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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

**NORTHWEST ENVIRONMENTAL
DEFENSE CENTER**, a non-profit corporation,
**OREGON CENTER FOR
ENVIRONMENTAL HEALTH**, a non-profit
corporation, and **SIERRA CLUB**, a non-profit
corporation,

Plaintiffs,

v.

OWENS CORNING CORPORATION,

Defendant.

NO. [CV 04-1727-JE](#)

[MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER](#)

I. INTRODUCTION

Under Fed. R. Civ. P. 26(c)(7), this Court may, in association with a request for production, "for good cause shown ... make any order which justice requires," including an order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." In this motion, Owens Corning seeks protection, pursuant to a protective order, of information specific to its existing plants and manufacturing lines which, if released to the public, could be used by competitors (and customers) to undermine Owens Corning's competitive position in the marketplace for extruded

1- MEMORANDUM IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER

[\[29641-0010-000000/PA052360.057\]](#)

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polystyrene foam. Under the facts set forth in the accompanying affidavit of Frank D. Cooper, the information that Owens Corning seeks to protect is confidential and a trade secret, and should be protected with an appropriate order.

Owens Corning does not seek to prevent reasonable access to this information by either counsel or expert witnesses for the plaintiff. Indeed, counsel for the plaintiffs has reviewed *in camera* the documents that Owens Corning proposes to produce subject to a protective order. Plaintiffs' counsel has determined, however, that plaintiffs are unwilling to consent to receipt of the documents on anything other than an unrestricted basis. Based on counsel's conferences with plaintiffs, Owens Corning believes that they intend to argue that the information at issue is "emission data" which should be subject to public disclosure under Clean Air Act § 114(c) (42 U.S.C. § 7414(c)). We believe that plaintiffs will also argue that the restrictions placed on the use of this information under the proposed protective order would interfere with their ability to hold an "open" public proceeding.

As discussed further below, however, the information at issue here is not subject to release under section 114 of the Clean Air Act. The documents currently designated as "confidential" are, without any significant exception, documents produced in response to plaintiffs' request for production of all documents relating generally to "emissions" and "potential to emit" (PTE) calculations at Owens Corning's other extruded polystyrene foam (XPS) manufacturing facilities. This information, then, is not information "obtained" by the relevant regulatory agency – Oregon DEQ. Nor is it "emission data" in this litigation, since the issue in this litigation is not "emission" from the Gresham plant, but a conservative calculation of what the *potential* emissions *might* be at the Gresham facility. Finally, even if this information could be considered "emission data" in Ohio and Illinois, those states have generally protected this information from public release, and this proceeding is not the appropriate place to collaterally attack those decisions (even if the plaintiffs had the standing to do so here).

2- MEMORANDUM IN SUPPORT OF MOTION FOR
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II. ARGUMENT

A. Owens Corning's Plant- and Line-Specific Production and Efficiency Data Is a Trade Secret, as is Information Relating to Alternative Processes.

As explained in the affidavit of Frank Cooper (Exhibit A to the Declaration of J. Dobbins), the information at issue in this motion is confidential information that amounts to a trade secret. In particular, the documents Owens Corning seeks to protect include production and efficiency data relating to production lines at Owens Corning's extruded polystyrene foam (XPS) facilities in Ohio and Illinois. As Mr. Cooper explains, nearly all the relevant information needed to calculate Owens Corning's profit margin in the sale of XPS is generally known in the industry. Information that is generally known or easily calculated or obtained includes: Raw material costs, transportation costs, the physical properties and content of Owens Corning's final product, and the sale price of that product to Owens Corning's customers. The only information missing from the calculation of Owens Corning's profit margin is information relating to the efficiency with which Owens Corning converts raw materials into finished product.

That efficiency information is the very data at issue here. If a competitor learns Owens Corning's production and efficiency levels, the competitor will be able to calculate Owens Corning's profit margin, and allow the competitor to undercut Owens Corning's price, giving the competitor a significant and unfair advantage in the industry. See generally F. Cooper Affidavit. The same holds true, of course, for sophisticated purchasers, who could reduce their purchase price to levels barely profitable for Owens Corning.

Because the key to this calculation is the efficiency and production data, Owens Corning works hard to protect that data. It is, for instance, maintained as confidential by the company even in its applications to regulatory agencies in other states; Owens Corning will, therefore, typically submit both a "public" copy of its applications or other submissions to those agencies, and it also submits a "business confidential" copy of its applications, which contains additional

information relating to the efficiencies and productivity of its plants. Those agencies accept the "confidential" applications and protect them from public disclosure. See generally Cooper Aff. at ¶ 11. Owens Corning also regularly protects as confidential aspects of its applications and internal data relating to the development of alternative processes for the production of XPS; every improvement and change in technology (including the coming change from use of HCFC-142b as a blowing agent) is confidential and could be used by Owens Corning's competitors to undermine Owens Corning's competitive position. See *id.* at ¶ 14.

B. Owens Corning Seeks to Protect Documents that Include Trade Secret and Confidential Information, and that Information Should Be Protected Under Rule 26(c)(7).

Because the Gresham facility has not yet been constructed and there are no "emissions" from the facility, none of the documents at issue here involve actual emissions from the Gresham plant. Furthermore, at this point, Owens Corning has provided to plaintiffs public documents, not marked confidential, that include spreadsheets in which Owens Corning calculated the *potential to emit* at the Gresham facility. Plaintiffs have such documents both for the initial application at issue in this litigation and for the application submitted to DEQ in May, 2005.

Almost without exception, then, the information currently at issue in this motion is information responsive to plaintiffs' very broad requests for production seeking documents relating to "emissions" and PTE calculations at Owens Corning's other XPS facilities.¹

¹ In August 2005, Owens Corning provided Oregon DEQ with spreadsheets setting forth the data and calculations used to generate the May 2005 application's PTE estimate (that application replaced the one pending when this case was filed). Owens Corning did redact from those documents information tying the data to specific plants and production lines at its other facilities, see Exh. B to Decl. of J. Dobbins (Letter of 8/18/05 from P. Lewandowski to C. Blaine); F. Cooper Aff. at ¶ 12. Owens Corning will produce to plaintiffs (but seeks to protect as confidential) non-redacted versions of the spreadsheets relating to the May 2005 application. Those non-redacted versions include facility-specific information that associate monthly average production and efficiency values to particular production lines at other facilities, and they therefore include trade secrets properly protectible under FRCP 26(c) and the Clean Air Act.

Documents responsive to those requests include copies of the "business confidential" versions of permit applications accepted by regulatory agencies in those states.² They also include data that supports those applications both directly and indirectly and other background information for the facilities. Much of the information as produced, relates to PTE calculations (although some may have also been used to generate "calculated emissions" data for these facilities).³

Finally, some of the documents designated as confidential include information relating to Owens Corning's efforts to research the utility and efficiency of alternative blowing agent or other technologies at its existing facilities. This information, even to the degree that it includes mere estimates of potential emissions of those alternative agents, includes confidential information about Owens Corning's research plan and its current understanding about the likely efficiencies of those alternative agents.

The above-described documents are appropriately marked as "confidential" and they are entitled to protection under Fed. R. Civ. P. 26(c). Under that rule, this Court may direct the entry of an appropriate protective order for "good cause shown." While the Ninth Circuit has cautioned that Owens Corning must, in this situation, show "that specific prejudice or harm will result if no protective order is granted," *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003), the concerns articulated here are the very kind of "specific examples [and]

² As a general matter, Owens Corning has designated as "Confidential" entire documents that contain trade secret or confidential information, even if some information in that document would not, in isolation, amount to a trade secret or confidential information. If plaintiffs believe that certain information in a document otherwise marked "confidential" should be de-designated, Owens Corning will be flexible in identifying and, if appropriate, de-designating redacted versions of the relevant documents. Furthermore, if necessary, the proposed sample protective order would permit plaintiffs to seek "de-designation" of documents that they believe are improperly labeled.

³ Plaintiffs have received (and will receive further) non-confidential versions of emissions reports provided by Owens Corning to the public agencies in Ohio and Illinois.

articulated reasoning," that should meet the Rule 26(c) test. *Id.* (internal quotation and citation omitted). Without the requested order, there is a substantial risk that Owens Corning will suffer an undue burden and risk of harm in its business. Good cause has therefore been demonstrated, and Owens Corning has, as a result, more than met the burden necessary to justify protecting this information from the public at large (and, therefore, its competitors and customers). We respectfully suggest that an appropriate protective order should therefore be entered.

It is important to stress that plaintiffs will in no way be prejudiced by such an order. As set forth in the proposed order, the information Owens Corning seeks to protect through this motion could, even if designated confidential, be viewed by plaintiffs' counsel, by the law students working for plaintiffs' counsel, by experts working for the plaintiffs, and by those individual members of plaintiff organization who have a need to review these documents in order to manage and make appropriate decisions regarding this litigation. The only thing that Owens Corning seeks to do is to protect this information from the eyes of its competitors, and it cannot do that without limiting the scope of its release to the plaintiffs and their immediate agents.

C. Nothing in the Clean Air Act Requires Public Release of This Information.

Plaintiffs have suggested that Section 114 of the Clean Air Act, 42 U.S.C. § 7414, requires release of this information. That statute, which addresses recordkeeping under the Clean Air Act, provides that the relevant regulatory agencies may require regulated parties to provide certain information, and that:

Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential ...

42 U.S.C. § 7414(c). The statute, therefore, addresses (1) information "obtained" by regulatory agencies under this provision of the Clean Air Act, and, furthermore, it recognizes that (2) trade secrets contained within such information should not be made available to the public, *unless* (3) the information is "emission data." Plaintiffs have argued that this information, even if a trade secret, is "emission data" under the statute, and therefore subject to public disclosure. They are incorrect for several reasons.

1. This Information Is Not Covered By CAA § 114(c) Since It Is Provided By Owens Corning, Not Obtained By The Oregon DEQ.

First, the information at issue in this motion is not within the scope of the statute, since it is not information "obtained" by the Oregon DEQ and, in the case of at least a substantial portion of the documents (with the exception of those submitted to Ohio or Illinois as "business confidential" versions of Owens Corning applications) it is not information "obtained" by any regulatory agency with the responsibility of enforcing the Clean Air Act.

While plaintiffs may argue that some of these documents *should* have been gathered by the relevant regulatory agency in those states under various recordkeeping obligations, the fact remains that the particular documents at issue here *were not*, so the rules in CAA § 114 are simply not applicable. If plaintiffs believe that information should have been obtained by the relevant regulatory agencies (or that the agencies improperly deemed information they did receive to be a non-disclosable trade secret), then plaintiffs are entitled to seek relief from those agencies.⁴ With respect to the information that *was* provided in similar form to the regulatory agencies in Ohio and Illinois, that information has been accepted by those agencies and is exempt from public release. If plaintiffs want to litigate those determinations under federal law,

⁴ Indeed, in early August (before the release of the August 18 letter and information discussed in Note 1), plaintiffs sent the Oregon DEQ a 60-day letter threatening litigation because, in their view, DEQ improperly found Owens Corning's May 2005 application complete because it did not demand the underlying PTE calculations.

and under Illinois and Ohio state law, they may contact the relevant states. But this Court, with its limited knowledge of Ohio and Illinois law, is in a poor position to second-guess those determinations, and this litigation is not the right place to mount such a collateral attack.

2. The Information Owens Corning Seeks to Protect Is Not "Emission Data" For the Facility at Issue.

Plaintiffs have suggested in conference that the information Owens Corning seeks to protect is "emission data" subject to release as an "exception to the [trade secret] exception" of CAA § 114(c). Their characterization is simply incorrect; even the information at the heart of the plaintiffs' lawsuit – the PTE determinations for the Gresham facility – is not "emission data." The information that plaintiffs seek – information about other facilities -- because it *might* undermine the calculation with respect to Gresham – is even further removed from the type of data that Congress intended to release through this statutory provision.

A review of the federal statute, as well as of the relevant state law (see ORS 468.095(2)) and federal regulations (see 40 C.F.R. § 2.301(a)(2)(i)), establishes the unsurprising proposition that the "emission data" that the statute is most concerned with is data regarding *actual emissions* from a facility.⁵ First, the plain language of the term "emission data" in subsection (c) presumes that there is a tangible "emission" on which data has been collected. Second, 40 C.F.R. § 2.301(a)(2)(i) defines "emission data" in a manner that does not include the PTE calculations at issue. Under that regulation, "emission data" includes (A) information necessary to determine certain characteristics "of any emission which *has been emitted* by the source," (B) information necessary to determine characteristics of "the *emissions which ... the source was authorized to*

⁵ Plaintiffs have pointed out that 56 Fed. Reg. 7042-01 (1991) suggests that EPA (at that time, at least) considered an "emission estimation method" to be "emission data" for purposes of the statute and regulation. But that was true for a *permitted* facility that was estimating its actual emissions, not a facility that was calculating its *potential* to emit. *See id.* Even if the algorithm for making those calculations are the same, the fact remains that for the Gresham facility, there is no calculation of "emissions" going on, at least not as understood under CAA section 114(c).

emit" and (C) a general description of the nature or location of the source that permits identification of that particular source in comparison to others. (Emphasis added.) None of these definitions include PTE-like calculations, since PTE does not provide information about what *has been* emitted, nor does it have anything to do with how pollutant a source is "authorized" to emit. PTE is, instead, a conservative calculation of how much pollutant a facility has the *potential* to emit in order to determine whether it should be characterized as a "major" emitting source or not).

As a result, not even the information that has already been released by Owens Corning to DEQ and the plaintiffs (involving the calculations for PTE at the Gresham facility) is "emission data" under the law. The information from Owens Corning's other facilities – which plaintiffs apparently intend to use in an effort to challenge the Gresham PTE calculations – is even further removed from the PTE calculation at issue in this case, and is far from anything that might be deemed "emission data" for this facility (let alone "emission data" in the hands of the Oregon DEQ).⁶

Thus, even if the information at issue in this motion amounts to information "obtained" by relevant regulatory agencies (and it does not), it is also information that amounts to a "trade secret" involving Owens Corning's XPS methods and processes, and it would not be subject to the exception for "emission data" under the statute. As such, it would be protected from public

⁶ To the degree that Owens Corning seeks to protect PTE calculations and supporting data for those other facilities, that information is, of course, subject to the same analysis as the Gresham PTE data. Furthermore, this proceeding is not the place, and plaintiffs are not the parties, to challenge the status of information that may have been provided to the Illinois and Ohio regulatory agencies as "business confidential." This is not least because of the highly tangential relevance of the information at issue in this motion. Because the calculations and data underlying the PTE estimates in the applications have been publicly released, the dispute here involves information that plaintiffs (apparently) believe might undermine those calculations. That is not "emission data."

disclosure under the Clean Air Act, and a protective order under Fed. R. Civ. P. 26(c) is appropriate and necessary to protect Owens Corning's confidential information.

III. CONCLUSION

For the above reasons, defendant Owens Corning respectfully requests that the Court grant its motion for a protective order.

DATED: August 26, 2005

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