

This class determination remains applicable insofar as it does not conflict with *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). The Agency is in the process of evaluating whether any changes need to be made to its regulations and guidance to conform with this recent U.S. Supreme Court decision and will update class determinations, as appropriate.

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CLASS DETERMINATION 1-89

EFFLUENT AND SLUDGE DATA UNDER THE 104-MILL
COOPERATIVE DIOXIN STUDY AGREEMENT

I. BACKGROUND

In April, 1988, EPA and 104 pulp and paper mills nationwide entered into an agreement entitled the "U.S. EPA - Paper Industry Cooperative Dioxin Study" (the "Cooperative Agreement" or "Agreement"). The study grew out of EPA's belief that there is a need to assess, as quickly as possible, the extent to which chlorinated dioxins or furans are present in bleached pulp mill effluent, sludge, and pulp (see Agreement at 1 - 2).

The Agreement states that the collection of data under the Agreement will assist EPA in fulfilling its regulatory responsibilities under the Clean Water Act ("CWA") (id. at 3). At present, EPA intends to use this information to support its review of effluent limitations guidelines and standards under the CWA for the pulp, paper and paperboard industry and as a basis for imposing conditions to limit dioxin in permits issued under the CWA National Pollutant Discharge Elimination System program. The Agreement also notes that state environmental agencies in many cases will wish to obtain such data in order to determine the need for action under state environmental laws (id. at 2).

The Agreement calls for the 104 participating mills to conduct studies and to submit the results of those studies and

various other information to EPA according to specified schedules. In July and August, 1988, EPA received Freedom of Information Act (FOIA) requests for the information that had been submitted to EPA under the Agreement. As of that time, among other information, the participating companies had submitted to EPA the following:^{1/}

1. Effluent Data,^{2/} consisting of:

data on levels of total suspended solids and BOD5 in wastewater and on quantity of wastewater flow; and

analytical studies of dioxins and furans in effluent.

2. Sludge Data, consisting of:

schematic diagrams of sludge handling and disposal processes; and,

descriptions of current and past sludge handling and disposal practices; and,

analytical studies of dioxins and furans in sludge.

^{1/} Participants also submitted bleach plant process schematic diagrams and data on bleach plant operating parameters. This information is included within the FOIA requests mentioned above and has also been claimed as confidential in whole or in part by many of the participants. For simplicity and to expedite resolution of these issues, EPA has decided first to issue this determination regarding effluent and sludge data. EPA will issue a separate class determination with respect to the bleach plant information in the near future.

^{2/} The terms "Effluent Data" and "Sludge Data" in the remainder of this Class Determination refer to the information listed here and to any other analytical studies of dioxins and furans in effluent or sludge that have been or will be submitted under the Cooperative Agreement.

Pursuant to the Cooperative Agreement, the participants submitted this information by means of a numerical code, with no company or mill name attached. The purpose of the coding procedure is to ensure that analytical testing will not be influenced by sample origin and to protect possible confidential business information. See paragraph 3.1 of the Agreement. For information which is ultimately deemed not to be entitled to confidential treatment, the Office of Water Regulations and Standards ("OWRS") intends to make the information available to the public with the mill or company name attached rather than the numerical code.

Some of the participants that submitted this information have claimed that all or part of it is entitled to protection as confidential business information. Specifically, 29 mills have claimed all or part of the Effluent or Sludge Data as confidential. These participants claim either that the information should not be released at all or that it should be released only with the numerical code attached and not the company or mill name. OWRS has requested that I issue a class determination regarding the confidentiality of this information.

II. FINDINGS

Under 40 C.F.R. § 2.207, I have authority to issue class determinations concerning the entitlement of business information

to confidential treatment. Regarding the information listed above, I find that:

1. EPA possesses, or is obtaining, a large volume of related items of business information of the types described above.
2. The information within each of the above categories with respect to each mill is of the same character. Therefore, it is proper to treat all of the information similarly for the purpose of this class determination.
3. A class determination will serve a useful purpose by simplifying EPA responses to FOIA requests for the information, reducing the burden of individual determinations, and informing requesters and affected businesses of EPA's position in advance with respect to future information that will be submitted of the same types.

III. DISCUSSION AND FINDINGS

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions in the Act. Exemption 4 of FOIA requires the withholding of "trade secrets and commercial or financial information obtained from a person

and privileged or confidential" (5 U.S.C. § 552(b)(4)). The Effluent Data and Sludge Data are commercial information obtained from a person. The remaining issue is whether the information is exempt from disclosure as "trade secrets" or is otherwise "confidential" within the meaning of 5 U.S.C. § 552(b)(4) and EPA's FOIA regulations at 40 C.F.R. Part 2.

Before EPA may conclude that material is exempt from disclosure as a trade secret or confidential commercial information, the Agency must find that the information is in fact maintained in confidence by the business and is not publicly available. If it is not maintained in confidence or is publicly available, it is not entitled to confidential treatment, and EPA must disclose the information.

A. Effluent Data

I have determined that the Effluent Data that have been or will be collected under the Cooperative Agreement are not entitled to confidential treatment because these data qualify as effluent data under 40 C.F.R. §2.302(a)(2) and section 308 of the CWA. Based on this finding, I need not reach the question of whether this information would otherwise qualify as trade secret or confidential.

Section 308 of the CWA contains the following provision:

(b) Any records, reports, or information obtained under this section . . . (2) 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 effluent 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 in accordance with the purposes of section 1905 of title 18 of the United States Code.

33 U.S.C. § 1318 (emphasis added).

Section 2.302(a)(2) of EPA's confidential business information regulations (contained at 40 CFR Part 2, Subpart B) defines the term "effluent data" for purposes of implementing section 308 of the CWA. Effluent data are defined in pertinent part as "[i]nformation necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source" 40 CFR § 2.302(a)(2)(i)(A). This definition applies to information obtained under section 308 in response to a request made under that section or if its submission "could have been required under section 308." See section 2.302(b)(2). EPA has broad authority under section 308 to collect data in support of its current development of regulations for the pulp, paper and paper board industry, among other reasons. In addition, EPA considers submittals under the Cooperative Agreement to constitute responses to requests under section 308. See paragraph 4.2 of the Agreement. Accordingly, I find that all of the Effluent Data collected under the Cooperative Agreement, for purposes of this class determination, should be treated as information obtained under section 308.

Further, I find that the Effluent Data submitted under the Cooperative Agreement meet the definition of "effluent data" in section 2.302(a)(2). Specifically, the information concerning levels of total suspended solids and BOD5 in wastewater and on quantity of wastewater flow is necessary to determine the amount, concentration or other water quality-related characteristics of pollutants present in the effluent. Submitted analytical studies of dioxins and furans in the effluent go toward those same determinations.

Under the terms of section 308, therefore, the Effluent Data submitted under the Agreement must be made available to the public. EPA's confidentiality regulations implementing section 308 make clear that effluent data are never entitled to confidential treatment, cannot be considered voluntarily submitted information, and shall be available to the public notwithstanding any other provision of Part 2. See 40 CFR sections 2.302(e) and (f). Accordingly, I find that the Effluent Data which have been or will be submitted under the Cooperative Agreement are not entitled to protection from disclosure under exemption 4 of FOIA.

I also find that the identity of the company or mill that is the source of particular Effluent Data is not confidential and must be made publicly available. The definition of "effluent data" includes the identity of the source of the data. See 40 CFR §2.302(a)(2)(i)(C).

These findings are fully consistent with the provisions of the Cooperative Agreement which state that EPA will treat confidential business information claims in accordance with 40 CFR Part 2, Subpart B (paragraph 4.3); that EPA will not provide additional confidentiality procedures beyond those required in Part 2 (paragraph 4.4); and that EPA shall choose the appropriate manner in which to release information after considering applicable confidentiality provisions (paragraph 4.5). I also find, pursuant to paragraph 2.5 of the Agreement (participating companies agree not to assert any claim of confidentiality for analytical data on treated or untreated wastewater or wastewater treatment sludge), that the participants have waived any claims of confidentiality with respect to the Effluent Data.

In addition, EPA requires effluent data of the type at issue here to be submitted, and makes that data available to the public, as part of the National Pollutant Discharge Elimination System (NPDES) permitting process under the Clean Water Act. For the mills with NPDES permits,^{3/} the Effluent Data are either already publicly available under the NPDES permitting process or could be compelled under that process.^{4/} Consistent with its

^{3/} Of the 29 mills with confidentiality claims for this data, 26 are **direct** dischargers holding NPDES permits. Overall, 95 of the 104 mills hold NPDES permits.

^{4/} In fact, EPA permitting authorities are currently awaiting this information for use in carrying out the directives in the Office of Water's August 9, 1988 Interim Guidance regarding pulp and paper mill dioxin discharges. This guidance calls for immediate imposition of NPDES permit conditions for dioxin on a "best professional judgment" basis and expressly directs the Regions to use the analytical data collected under the

confidentiality regulations, EPA's NPDES regulations direct that the effluent data submitted for NPDES purposes may never be considered confidential. See 40 C.F.R. §§ 122.7(b) and (c).^{5/}

For the above reasons, the Effluent Data submitted under the Cooperative Agreement are not entitled to confidential treatment.

B. Sludge Data

I have determined that the Sludge Data that have been or will be collected under the Cooperative Agreement are not entitled to confidential treatment because these data are not trade secret or confidential business information under 5 U.S.C. §552(b)(4). The terms of the Cooperative Agreement are fully consistent with this determination.

The Sludge Data do not meet the definition of "trade secret" set forth in Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983). There, a "trade secret" is defined as "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be

Cooperative Agreement for permitting purposes.

^{5/} See Class Determination 1-78, issued by EPA's General Counsel in March, 1978. This determination states that section 402(j) of the CWA requires that NPDES permit applications be made available to the public notwithstanding the fact that some of the information contained in them would otherwise be treated as confidential. See also 49 Fed. Reg. 29245 (July 19, 1984), in which EPA denied a petition to revise 40 CFR § 122.7. EPA's denial was based on Class Determination 1-78 and the Agency's "longstanding and consistent policy" of denying confidential treatment to NPDES applications. Id. at 29246.

said to be the end product of either innovation or substantial effort."

Apart from the analytical data, the Sludge Data consist of only general descriptions and schematic diagrams of sludge handling and disposal methods (i.e., simple flow diagrams showing the order in which dewatering, trucking, or other processes occur and generic descriptions of disposal methods such as "composting," "land application," or "filter press dewatering"). These handling and disposal methods are all standard practices that are widely known and adopted within the pulp and paper industry and others. Companies did not provide information on specific sludge properties (other than the dioxin analytical data) or on detailed design or operating parameters for their sludge management systems. Therefore, whether a company has developed its own method of making these general sludge management processes more efficient or in some other way more commercially valuable cannot be ascertained from the handling and disposal information they submitted. Further, such individualized sludge handling and disposal practices, if they exist, plainly cannot be ascertained from the analytical data on dioxin levels in sludge. Accordingly, none of the Sludge Data submitted can be said to be the end result of innovation or substantial effort, and the Sludge Data are not trade secrets.

Information which is not trade secret but has been kept confidential and has not been made public in any way may also be entitled to confidential treatment under 5 U.S.C. § 552(b)(4) as

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confidential business information if it meets one of the tests set out in National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Under National Parks, commercial or financial information may only be withheld from disclosure if disclosure by EPA would be likely (1) to impair the ability of the government to obtain necessary information in the future, or (2) to cause substantial harm to the competitive position of the person who submitted it to the government. As described below, I find that the Sludge Data, as identified by company or mill name, are not entitled to confidential treatment under either prong of the National Parks test.

1. Ability to Obtain Future Information. I find that the Sludge Data are not entitled to confidential status under Prong 1 of the National Parks test. EPA has broad general authority under section 308 of the CWA to require the submission of the Sludge Data if it chooses to do so. In addition, for the mills with NPDES permits, part of the Sludge Data (*i.e.*, the descriptions and schematics of sludge handling and disposal practices) is required by the Agency as part of the NPDES permitting process.

Because of EPA's broad authority to compel submission of the Sludge Data, that data cannot be considered "voluntarily submitted" information for confidentiality purposes (see 40 CFR § 2.201(i)). Moreover, in light of this authority, there is no significant risk that the quality or accuracy of future

submittals to EPA of this type of information will be decreased if the Sludge Data are disclosed. Consequently, disclosure of the Sludge Data will not impair EPA's ability to obtain necessary information in the future.

Further, contrary to assertions by affected businesses, the fact that a company entered into the Cooperative Agreement does not mean that the information submitted thereunder is "voluntarily submitted" for confidentiality purposes and does not establish the possible impairment of EPA's ability to obtain necessary information in the future. The previous discussion concerning the definition of "voluntarily submitted" information and the risk of impairment still governs. Accordingly, the Sludge Data are not entitled to confidential treatment under Prong 1 of the National Parks test.

2. Competitive Harm. Under the second prong of National Parks, the determination of confidentiality is based upon whether disclosure of specific information is likely to cause substantial harm to the competitive position of the business submitting the information. There is no question that the participating mills face actual competition. As set forth below, however, I have determined that the Sludge Data are also not entitled to confidential treatment under this prong of the National Parks test, either because this information is publicly available, or because there is no indication that substantial harm would likely result from disclosure of the information.

a. Description and schematic diagrams of past and current sludge handling and disposal processes.

As stated in the discussion above of whether trade secrets exist, participants submitted only general information on their sludge handling and disposal practices. The submitted information concerns standard practices that are widely known and adopted within the pulp and paper industry and others. Companies did not provide information on specific sludge properties (other than the dioxin analytical data) or on detailed design or operating parameters for their sludge management systems. Therefore, I find that disclosure of this information would not reveal any individualized sludge management handling or disposal methods in a manner that would be likely to cause substantial competitive harm to the mills.

In addition, EPA obtains this type of information in the applications that must be submitted for NPDES permits. As described in section III.A above, NPDES permit application information is made available to the public and, under regulations at 40 CFR § 122.7(b) and (c), is not entitled to confidential treatment. For mills that have submitted this information under the NPDES process, this is a further reason why the information is not entitled to confidential status.

b. Analytical data on dioxin/furan levels in sludge.

I find that disclosure of this data in and of itself would not be useful to competing businesses because it will not reveal information which could be of value to competitors, e.g., production techniques or processes developed by a mill or aspects of a mill's product composition. For example, these data cannot be used to ascertain details about bleach plant operations, including chemical dosage rates or other operating parameters. Further, I have found no indication that these data can be "reverse engineered" to reveal such information to competitors.

A number of participating mills have asserted that competitive harm would result because their pulp customers, or the ultimate paper product consumers, will avoid a mill's products where analytical data show higher levels of dioxin/furans than those of competitors. There is a similar contention that a mill that has performed more sampling to date than others might unjustifiably appear to have dioxin/furan levels in its discharges that are different from those of other mills. These claims do not address the appropriate criteria for evaluating whether information is business confidential. Rather,

they are directed solely to the issue of customer estrangement. As such, they are not cognizable under FOIA exemption 4.^{6/}

Accordingly, I find that Sludge Data which have been or will be collected under the Cooperative Agreement are not entitled to confidential treatment under the second prong of the National Parks test. Since this information does not meet either prong of the National Parks test, it is not entitled to confidential treatment under exemption 4 of the FOIA.

I also find, pursuant to paragraph 2.5 of the Cooperative Agreement (participating companies agree not to assert any claim of confidentiality for analytical data on treated or untreated wastewater or wastewater treatment sludge) that the participants have waived any claims of confidentiality with respect to the analytical sludge data.

C. Copyright Protection

One of the participating companies has asserted that the Copyright Act of 1976 (the "Copyright Act") is a basis for its claim that information it submitted is entitled to confidential status. I find, however, that release of the Effluent and Sludge Data will not violate the Copyright Act.

^{6/} See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (competitive harm "should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement . . ."); CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (unfavorable publicity does not equate with "harm flowing from the affirmative use of proprietary information by competitors" and is insufficient for showing of competitive harm).

The fact that some of the documents submitted under the Cooperative Agreement may be copyrighted does not remove them from consideration as agency records under FOIA. Weisberg v. Department of Justice, 631 F.2d 824, 830 (D.C. Cir. 1980). Accordingly, the proper inquiry for such documents is whether they are withholdable under Exemption 4.

I have already determined that this information is not trade secret or confidential information and therefore cannot be withheld on this basis. Whether a copyrighted document can otherwise be withheld as exempt under Exemption 4 requires an analysis of the commercial value of the work itself and whether disclosure would affect the copyright holder's potential market for the work. Since many mills have argued that dissemination of the analytical information will cause customers to avoid a mill's products, it is likely that there is no commercial market for these documents and, accordingly, no commercial value. In addition, consistent with my finding that the descriptions and schematics of sludge handling and disposal systems are not trade secrets, it is also likely that there is no commercial market for these documents and, accordingly, no commercial value. Thus, disclosure of any of these documents will not affect the copyright holder's market for his work.

Where the government's release under FOIA of a copyrighted document would not adversely affect the copyright holder's potential market, disclosure is required under Exemption 4. In addition, disclosure is appropriate under the Copyright Act as a

"fair use." See 17 U.S.C. §107. An important consideration in determining whether a particular use is a fair use is the public interest in access to the information. See Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert den., 385 U.S. 1009 (1967). The Freedom of Information Act places a high priority on public availability of documents which are not subject to one of the FOIA exemptions from disclosure. Based upon this high public interest in access to information, disclosure of any copyrighted information submitted under the Cooperative Agreement is not a copyright violation because it constitutes fair use.

1/13/69
Date

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