

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.

US EPA ARCHIVE DOCUMENT

CLASS DETERMINATION 3-89

BLEACH PLANT, PULP, AND MISCELLANEOUS DATA UNDER THE 104-MILL COOPERATIVE DIOXIN STUDY AGREEMENT

This is a Class Determination under the Freedom of Information Act ("FOIA") concerning whether EPA should accord confidential treatment to bleach plant process data, pulp data, and certain miscellaneous information submitted by pulp and paper mills under the EPA - Paper Industry Cooperative Dioxin Study Agreement. For a related class determination under FOIA, see 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 (the "companies" or "participants") 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 for the following purposes: to support its review of effluent limitations guidelines and standards under the CWA for the pulp, paper and paperboard industry; as a basis for imposing conditions to limit dioxin in permits issued under the CWA National Pollutant Discharge Elimination System program; and to perform a multiple pathway assessment of risks in connection with effluent, sludge and pulp produced at the mills. 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 initially been submitted to EPA under the Agreement. As of that time, among other information,¹ the participating companies had submitted to EPA the following:

¹ The companies had also submitted effluent data and sludge data, which are the subjects of Class Determination 1-89.

1. Bleach Plant Data², consisting of:

- schematic diagrams of bleach plant processes;
and,

- data on bleach plant operating parameters,
including chemical application rates.

2. Pulp Data, consisting of analytical studies of dioxins and furans in pulp produced at the mills;

3. Miscellaneous Data, consisting of:

- Environmental Monitoring Data

- In-Plant Wastestream Data (schematics and analytical)

- Wastewater Treatment System Schematics

Pursuant to the Cooperative Agreement, the participants submitted the above 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.

² The terms "Bleach Plant Data," "Pulp Data," and "Miscellaneous Data" in the remainder of this Class Determination refer to all information fitting the descriptions below that has been or will be submitted under the Cooperative Agreement.

Some of the participants that submitted this information have claimed that all or part of it is entitled to protection as confidential business information. 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 information submitted under the Cooperative Agreement. Class Determination 1-89, issued on January 13, 1989, contains my findings with respect to the effluent and sludge data. My findings as to the Bleach Plant Data, Pulp Data, and Miscellaneous Data are set forth below.

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. With respect to the Bleach Plant, Pulp, and Miscellaneous Data, I find that:

1. EPA possesses, or is obtaining, a large volume of information that constitutes Bleach Plant, Pulp, and Miscellaneous Data.
2. Bleach Plant, Pulp, and Miscellaneous Data with respect to each mill are 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

A. Bleach Plant Data

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions in the Act. Exemption 4 of the FOIA, as applied by EPA, 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 Bleach Plant Data are commercial information obtained from a person. The remaining issue is whether this 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.

There are two threshold matters to address. First, to EPA's knowledge, the Bleach Plant Data that are claimed as confidential are not publicly available data. EPA has collected this type of information previously only with respect to five of the participating mills. This information was collected as part of the June 20, 1986 "USEPA/Paper Industry Cooperative Dioxin Screening Study" (the "Five Mill Study"). The Agency has publicly released this information from the Five Mill Study only in summary and coded form (i.e., without revealing mill identities). Further, EPA is not aware of any public data sources through which the Bleach Plant Data are available. In addition, the companies claiming confidentiality have generally asserted that they go to extensive lengths to keep the Bleach Plant Data secret. They point to their policies and practices of strictly limiting access to this information within the companies themselves as well as outside the companies.

As a second threshold matter, one of the FOIA petitioners asserts that the Bleach Plant Data constitute "effluent data" and are therefore ineligible for confidential treatment pursuant to CWA section 308. See Class Determination 1-89 at 5 (finding that information that qualifies as effluent data under section 308 and 40 CFR § 2.302(a)(2) is not entitled to confidential treatment). Effluent Data are defined in 40 CFR § 2.302(a)(2) 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).

The Bleach Plant Data at this time do not meet this definition. They are not data currently necessary to determine the "identity, amount," or other characteristics of dioxin being discharged by the mills, and they are not being used by EPA permitting authorities for such purposes.³ Therefore, the Bleach Plant Data remain eligible for confidential treatment based on whether they qualify as trade secrets or confidential business information under FOIA Exemption 4.

³ Overall, 95 of the 104 mills hold permits under the National Pollutant Discharge Elimination System ("NPDES") program. NPDES permit application information is made available to the public and, under regulations at 40 CFR §§ 122.7(b) and (c), is not eligible for confidential treatment. Thus, if all or part of the Bleach Plant Data are necessary in the future for NPDES permitting purposes, they would not be entitled to confidentiality protection.

1. Trade Secrets. The definition of "trade secret" is 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 said to be the end product of either innovation or substantial effort."

The systems developed by the mills to bleach pulp consist of complex arrangements of various sub-processes. As is apparent from the information submitted, these arrangements vary considerably among the mills. Moreover, some mills may arrive at a highly individualized blend of pulp they manufacture themselves with various types of fibers they purchase. The bleach plant designs at the mills, then, are typically the result of a substantial investment of resources and technical expertise by the companies in their efforts to produce high quality and competitive products. In sum, the bleach plant schematic diagrams claimed as confidential describe commercially valuable processes that are used to make trade commodities and that can be said to be the end result of innovation or substantial effort. Accordingly, I find that they are entitled to protection as trade secrets.

I reach the same finding with respect to the remaining Bleach Plant Data -- i.e., information on bleach plant operating parameters, including chemical application rates. This information is highly particular to individual mills. The

operating parameters and chemical application rates may take substantial investments of time and technical expertise to develop and refine. In addition, the chemical application rates are commercially valuable because they drive a substantial percentage of the total variable manufacturing costs and thus represent a critical element of the total product cost structure. Therefore, the bleach plant operating parameters, including chemical application rates, that were claimed as confidential describe commercially valuable processes that are used to make trade commodities and that can be said to be the end result of innovation or substantial effort. They too are entitled to protection as trade secrets.

In summary, all of the Bleach Plant Data that have been or will be submitted and that are claimed as confidential qualify as trade secrets and are therefore entitled to protection from disclosure.

2. Confidential Business Information. Information which 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) 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 by EPA if disclosure 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.

The first prong of the National Parks test is not applicable to the Bleach Plant Data because EPA has broad general authority under section 308 of the CWA to require the submission of the Bleach Plant Data if it chooses to do so. The Bleach Plant Data therefore 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 would be decreased if the Bleach Plant Data were to be disclosed. Consequently, disclosure of the Bleach Plant Data would 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 Bleach Plant Data would not be entitled to confidential treatment under Prong 1 of the National Parks test.

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.

Release of the Bleach Plant Data would reveal to competitors critical information on the production capacity and capabilities and technical sophistication of a participant's mill. This information would allow competitors to derive important characteristics of plant profitability (both past and forecasted), production flexibility, and product quality. It would also indirectly reveal important aspects of a mill's marginal cost structure and operating and capital investment strategies. In short, disclosure of the Bleach Plant Data would provide competitors with valuable insights into a mill's operational strengths and weaknesses.

In addition, using the Bleach Plant Data, with little effort on their own part, competitors could appropriate technical improvements from a mill that expended substantial time and resources developing those improvements. Competitors also would be able to duplicate products unique in composition and quality that mills have gone to great lengths to research and develop. Moreover, it is not just the participants in the Cooperative Agreement that would benefit from these data; all competitors would benefit, including new companies entering the market and international competitors. For all of these reasons, I find that disclosure of the Bleach Plant Data would likely result in

substantial competitive harm to the companies that submitted the data.

Accordingly, I find that the Bleach Plant Data that have been or will be collected under the Cooperative Agreement and which were claimed as confidential constitute confidential business information under the second prong of the National Parks test. Since this information qualifies as trade secrets, and as confidential business information under the second prong of the National Parks test, it is entitled to confidential treatment under exemption 4 of the FOIA.

B. Pulp Data

Participants have submitted analytical data on dioxin and furan levels in pulp. This information consists of analyses under the Cooperative Agreement of the end-product pulp produced at the mills, and analyses that certain companies had performed prior to the Cooperative Agreement of pulp from intermediate stages of the production process (collectively, the "Pulp Data"). As stated earlier, EPA must withhold from public disclosure information that is determined to be trade secret or confidential under Exemption 4 of the FOIA.

1. Trade Secrets

The data on dioxin and furan levels in pulp are plainly not "commercially valuable" plans, formulas, or processes that are used to make trade commodities and that are the end result of "innovation or substantial effort." Dioxins present in a mill's pulp are an unintended and undesired by-product of the pulp production process; information on their presence does not qualify as a "plan, formula, or process" that competitors would have an interest in obtaining and incorporating into their own production of similar trade commodities. In addition, because the presence of dioxins is unintended, they are clearly not, as is obvious, the end result of "innovation or substantial effort." Neither has there been any showing that disclosure of these data would reveal any other information that does qualify as trade secrets. Consequently, the Pulp Data that have been or will be submitted are not entitled to protection from disclosure as trade secrets.

2. Confidential Business Information

a. Ability to Obtain Future Information. As with the Bleach Plant Data discussed in section A, the first prong of the National Parks test is not applicable to the Pulp Data. These data are not voluntarily submitted within the definition at 40 CFR § 2.201(i) because their submittal could have been required

under section 308 of the Clean Water Act. Therefore, disclosure of this information would not impair EPA's ability to obtain necessary information in the future. Accordingly, prong one of the National Parks test does not prohibit disclosure of the Pulp Data.

b. Competitive Harm. Disclosure of the Pulp Data would not reveal proprietary information that would be of commercial value to competitors. As noted, dioxins are an unintended by-product in a mill's pulp. There is no indication that these data could be appropriated by competitors in a manner that would be likely to cause competitive harm to the mill that submitted the information. I also reject the assertion by some companies that release of the Pulp Data would indirectly reveal capital and operating budget information for the mills.⁴ There is no indication that disclosure of dioxin levels in pulp would allow such information to be derived. In addition, many of the mills assert 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

⁴ Certain companies made general assertions that disclosure of data submitted under the Cooperative Agreement (which includes the Pulp Data) would indirectly reveal financial information of this nature.

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 4.⁵ Accordingly, the Pulp Data is not entitled to protection under prong 2 of the National Parks test.

In conclusion, the Pulp Data that have been or will be submitted are not entitled to protection from disclosure because they do not qualify as trade secrets and do not qualify as confidential business information under Exemption 4 of the FOIA.

C. Miscellaneous Data

1. Environmental Monitoring Data

The Environmental Monitoring Data submitted by participants consist of analytical data on dioxin and furan levels in river water and sediment, landfill leachate, boiler ash, and fish tissue. These data are plainly not "commercially valuable" plans, formulas, or processes that are used to make trade

⁵ 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 to "harm flowing from the affirmative use of proprietary information by competitors" and is insufficient for showing of competitive harm).

commodities and that are the end result of "innovation or substantial effort." Dioxins present in these items, if from the mills, are an unintended and undesired by-product of the pulp production process; information on their presence does not qualify as a "plan, formula, or process" that competitors would have an interest in obtaining and incorporating into their own production of similar trade commodities. In addition, because the presence of dioxins is unintended, they are clearly not, as is obvious, the end result of "innovation or substantial effort." Neither has there been any showing that disclosure of these data would reveal any other information that does qualify as trade secrets. Consequently, the Environmental Monitoring Data are not entitled to protection from disclosure as trade secrets.

In addition, the Environmental Monitoring Data are not entitled to protection as confidential business information. First, for the reasons given above with respect to the Bleach Plant Data, prong one of the National Parks test does not prohibit disclosure of the Environmental Monitoring Data. Second, as the above discussion of trade secrets indicates, disclosure of the Environmental Monitoring Data would not reveal proprietary information that would be of commercial value to competitors. As noted, dioxins are an unintended by-product of a mill's production processes. There is no indication that the Environmental Monitoring Data could be appropriated by competitors in a manner likely to cause competitive harm to the mill that submitted the information. Therefore, the

Environmental Monitoring Data are not entitled to confidential treatment under prong two of National Parks.

In sum, the Environmental Monitoring Data that have been or will be submitted are not entitled to protection from disclosure because they do not qualify as trade secrets or as confidential business information under Exemption 4 of the FOIA.

2. In-Plant Wastestream Data

The In-Plant Wastestream Data submitted by participants consist of (a) schematic diagrams for in-plant wastestream handling and (b) analytical data on dioxin and furan levels in the in-plant wastestreams. The schematics are general flow diagrams showing the sequence in which the various wastestreams are combined before proceeding to a plant's wastewater treatment system. Whether a company has developed its own method of making these general processes more efficient or in some other way more commercially valuable cannot be ascertained from either the schematics or analytical data concerning in-plant wastestreams. Accordingly, this information cannot be said to be the end result of innovation or substantial effort, and the In-Plant Wastestream Data are not trade secrets.

In addition, the In-Plant Wastestream Data do not qualify as confidential business information under National Parks. The first prong of the National Parks test is not applicable to the In-Plant Wastestream Data, for the reasons stated above with

respect to the Bleach Plant Data. Further, the in-plant wastestream schematics submitted by the companies contain only a general level of detail, and they do not reveal any individualized processes in a manner likely to cause substantial competitive harm to the mills. The analytical information from in-plant wastestreams also would not reveal information that would be of value to competitors. Accordingly, the In-Plant Wastestream Data that have been or will be submitted are not entitled to confidential treatment either as trade secrets or as confidential business information under the National Parks test.⁶

3. Wastewater Treatment System Schematics

The participants also submitted general schematic diagrams of their wastewater treatment systems. I find that these diagrams should be evaluated for confidentiality purposes in the same manner that the participants' schematic diagrams of sludge handling and disposal methods were evaluated in Class Determination 1-89. Accordingly, for the below reasons, and consistent with the treatment of the sludge system schematics in Class Determination 1-89, I find that the wastewater treatment system schematics that have been or will be submitted by the

⁶ In light of these findings, I need not address whether any of the Environmental Monitoring Data or In-Plant Wastestream Data also constitute effluent data as defined in CWA section 308 and 40 CFR § 2.302(a).

participants are neither trade secrets nor confidential business information under Exemption 4.

The wastewater treatment system schematics are only generalized flow diagrams that show standard practices for wastewater treatment that are widely known and adopted within the pulp and paper industry and others. Companies did not provide information on detailed design or operating parameters for their wastewater treatment systems. Therefore, whether a company has developed its own method of making these treatment processes more efficient or in some other way more commercially valuable cannot be ascertained from the information they submitted. Accordingly, the wastewater treatment system schematics cannot be said to be the end result of innovation or substantial effort, and they are not trade secrets.

In addition, the wastewater treatment system schematics do not qualify as confidential business information under National Parks. The first prong of National Parks is not applicable to the wastewater treatment system schematics, for the reasons stated above with respect to the Bleach Plant Data. Moreover, for the mills with NPDES permits, the wastewater treatment system schematics cannot be considered voluntarily submitted for the further reason that these diagrams are required by the Agency as part of the NPDES permitting process.

Neither do the wastewater treatment system schematics qualify as confidential business information under the second prong of National Parks. As stated above, participants submitted

only generalized flow diagrams that show standard, widely adopted practices for wastewater treatment. Companies did not provide information on detailed design or operating parameters for their wastewater treatment systems. Additionally, for the mills with NPDES permits, these diagrams are made public in connection with the permitting process. Therefore, I find that disclosure of this information would not reveal any individualized wastewater treatment practices in a manner that would be likely to cause substantial competitive harm to the mills.

In sum, the wastewater treatment system schematics that have been or will be submitted are not entitled to confidential treatment as trade secrets or as confidential business information under exemption 4 of the FOIA.

D. Scope of Confidentiality Protection

I have determined above that Bleach Plant Data claimed as confidential are entitled to protection from disclosure. EPA has also considered whether it is necessary to treat other Bleach Plant Data as confidential, rather than just the subset of data claimed by the companies as confidential, for the reason that release of the data not claimed as confidential would jeopardize the secrecy of data that were claimed as confidential. For the reasons set forth below, EPA has decided to treat as confidential

Bleach Plant Data submitted by 24 (out of the 104) participating mills that were not claimed as confidential.

To support a rulemaking that arises out of this review of the pulp and paper effluent guidelines, EPA will wish to release certain information in the aggregate or in some other statistical form, coded to mask mill identities in order to preserve valid confidentiality claims. EPA's previous effluent limitation guidelines and standards for the pulp and paper industry subcategorized the industry for regulatory purposes. It is highly likely that any new rulemaking will also subcategorize this industry. Accordingly, information collected to support the rulemaking will also be segregated by subcategory.

The Agency's concern is that release of coded information for a small subcategory could indirectly reveal information deemed to be confidential. For example, for a subcategory that includes two mills, if EPA makes pulp data available for only one of the mills (because only the other mill claimed the data as confidential), and then releases data for the two-mill subcategory in coded form, it would be possible by a simple process of subtraction to derive the data that apply to the other mill. Similarly, the release of information for most of the mills in a larger subcategory in which only the small number of remaining mills have claimed confidentiality could ultimately compromise the confidentiality of the information for those remaining mills.

There are 25 subcategories in the current pulp, paper and paperboard effluent limitations guidelines and standards, and several of these subcategories include only a small number (e.g., 2 or 3) of mills. In addition, this subcategorization scheme may well change as a result of EPA's review of these guidelines, and it is possible that more small subcategories may be created.

On the basis of this concern, for the subcategories in which only a small number of mills have claimed confidentiality, I have determined that the Bleach Plant Data for all of the mills in those subcategories should be withheld from disclosure; this will include 24 of the mills that did not claim this data as confidential. The Bleach Plant Data for these 24 mills will be treated as confidential along with the Bleach Plant Data for all mills that did claim confidentiality. Once the review of the effluent guidelines for the pulp and paper industry is further underway, EPA may reconsider the need to hold the information for these 24 mills confidential in light of the Agency's updated subcategorization schemes and need to release information.

E. Copyright Protection

One of the participants 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 need not reach a determination regarding copyright protection for the Bleach Plant Data because, under today's decision, EPA will

accord confidential status pursuant to FOIA Exemption 4 to all Bleach Plant Data that were claimed as confidential. I find, however, that release of the Pulp Data and Miscellaneous Data will not violate the Copyright Act of 1976.

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 the Pulp Data and Miscellaneous Data are not trade secret or confidential 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 in-plant wastestream and wastewater treatment schematics 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 the Pulp

Data and Miscellaneous Data 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.

IV. CONCLUSION

For the foregoing reasons, I find that a portion of the Bleach Plant Data, as described above, should be accorded confidential treatment, but that the Pulp Data, Miscellaneous Data, and remaining Bleach Plant Data are not entitled to protection from disclosure. Because I have determined that the

Pulp Data, Miscellaneous Data, and remaining Bleach Plant Data are not confidential, I do not reach the question of whether that information is in fact maintained in confidence by the participants.

5/4/89
Date

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