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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

REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR
PROTECTIVE ORDER

Defendant Owens Corning respectfully offers this brief reply in support of its motion for a protective order.¹

First, a factual clarification: Plaintiffs argue that the documents at issue include "the very data that Owens Corning used to develop these PTE calculations." Response at 2. Yet the plaintiffs and DEQ have access to all the information directly supporting the PTE calculations.

¹ Owens Corning recognizes the existence of L.R. 26.5(c), but is uncertain whether that rule is intended to address only those motions brought under Rule 37 to enforce requests issued under Rule 26, or if it applies to the instant motion for a protective order. If a reply brief is inappropriate under L.R. 26.5, Owens Corning apologizes for its filing without leave of the Court, but respectfully requests such leave since the brief will benefit the Court's consideration.

In August, for instance, Owens Corning submitted to the public record both the calculations and the monthly data used to generate the May 2005 PTE. See Exhibit B to Decl. of J. Dobbins (describing release of information to DEQ with minor redactions); see also, e.g., OC2728-801 (documents supporting initial application). Plaintiffs vastly overstate the importance of the documents at issue in this motion; most of them were *not* used to generate PTE values for Gresham.² Rather, they offer information about other plants that plaintiffs requested, which they apparently *believe* might undermine the Gresham calculations. That information is possible rebuttal evidence, not "emission data." While Owens Corning is willing to provide plaintiffs this tangentially relevant information, it should not be obligated to do so publicly when it has demonstrated specific ways that such public release would harm its business operations.

Even if the documents at issue did relate directly to the Gresham PTE calculations, nothing in the Clean Air Act would require the production of trade secrets otherwise protected under Rule 26(c). Section 114(c) of the Clean Air Act guides the public release of information provided *to the agency* – not the terms of discovery requested in litigation against regulated parties.³ In addition, the requested information is not "emission data." Plaintiffs try to shoehorn this information into the language of EPA regulations, see Response at 5-6, but PTE calculations do not address an "applicable standard or limitation"; they simply determine the initial permitting category into which a facility falls. Once permitted, data relating to emissions and compliance at

² The only information Owens Corning believes not publicly released yet relating to the May 2005 PTE calculation is (1) labels that match data underlying the calculation to particular facilities, and (2) run-by-run data that support the monthly values used for that calculation. Neither is critical to understanding the PTE calculation itself; instead, they relate to plaintiffs' efforts to undermine the validity of that calculation. Furthermore, Owens Corning believes that all information directly relating to the original Gresham application has been released.

³ Plaintiffs admit that they have begun the process necessary to sue Oregon DEQ for its failure to gather information that they believe amounts to emission data. See Response at 3-4. If they are victorious, then the release of *that* information would be guided by the statute.

a facility may be "emissions data" that must be publicly released. But a calculation of what the maximum possible emission *might* be for a facility not yet permitted is not.

Plaintiffs suggest that Owens Corning must show that "each specific document" contains trade secrets. Response at 6-7. It is not clear whether plaintiffs seek a clearer definition of documents to be protected, or a document-by-document review of the pages at issue. It is clear, though, that neither concern would justify denying the motion. Plaintiffs may propose a clearer definition, or ask Owens Corning to reconsider pages currently labeled "confidential" (Owens Corning will willingly review those documents, see Memo in Support at 5 n.2). Neither point justifies a blanket release of these confidential secrets to Owens Corning's competitors.

Notably, even with the order in place, Plaintiffs and their experts *will receive* this information. Conclusions drawn from it will likely not pose problems of confidentiality, and could be released into the public domain. Also, the most critical data – information leading directly to the PTE calculations – has already been released. Plaintiffs' speculative concerns regarding the protective order do not, therefore, threaten their ability to prosecute their case. Response at 9-10. It is no "burden" to seek redesignation of documents; plaintiffs' team *has* full access. It is only a "burden" to the degree that plaintiffs want to publish the information agencies and the general public. That shouldn't be the point of this litigation anyway (and agencies have their own authority to gather relevant information). The proposed limits on experts are also reasonable; Owens Corning is entitled to know which experts might be conflicted out of the process if they had confidential information, and there is no work product concern associated with providing Owens Corning a name so that it can check on the existence of any legal obligations (i.e., confidentiality agreements) owed it by possible experts.

By contrast, the affidavit of Mr. Cooper is very specific about both the degree of confidentiality of this information and the threat that public release poses to Owens Corning. The protective order is both necessary and proper to protect the company from that threat.

3- REPLY MEMORANDUM IN SUPPORT OF MOTION
FOR PROTECTIVE ORDER

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CONCLUSION

Defendant Owens Corning respectfully requests that the Court grant its motion for a protective order.

DATED: September 13, 2005.

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