ILLINOIS POLLUTION CONTROL BOARD
September 6, 1972

OLIN CORPORATION	)	
	)	
	)	#72-253
	)	
v.	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

OPINION AND ORDER ON APPLICATION FOR NON-DISCLOSURE (BY SAMUEL T. LAWTON, JR.)

On August 10, 1972, we entered an Order denying petitioner's application for non-disclosure as to certain specified matters, without prejudice to the later submission of an amended petition conforming to the requirements of the Act and our Procedural Rules, consistent with the Opinion and Order then rendered. The opinion outlines in detail the requisites for obtaining a non-disclosure order, noting that matters that are covered by such characterization must be either trade secrets, privileged information, secret manufacturing processes, or confidential data.

Our procedural rule with respect to this subject, Rule 107, requires that the material for which non-disclosure is sought be identified, the characterization of the material to qualify for such treatment be specified, and the reasons supporting the request be stated.

We held that Olin had failed to make the requisite statutory and procedural showing and entered the order above referred to. We have now received an amended petition for order of non-disclosure requesting that Petitioner's Exhibits 1, 2 and 3 and Environmental Protection Agency Exhibit 4, introduced in evidence at the recent hearings in the case be denominated as "not subject to disclosure." Appended to the petition is an affidavit of Ben W. Smith, Vice-President, Manufacturing and Engineering of the Chemical Group of Olin Corporation.

The exhibits for which the order is sought relate to projections for the years 1972 through 1977 of pollution abatement costs and cash flow with respect to "Joliet Phosphates", expected profits and maintenance, replacement and capital costs, pollution cash recovery, volume sensitivities of STPP (a sodium tripolyphosphate product of petitioner), and sales figures for industrial phosphates. The affiant represents that the foregoing materials are regarded as confidential and their disclosure would injure Olin's competitive position if publicly released. The different manufacturing process (so-called

"wet process") used by Olin for production of laundry phosphates allegedly precludes the awareness of Olin's cost figures by its competitors. Revelation of those cost figures in the judgment of the affiant also would be detrimental to Olin because of its single plant operation, whereas the majority of its competitors have multiple plants. Just why this would follow is not completely clear from the affidavit. However, Mr. Smith concludes that such disclosure would be detrimental to Olin's competitive sales position.

While the Affidavit contains matters that are both speculative and conclusionary, we recognize that anticipation of possible harm from disclosure of any sort must in some sense be speculative, and the objective, of course, is to lessen the likelihood of harm before it occurs.

We have neither the ability nor desire to make a business judgment with respect to the consequence that might flow from disclosure of the information Olin seeks to protect. Our problem is in an entirely different category. The overall thrust of the Environmental Protection Act is to stimulate and welcome public participation and give assurance to the maximum possible extent that the basis for all Board decisions is not only set forth in the opinions but available for public scrutiny and consideration. Variances, by their very nature, are premised on arbitrary or unreasonable hardship resulting to the applicant as a result of the enforcement of the Board's rules. This, in virtually every case, is a matter of economics to which such matters as profit and loss, cash flow, product cost, manufacturing overhead, sales data and related subjects are relevant. To deprive public observation of these subjects could deprive the public of comprehending the basis on which our decisions are rendered. Accordingly, we are reluctant to enter non-disclosure orders except in instances where the subject matter is clearly within the protected categories and the likelihood of harm is both severe and reasonably certain. The arguments made by Olin for non-disclosure would be available to every petitioner in a variance case where the manufacturing process and competitive sales position were involved. On the other hand, we are not disposed to second guess a company as to the probability of damage resulting from disclosures when it feels that substantial detriment would ensue.

We thus find ourselves in the unenviable bind of not wishing to decline a sincere request for non-disclosure of data, the public knowledge of which Olin feels would be harmful, and at the same time, not wishing to curtail our statutory mandate to make known the basis on which our judgments are structured. The instant proceeding is a good example of the awkwardness inherent in dealing with this situation. However, in oral argument, petitioner has indicated that it would be satisfied with a conditional non-disclosure order pending the ultimate resolution of the case. Since this is

a variance request, the burden is upon petitioner to establish the propriety of any variance sought. We will grant non-disclosure status until such time as we are prepared to render our decision. If it appears that we will be obliged to make disclosure of any of the materials previously captioned for non-disclosure in order to render our decision, we will so advise petitioner, at which time petitioner will be required to decide whether to waive the non-disclosure status of any documents so marked, or be subject to the risk of a variance denial because of our inability to properly justify our decision pursuant to statute, if needed information cannot be mentioned to fully substantiate our order because of the non-disclosure status.

This opinion constitutes the findings of fact and conclusions of law of the Board.

IT IS THE ORDER of the Pollution Control Board that petitioner's Exhibits 1, 2 and 3 and Environmental Protection Agency Exhibit 4 be designated as "not subject to disclosure" until prior to the rendition of the final order in this proceeding, at which time the Board will advise petitioner whether the caption on any or all of the foregoing exhibits must be lifted in order to allow the rendition of said final order, at which time petitioner will either acquiesce in such de-classification or withdraw such exhibits from the record, enabling the Board to enter its order on the ultimate issues of the variance on the basis of the record as it then exists.

I, Christan Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order on Application for Non-Disclosure was adopted on the 6th day of September, 1972, by a vote of 4 to 0.

Christan L. Moffett