



United States Department of the Interior
OFFICE OF THE SOLICITOR

DENVER REGION
P.O. BOX 25007
DENVER FEDERAL CENTER
DENVER, COLORADO 80225

March 26, 1981

Memorandum

To: Regional Director, OSM, Denver

From: Regional Solicitor, Rocky Mountain Region

Subject: Confidentiality Requests for Information Submitted
with Mine Plans

By three separate memoranda, you have asked what specific information in a mine plan may be kept confidential pursuant to the provisions of the Surface Mining Control and Reclamation Act of 1977 [SMCRA], 30 U.S.C. § 1201 et seq. and the implementing regulations in 30 C.F.R. Parts 741 and 786.

There are four pertinent statutory provisions in SMCRA relating to confidentiality of information in mining and reclamation plans. Section 507 of SMCRA, 30 U.S.C. § 1257, contains the first two and the most important provisions. The first provision is a minor proviso contained in subsection 17 of subsection b, that is, ~~Section 507(b)(17)~~, 30 U.S.C. § 1257(b)(17). Before looking at the proviso itself, it is important to put it into the proper context. Subsection b covers three pages and contains 17 subsections. Each one of the subsections requires very detailed information on some aspect of the mine plan. Subsection 17 requires that:

information pertaining to coal seams, test borings, core samplings, or soil samples as required by this section shall be made available to any person with an interest which is or may be adversely affected: Provided, That information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental content which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record.

30 U.S.C. § 1257(b)(17).



United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
BROOKS TOWERS
1020 15TH STREET
DENVER, COLORADO 80202

3 0 MAR 1981

MEMORANDUM

FOR: Distribution

FROM: John Hardaway

SUBJECT: Confidentiality of Information Submitted in Mining and Reclamation Plans - TPO Responsibilities

Attached for inclusion in staff notebooks, is an interpretation regarding confidentiality of mine plan data submitted pursuant to SMCRA.

All plans and related materials which contain material designated as "confidential" by the applicant should be examined in light of the Attachment. Upon finding material other than that which relates to the analysis of chemical and physical properties of the coal (such as Btu, ash, % moisture, sodium but excluding analyses of potentially toxic elements or compounds), the TPO shall either prepare a memorandum and letter rejecting the improperly-designated material, or shall develop the rejection in the ACR letter.

Attachment

As one can see, information about the coal seams can only be kept confidential to the extent it concerns the chemical or physical properties of the coal deposit itself, such as ash, sulphur, or water content. Nothing else pertaining to environmental information may be kept confidential. Especially may information about hydrology not be kept confidential.

The physical parameters of the mining site and its environs must be clearly set forth in the application, so as to yield an accurate picture of the geological, hydrologic, surficial, developmental, ecological, and general land use features of the landscape which will be affected directly or indirectly by the operator. Due to the movement of water through the environment, the hydrologic aspects of the application requirements will have the most profound implications for offsite residents and the community as a whole. Both the quantity and the quality of water supplies available to downstream users have been destroyed by the abysmal operational and reclamation practices of coal operators in areas where the State laws were insufficient and not enforced. Except for selected information derived from test borings relating to quantitative and qualitative analysis of the coal seam, all other such information shall be open to public scrutiny, especially that pertaining to toxicity. (Emphasis added.)

H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 91 (1977).

Congress emphasized again in section 507 that all environmental information was to be made public.

Each applicant for a surface coal mining and reclamation permit shall file a copy of his application for public inspection with the recorder at the courthouse of the county or an appropriate public office approved by the regulatory authority where the mining is proposed to occur, except for that information pertaining to the coal seam itself.

Section 507(e), 30 U.S.C. § 1257(e).

Again, the legislative history confirms that all information in the application for a mining permit must be made public, except for the chemical and physical content of the actual deposit.

Each application will be available for public review at an appropriate place. The applicant must supply proof of newspaper notice that acquaints local residents with the location of the operation and where the application may be examined.

H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 92 (1977).

If SMCRA contained no more provisions on confidentiality, the analysis would end at this point with the conclusion that the proviso in subsection 507(b)(17), 30 U.S.C. § 1257(b)(17), excepts only the physical and chemical contents of the actual coal deposit from disclosure. However, two further provisions in the next section of SMCRA, section 508, 30 U.S.C. § 1258, appear to cloud the issue somewhat, but in reality, make no difference on environmental disclosure.

Subsection 12 of subsection a of section 508 is very similar to section 507(b)(17) of SMCRA with one important difference. Section 507 applies to mine plans while section 508 applies to the reclamation plan. Subsection 508(a)(12), 30 U.S.C. § 1258(a)(12), requires disclosure of:

the results of test boring which the applicant has made at the area to be covered by the permit, or other equivalent information and data in a form satisfactory to the regulatory authority, including the location of subsurface water, and an analysis of the chemical properties including acid forming properties of the mineral and overburden: Provided, that information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental contents which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record

As one can see, the principal difference between subsection 507(b)(17) and 508(a)(12) is that the former is directed to the effects of the actual mining operation while the latter is directed to problems with reclamation.

What appears to confuse the issue is subsection b of section 508, 30 U.S.C. § 1258(b), which provides that:

Any information required by this section which is not on public file pursuant to State law shall be held in confidence by the regulatory authority.

Because that provision applies to all of section 508, it appears to allow withholding of the core hole data required in 508(a)(12), 30 U.S.C. § 1258(a)(12). That appearance is simply deceptive. First, the more specific proviso in subsection 508(a)(12) specifies what can be withheld from public disclosure under that subsection. Because it is more specific, it must control over the more general proviso in subsection 508(b), 30 U.S.C. § 1258(b).

Second, the legislative history of SMCRA makes clear that subsection b was meant to apply to the applicant's post-mining plans for use of the land.

A statement is required demonstrating that the permittee has considered all applicable State and local land use plans and programs including the desires of the owner of the surface with regard to post-mining land uses; and disclosure to the regulatory authority of all rights and interest in lands held by the applicant which are contiguous to the lands covered by the permit application is required. The purpose of this disclosure is to provide the regulatory authority with information on the prospective long-term plans of the applicant in the immediate vicinity. The bill would not require public disclosure of this information; however, it does not preclude State law from requiring disclosure of part or all of it.

S. Rep. No. 95-128, 95th Cong., 1st Sess. 77 (1977).

~~Clearly, subsection b was meant to apply only to those provisions in section 508 relating to post-mining plans, viz. subsections (a)(3), (a)(4), (a)(8), and (a)(11).~~

~~But the most important factor in construing sections 507 and 508 is that subsection 508(b) applies by its own terms only to section 508. (It has no application to section 507.) Accordingly, even if certain core hole data were held to be exempt from disclosure under section 508 (an unlikely conclusion), that data would still have to be disclosed under section 507, as subsection 508(b) has no application to section 507.~~

The Department's regulations reflect that interpretation of the four provisions of SMCRA just discussed. The permanent program regulation applicable to Federal lands is 30 C.F.R. 741.19. The regulation applicable to approval of a State program is 30 C.F.R. 786.15. Both regulations provide the same thing, as must any State program approved under 30 C.F.R. 786.15.

(a) Information in a permit application on file with the Office and any State regulatory authority shall be open for public inspection and copying at reasonable times upon written request, subject to the following--

(1) Information in a permit application which pertains only to the analysis of the chemical and physical properties of the coal, except information on a mineral or elemental content which is potentially toxic in the environment, shall be kept confidential and not made a matter of public record; and

(2) Only information in mining and reclamation plan portions of the application, which is required to be filed with the Regional Director under Section 508 of the Act and which is exempt from disclosure by the Freedom of Information Act (5 U.S.C. 552(b)), shall be held in confidence by the Regional Director according to 43 C.F.R. Part 2.

30 C.F.R. 741.19(a).

As one can see, all environmental data obtained under section 507 of SMCRA, 30 U.S.C. § 1257, must be made public, except for the physical and chemical content of the actual coal deposit. Some of the data pertaining to post-mining land use can be withheld under section 508 of SMCRA, 30 U.S.C. § 1258, in accordance with the standards set forth in 43 C.F.R. Part 2, or in accordance with State law. With the foregoing discussion of SMCRA, its implementing regulations, and any approved State programs under SMCRA, we turn to an examination of the specific requests for confidentiality referred to this office.

I. SAGE POINT-DUGOUT CANYON

Eureka Energy Company, a subsidiary of Pacific Gas and Electric Company, has responded to an earlier letter from the Regional Director suggesting that the company reevaluate its request for confidentiality as to a number of items contained in its proposed mine plan for the Sage Point-Dugout Canyon mine and reclamation plan in Utah. Attachment A-1 and A-2. The company cites only a portion of 30 C.F.R. 741.19(a)(2) referring to matters which may be exempt from disclosure under the Freedom of Information Act, as amended, 5 U.S.C. § 552(b), and the Department's implementing regulations at 43 C.F.R. Part 2. Unfortunately, that portion of the regulation, 30 C.F.R. 741.19(a)(2), as we have already seen, has application only to those matters in section 508 which refer to post-mining land use in reclamation plans. The information submitted under the mine plan pursuant to section 507 of SMCRA, 30 U.S.C. § 1257, may not be held confidential except as to the proviso in subsection 507(b)(17), 30 U.S.C. § 1257(b)(17), which exception is essentially repeated in 30 C.F.R. 741.19(a)(1).

4) ? → The data which OSM questions include: 1) proposed production figures, 2) proposed mining sequence, 3) thickness of coal seams, 5) outcrop maps, 6) BTU content of the coal, 7) sulphur content of the coal, and 8) ash content of the coal. By the standards of the Act and the regulations discussed above, it is clear that the first five items in the mine plan must be disclosed and cannot be kept confidential. The latter three items all relate to the physical and chemical content of the coal and may be kept confidential, provided there are no problems created concerning toxicity of those items.

II. TRAPPER MINE

The second memorandum (Attachment B) concerns Utah International, Inc.'s Trapper Mine located near Craig, Colorado. Extensive maps, diagrams, operating data and cost figures are included in one volume which is marked "CONFIDENTIAL" on every page. However, only one page concerns itself with the physical and chemical content of the coal - page 2-398. Accordingly, only that page may be held confidential.

III. DORCHESTER MINE

The Dorechester Mine in western Colorado has asked Colorado's Mined Land Reclamation Division to withhold certain information pertaining to hydrology from the company's permit application. The MLRD has informally asked that the Department of the Interior comment, even though both the MLRD and the Colorado Attorney General recognize that the Department's views are not meant to be an attempt to interpret Colorado law. However, the Department can comment on what it thought it was approving in Colorado's State program submission. In that regard, the Department believed it was approving, and indeed was under a duty to approve, confidentiality and public disclosure provisions consistent with the provisions of SMCRA and 30 C.F.R. 786.15. To the extent that State law is consistent with the Federal provisions, the result would necessarily be that the hydrologic data could not be held confidential.

The attorney for Dorechester Coal argues that because the coal seam is itself an aquifer, the hydrologic study may be kept confidential as part of the data on the physical or chemical content of the coal. Attachment C. That is not what Congress intended; and, in fact, several subsections of section 507 require complete disclosure of hydrologic data. See e.g. 507(b)(11), 30 U.S.C. § 1257(b)(11).

Apparently, the primary concern of Dorchester is not the typical concern where one coal company has a competitive advantage over another due to knowledge of location and richness of coal deposits which may be acquired by either company. Rather, the competitive edge among the smaller local companies is so small that the extra cost of preparing a hydrologic study, which may also be used by neighboring coal companies if made public, will put the company paying for an expensive study at a serious cost disadvantage. The attorney for Dorchester Coal Company asserts that making the

study public would be unfair and inequitable; and, of course, he is correct. This situation presents one of those classic economic examples of "externalities." "Externalities" is economic shorthand for either "external" costs or "external" benefits which the owner of the resource does not pay or receive. For example, water pollution from surface mines, where there are no laws preventing it, is an "external" (as opposed to internal) cost which the operator does not have to pay. Instead that "cost" is born by the public. For that reason, the operator can sell his product at a lower price. It is precisely this kind of externality (that is, external cost) that most environmental laws aim to change - by making the operator pay all the costs of the operation. Or to put it another way, the Government forces the operator to internalize what were formerly external costs. Thus, all costs are reflected in the price of the coal.

But the externality that Dorchester Coal complains about is the benefit it would be forced to give a neighboring coal company by disclosing its hydrology study. In fact, OSM wants to know if it can use that study for the SOAP program study on that mine (GEC). See section 507(b) of SMCRA, 30 U.S.C. § 1257(c), and the implementing regulations at 30 C.F.R. Part 795. There is no doubt that it would be inequitable, at least in the ordinary sense of that word, to let a neighboring mine have the benefit of the hydrology study at no cost and thus put Dorchester Coal at a competitive disadvantage. Unfortunately, the law on this point does not allow OSM to treat the hydrology study as confidential. SMCRA clearly mandates release of the information in the hydrology study. Moreover, the only other law on the subject also mandates that confidentiality be limited to pre-leasing (i.e., exploration) activities. See the Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083, as amended, 30 U.S.C. §§ 201(b)(3), 208-1(c), and 208-1(d). See also, the implementing regulations at 43 C.F.R. Part 2, 43 C.F.R. 2.20(b)(3), and 2.20(c)(3).

There is a limited alternative available to some extent to all these companies. First, it sometimes happens that companies submit far more data to the regulatory authority than is legally necessary. When that happens, the regulatory authority, if it chooses to rely on such data, must make it public. But where it is really unnecessary for analytical purposes, the company should be given a reasonable opportunity to withdraw superfluous data. While the foregoing may be in the category of pointing out the obvious, withdrawal of excess

data is a reasonable alternative to disclosure of all the data. Moreover, withholding of certain portions of confidential data (to the extent the regulatory authority does not rely on the withheld parts) may, in effect, maintain the confidentiality of the rest of the data.

As to Dorchester Coal's problem with its hydrology study, the company may wish to consider asking the Department for financial relief under the Small Operator Assistance Program (SOAP). While the program, as currently constituted at 30 C.F.R. 795, does not appear to provide for OSM purchase of all or part of the study for use in the SOAP program, the Department may wish to consider that possibility by regulation or otherwise, due to the equities in this case.

CONCLUSION

The information contained in the three mine plans, with the exception of the physical or chemical content of the coal must be made public. If the data are necessary to processing and public review of the mine plan, they must be made public. If the data are not necessary to processing and public review of the mine plan, they may be withdrawn. Data not withdrawn will be made public. When you notify the companies of your decision, you should add a final paragraph containing the following statement:

Pursuant to 43 C.F.R. 4.1280, you have the right to appeal this decision to the Interior Board of Surface Mining Appeals. You must file your notice of appeal within 20 days with this office and the Board. Failure to file with this office within 20 days will result in loss of all appeal rights.

Should you have further questions, please do not hesitate to contact me.

Lyle K. Rising
For the Regional Solicitor
Rocky Mountain Region

cc: ✓ J. Hardaway, OSM, Denver
J. Nadolski, OSM, Denver
Associate Solicitor, DSM, Washington
S. Keiner, DSM, Washington
L. Hodge, DSM, Washington

EUREKA ENERGY COMPANY

A SUBSIDIARY OF PACIFIC GAS AND ELECTRIC COMPANY

77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211 • TWX 910-372-6587



February 26, 1981

Donald Crane, Regional Director
 Region V, Office of Surface Mining
 1823 Stout Street
 Denver, Colorado 80202

Re: Sage Point-Dugout Canyon
 Mine and Reclamation Plan

Dear Mr. Crane:

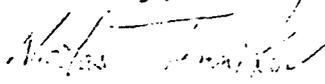
In your January 14, 1981 letter, you informed us that certain information marked "confidential" in our SMCRA permit application does not meet the requirements for confidentiality set forth in the Surface Mining Control and Reclamation Act. In response, we would like to point out that all of the information marked "confidential" is of a proprietary nature. Public disclosure of this information could be harmful to any financial negotiations we may take part in regarding the project.

30 CFR 741.19(a)(2) states that "information... which is exempt from disclosure by the Freedom on Information Act (5 U.S.C. 552(b)) shall be held in confidence... according to 43 CFR 2." 43 CFR 2.13(c) states, "The Act (Freedom on Information Act) provides that disclosure is not required of matters that are... trade secrets and commercial or financial information obtained from a person and privileged and confidential."

Accordingly, we feel that the status of most information marked "confidential" in our application comes under 43 CFR 2.13(c) and should not be changed. We agree that the overburden maps should not be considered "confidential" anymore.

By copy of this letter, we are advising Jim Smith of DOGM of this matter. We are trying to work through DOGM and the Interior pursuant to the June 11, 1979 Cooperative Agreement between the State of Utah and the U. S. Department of the Interior. So it would be helpful if further correspondence or discussion on this subject could be coordinated with that agency.

Sincerely,


 NICOLAS K. TEMNIKOV
 Regulatory Coordinator

NKT:dmh

cc: Jim Smith (DOGM - Salt Lake City)
 RFGoudge (Eureka - Price, Utah)

81
JAN 14 1980

Mr. David W. Hess
Vice President and General Manager
Eureka Energy Company
215 Market Street
San Francisco, CA 94106

Dear Mr. Hess:

OSM has received and is in the process of determining completeness for the Sage Point - Dugout Canyon Mine and Reclamation Plan. Volume II of the plan is labeled "Confidential". Upon review of this volume, it was noted by my staff that the items marked "Confidential" included not only coal quality, but also the mining plan (detailed underground workings), thickness of seam, specific interval thickness and specific overburden thickness. The Surface Mining Control and Reclamation Act (Public Law 95-87, Sections 507(b)(17) and 508(a)(12)) requires that only information pertaining to the analysis of the chemical and physical properties of the coal shall be kept confidential and not made a matter of public record. Further, some information in the "Confidential" volume is reiterated in the non-confidential volume, in particular volume one. Thus it is unclear as to the specific information considered confidential. With this in mind, I suggest that you re-evaluate the items classified as "Confidential".

If you have any questions regarding the review of your plan, please call John Nadolski (303-837-3773) of my staff.

Sincerely,

DONALD A. CRANE

cc: Smith, DOGM, SLC
Berggren, BLM, Price, Utah
Goudae, Eureka Energy, Price, Utah
Rising, OSM, Denver

bcc: OFC
Reading/R.D.
chron
Nadolski

Nadolski:lc 12/22/80



United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
BROOKS TOWERS
1020 15TH STREET
DENVER, COLORADO 80202

OFFICE OF THE REGIONAL DIRECTOR

MAR 20 1981

MEMORANDUM

TO: Jack Little

ATTN: Lyle Rising

FROM: Donald A. Crane *[Signature]*

SUBJECT: Request for Review of Validity of "Confidential" Designations
Submitted By Utah International For The Trapper Mine.

Attached is one volume of information designated "Confidential" by Utah International. I have requested your review to determine whether the material is justifiably designated. We find that most of the data presentations in this volume are not reproduced in the unclassified portions of the plan.

We find that some of the presentations are lacking adequate detail to satisfy the regulations anyway, but we would not want resubmissions to be inappropriately classified.

We suggest that only page§ 2-398 can be classified as Confidential. Please advise at your earliest convenience. John Hardaway can answer questions.

Attachment: Confidential Data. C3



United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
BROOKS TOWERS
1020 15TH STREET
DENVER, COLORADO 80202

OFFICE OF THE REGIONAL DIRECTOR

MAR 20 1981

MEMORANDUM

To: Lyle Rising, Assistant Regional Solicitor
From: Don Crane *Don*
Subject: Confidentiality of Mine Permit Applications

Lew Woods at the Colorado Attorney General's Office has requested that you review the attached letter requesting confidentiality for certain portions of a mine permit application.

We have attempted to acquire certain hydrologic and geologic information from the Dorchester Mine to reduce the information requirements and thereby the cost for a SOAP contract on the adjacent G.E.C. mine. Dorchester is unwilling to share their hydrologic and geologic information with G.E.C. and has therefore requested that it be kept confidential.

Please coordinate with Charles Harrison of my staff regarding the time frame for response. Clearly a decision in favor of confidentiality may have broad consequences for the administration of the permanent regulatory program in Colorado.

Attachment

DELANEY & BALCOMB, P.C.

ATTORNEYS AT LAW

DRAWER 790

GLENWOOD SPRINGS, COLORADO 81601

ROBERT DELANEY
KENNETH BALCOMB
JOHN A. THULSON
EDWARD MULHALL, JR.
ROBERT C. CUTTER
SCOTT M. BALCOMB
DAVID R. STURGES
LAWRENCE R. GREEN
ANDREW O. NORELL

February 24, 1981

818 COLORADO AVENUE
DENVER, COLORADO 80202
TELEPHONE 945-6546
FAX 945-2371
AREA CODE 303

RECEIVED

FEB 28 1981

Mr. David Shelton, Director
Mined Land Reclamation
1313 Sherman Street, Room 423
Denver, CO 80203

MINED LAND RECLAMATION
Colo. Dept. of Natural Resources

RE: Dorchester Coal Company
Confidentiality of Certain Proprietary
Information in MRP Permit Applications

Dear Dave:

Pursuant to my various telephone conversations with you and your staff, including Lew Woods, please accept this letter in support of Dorchester Coal Company's (DCC) written requests dated January 27 and 28, 1981 for confidential treatment of certain portions of its previously filed MRP applications. We request you review this letter and respond to our claim of confidentiality. After Lew Woods has had an opportunity to review this matter, I would be available to meet with him and you to discuss your preliminary findings.

Part 2 of the Colorado Open Records Act provides in §24-72-201, C.R.S. 1973, as amended, that "it is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." (Emphasis added) Public records are defined in §24-72-102(b) as including "...all writings made, maintained, or kept by the state or any agency...for use in the exercise of functions required or authorized by law or administrative rule or involving receipt or expenditure of public funds."

Thus, under the permit application requirements of the Colorado Mined Land Reclamation Act of 1976 and the Colorado Surface Coal Mining Reclamation Act of 1979, it would appear that a permit application filed and/or approved under these Acts would be viewed as a "public record" and would be subject to public inspection under §24-72-201 unless subject to an exemption provided (1) under Part 2 of the Colorado Open Records Act, or (2) as otherwise specifically provided by law.

Mr. David Shelton, Director
February 24, 1981
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In reviewing Part 2 of the Colorado Open Records Act it is important to note that §24-72-104(1) provides that "the custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section...." (Emphasis added) It is relevant to note that under the following grounds of subsection (1) the exception would apply to (a) where "such inspection would be contrary to any state statute" or (b) where "such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law."

Subsection (2) of §24-72-104 does not appear relevant to this issue.

Subsection (3)(a)(IV) of §24-72-104 does appear relevant to this issue because it provides that "the custodian shall deny the right of inspection of the following records, unless otherwise provided by law... (IV) trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person." (Emphasis added) Geophysical is defined in Webster's New Collegiate Dictionary as the "physics of the earth including the fields of meteorology, hydrology, oceanography, seismology, volcanology, magnetism, radioactivity and geodesy." Thus, it would appear that the hydrology study claimed as confidential in DCC's letters of January 27 and 28, 1981 should be afforded confidential treatment under authority of §24-72-204 (1) and (3)(a)(IV), unless otherwise provided by law.

In reviewing other Colorado statutes which might require the public inspection of such claimed confidential geologic and geophysical data, §34-32-112(9) of the Colorado Mined Land Reclamation Act of 1976 provides that "information provided the board in an application for a permit relating to the location, size or nature of the deposit or information required in subsection (5) of this section and marked as confidential information by the operator shall be protected by the board and not be a matter of public record in the absence of a written release from the operator or until such mining has been terminated." The dictionary's definition of "nature" is "the inherent character or basic constitution of a person or thing." It is our position that because coal bodies are generally considered aquifers (i.e., geologic

Mr. David Shelton, Director
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strata capable of bearing or transmitting water), hydrology investigations as required in permit applications are therefore specifically accorded confidential treatment under §34-32-112(9). In the alternative, it is our contention that §34-32-112(9) does not specifically preclude confidential treatment as claimed by DCC for this hydrology report and that §24-72-104(3)(a)(IV) of the Colorado Open Records Act does provide authority for confidential treatment of claimed confidential geologic or geophysical data.

Board Rule 1.33 under the 1976 Act implements the statutory authority found in §34-32-112(9) by providing that "an operator may mark "CONFIDENTIAL" information supplied in a permit application disclosing the location, size, or nature of the deposit...." This rule further provides in subsection (1) that "confidential information so marked shall not be available to the public until the mining operation is terminated, unless the operator gives a written consent to the release of all or any part of the information." It should be noted that both the above cited law and rule provide a mechanism whereby the operator is given the discretion to mark or indicate such information as confidential and that confidential treatment is thereby provided by operation of law and regulation. This cited statutory and regulatory authority, however, provides no authority or mechanism for the Board or the Division staff to contest or deny such claim of confidentiality as indicated at the discretion of the operator.

It should be noted that DCC has submitted a claim of confidentiality on this hydrology report, that its Dorchester No. 1 mining operations have not terminated, and that DCC has not given and will not give a written consent to the release of this report.

While the hydrology report in question was submitted with a permit application which was reviewed and approved by the Board under the 1976 Act, it is unclear whether the Colorado Surface Coal Mining Reclamation Act which was enacted on July 1, 1979 has any legal bearing on this issue. For the sake of argument, assuming the 1979 Act does have some legal bearing on this issue, the following points and authorities should be noted.

Section 34-33-111(1)(1) of the 1979 Act addresses confidentiality of permit data in the reclamation plan where it provides "...except that information which pertains to

Mr. David Shelton, Director
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the quantity of the coal or to the analysis of the chemical and physical properties of the coal... shall be kept confidential and shall not be made a matter of public record;...."

Subsection (2) of this same section provides that "any information required by this section which is not on public file pursuant to state law shall be held in confidence by the board and the division." (Emphasis added)

The Board rules implementing this statutory provision are found in Rule 2.07.5. Subsection (1)(c) of this rule provides that "information in the reclamation plan portions of the application, which is required to be filed with the Division under §34-33-111(2), C.R.S. 1973 and which is not on public file pursuant to state law, shall be held in confidence by the Board and the Division provided that such information is clearly indentified as being confidential or a specific written request is received from the applicant." (Emphasis added)

It is our position that §24-72-104(3)(a)(IV) is the appropriate legal authority for confidentiality treatment where the 1979 Act and Board rules cited above refer to "and which is not on public file pursuant to state law." It should be noted that it is my impression that Rule 2.07.5(1)(c) should cite §34-33-111(1) rather than §34-33-111(2). This may have been an oversight in the drafting and promulgation of this particular rule. Subsection (2) of §34-33-111 does not specify the legal requirements for a reclamation plan. It should not matter whether a hydrology report is physically located in a baseline information section or a reclamation plan section of the permit application as the mitigation or environmental protection measure described in the reclamation plan for the permit area normally must reference the baseline hydrologic investigation report should it be physically located in a section other than the reclamation plan section.

In reviewing applicable case law to this matter, only two Colorado Supreme Court case decisions have interpreted the Colorado Open Records Act. The case Cervi v. Russell, 184 Colo. 282, 519 P.2d 1189 (1974) does not appear relevant to this issue. A companion decision in Denver Publishing Company v. Dreyfus, 184 Colo. 288, 520 P.2d 104 (1974) does establish the basic premise, based on the clear legislative intent manifested in the declaration of policy, that all public records are to be open for inspection except as provided for in the Act itself or otherwise specifically

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provided by law. The defendant in this case was unable to prove that his denial of the requested autopsy reports was excepted from public disclosure in the Act itself or in any other statute. This Colorado Supreme Court decision does not contradict our claim for confidentiality treatment under authority of §24-72-104(3)(a)(IV) of the Colorado Open Records Act, as provided for in §24-72-201 and 203(1) in the same Act.

There are no known Colorado court decisions interpreting §34-32-112(9) of the 1976 Act or §34-33-111(1)(1) or (2) of the 1979 Act. In addition, there are no known Colorado Attorney General's published opinions on the cited sections of these Colorado laws.

While not controlling, the Federal Freedom of Information Act found in 5 U.S.C. §552 provides some analogy of similar purposes of public disclosure and treatment of confidential information claims based on trade secrets and commercial or financial information supplied to the federal government. Subsection (b)(4) of 5 U.S.C. §552 specifically exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The term "confidential" in the context of Freedom of Information Act exemption (b)(4) requires a subjective analysis of whether matters are customarily held in confidence by the owners and persons like him, and objective analysis of whether disclosure would (a) significantly harm the owner's competitive position and (b) deter others from submitting this detailed data to the agency in the future. See Federal Information Disclosure, James T. Reilly, Sheperd's Inc. §14.08. Historically, the term "confidential" was added to this federal Act to encompass non-trade secret concepts about matters which were held secret by persons and corporations and which were customarily confidential in the hands of those persons.

The recognized objective test for "confidential" status is that established by National Parks & Conservation Assn. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The Appeals Court summarized the legal objective test for (b)(4) confidential status as follows:

Commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects:

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(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added)

Using the narrative description above regarding the analogous treatment of the FOIA §(b)(4) exemption, the following assertions are submitted in support of DCC's claim of confidential treatment of its hydrology report:

(1) "Customarily Confidential" Test. Most, if not all, Colorado coal operators wish to and/or have taken steps to protect as confidential their hydrologic and geologic investigations, reports, etc. which have only recently been required as part of MRP applications. These hydrologic/geologic studies and reports usually describe or supplement other descriptions of the coal deposit which upon close analysis by a competitor can lead to an identification of certain mining and/or reclamation costs of the mining operation. As such hydrologic studies have been required in all MRP applications for only a short time, the "customary" aspect of this subject should be examined only over the past few years. In this writer's experience, he has known of no instance where coal operators have exchanged such hydrologic information, except where some financial investment by the reviewing company was an inducement to the exchange of such information. Hydrologic studies done for or by coal companies have customarily been viewed as a valuable asset of the owning company and customarily not released to the public at large, directly, or indirectly through public agencies.

(2) "Impair Government's Ability to Obtain Such Information in the Future" Test. It is our understanding that a number of coal operators have and are filing claims of confidentiality on hydrology and other specific data reports. An increase of such claims could be viewed as a potential impairment of the CMLR's ability to secure such information in the future, particularly if all such claims for confidentiality are unilaterally denied by the CMLR. A claim of confidentiality, however, does not now impair the CMLR from using this information to meet its statutory obligations. If CMLR were to deny, on some theory of legal authority, all pending and future claims of confidential information, then it is conceivable that the CMLR might become the subject of either amendatory legislation or law suits challenging the CMLR's authority and action in denying such claims. Such a possible response could further impair or impede the agency's ability to secure this information.

(3) "Substantial Harm to the Competitive Position"
Test. In Fremont County, Colorado, DCC's mining operations are in a highly competitive coal development area. DCC's Dorchester No. 1 mine is contiguous to both GEC, Minerals, Inc.'s surface mining operation, and to Harrison Western's Newlin Creek underground mining operation. There is active pursuit by all three companies to hold down the costs of operations, including the costs of permitting and environmental compliance, as well as increasing production efficiencies. In addition, DCC is in and presumably will remain in active marketing competition with these neighboring mining operators. Specifically, these companies, in whole or in part, compete for sales to Lone Star Industries (cement plant) in Texas; Southern Colorado Power Division of Central Telephone & Utilities Corp. (power plant) in Canon City; Colorado State Hospital in Pueblo; and Martin Marietta (cement plant) in Lyons. Future competition may be directed at Great Western Sugar Co. and the Federal Center in Denver.

The cost to DCC for obtaining the hydrology study in question is estimated to be \$50,000 for drilling costs and \$12,300 for the analysis and write-up of the hydrology report. Such costs, estimated at a total of \$62,300, can be critical in securing or maintaining a position in coal sales given the tight competitive market described above. The cost of these drilling operations and hydrology studies are recognized by Colorado coal operations as representing the highest single component cost in permit applications. To make such hydrology reports readily available to one's competitors would be contrary to all equitable considerations and contrary to the legal standards found in §24-72-104(3)(a)(IV) of the Colorado Open Records Acts.

Dorchester feels that the foregoing analysis of legal authorities and factual assertions of significant harm to DCC's competitive position provides ample support for its claim of confidentiality.

It may be appropriate to re-emphasize that there appears to be no legal authority for CMLR to dispute an operator's claim of confidentiality once exercised by the operator. In addition, under current Board Rule 2.07.5, it is noted that "information contained in permit applications shall be open, upon written request, for public inspection...." (Emphasis added) It should be clear that this process, if at all authorized by law, of making a determination as to the appropriate classification and treatment of data as confidential, begins with a written request for public

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inspection. As the CMLR staff has access to even confidential information in its permit review function, such written requests should, and presumably would be initiated from some outside source. It would appear that at this stage and time some review of confidential data claims might commence once such written request was filed.

It is this writer's opinion that a "completeness" letter determination stage has absolutely no bearing on this matter of confidential data claims. It should be noted that Rule 2.07.4(4)(a) appears contradictory and without legal authority when it refers to "data and/or other information if it is determined by the Division to be confidential according to 2.07.5." Rule 2.07.5, as written and based on its cited statutory authority, does not clearly provide authority for a discretionary determination by the CMLR staff of the appropriateness of confidential data claims. The authority in §34-33-110(4), which refers explicitly to an exception to disclosure of coal seam data, cannot be read and applied without regard to the applicability of §24-72-104(3)(a)(IV) of the Colorado Open Records Act. Thus, once the operator files a MRP application or written request for confidential treatment under authority of §24-72-104(3)(a)(IV) of the Colorado Open Records Act, this designation of confidential data cannot be contradicted during the initial "completeness" review process. Once a written request is received by the CMLR for disclosure of a claimed confidential matter, only then might an inquiry be conducted into the appropriateness of the confidentiality claim. I would presume that an analysis of applicable state law and common law determinations of privileged or confidential data would then be reviewed against the assertions of legal authority and facts presented by the applicant. Subsections (4), (5) and (6) of §24-72-204 of the Colorado Open Records Acts sets forth the procedures for the CMLR to respond to such written requests for public disclosure, including the rights and remedies available to the requestor and to the official custodian of any public record.

I apologize for the length of this letter, but the precedential nature of this matter and the lack of clarity in the Colorado statutes required the length and depth of this analysis. As noted above, I would be pleased to meet with you and Lew Woods to discuss this matter further. I would be happy to supply you with any further research or factual data if you deem it necessary to support our claim.

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I believe it would be advisable to continue to review this important matter on a rationale and reasonable time course and not move to a precipitous decision based on some imagined time constraint. Please contact me when you are ready to discuss further.

Sincerely,

DELANEY & BALCOMB, P.C.

By



David R. Sturges

cc: Darrel Hesper
Lee Acre