This name should be the name as registered with the State Corporation Commission if the requestor is a corporation or other entity and not an individual or agency. This person should be the individual who owns or controls the information requested to be protected.

Address, City, State, and Zip: Provide the address of the requestor.

Contact Phone Number, and Email: Provide contact information for the requestor.

B. Contact Information

Contact Name, Title, Phone Number, and Email: Provide contact information for the person responsible for submitting this request. DEQ will consider the person listed as the main contact for correspondence relating to the request.

C. Facility Information (if applicable):

SWP#/EPA HW ID#: If the information is being submitted related to a facility with a Solid Waste Permit or EPA Hazardous Waste ID number, include that number here.

Name, Address, and Phone: Provide name and address of the facility associated with the information being submitted.

II. BASIS FOR REQUEST

A. Information Sought to be Protected: Please **specifically** identify what information in the submission is sought to be protected. The request should be as narrow as possible and only seek to protect that information which qualifies. For example, if the information being submitted is 100 pages but only 20 pages contain information sought to be protect then identify those pages in this section. Do not include actual information that is being sought to be protected. For example, do not include in this section the formula that is the subject of the requested protection.

B. Reason Information Qualifies as a Trade Secret: Please indentify how this information meets the definition of a trade secret. This section should indicate whether the information is a formula, pattern, compilation, program, device, method, technique, or process. It should also indicate what the formula, pattern, compilation, program, device, method, technique, or process accomplishes and how it has independent economic value. For example, if a formula is sought to be protected, this section could identify "the information is a formula which produces the end product of X which is used commercially as an industrial solvent. The formula is not a common formulation or otherwise used or produced in the marketplace."

C. Additional Information/Certification:

This information derives independent economic value by virtue of being protected as a trade secret. Please check the appropriate box.

This information is not a part of the public domain or otherwise easily ascertained by the public. Please check the appropriate box.

Has this information has been deemed a trade secret by another agency, court, or governmental/judicial entity. Please check the appropriate box. If no other agency, court, or governmental/judicial entity has reviewed this information to determine if it qualifies as a trade secret, check "N/A." If another agency, court, or governmental/judicial entity has review this information and made determination as to whether it is a trade secret,

check "YES" or "NO" depending on the result. Also, include with "YES" or "NO," the another agency, court, or governmental/judicial entity that made the determination.

This information is covered in a registered trademark or patent.
Please check the appropriate box. If the information is not the subject of a registered trademark or patent, check "NO." If is the information is the subject of a registered trademark or patent, check "YES" and provide the registered trademark No. or Patent No.

III. REQUESTOR SIGNATURE

This form must be signed by the requestor or if the requestor is a legal entity other than individual, a responsible official of the requestor. A responsible official is:

1. For a business entity, such as a corporation, association, limited liability company, or cooperative: a duly authorized representative of such business entity if the representative is responsible for the overall operation of one or more operating facilities applying for or subject to a permit. The authority to sign documents must be assigned or delegated to such representative in accordance with procedures of the business entity;

2. For a partnership or sole proprietorship: a general partner or the proprietor, respectively; or

3. For a municipality, state, federal, or other public agency: a duly authorized representative of the locality if the representative is responsible for the overall operation of one or more operating facilities applying for or subject to a permit. The authority to sign documents must be assigned or delegated to such representative in accordance with procedures of the locality."

ATTACHMENT C

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

NOTICE

REDACTED INFORMATION

Please be advised that the following document has had portions redacted due to protection as a trade secret. The redacted information is not included pursuant to Va. Code § 2.2-3705.6(26). The redacted portion includes approximately _____ pages.

If you have any questions regarding this redaction, please contact the Office of Waste Permitting and Compliance.

ATTACHMENT D

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

NOTICE-TRADE SECRET PROTECTED INFORMATION

Please be advised that the following document contains information that is protected as a trade secret. This information should **not** be released under a FOIA request pursuant to Va. Code § 2.2-3705.6(26). A redacted version of this document which can be released under FOIA has been scanned into ECM as well.

If you have any questions regarding the protection and the handling of this information, please contact the Office of Waste Permitting and Compliance.