for John

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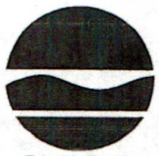

Erin M. Crotty
Commissioner

M E M O R A N D U M

TO: Louis A. Alexander, Assistant Commissioner

FROM: James T. McClymonds, Chief Administrative Law Judge
Susan J. DuBois, Administrative Law Judge SJD

Re: William Hecht/Cargill Cayuga Mine: FOIL Appeal No. 02-29-7A and Request for Trade Secret Protection -- Recommended Decision

Mr. Hecht requested access, pursuant to the Freedom of Information Law (Public Officers Law ["POL"] §§ 84-90 ["FOIL"]), to certain documents submitted by Cargill, Inc. ("Cargill") to the Department of Environmental Conservation (the "Department" or "DEC"). The Department's Region 7 Staff ("Staff") denied Mr. Hecht access to the documents and Mr. Hecht appealed. In response to Mr. Hecht's appeal, Cargill requests that portions of the documents be afforded trade secret protection.

The following constitutes our recommended decision in this matter. Based upon the material submitted, we recommend that Cargill's request for trade secret protection be denied, and Mr. Hecht's FOIL appeal be granted.

Background

The document in question is Volume II, Expanded Environmental Assessment for the Cargill Cayuga Mine ("Volume II"). The mine is an existing salt mine located next to and under Cayuga Lake that Cargill proposes to expand. Cargill

removes the salt from the underground mine by excavation, not by solution mining.[1]

DEC Staff received an application from Cargill on September 17, 1997 for renewal of its Mined Land Reclamation Permit (MLR File No. 709-3-29-0052). The application proposed to include an additional 5,056 underground acres within the Cayuga Mine. These acres were, as of January 14, 2000, the subject of a request by Cargill "for authority from the [New York State] Office of General Services (OGS) to include an additional 5,056 underground acres of State owned lands" (Stipulation between Cargill & DEC [1-14-00], at 6).

The salt under Cayuga Lake is owned by New York State (see Public Lands Law § 81; see also Notice of Complete Application [dated 8-14-02]). As part of its existing mine, Cargill already had consent from OGS to mine rock salt from approximately 4,425 acres of State-owned lands under the waters of Cayuga Lake (see Notice of Complete Application [dated 8-14-02]). Under an agreement between Cargill and OGS, Cargill pays New York State an amount per ton of salt that Cargill brings to the surface.

Cargill's request for an enlargement of the consent area to include the additional 5,056 acres of State-owned land was put on hold by OGS until DEC issued a mining permit for the proposed mine expansion. After DEC issued the relevant permit,

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[1] Solution mining involves dissolving the salt in water and bringing it to the surface as brine.

OGS would consider the request for enlargement of the consent area.

DEC Staff and Cargill disagreed on a number of points concerning the review of the application. Among the disagreements was Cargill's contention that DEC lacks statutory or regulatory authority to regulate Cargill's underground mining operations. While recognizing the disagreement and reserving their respective rights, DEC Staff and Cargill agreed to a stipulation under which Cargill would submit information to DEC. Among other provisions of the stipulation, Cargill agreed to pay certain costs for a mining engineering consultant to assist DEC Staff in review of the proposed underground mining design for potential impacts on the public health and safety, natural resources and the environment. The Stipulation contains a paragraph (Paragraph 5.D) that Cargill asserts requires DEC to maintain the confidentiality of the information provided by Cargill "to the fullest extent permitted by law."

In December 2000, Cargill initially asserted that two of its application documents were confidential: Volume I, Mined Land Use Plan (with Application Form and Environmental Assessment Form) and Volume II, Expanded Environmental Assessment. Volume II consists of two binders, one containing text, figures and tables, and the other containing large maps and drawings. On June 26, 2002, shortly prior to a public meeting concerning the application, Cargill notified DEC that it would make Volume I public in connection with the meeting. Cargill stated, however,

that Volume II contained trade secrets and, therefore, should remain confidential.

In response to Mr. Hecht's September 16, 2002, request to review documents pertaining to the mine expansion, the DEC Region 7 Staff provided access to the documents with the exception of Volume II, which was withheld on the ground that it contained trade secrets. At the time of this determination, DEC did not notify Cargill of Mr. Hecht's request or set any time period for Cargill to submit a statement about granting or continuing an exception from disclosure (see 6 NYCRR 616.7[c]).

Mr. Hecht appealed the decision by DEC Region 7 to withhold Volume II. Administrative Law Judge Susan J. DuBois was assigned to review the appeal. Following correspondence and telephone calls among representatives of Cargill, representatives of the DEC Staff, Mr. Hecht, and ALJ DuBois, Cargill agreed to release portions of Volume II to Mr. Hecht and to provide its reasons why the remainder of Volume II should be exempt from access as trade secrets. Cargill submitted a letter dated November 22, 2002 (the "Roe Letter") stating its reasons, and sent to ALJ DuBois a copy of the full text of Volume II marked to show the sections that Cargill was arguing are trade secrets (the "explained redacted" version of Volume II). The Roe Letter sets forth five categories of information it argues are trade secrets. Cargill also asserts that a paragraph in the Roe Letter contains trade secrets, and requests that the subject paragraph also be excepted from disclosure (see 6 NYCRR 616.7[a][1]). The version

of the Roe Letter that Cargill provided to Mr. Hecht has the subject paragraph omitted.

Mr. Hecht submitted e-mail messages stating that the information should be released for various public interest reasons, including that the salt is state property and that there should be full, public review of a project that could have major adverse consequences if an accident were to occur. On February 5, 2003, Bradley J. Field, Director of the Division of Mineral Resources, wrote to ALJ DuBois briefly stating Staff's position in support of Cargill's request for trade secret protection.

On January 6, 2003, the DEC Region 7 Office issued a permit to Cargill for the proposed mine expansion. Among other conditions, Special Condition No. 1 of the permit requires that all activities authorized by the permit must be in conformance with the approved plans submitted by Cargill as part of the permit application. The plans, including all of Volume II, are incorporated into the permit and are to be considered the operational plans for all surface and subsurface activities.

Statutory and Regulatory Provisions

POL § 87(2)(d) excepts from disclosure under FOIL records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise" (see also 6 NYCRR 616.7[a][4], [c][2][ii]). The party requesting trade secret protection has the burden of

proving that the record falls within the exception (see POL § 89[5][e]).

Although FOIL does not define the term "trade secret," Department regulations provide a definition: "[A] trade secret may consist of, but shall not necessarily be limited to, any formula, pattern, process, procedure, plan, compound, device, customer list, cost records or compilation of information that is not published or divulged and which gives an advantage over competitors who do not know, use, or have access to such data or information" (6 NYCRR 616.7[c][2][v]; see also New York Tel. v Public Serv. Commn., 56 NY2d 213 [1982]).

The regulations also list factors to be considered in determining whether or not a trade secret exists. These are:

(a) the extent to which the information is known outside of the business of the person submitting the information;

(b) the extent to which it is known by the person's employees and others involved in his business;

(c) the extent of measures taken by the person to guard the secrecy of the information;

(d) the value of the information to the person and to his competitors;

(e) the amount of effort or money expended by the person in developing the information; and

(f) the ease or difficulty with which the information could be properly acquired or duplicated by others (see 6 NYCRR 616.7[c][2][vi]).

Information for which Cargill Seeks Trade Secret Protection

As described in the Roe Letter, the information for which Cargill is seeking trade secret protection falls into one or more of the following categories:

A. Seismic information. Cargill argues that proprietary seismic information acquired at Cargill's expense and not otherwise available to the public should be withheld. Cargill states that the proprietary information was acquired at a cost in excess of $500,000, and that from the information a competitor could derive Cargill's inventory of salt and costs of production. This section of Cargill's argument also contains the paragraph that Cargill seeks to have withheld.

B. Geologic information specific to Cayuga Mine. Cargill states that some of the geologic information specific to the Cayuga mine is based upon a combination of public information and proprietary data obtained from Cargill's own drilling programs, and that this combined-source information has been withheld because it will reveal the proprietary information. Cargill argues that the proprietary information from the drilling program was obtained at a cost of $350,000, would allow competitors to calculate Cargill's production costs and inventory, and would allow competitors to undercut Cargill's bids for government contracts.

C. Specific dimensions of yield pillar mine design.[2] Cargill states that the specific dimensions of the yield pillars, barrier pillars, mining panels, and entries are the result of more than 30 years of study, costing Cargill several million dollars. Cargill claims that over time, its engineers and technical consultants have developed a proprietary formula for the size and spacing of yield and barrier pillars that minimizes waste of rock salt reserves without compromising mine safety. Cargill states that the mine design is a "formula, pattern, process," and "plan" that is not published or divulged outside of the company except pursuant to a confidentiality agreement or in the context of a privileged relationship. Cargill states that access to the information within the company is also restricted. Cargill attached a copy of its employee confidentiality agreement. Cargill argues that disclosure of the information would allow Cargill's competitors to exploit its design without associated costs, and provide competitors with information they could use to estimate and undercut its bids.

D. Protocol for stability analysis. Cargill requests trade secret protection for both the "protocols and methodologies," and the outcome, of the studies. Cargill states that the studies cost it in excess of $300,000 (no time period

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[2] As described in the November 22, 2002 letter, the yield pillar design involves leaving portions of the salt deposit in place to serve as pillars and barriers to support the mine roof after extraction of the rest of the salt. The use of yield pillars is further described at pages 26 through 31 of Volume I (Mined Land Use Plan).

was stated for this expenditure). Cargill states that while the protocol incorporates fundamental concepts of rock mechanics, which are publicly known, the parameters of the performance of the salt and overlying formations at this site, and assumptions about their interaction, were developed by Cargill and its consultant over many years. Cargill argues that competitors could use the protocol for analyzing the stability of their own mine sites, and could avoid the cost and time associated with developing their own protocols.

E. Miscellaneous operating expense. Cargill requests trade secret protection for information regarding the rate of brine collection on the basis that it is an operational expense that competitors can estimate. Cargill also considers references to salt quality "in certain areas of the investigation" to be trade secrets, and states that this information would allow competitors to undercut Cargill's bids.

The sections of Volume II which Cargill marked as trade secrets in the "explained redacted copy" were annotated with one or more of the above letters to designate the category within which the specific information fell.

Discussion

Cargill Cayuga Mine Environmental Assessment Vol. II

As previously noted, an agency may deny access to records that are "derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject

enterprise" (POL § 87[2][d]). In carrying its burden of establishing "substantial competitive injury," the party seeking trade secret protection need not show actual competitive harm (see Matter of Encore Coll. Bookstore v Auxiliary Serv. Corp., 87 NY2d 410, 421 [1995]). Rather, "'[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown'" (id. [quoting Gulf & W. Indus. v United States, 615 F2d 527, 530 (DC Cir)]). Here, Cargill has established actual competition in the field of rock salt production -- American Rock Salt and International Salt, among others. Thus, the question is whether Cargill has carried its burden of establishing the "likelihood of substantial competitive injury" if the subject information is disclosed. Cargill fails to carry that burden.

The determination whether the potential for "substantial competitive injury" exists for purposes of FOIL's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means (see id. at 420; see also 6 NYCRR 616.7[c][2][vi][d], [f]). Where FOIL disclosure is the sole means of acquiring the requested information, consideration need only be given to the value of the information to the competing business, and the resulting damage to the submitting enterprise (see id.).

Where material is available from other sources, the relative cost of acquiring the information must also be considered (see Encore, 87 NY2d at 420 [citing Worthington

Compressors v Costle, 662 F2d 45, 51 (DC Cir 1981)]; see also 6 NYCRR 616.7[c][2][vi][f]). If the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive injury to the submitting enterprise (see Encore, 87 NY2d at 420). On the other hand, if the costs of acquiring the information are considerable, a competitor would likely receive a windfall if it obtains that same information through FOIL for only minimal cost (see id.; see also Worthington, 622 F2d at 51 ["If private reproduction of the information would be so expensive or arcane as to be impracticable, disclosure through the FOIA conduit could damage the competitive position of the submitters, to the advantage of FOIA requesters"]). In determining the relative cost of acquiring the information (see Encore, 87 NY2d at 420), the cost of compiling the information must be considered relative to the cost of the entire project (see Matter of Sunset Energy Fleet, L.L.C., v New York State Dept. of Envtl. Conserv., 285 AD2d 865, 868 [3d Dept 2001]).[3]

Cargill fails to establish that the subject information is of any significant value to competitors. Cargill concedes that the seismic and geologic information is specific to the

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[3] We disagree with Cargill's contention that Sunset Energy is inconsistent with Encore. The cost of compiling information relative to the overall cost of a project (see Sunset Energy, 285 AD2d at 868) is directly relevant to the measure of the costs avoided by, or the "dimensions of the windfall" to (see Worthington Compressor, 662 F2d at 51), a competitor if the information is obtained through FOIL disclosure (see Encore, 87 NY2d at 420).

Cayuga Mine. Cargill's own description of the method used to arrive at its yield pillar mine design and its protocol for stability analysis reveals a highly site-specific investigation. Rates of brine collection and salt quality are also site specific. As Assistant Commissioner G.S. Peter Bergen noted in a FOIL and trade secret determination related to the Akzo-Nobel Salt, Inc. case, such site specific information is of little value to a competitor, who would have to incur costs to develop similar information and obtain expert advice about its own mine and mine design (see Matter of Akzo-Nobel Salt, Inc., Letter Decision from Asst. Comm. Bergen to Kenneth A. Payment [12-1-95], at 4-7 [hereinafter "Bergen Letter"] [attached]). Thus, release of the information would not help a competitor or harm Cargill's competitive position simply because site specific information would be revealed.

Cargill contends that release of the subject information will allow a competitor to estimate Cargill's salt inventory and production costs and, thus, allow its competitors to undercut its bids for public contracts. Although a competitor willing to do the calculations might be able to get a rough estimate of Cargill's salt reserves from the subject information, the information is insufficiently specific to allow a competitor to get an accurate estimate. Moreover, none of the information reveals anything about Cargill's actual production costs, expenses, profits or losses (cf. Gulf & W. Indus. v United States, 615 F2d 527, 529-531 [DC Cir 1979]). It is not apparent,

and Cargill does not explain, how a competitor could use the information to accurately calculate its future bids and pricing structure (see id. at 530; Matter of New York State Elec. & Gas Corp. v New York State Energy Planning Bd., 221 AD2d 121, 124-125 [3d Dept 1996], appeal withdrawn 89 NY2d 1031 [1997]; see also Center for Pub. Integrity v Department of Energy, 191 F Supp 2d 187, 194-195 [DDC] [and cases cited therein], appeal dismissed __ F3d __, 2002 WL 31667856 [DC Cir 2002]).

Even assuming Cargill's future bids could be accurately estimated from the information withheld, those bids, subject to applicable law, will ultimately be made public, in any event, and would themselves not be a trade secret (see Matter of Professional Stds. Review Council v New York State Dept. of Health, 193 AD2d 937, 939 [3d Dept 1993]). In addition, Cargill's business, including the volume of salt produced, is and will continue to be open and notorious (see Waste-Stream v St. Lawrence County Solid Waste Disposal Auth., 166 Misc 2d 6 [1995]). Indeed, Cargill itself has made public information concerning the nature and extent of its reserves, its level of production, and its mine design (see Pease, City Under the Lake, Cortland Standard, Jan. 7, 2003, at 3, col 1 [reporting that Cargill's mine employs 230 people, that a third of them are engaged in salt production, that the miners could produce 9,000 tons a day or 2.3 million tons per year, that 800 to 1000 trucks are loaded daily with up to 25 tons of salt each, and that the expanded mine could produce salt for another 50 or 60 years];

Greene, Down Time Can Be Busy, Syracuse Post-Standard, Cayuga Neighbors, Feb. 15, 2001, at 3-4 [reporting that Cargill's Cayuga mine has corridors 11 feet high and 30 feet wide, and that the salt is 98 percent pure]). The fact that much of the subject information will be or has been made public undermines not only Cargill's claim that release under FOIL will result in a competitive injury, but that the information is confidential and not otherwise generally made public (see 6 NYCRR 616.7[c][2][vi][a]-[c]).

Cargill justifies withholding both the specific dimensions of its yield pillar mine design and its protocol for stability analysis on the additional ground that release of the information would reveal to its competitors proprietary formulas, protocols, and methodologies it has developed at great cost. While making this assertion, Cargill does not reveal for in camera review the specific formulas or protocols claimed, nor does it explain how those formulas and methodologies can be derived from the information given (see Raytheon Co. v Department of Navy, 1989 WL 550581, at *5-6 [DDC 1989]).

It is not evident, from the subject information and studies themselves, how any claimed proprietary formulas could be derived. Room and pillar mining techniques are well known (see Bergen Letter, at 4; see also Nat'l Stone Assn, The Aggregate Handbook, at 7-31 [Barksdale ed 1991]; Lewis & Clark, Elements of Mining, at 420-421 [3d ed 1964]). The size of the pillars is a matter of engineering and scientific judgment applied to the

specific conditions of a particular mine, including the depth of the mining operation, the weight of the overburden, the height of the mine ceiling, the plasticity of the material constituting the pillars and so on (see Bergen Letter, at 5). Given the numerous site specific variables involved in designing a room and pillar mine, Cargill has not shown how a competitor would be able to accurately derive Cargill's claimed proprietary formula. Moreover, given the site specificity inherent in the dimensions of Cargill's yield pillars, no competitor could simply adopt Cargill's pillar dimensions without first making equivalent expenditures for engineering and consultant work in its own mine (see id.).

With respect to the stability and subsidence studies, Cargill concedes that the protocol used incorporates fundamental, publicly known concepts of rock mechanics. Cargill claims, however, that "parameters about the performance of the salt and overlying formations at this site and the assumptions about how individual components interact have been developed by Cargill and its consultants over many years of testing and verifying various hypotheses" and are not publicly known (Roe Letter, at 6). Cargill's own claim reveals that the only proprietary information contained in the stability and subsidence analysis is information specific to the site.

In camera review of Cargill's stability study bears this conclusion out. The models and formulas used in the study appear to be either commercially or publicly available, as

evidenced by the bibliography. Indeed, subsidence studies have been conducted in other underground mines (see, e.g., Matter of Akzo Nobel Salt Inc., Interim Dec of the Commissioner, Jan. 31, 1996, at 13). The site specific information in the study would be of little value to a competitor, who would have to conduct its own site specific experimentation in order to assess the stability of its own mine. Cargill fails to specify or otherwise establish which elements of its stability study contain any proprietary protocols useful off site, or explain how a competitor might derive any such protocols.

Cargill argues that the withheld information is not otherwise publicly available and, in Cargill's view, FOIL disclosure is the sole means by which competitors can obtain the requested information. Thus, Cargill contends, there is no need to consider the cost of obtaining the information relative to the cost of the project. Accordingly, although Cargill alleges certain costs associated with obtaining the seismic and geologic data, designing the yield pillar dimensions, and conducting the stability analysis, it makes no showing of those costs relative to the overall cost of the mining project.

Cargill is correct that some of the site specific information cannot be obtained through other means. Cargill's argument for trade secret protection is premised in part, however, on the theory that the site-specific information is of value to a competitor, at least to the extent that the information could be used by a competitor to avoid conducting its

own seismic and geologic studies, yield pillar dimension experimentation, and stability analysis protocol development in its own mines. Moreover, some of the site specific information, such as the seismic data, could be obtained by a competitor, albeit at a cost. Thus, it is appropriate to consider the relative costs a competitor would face to do those studies, and to compare those costs to the overall cost of a project, to determine the extent of a windfall a competitor might receive if those costs are avoided. However, because Cargill fails to demonstrate or even allege that the costs of compiling the data were considerable relative to the cost of the project overall, any claim that competitors will receive a windfall if the information is obtained through FOIL disclosure is speculative and without basis on this record (see Sunset Energy, 285 AD2d at 868).

Cargill contends that disclosure of the redacted information would impair the Department's ability to obtain such information in the future. Cargill contends that the Department's regulations do not govern underground mining and, therefore, Cargill's submission of the redacted information was voluntary. Cargill argues that the release of the information in this case will discourage Cargill and others from cooperating with the Department in the future.

As an initial matter, in making this argument, Cargill relies on dicta from Encore, wherein the Court of Appeals discussed federal case law under the federal Freedom of

Information Act ("FOIA") (see 87 NY2d at 419 [noting that under FOIA, information is "confidential" if "it would impair the government's ability to obtain necessary information in the future" or "cause 'substantial harm to the competitive position' of the person from whom the information was obtained"]). Because the trade secret provision of FOIL does not include the term "confidential" (see POL § 87[2][d]), the extent to which federal authority interpreting that term is applicable to analysis of FOIL is unclear.

In any event, whether supplied pursuant to statute, regulation or "some less formal mandate," if disclosure of material to an agency is a mandatory condition of obtaining governmental approval, there is no danger that public disclosure will impair the ability of government to obtain the information in the future (National Parks and Conservation Assn. v Morton, 498 F2d 765, 770 [DC Cir 1974]). As the Commissioner has previously noted, DEC has the power and duty to issue mining permits in accordance with the criteria of the Mined Land Reclamation Law (ECL art 23, title 27 ["MLRL"]) and related rules (see Matter of Akzo Nobel Salt Inc., Interim Dec of the Commissioner, at 8-9). The statutory and regulatory requirements, for both surface and underground mines, require that each permit application be accompanied by a mined land use plan that specifies the proposed mining plan and measures to minimize effects on the environment, property, health, safety and welfare (see id.). As part of the application process,

applicants are required to provide sufficient information on geology, hydrology, mine design, and subsidence so as to provide the Department with reasonable assurance that water supplies, adjacent properties, and the environment will not be adversely impacted (see id. at 11). Thus, because the withheld information is mandated as part of the mining permit application process, its public disclosure will not impair the Department's ability to obtain the information in the future.

In the alternative, Cargill sought governmental approval to mine state lands and, as a condition for that approval, was required to acquire a Department permit. Indeed, in the stipulation between Cargill and the Department,[4] Cargill effectively acceded to the Department's authority. At the very least, the withheld information was supplied pursuant to this "less formal mandate," and its release will not impair the Department's ability to obtain like information when governmental approval is sought under similar circumstances in the future.

Finally, strong public policy considerations support release of the information withheld in this case. As just noted, the redacted information was central to the Department's core

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[4] Cargill has also argued in these proceedings that paragraph 5.D of the stipulation, which requires DEC to maintain the confidentiality of information provided by Cargill "to the fullest extent permitted by law," prevents DEC from releasing the redacted material. Paragraph 5.D, however, would not allow DEC to violate FOIL, if disclosure is required by that statute (see Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 567 [1984] [promises of confidentiality do not affect applicability of any FOIL exemption]).

concerns and review of this mining permit application. Ultimately, the information was incorporated into the mining permit itself. The essence not only of FOIL, but the Department's permitting procedures in general is openness and public scrutiny. Detailed information on project sites and applicants' proposed activities is commonly included in applications for DEC permits and is available for public review and comment (see, e.g., Akzo, Commissioner's Interim Dec). Shielding from public scrutiny the very information necessary to assess the potential environmental impacts and safety issues associated with a proposed mine is inimical to that process.

The environmental and public safety risks associated with mining are significant, as evidence by Akzo's Retsof mine collapse and closure. Given the apparently limited value the withheld information in this case has for competitors, the trade secret provisions of FOIL and the Department's regulations should not be read to shield from the public information "relating to the environmental soundness of property which belongs to the people of this state" and that "ultimately has a direct bearing on public health and safety" (Matter of Niagara Mohawk Power Corp. v New York State Dept. of Envtl. Conservation, Sup Ct, Albany County, July 18, 1989, Bradley, J., Index No. 2572-88, appeal dismissed as moot 169 AD2d 943 [1991]).

November 22, 2002 Roe Letter

Cargill requests that a paragraph in the November 22, 2002 Roe Letter itself be withheld as a trade secret. The

paragraph suggests that the withheld seismic information in Volume II might be of value to a competitor for the additional reason that it might reveal the location of deposits of materials other than salt. For the same reason the site-specific seismic information lacks value to competitors in the salt production business, it appears to lack value to competitors in the production of the other materials. Cargill has not argued nor shown that the seismic information actually identifies deposits of any of the materials mentioned. Cargill merely suggests that those materials might be present. Accordingly, further investigation would be required. Moreover, there is no allegation that competitors are seeking state approval to extract the materials from the site or even that Cargill itself is seeking approval to extract those materials. Thus, Cargill fails to establish that the subject paragraph should be withheld as a trade secret.

Conclusion

In sum, Cargill has failed to carry its burden of establishing that the withheld information contained in Volume II and the redacted paragraph in the November 22, 2002 Roe Letter are trade secrets under FOIL and the Department's regulations. Accordingly, Cargill's request that the withheld information be excepted from disclosure under FOIL as a trade secret should be denied, and Mr. Hecht's request for access to the information should be granted.

Encl.

cc: Robert Freeman, Executive Director
Committee on Open Government
Alan Bauder, OGS

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Michael D. Zagata
Commissioner

December 1, 1995

Kenneth A. Payment, Esq.
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Re: Freedom of Information Law Appeal: Denial of exemption from disclosure, Akzo-Nobel Salt, Inc.

Dear Mr. Payment:

I am writing in response to your appeal under the New York Freedom of Information Law ("FOIL") from the denial by staff of the Department of Environmental Conservation ("Department" or "DEC") of an exemption from disclosure under FOIL of certain documents concerning the mining operations of your client, Akzo-Nobel Salt, Inc.

The history of this appeal, as it appears from the documents, is as follows: on October 17, 1995, DEC Regional Attorney Paul D'Amato wrote to you and requested that you provide justification "which comports with the requirements of 6 NYCRR Part 616.7" for the continued exemption of documents submitted by Akzo to the Department as confidential, in view of the collapse and closure of Akzo's Retsof mine. Mr. D'Amato attached a page with 53 numbers, corresponding to index numbers of documents in a computerized listing of documents submitted to the Department relating to the Retsof mine.

On October 25, 1995 you replied stating that Akzo hoped to permit a new mine in Livingston County, New York, with

> many similarities to the Retsof mine. The competitive concerns of the new mine, which will serve markets of the former Retsof mine, are the same as they were at Retsof. Accordingly, the rationale of our letters of July 13, 1994 and August 3, 1994 remain the same. In addition, Akzo Nobel Salt, Inc. is now a party to three lawsuits in which the documents in question may be relevant.

Your letter of August 3, 1994, contains a table of 38 documents or groups of documents which Akzo considers confidential. One of them, # 116, was not on Mr. D'Amato's list.

Mr. D'Amato then issued a decision letter dated October 31, 1995 denying an

exemption to all but seven of the 38 documents. Mr. D'Amato pointed out that the Retsof mine is now completely flooded and closed to further mining. You submitted a timely appeal on behalf of Akzo, referring to your letters of July 13 and August 3, 1994.

Applicable legal authorities

The New York Freedom of Information Law, found in Public Officers Law ("POL") § 84 et seq., provides that an agency may deny access to records which

> are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise. . . ."

Public Officers Law §87(2)(d).

The procedure for asserting a claim of trade secret or confidential status is set forth in POL §89(5), which states in pertinent part that

> [a] person acting pursuant to law or regulation who . . . submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under [the trade secret exemption, POL §87(2)(d)].

The person requesting the exception from disclosure has the burden of proving that the record falls within the exception. POL §89(5)(e).

The term "trade secret" is not defined in the Freedom of Information Law, but the Department's regulations dealing with the determination of trade secret status of records contain the following definition:

> a trade secret may consist of, but shall not necessarily be limited to, any formula, pattern process, procedure, plan . . . or compilation of information that is not published or divulged and which gives an advantage over competitors who do not know, use or have access to such data and information . . . .

6 NYCRR 616.7(c)(2)(v).

In addition, the Department's regulations establish factors to be considered in determining whether or not a trade secret exists, which include the following:

> (a) the extent to which the information is known outside of the business of the person submitting the information;
> (b) the extent to which it is known by the person's employees and others involved in his business;
> (c) the extent of measures taken by the person to guard the secrecy of the

information;
(d) the value of the information to the person and to his competitors;
(e) the amount of effort or money expended by the person in developing the information; and
(f) the ease or difficulty with which the information could be properly acquired or duplicated by others.

6 NYCRR 616.7(b)(2)(vi).

Discussion

As a preliminary matter, a review of the records reveals numerous instances in which your transmittal letters to the Department, accompanying copies of studies or other information, asserted that the transmitted documents were confidential and could not be released without Akzo's permission. This claim of confidentiality upon submission of these materials is consistent with POL §89(5).

With regard to justification for exemption of documents as a trade secret, it should be noted that Mr. D'Amato's letter requested justification for the exemption "which comports with 6 NYCRR 616.7." However, scant information has been submitted concerning the factors to be considered under section 616.7. For example, there is no discussion of the extent to which the material in the documents is known outside Akzo's business organization; the extent to which it is known by Akzo's employees; the extent of measures taken to guard the information; or the ease or difficulty with which the information could be properly acquired by others. There is no explanation of how disclosure of the documents would cause substantial injury to Akzo's competitive position.

There is a reference in the appeal letter to other litigation which may involve the documents in question. However, the public's right to obtain records in the possession of a government agency under FOIL is a right which is independent of discovery rights under the CPLR or other statute. Any member of the public may make a request for information under FOIL, regardless of whether the requestor is engaged in litigation with the agency or others. Farbman v. NYC Health & Hospitals Corp., 62 NY2d 75 (1984). "...[T]he standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither enhanced ... nor restricted ... because he is a litigant or a potential litigant." Farbman at 82, quoting from Matter of John P. v. Whalen, 54 NY2d 89, at 99 (1981).

A number of the records for which confidentiality has been requested are studies prepared by mining consultants at Akzo's expense. Cost is a factor to be evaluated under section 616.7, but cost is one factor to be weighed among many others in determining whether disclosure would provide an advantage to a competitor. For example, a boundary line survey of a piece of property may be costly, but have no value to a competitor. The information in such a survey is unique to the property in question. A competitor would be

compelled to incur similar costs to survey its own property boundaries. Since there is no cost savings, there is no advantage to a competitor. Similarly, disclosure of information which is commonly known or which a competitor could easily obtain would provide no advantage to a competitor. Thus, room and pillar mining techniques are widely known and used. See Elements of Mining by Lewis and Clark, pp. 420 and 421 (1964). Information about the geology and rock strata in the area of the Akzo mine is widely known. In this context, many of the documents which are consultant studies employ these general principles and draw on experience and expertise for application to the varying and specific conditions at a particular mine. The consultants' reports are specific to the Akzo mine. There is no basis on which to conclude that a competitor could use such information at its own mine without undertaking comparable studies, or that release of this information would cause substantial injury to Akzo's competitive position in the industry.

In general, the techniques used by Akzo's consultants are known to geologists and mining engineers, and cannot be considered a trade secret. To the extent that a consultant employed a new or experimental technique, a competitor could also employ that technique by contracting with the same consultant. There has been no showing that any consultant has obligated himself or herself to use an experimental technique solely for Akzo and not for any other mining company.

In summary, a careful review of the documents reveals that the information they contain (i) is generally known or is from a source from which it may easily be obtained; or (ii) is specific to the Akzo mine and the geology of that mine; therefore a competitor would have to incur costs to develop similar information and to get expert advice about its mine. Consequently, release of these documents would not help a competitor or harm Akzo's competitive position. Accordingly, Akzo has not met its burden under POL §89(5) of demonstrating that any of the documents should be granted confidential status by the Department. This conclusion applies also to the seven documents which were granted confidential status by Regional Attorney D'Amato.

The following discussion reviews a number of documents to illustrate these points.

62 This document is a report from the National Center for Earthquake Engineering Research, a not-for-profit research organization funded from state and federal funding sources, located at the State University of New York at Buffalo. The report was sent to an official of the Department in may, 1994. This report clearly could easily be obtained from NCEER. It discusses "The Geneseo Seismic Event of March 12, 1994" but contains no information about Akzo's mining operations or management practices. Accordingly, this document is not a secret, and its disclosure would not injure Akzo's competitive position.

109 This number is assigned to a package of materials, consisting of (a) a cover letter signed by you dated April 29, 1994; (b) four subsidence graphs prepared by a consultant for Akzo, Gary Petersen of Rock Mechanics Assist; (c) a map prepared by Akzo showing the location of subsidence monuments; (d) Gary Petersen's report on "Akzo Salt

Inc. Retsof Mine Ground Penetrating Radar Report;" (e) 4 preliminary drawings prepared by Acres International Corporation, an Akzo consultant, of the geology at the Akzo mine site; (f) water well monitoring data reported by the United States Geologic Survey.

The cover letter (a) does not contain any information other than the identification of the documents which are transmitted, and a brief discussion of the failure of the grouting program. It is widely known that the grouting program failed, and the list of documents in the letter contains nothing that would be helpful to a competitor. The letter also says nothing about any other mine of Akzo, or about Akzo's management methods. Accordingly, the cover letter cannot be considered a trade secret.

The four subsidence graphs (b) describe conditions unique to the Akzo property. Similarly, the map showing the subsistence monuments (c) describe conditions specific to the Retsof mine. In other words, knowledge of the subsidence graphs or knowledge of the location of the subsidence monuments would not reveal any information which would help a competitor of Akzo. It is a matter of public knowledge that there have been subsidence events on the Akzo property.

The map also shows to scale the location of large and small supporting pillars in the mine. As previously noted, the concept of rooms and supporting pillars of minerals in mines is a standard mining technique found in mining textbooks. Akzo's consultant, Gary Petersen of Rock Mechanics Assist, states in a 1992 report (#137, page 1) that the Retsof mine uses a conventional room and pillar design. The size of the pillars is a matter of engineering and scientific judgment applied to the specific conditions in a particular mine. Stresses on supporting pillars vary with a number of factors, including the depth of the mining operation and the weight of the overburden, the height of the mine ceiling, the plasticity of the material constituting the supporting pillars, the solidity or competency of the overlying rock, etc. Thus, an appropriate size for pillars in one mine may not be an appropriate size for pillars in another mine. Under these circumstances, the disclosure of the pillar sizes cannot be said to impair Akzo's competitive position. A competitor could not rely on the engineering/consultant work for the Retsof mine and thus reduce costs; a competitor would be compelled to make equivalent expenditures for engineering/consultant work in its own mine.

The small pillars or yielding pillars shown on the map are similarly a recognized mining technique which, as Akzo's consultant Mr. Petersen notes (#137, page 2), has been used in other salt mines. The successful use of the yielding pillar technique depends upon scientific judgments concerning, inter alia, the "competency" of the overlying rock formation. Consequently, disclosure of the size of the small pillars will not impair Akzo's competitive position, since the technique is not new and a competitor would have to incur costs in order to employ the technique successfully at another mine.

The map also shows that a subsidence event occurred in an area of the mine where small pillars were used. However, this fact is commonly known.

Finally, the water well monitoring data (f) was supplied by the United States Geologic Survey, and is available to the public from that body. Accordingly, as with # 62, this information is not secret, and its disclosure by the Department would not injure Akzo's competitive position.

The same reasoning applies to documents 113 (Akzo crack map) and 116 (Akzo Retsof map).

The same can also be said for the report prepared by Gary Petersen of the consultant Rock Mechanics Assist, on the use of ground penetrating radar at the Akzo site (document d, also numbered 110 on the index) and the four drawings of geology at the Akzo site prepared by Acres International. The use of ground penetrating radar is not a new technique, and the observation that problems with roof falls are associated with penetrations of the rock overlying the mine into the salt layer, is not a new observation. The attached radar profiles, graphs and diagrams of the Retsof mine represent information which is relevant to the Retsof mine, but not necessarily applicable to another mine. A competitor would not be able to avoid costs to acquire such information, but would have to hire Rock Mechanics Assist or another consultant to perform similar work in its mine to determine the locations of any penetrations of overlying rock layers. Similarly, a competitor would learn little about the depths to the desired minerals on its property except by incurring the expense of drilling exploratory holes and preparing diagrams similar to those Acres International prepared for Akzo.

136 is a hand written, unsigned document on Rock Mechanics Assist letterhead which reviews work done in 1992 and proposes additional work for 1993. The information is all related to the Retsof mine; release of the information would not allow a competitor to avoid costs for similar rock mechanics work in its own mine.

137, Mr. Petersen's report on "8 Yard East Pillar Splitting Experiment" describes measurements of stress and salt movement he observed after taking several large pillars and splitting each into four small pillars. Not surprisingly, this allowed more salt to be removed. While entitled an experiment, Mr. Petersen's report notes that "the concept of yielding pillars has been used successfully as a stress relief technique in other salt mines." The results did were not inconsistent with this experience. As previously noted, the use of small or yielding pillars is a matter of discretion based upon an expert evaluation of a number of factors, including the depth of the mine, height of the mine ceiling, competency of the overlying rock layer, and plasticity of the pillar material. Disclosure of this report would not harm Akzo's competitive position, because a competitor would have to incur costs to hire Rock Materials Assist or other mining consultants to prepare similar evaluations of conditions in its mine. As Mr. Petersen points out, conditions may vary between different locations, even in the same mine.

The same reasoning applies to # 143, 144, 148, 150, 151 and the other documents in the table in your August 3, 1994 letter. They pertain to special conditions at the Retsof mine,

a mine now closed and flooded. Disclosure of these documents would not result in cost savings to a competitor, because of the varying underground conditions. A careful reading of the documents, which are entirely from sources outside Akzo and include no internal Akzo memoranda or analysis, reveals nothing about Akzo's decision making or management practices.

Accordingly, as noted, Akzo has not met its burden under POL §89(5) of demonstrating that any of the documents above referenced and as to which you initiated this appeal should be granted trade secret or confidential status. This is because we are unable to conclude that Akzo's competitive position would be substantially injured by their release. As noted, this conclusion and determination also applies to the documents that Mr. D'Amato's October 31, 1995 letter found to be exempt from disclosure; pursuant to §616.7(c)(1) of the Department's regulations, we hereby decline to continue exception from disclosure as to such documents.

The Department will withhold the documents for a period of 15 days following service of this decision, and will then release the documents unless restrained by the order of a court of competent jurisdiction. POL § 89(5)(d); 6 NYCRR 616.7(d)(2).

Sincerely,

G. S. Peter Bergen
Assistant Commisssioner for Hearings

cc: G. Spielmann
G. Donohue
H. Doig
G. Sheffer
R. Freeman
K. Casutto
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