

MELISSA POWERS, OSB No. 02118  
ALLISON LAPLANTE, OSB No. 02361  
Pacific Environmental Advocacy Center  
10015 SW Terwilliger Blvd.  
Portland, OR 97219  
(503) 768-6727, (503) 768-6894  
(503) 768-6642 (fax)  
powers@lclark.edu, laplante@lclark.edu

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE 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.

---

Civil No.: 04-CV-1727-JE

PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTION FOR  
PROTECTIVE ORDER

## **INTRODUCTION**

In its motion for a protective order, Owens Corning argues that the information underlying the potential to emit calculations for its proposed Gresham, Oregon facility should be exempt from public disclosure due to its claims that the information could undermine Owens Corning's competitive position. The information that Owens Corning refuses to publicly disclose, however, is the very information that Plaintiffs, the public at large, and the regulatory agencies must have to review that accuracy of Owens Corning's potential to emit calculations. The information is thus "emission data" which must be disclosed under the Clean Air Act (CAA). Moreover, Owens Corning has failed to meet the heavy burden of demonstrating that *each piece* of information that Owens Corning wishes to keep from the public domain is entitled to trade secret protection. Plaintiffs therefore respectfully ask this Court to deny Owens Corning's Motion for Protective Order and to order Owens Corning to immediately produce the information at issue.

## **BACKGROUND**

In October, 2003, pursuant to the Prevention of Significant Deterioration (PSD) requirements of the CAA and Oregon's State Implementation Plan (SIP), Owens Corning submitted a permit application to the Oregon Department of Environmental Quality (DEQ) to construct a new extruded polystyrene foam insulation board facility. The permit application stated that the facility had the potential to emit (PTE) 283 tons of the chemical HCFC-142b. Owens Corning has since revised its PTE estimates several times, each time lowering the PTE, so that Owens Corning's most recent PTE estimate is now 226 tons per year. *See* , attached as Exhibit B to Declaration of Melissa Powers in Support of Plaintiffs' Opposition to Defendants Motion for Protective Order (hereinafter Powers

Decl.)

Each PTE calculation performed by Owens Corning has relied on information generated at other Owens Corning extruded polystyrene foam insulation board facilities. *See generally* Exhibit B. Owens Corning has not monitored its actual emissions at these other facilities, and instead bases its emission estimates on the manufacturing process and production rates at its other facilities. Specifically, Owens Corning bases its PTE in part on emissions from the “vacuum extruder,” emissions caused by trimming and grinding excess foam board, the percentage of HCFC-142b present in the foam, the amount of HCFC-142b that “outgasses” from the foam, and other similar factors. *See* Exhibit B. Owens Corning, however, refuses to publicly release the very data that Owens Corning used to develop these PTE calculations. While Owens Corning has given DEQ a “statistical analysis” of some of these data, it believes that it should not be required to produce the actual information used to develop the statistical analysis and its PTE calculation.

## **ARGUMENT**

### **I. The Information Owens Corning Seeks to Protect is Subject to Public Disclosure Under Section 114 of the Clean Air Act.**

The CAA requires public disclosure of the information that Owens Corning seeks to withhold from public review. Section 114(c) of the CAA requires public disclosure of emission data, regardless of whether the information would otherwise be classified as confidential business information. 42 U.S.C. § 7414(c). “Emission data” include any information necessary to determine the amount and type of pollution emitted from a facility and to determine if a facility is in compliance with applicable standards or limitations. 40 C.F.R. 2.301(a)(2)(i)-(ii). EPA interprets Section 114(c) to mean “that information claimed to be a trade secret but which constitutes emission

data may not be withheld as confidential.” *Disclosure of Emissions Data Claimed as Confidential Under Section 110 and 114(c) of the Clean Air Act*, 56 Fed. Reg. 7042, 7042 (Feb. 21, 1991). EPA policy specifically lists “process design capacity,” “emissions estimation method,” and “hourly maximum design rate” as types of information included in the definition of “emission data” which are subject to public disclosure. *Id.*

Though the statute and regulations apply specifically to information sought by EPA and states, courts have found that laws regarding information reported to the government are relevant to discovery in litigation. *See Wiener v. NEC Electronics, Inc.*, 848 F. Supp. 124, 126-27 (N.D. Cal. 1994). Courts have also stressed the importance of the CAA’s public information requirements in citizen enforcement actions. *NRDC v. EPA*, 489 F.2d 390, 397-98 (5th Cir. 1974) (“private interests in protecting confidential trade information . . . [are] subordinate to the public interest in full disclosure of emissions data”). *rev'd on other grounds sub nom. Train v. NRDC*, 421 U.S. 60 (1975).

Owens Corning first argues that the information underlying its potential to emit calculations need not be publicly disclosed because DEQ has not independently obtained this information. If this argument were adopted, however, it would turn Congress’ intent that the public have full access to “emission data” on its head, as Plaintiffs’ experience shows. As Owens Corning notes, Plaintiffs have repeatedly asked DEQ to acquire information underlying Owens Corning’s emission estimates, *see* Powers Decl. ¶ 5-11, and Exhibits A, C-F to Powers Decl., and, on August 10, 2005, notified DEQ of Plaintiffs’ intent to sue DEQ for failing to obtain data and other information underlying Owens Corning’s emissions estimates. *See* Powers Decl. ¶ 12 and Exhibit G to Powers Decl. DEQ nonetheless refuses to obtain information underlying Owens Corning’s potential to emit calculations.

Powers Decl. ¶ 15. Under Owens Corning’s argument, unless and until DEQ gets this information, Plaintiffs have no right to such information either. Even if DEQ’s refusal to obtain this information is unlawful (and Plaintiffs believe it is), Plaintiffs would not be entitled to such information unless they agree to excessively restrictive terms established in a protective order. That cannot be what Congress intended when it required, in the statute itself, that emission data be publicly disclosed.

Owens Corning next argues that the information does not constitute “emission data” because it is relevant only to Owens Corning’s potential to emit, and not to its actual emissions, at its Gresham facility. However, the very regulation that Owens Corning cites makes clear that “emission data” include data related to pollutants that have actually been emitted, 40 C.F.R. § 2.301(a)(2)(i), as well as information necessary “to disclose *publicly* that a source is (or is not) in compliance with an applicable standard or limitation.” 40 C.F.R. § 2.301(a)(2)(ii) (emphasis added). This latter category, which includes “[i]nformation concerning any product, method, device or installation (or any component thereof) designed and *intended to be marketed or used commercially but not yet so marketed or used,*” plainly defines emission data to include information relevant to potential, and not only actual, emissions. 40 C.F.R. § 2.301(a)(2)(ii)(B) (emphasis added).

Here, based on their *in camera* review of documents, Plaintiffs assert that the information that Plaintiffs seek fits under both definitions of emission data. First, the information that Plaintiffs reviewed includes summaries of the amount of HCFC-142b in the foam, the percentages of foam that are trimmed, percentages of HCFC-142b that outgas from the finished product, and other similar information generated at other facilities. These summaries fall within the regulatory definition of emission data because they are the information necessary to determine the amount, frequency, and

concentration of emissions that have been emitted or which Owens Corning was authorized to emit at its other facilities. 40 C.F.R. § 2.301(a)(2)(i). Second, this information is necessary to determine whether Owens Corning's PTE was and remains over 250 tons per year and thus whether Owens Corning is in compliance with the PSD requirements of the CAA. *See* 40 C.F.R. § 2.301(a)(2)(ii). The CAA therefore requires that Owens Corning release this information to Plaintiffs, without any limitation on how Plaintiffs may use the information or to whom Plaintiffs may disclose that information.

## **II. Owens Corning Has Not Met Its Substantial Burden to Show that a Protective Order is Necessary.**

Federal Rule of Civil Procedure (FRCP) 26(b) provides for broad discovery of “any matter, not privileged, that is relevant to the claim or defense of any party.” Fed. R. Civ. P. 26(b). Information produced during discovery, along with information filed with a court, is presumptively “public.” *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002) (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999)). Moreover, information protected by court order during discovery is publically disclosed if the information is later formally filed in the case because the federal common law right of access generally demands open and accessible court proceedings. *Id.* (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)). This common law right reflects a public interest in open and accessible court proceedings correlated with the “need for openness in a democratic society.” *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005) (citing Oliver Wendell Holmes in *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (“[T]he trial of causes should take place under the public eye . . . because it is of the highest moment that those who

administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.”)).

Against this backdrop of presumptive public access, FRCP 26(c) provides that if a party shows “good cause,” a court may enter “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including an order limiting the public availability of confidential commercial information and trade secrets. Fed. R. Civ. P. 26(c)(7). The proponent of a protective order bears a heavy burden to show that “specific prejudice or harm will result if no protective order is granted.” *Phillips*, 307 F.3d at 1210-11. The proponent must meet this burden for each individual document that the proponent seeks to keep from public disclosure. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). The proponent must therefore show that each document contains confidential or trade secret information, the disclosure of which will cause specific harm. *Phillips*, 307 F.3d at 1211. Owens Corning has failed to meet its burden on each of these points.

**A. Owens Corning has not shown that each specific document contains “trade secrets” or “confidential” information.**

Before issuing a protective order, a court must ascertain whether the information sought to be protected satisfies the legal definition of “trade secret” or “confidential information.” Fed. R. Civ. P. 26(c)(7). This Court cannot make even that initial determination, because Owens Corning has not identified the documents over which Owens Corning intends to assert trade secret protection. While the Proposed Protective Order describes these documents as information that “specifically includes plant- and line-specific information about manufacturing processes, costs, and efficiencies . . . as

well as information regarding Owens Corning’s research into alternative blowing agents and processes . . .,” this description is not sufficiently specific for the Court to decide whether the materials are subject to trade secret protection. Indeed, the documents over which Owens Corning would assert trade secret information include documents that were - or should have been - publicly disclosed by permitting agencies in other states. For example, in their *in camera* review, Plaintiffs noted that the documents included communications with state permitting agencies regarding actual emissions at specific facilities, permit applications for other facilities in other states, actual and potential emission calculations at other facilities, and emails among Owens Corning employees discussing these emission estimates. Owens Corning must explain why *each* of these documents is not subject to public disclosure.

**B. Owens Corning has not shown “good cause” to protect the information.**

Owens Corning has not met its heavy burden of showing “the specific harm” that would result from public disclosure of each of the unidentified documents over which Owens Corning seeks trade secret protection. Frank Cooper states that competitors and clients would gain a competitive advantage from knowing the “the number of lines in each Owens plant, rate of manufacture, trim rate, scrap rates and densities,” because they would be able to determine Owens Corning’s gross profit margin. Cooper Decl. at 3, ¶ 9. Yet Owens Corning provided at least some of this information, at least in part, when it submitted certain trim, scrap, and blowing agent data on August 28, 2005. *See* Cooper Decl. at 4, ¶12. Mr. Cooper does not explain why disclosure of some of this information is not harmful, while disclosure of other information is. Indeed, Mr. Cooper’s declaration is simply full of conclusory statements regarding the perceived competitive advantages

that would be lost, without any empirical data supporting such statements. This is not sufficient to show “the specific harm” that would result from public disclosure of *each* document for which Owens Corning seeks protection. Owens Corning has thus not met its heavy burden of showing that good cause exists to withhold the documents from public disclosure.

### **III. The Public Interest in Disclosure of the Types of Information Owens Corning Seeks to Protect Outweighs Owens Corning’s Business Interests.**

Even if Owens Corning had met its burden to show “good cause” for withholding documents from public review, the public interest favors public disclosure. Once determining that a proponent of a protective order has met its initial burden, courts then must balance “the public and private interests to decide whether a protective order is necessary.” *Phillips*, 307 F.3d at 1211. In *San Jose Mercury News*, the Ninth Circuit explained that the “strong presumption in favor of access” may *only* be “overcome by sufficiently important countervailing interests.” 187 F.3d at 1102. Similarly, in *Foltz*, the court held that overcoming the “strong presumption in favor of access to court records” requires a showing of compelling reasons for protecting information from public disclosure. 331 F.3d at 1135. The district court “must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.” *Id.*

Here, the public interest strongly favors public disclosure of the documents at issue. There is considerable public interest in this case and in Owens Corning’s emissions estimates, as demonstrated by the several newspaper articles that have been written, and as demonstrated by the participation of several public officials in the public commenting process before DEQ. Congress itself recognized the importance of “informed public participation” when it enacted the PSD provisions of the CAA, 42 U.S.C. § 7470(5). Much of the information at issue here is the *very*

information that Owens Corning used to develop its emissions estimates for the Gresham facility. Plaintiffs should be able to obtain and analyze this information, and, if necessary, release the information to DEQ, EPA, and members of the public, to ensure that Owens Corning's PTE calculation is correct. And if Owens Corning's PTE calculation is not correct, Plaintiffs should be able to make that case publicly, before this Court, without the burden of sealing the record, and likely the courtroom, because of Owens Corning's unsubstantiated fears.

#### **IV. The Protective Order As Drafted Is Overly Broad and Restrictive**

Last, Plaintiffs are very concerned about the scope of the protective order. First, Owens Corning proposes that information that "specifically includes plant- and line-specific information about manufacturing processes, costs, and efficiencies . . . as well as information regarding Owens Corning's research into alternative blowing agents and processes . . .," be covered under the order, but does not identify which documents these include. Given Plaintiffs' experience regarding Owens Corning's claims to trade secret protection in this litigation to date, Plaintiffs do not believe that an open-ended order will adequately protect Plaintiffs' interests. Indeed, the order would place the burden on Plaintiffs to challenge any future assertions of confidentiality. Second, the order prohibits Plaintiffs from releasing relevant information to state and federal regulatory agencies, even if Plaintiffs determine that the information is directly relevant to the permitting process underway before DEQ. Third, the order unjustly impedes Plaintiffs' ability to obtain expert assistance, because it restricts Plaintiffs from hiring any experts with recent dealings with Owens Corning; requires Plaintiffs to identify non-testifying experts to Owens Corning, and thus interferes with Plaintiffs' litigation strategy and could require disclosure of attorney work-product. Last, the order

requires that all information be placed under seal. Because this information goes to a key issue in this case - the PTE calculation - the protective order could require significant aspects of this case to be performed out of the public eye. Plaintiffs thus request that, should this Court grant Owens Corning's motion for a protective order, that it allow the parties to negotiate the terms of the protective order or seek this Court's further intervention, should such negotiations fail.

### **Conclusion**

Plaintiffs respectfully request that the court deny Owens Corning's motion for a protective order.

DATED this 8th day of September, 2005.

Respectfully submitted,

/s/ Melissa Powers

Melissa Powers, OSB No. 02118  
Allison LaPlante, OSB No. 02361  
(503) 768-6727, (503) 768-6894  
Attorneys for Plaintiffs