

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Application for an Underground Gas Storage Permit Pursuant to Environmental Conservation Law (ECL) Article 23, Title 13,

- by -

FINGER LAKES LPG STORAGE, LLC,

Applicant.

**RULING OF THE CHIEF
ADMINISTRATIVE LAW
JUDGE**

DEC Permit Application ID No.
8-4432-00085

September 8, 2017

**RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE
ON MOTION TO AFFIRM CONFIDENTIALITY OF
PROTECTED MATERIALS**

Pursuant to paragraph 5(b) of the confidentiality agreement and order entered in this matter, applicant Finger Lakes LPG Storage, LLC (applicant or Finger Lakes LPG) seeks a ruling confirming the confidentiality of certain documents submitted to the Department of Environmental Conservation (Department) in support of its application for an underground storage of gas permit. Pursuant to paragraph 3(g) of the confidentiality agreement and order, full-party petitioner Seneca Lake Pure Waters Association (SLPWA) also moves for a ruling disclosing certain documents on the ground that Finger Lakes LPG waived the confidentiality of those documents. For the reasons that follow, Finger Lakes LPG's motion is granted in part and otherwise denied. SLPWA's motion is denied.

I. PROCEEDINGS

On October 9, 2009, Finger Lakes LPG applied to the Department for an underground storage of gas permit pursuant to ECL article 23, title 13. Applicant proposes to construct a multi-cycle liquid petroleum gas (LPG) storage facility for the storage of liquid propane in the Town of Reading, Schuyler County. The storage facility would use existing underground caverns located in the Syracuse salt formation created by US Salt (an affiliate of applicant) and its predecessors' salt production operations. The facility would connect to the existing TE Products Pipeline Company, LLC (TEPPCO) LPG interstate pipeline, and would ship LPG by pipeline.

In support of its application, applicant submitted project-related documents it claimed are confidential and, thus, exempt from public disclosure pursuant to the Freedom of Information Law (Public Officers Law article 6 [POL or FOIL]). Specifically, applicant claimed that the documents contain trade secrets, confidential commercial information, critical

infrastructure information, or a combination thereof and, thus, are exempt from disclosure pursuant to POL § 87(2)(d) and (f), and POL § 89(5)(a)(1-a). In addition, applicant claimed some documents are exempt from disclosure under ECL 23-1303 and, therefore, exempt from disclosure under POL § 87(2)(a).

During the period of permit application review by Department staff, several members of the public made FOIL requests seeking disclosure of the documents applicant claimed are confidential. In a series of FOIL responses and one FOIL appeal, Department staff confirmed the confidentiality of many of the documents submitted by applicant (see NYSDEC OHMS Document No. 201166576-00004, Doc. List II.A-I).¹

In August 2014, the matter was referred to the Department's Office of Hearings and Mediation Services (OHMS) for permit hearing proceedings pursuant to 6 NYCRR part 624 (Part 624). In Part 624 proceedings, all rules of privilege are observed by the Administrative Law Judge (ALJ) and the Commissioner (see 6 NYCRR 624.9[a][1]; 624.8[b][1][vii], [viii]). In addition, under the Department's FOIL regulations, determinations of any claims relating to trade secrets, confidential commercial information, or critical infrastructure information that arise in a Part 624 proceeding are reserved to OHMS and the Commissioner (see 6 NYCRR 616.7[e]).

Accordingly, to allow potential parties to the Part 624 proceeding access to the documents applicant claimed to be confidential without the need for a ruling on confidentiality from the ALJ, a confidentiality agreement and order (Order, attached) was issued for use by the parties. Many of the parties to the issues conference in this proceeding executed an Order with applicant and filed the Order with the ALJ.²

¹ Each document is marked as "NYSDEC OHMS Document No. 201166576" followed by a hyphen and a five digit suffix. Hereafter, documents will be referenced as "OHMS Doc. No." followed by the five digit suffix. If the document also appears on the document list in this matter last updated on August 30, 2017 (attached), the document is also identified with "Doc. List" and the document list number.

² The following parties have confidentiality agreements with applicant on file with OHMS:

- Gas Free Seneca (Deborah Goldberg, Earthjustice) (11/2/14)
 - Dr. Howard C. Clark (11/10/14)
- Seneca Lake Pure Waters Association (11/13/14)
 - Alberto S. Nieto (11/30/14)
 - Raymond C. Vaughan (12/15/14)
 - Mary Anne Kowalski (11/11/14)
 - Richard Weakland (8/29/16)
- Finger Lakes Wine Business Coalition (John L. Barone) (12/23/14)
- City and Town of Geneva and Village of Watkins Glen (Jon Krois, NRDC) (1/9/15)
- Dr. John Halfman (Seneca Lake Communities) (2/11/15)

Among other things, the Order requires the parties to execute a non-disclosure certificate prior to receiving any materials designated by applicant as “protected,” and to treat those materials as confidential and in accordance with the terms of the order (see Order ¶¶ 3[b], 4[a]). The Order requires applicant to physically mark each page of any protected materials it produces with the phrase “protected materials” or words of similar import (see id. ¶ 4[d]). In addition, if the materials produced by applicant contain critical infrastructure information, applicant is to additionally mark on each page containing such information the phrase “contains critical infrastructure information -- do not release” (id. ¶ 4[e]). The parties to the Order are allowed to refer to protected materials in briefs, motions, testimony, exhibits, and other materials provided that separate versions of documents are produced, one version of which is unredacted and marked as such, and one version of which omits the protected materials (see id. ¶ 3[i]). Finally, the Order contains procedures for challenging applicant’s designation of materials as protected materials (see id. ¶ 5[b]).

Notwithstanding the issuance of the confidentiality agreement and order, on January 9, 2015, full-party status petitioners SLPWA and Gas Free Seneca (GFS) filed a notice pursuant to section 5(b) of the Order contesting the “protected materials” designation on all documents on a compact disk provided to petitioners by applicant (see Letter from Rachel Treichler to Chief ALJ [1-9-15], OHMS Doc. No. 00027; Confidential Documents CD, OHMS Doc. No. 00003B). In response, pursuant to paragraph 5(b) of the Order, applicant served and filed a motion dated January 26, 2015, to affirm the confidentiality of protected materials (see OHMS Doc. No. 00028). Attached to the motion are exhibits A through H, and an affidavit of John A. Istvan dated January 26, 2015.

A response in support of the motion was filed by Department staff on February 20, 2015 (OHMS Doc. No. 00034). SLPWA (OHMS Doc. No. 00035) and GFS (OHMS Doc. No. 00036) each filed responses in opposition to the motion dated February 20, 2015, with exhibits attached.

Subsequently, by letter dated May 7, 2015, SLPWA requested a ruling pursuant to paragraph 3(g) of the Order allowing it to release its petition and issues conference brief to the public without redaction (see Letter from Rachel Treichler to Chief ALJ [5-7-15], OHMS Doc. No. 00049). SLPWA argued that because applicant posted certain documents, including the executive summary of two documents previously designated as protected materials, on a public website, applicant waived its claims to confidentiality in documents that form the basis of its public assertions.

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- NYPGA and PGANE (A.B. Howard and Matthew Griesemer) (2/9/15)
 - NPGA (Jeffrey Petrash) (2/9/15)
 - Schuyler County Legislators Harp and Lausell (2/12/15)

I authorized responses to SLPWA's May 7, 2015 letter. Applicant filed a letter in response dated May 22, 2015, opposing SLPWA's request (see Letter from Kevin M. Bernstein to Chief ALJ [5-22-15], OHMS Doc. No. 00050). No other submissions in response to SLPWA's letter were received.

II. DISCUSSION

A. Applicant's Motion to Confirm Confidentiality

Under the Order, the parties have agreed to use Part 624's motion practice rules for the resolution of any confidentiality challenges, with the applicant bearing the burden of proof on any motion to confirm confidentiality (see Order ¶ 5[b]). At the issues conference stage of a Part 624 proceeding, the substantive law applicable to applicant's motion is the law governing FOIL (see 6 NYCRR 624.7[a]).

Under FOIL, agency records are presumptively open to public inspection unless a specific exemption to disclosure applies (see Matter of Beechwood Restorative Care Ctr. v Signor, 5 NY3d 435, 440 [2005]). Because the overall purpose of FOIL is to afford the public greater access to governmental records, any claimed exemption is interpreted narrowly (see Matter of Markowitz v Serio, 11 NY3d 43, 51 [2008]). To meet its burden, the party claiming an exemption must articulate a particularized and specific justification for denying access (see id. at 50-51).

FOIL lists several statutory exemptions from disclosure (see POL §§ 87[2], 89[5][a][1-a]). The exemptions at issue in this matter include the exemptions for records specifically exempted from disclosure by State or federal law (see POL § 87[2][a]), for trade secrets or confidential commercial information (see POL § 87[2][d]), and for critical infrastructure information (see POL §§ 87[2][f]; 89[5][a][1-a]). Each exemption claimed is addressed in turn.

Finger Lakes LPG notes that many of the documents contained on the confidential documents CD have been the subject of prior FOIL requests and appeals. Accordingly, Finger Lakes LPG argues that Department staff's prior determination should be honored and affirmed. As noted above, however, the determination of confidentiality claims that arise in Part 624 permit hearing proceedings are reserved to the ALJ and Commissioner (see 6 NYCRR 616.7[e]), and are reviewed de novo by the ALJ and the Commissioner. Nevertheless, Department staff's prior determinations, if any, are appropriately considered by the ALJ and the Commissioner when making confidentiality determinations. Also appropriately considered are the confidentiality grounds asserted by an applicant when the records were originally furnished to the Department and in response to prior FOIL requests for those records (see POL § 89[5][a]; 6 NYCRR 616.7[a], [c]). This is in addition to the grounds asserted in applicant's motion papers.

1. ECL 23-0313 Exemptions

In response to the prior FOIL requests, applicant relied in part upon, and Department staff applied in part, the statutory disclosure exemptions specifically provided for in ECL 23-0313. ECL 23-0313 establishes disclosure exemption periods for documents, records, and reports the Department is authorized to require from oil, gas, and solution mining operations under ECL 23-0305. The purpose of ECL 23-0313 was to establish appropriate periods of non-disclosure for the documents required by the Department so as to avoid the time consuming, case-by-case evaluation of trade secret claims that well drillers often asserted for those documents (see Mem of State Dept of Env'tl Conservation, 1989 McKinney's Session Laws of NY at 2259). Documents subject to the ECL 23-0313 disclosure exemptions are exempt from disclosure under FOIL (see POL § 87[2][a]).

ECL 23-0305(8)(f) authorizes the Department to require every person who produces, sells, purchases, acquires, stores, injects, or transports oil or gas and associated fluids to file with the Department complete and accurate records of the quantities of oil, gas, and associated fluids handled. ECL 23-0313(1)(a) exempts those records from disclosure for a period of six months. Once the six-month non-disclosure period expires, the record are not exempt from disclosure, notwithstanding any law to the contrary (see ECL 23-0313[1][a]).

Similarly, for well logs, well samples, directional surveys and reports on well drilling and completion required pursuant to ECL 23-0305(8)(i) for all wells subject to the oil, gas and solution mining law, ECL 23-0313(1)(d) provides for a six-month period of non-disclosure after the commencement of actual drilling operations. The disclosure period may be extended up to an additional one and one-half years, for a total of two years, upon the request of the person furnishing the record (see ECL 23-0313[1][d][2]). Once the six-month to two-year period expires, the records are no longer exempt from disclosure (see id.; see also Technical Guidance Memo 90-3 Confidentiality of Records [1990] ¶ 2).

With respect to solution mining, ECL 23-0305(9)(d) authorizes the Department to require the metering or other measuring of brine produced by solution mining, and the maintenance of records from each cavity or group of interconnected cavities until the wells in a cavity have been plugged and abandoned. ECL 23-0313(1)(b) provides that records concerning the metering of brine from solution mining are confidential and not subject to release to the public without the consent of the producer. Thus, the period of confidentiality for such records is indefinite.

On the other hand, applications for permits, information on the depth of wells, and plugging records of wells subject to the oil, gas and solution mining law are not excepted from public disclosure, notwithstanding any law to the contrary (see ECL 23-0313[1][c]). Thus, these records are never exempted from public disclosure and are releasable under FOIL notwithstanding any claims of confidentiality (see Technical Guidance Memo 90-3 at ¶ 2).

Records not specified in ECL 23-0313 may nonetheless be eligible for confidential status as trade secrets, confidential commercial information, or critical infrastructure under FOIL. Records relevant to oil, gas and solution mining that are examined for confidential treatment under FOIL include detailed analysis, opinion, interpretation or evaluation of factual data, such as reservoir studies or analyses, and records, reports, or studies of formations or geological phenomenon (see Technical Guidance Memo 90-3 at ¶ 3). Whether these bases for confidentiality are applicable to the documents involved in this matter are discussed further below.

Several of the records Finger Lakes LPG claims are confidential are well logs, directional surveys, and well drilling and completion reports subject to the ECL 23-0313(1)(d) six-month to two year confidentiality period (see Appendix A, Confidential Documents List [9-8-17] [Appdx A], Item Nos. 24, 26, 30, 48, 49, 50, 54, 62³, 65, 69, 70, and 71 [attached]). Department staff previously released many of these records on the ground that the ECL 23-0313(1)(d) confidentiality period had expired. The applicable confidentiality period has also expired for the remainder of the records. Accordingly, the well logs, directional surveys, and well drilling and completion reports are releasable pursuant to ECL 23-0313(1)(d). Note, however, that the well drilling and completion reports in item nos. 69 and 71 are subject to redaction to protect confidential commercial information (see discussion below).

Some records Finger Lakes LPG claims are confidential contain information concerning the metering or measuring of brine produced as a result of solution mining (see Appdx A, Item Nos. 40 [portions of pages 3-4 and 12], 42, 47, 51 [portions of pages 3-4, and 12 and revised Exh G], 53, and 59).⁴ Department staff previously withheld these records on the ground that they are confidential pursuant to ECL 23-0313(1)(b) (subdivision 1[b] exemption). I agree. Accordingly, these records are either withheld in their entirety or redacted on the ground that the records pertain to the metering or measuring of brine produced by solution mining.

Department staff also withheld several gallery maps and cross-sections, sonar surveys, and portions of well reports on the ground that they are records concerning solution mining subject to the subdivision 1(b) exemption (see Appdx A, Item Nos. 63, 65-72). In addition, Finger Lakes LPG claimed this exemption for gallery maps and cross sections that have not yet been the subject of a FOIL determination (see id., Item Nos. 74 and 75). Department staff argues that the subdivision 1(b) exemption applies to all records concerning solution mining (emphasis added), not just records concerning the metering or measuring of brine.

Department staff's interpretation of the scope of the subdivision 1(b) exemption is over broad. As noted above, ECL 23-0305(9)(d) provides that with respect to solution mining

³ Note that the confidential documents CD provided to the ALJ does not contain an unredacted version of item no. 62. Accordingly, applicant is directed to provide an unredacted copy of item no. 62 to the ALJ and to the parties subject to the confidentiality Order.

⁴ Item no. 37 (Capacity Matrix) was released by Department staff in response to a FOIL request. See discussion below.

areas, the Department has the power to “[r]equire metering or other measuring of brine produced by solution mining, and the maintenance of the records from each cavity or group of interconnected cavities until the wells in a cavity have been plugged and abandoned.” Subdivision 1(b) expressly provides that “[n]otwithstanding any law to the contrary, records or portions thereof pertaining to metering or other measuring of brine produced by solution mining and to each solution mining cavity or group of interconnected solution mining cavities shall not be released by the department for publication nor be available to the general public without the consent of the producer.” Thus, on its face, subdivision 1(b) refers to the specific records authorized by ECL 23-0305(9)(d), that is, records of brine production from solution mining, whether from a single well or from a group of interconnected wells. Nothing in subdivision 1(b) expressly refers to “all” records associated with solution mining.

Moreover, an examination of the legislative history of subdivision 1(b) supports a narrow interpretation of the statutory language. ECL 23-0313 (Public access to records) was enacted in 1989 (see L 1989, ch 721). Prior to 1989, the operative language of subdivision 1(b) was contained in ECL 23-0305(9)(d), which authorized the Department to

“[r]equire metering or other measuring of brine produced by solution mining, and the maintenance of the records from each cavity or group of interconnected cavities until the wells in a cavity have been abandoned and plugged. These records shall be given to the department on request and shall not be released by the department for publication or be available to the general public without consent of the producer”

(L 1981, ch 846 [emphasis added]). Thus, as originally enacted, the disclosure exemption applied only to the records concerning brine production from solution mining.

When the Legislature enacted ECL 23-0313, it moved existing disclosure provisions, including the brine production exemption, from various subdivisions of ECL 23-0305, and placed them in ECL 23-0313 (see L 1989, ch 721). The Legislature’s intent was to consolidate into one section the existing provisions in ECL 23-0305 that pertained to the disclosure of oil and gas records held by the Department (see Mem of State Dept of Env’tl Conservation, 1989 McKinney’s Session Laws of NY at 2258). Other than expressly adding new provisions to ECL 23-0313(1)(d) concerning the six-month to two year non-disclosure provisions for well drilling data, the legislative history evinces no intent to expand the scope of the then-existing disclosure provisions of ECL 23-0305. To the contrary, the Departmental memorandum supporting chapter 721 of the Laws of 1989 expressly notes that the brine production exemption that was previously contained in ECL 23-0305(9)(d) was duplicative of the subdivision 1(b) exemption contained in the newly enacted ECL 23-0313 (see Mem at 2258).

Finally, staff’s broad interpretation of subdivision 1(b) is inconsistent with the directive that FOIL exemptions be narrowly interpreted, particularly given the context in this matter (see Matter of Markowitz, 11 NY3d at 51). In this case, the primary purpose of Finger Lakes LPG’s project is the storage of LPG gas (see Draft Supplemental Environmental Impact Statement, OHMS Doc. No. 00006, Doc. List IV.A.1 [DSEIS], § 2.0, at 6). The solution mining

of salt is only an incidental aspect of applicant's project. To apply a blanket exemption designed to protect information concerning the production levels of solution mining salt producers to records supporting an application for an underground storage of gas permit merely because the gas is proposed to be stored in previously plugged and abandoned solution-mined salt caverns constitutes an unwarranted expansion of the exemption that is inconsistent with FOIL's presumption in favor of disclosure.

Accordingly, although the subdivision 1(b) exemption is applicable to records concerning the volume of brine produced by Finger Lakes LPG as a result of solution mining incidental to its storage of LPG in salt caverns (see Appdx A, Item Nos. 40 [portions], 42, 47, 51 [portions], 53, and 59), it is not applicable to gallery maps and cross-sections, sonar surveys, and the withheld portions of well reports merely because those records pertain to previously solution-mined caverns. The extent to which other FOIL exemptions nonetheless apply to those records is discussed further below.

2. Trade Secret and Confidential Commercial Information Exemption

For a majority of the documents contained on the confidential documents CD, Finger Lakes LPG invokes the trade secret exemption, the confidential commercial information exemption, or both. Under FOIL, an agency may deny access to records or portions of records that (1) are trade secrets, or (2) are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise (see POL § 87[2][d]). The former exemption is hereafter referred to as the trade secret exemption; the latter, the confidential commercial information exemption.

The Department's FOIL regulation provide further definitions and factors to be considered in making a determination whether to apply either or both of these two exemptions (see 6 NYCRR 616.7[c]). Under the regulations, a trade secret may consist of, but is not necessarily limited to, any formula, pattern, process, procedure, plan, compound, or device that is not published or divulged and which gives an advantage over competitors who do not know, use, or have access to such data or information (see 6 NYCRR 616.7[c][2][i][a]). Confidential commercial information may consist of customer lists, revenue, expense, or income information, or other compilations of information that is not published or divulged and which if disclosed would likely cause substantial injury to the competitive position of the subject enterprise (see 6 NYCRR 616.7[c][2][i][b]).

Additional factors to consider when determining whether to apply either the trade secret or confidential commercial information exemptions include:

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

- (2) the extent to which the information is known by the person's employees and others involved in the business;
- (3) the extent of measures taken by the person to guard the secrecy of the information;
- (4) the value of the information to the person and to the person's competitors;
- (5) the amount of effort or money expended by the person in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others

(see 6 NYCRR 616.7[c][2][ii]-[vii]).

a) Records Publicly Available

As noted above, one of the factors to consider in determining whether records constitute trade secrets or confidential commercial information is the public availability of the records or information. Two records previously redacted by the Department -- the Department's notice of incomplete application (NOIA) and second NOIA -- were subsequently released by the Department in their entirety in Appendix O of the DSEIS (see Appdx A, Item Nos. 15 and 39). Similarly, Department staff denied confidential status to its third NOIA in response to FOIL request no. 11-1732 (Campbell) (see *id.*, Item No. 52; see also Letter from Peter Briggs to Kevin Bernstein RE: Trade Secret Determination - FOIL #11-1732 [8-9-11] [Briggs 8-9-11 Letter], OHMS Doc. No. 00004, Doc. List II.F, Summary, at 1). Accordingly, all three NOIAs should be released in their entirety.

In response to FOIL request no. 10-0541 (Mantius), Department staff released applicant's April 2010 Finger Lakes Cavern Volumes and Salt Tonnage Extracted or to be Extracted as Table A to applicant's full environmental assessment form (see Letter from Peter Briggs to Kevin Bernstein RE: Trade Secret Determination - FOIL #10-0541 [8-17-10], Doc. No. 00004, Doc. List II.A). Accordingly, item no. 37, which is the same document, should be released in its entirety.

Also in response to FOIL request no. 11-1732, Department staff denied confidential status to Attachment I of Finger Lakes LPG's response to the third NOIA, which is a Finger Lakes LPG Gallery 1 Mechanical Integrity Test (MIT) pressure test report and chart dated 1985 (see Appdx A, Item No. 60). Accordingly, Attachment I should be released in its entirety.

The Department also released revision 9 of the Vertical Section A-A' (see *id.*, Item No. 74). Accordingly, Vertical Section A-A' revision 9 and all prior versions of the Section, which are included in revision 9, should be released (see *id.*, Item Nos. 6, 33, 46, 56, 72,

73, 74, and 75). In addition, the figure entitled “Well No. 31 Stratigraphy Projected to Gallery No. 1” included in Exhibit 3 of Tab C of applicant’s October 9, 2009 storage permit application (see id., Item No. 4) should be released on the ground that it contains the same information as is contained on Vertical Section A-A’, which is publicly available.

In response to a federal Freedom of Information Act (FOIA) request, the United States Environmental Protection Agency (EPA) released, either in whole or in part, several records contained in applicant’s October 2009 application and its response to the Department’s first NOIA (see id., Item Nos. 1,⁵ 4, 8, 9, 10, 11, 16, 17, and 18; see also Letter from Eric Schaaf, Regional Counsel, EPA, to Joseph Campbell RE: FOIA Request 02-FOI-00738-12 [12-18-12], OHMS Doc. No 00036, Exh A).⁶ Accordingly, those records are releasable to the extent they were released by EPA. Also, a redacted version of item no. 38 should be released on the ground that it is virtually the same record as item no. 11 released in part by EPA.

b) Confidential Commercial Information

Finger Lakes LPG asserts that the materials submitted in support of its underground gas storage application, including the reservoir suitability report, geological and engineering information and mapping, cross sections, capacity information, well log information, work plans and reports, and responses to the Department, constitute confidential commercial information and, therefore, should be withheld from disclosure pursuant to POL § 87(2)(d). Finger Lakes LPG argues that these materials involve specific expertise unique to the underground gas storage industry, are not known outside applicant, are safeguarded by applicant, and are expensive to develop. Furthermore, Finger Lakes LPG argues that because these materials are “partially transmutable” to other gas storage projects, they are of value to competitors who would receive a windfall if they are publically released and would allow competitors to disadvantage Finger Lakes LPG in the competitive LPG distribution market (Letter from Kevin Bernstein to Chief ALJ [1-26-15], OHMS Doc. No. 00028, at 7).

In support of its arguments, Finger Lakes LPG offers the affidavit of its expert, John A. Istvan (see Istvan aff [1-26-15], OHMS Doc. No. 00028, Attach). In his affidavit, Mr. Istvan states,

“It is my opinion that the release of this information could undermine Finger Lakes’ competitive position. This kind of information can be obtained only through a significant investment of time and resources. If the confidentiality of this information is

⁵ The unredacted version of Item No. 1, applicant’s October 9, 2009 storage permit application, is located on the confidential documents CD in a document entitled “October 09, 2009 Letter.pdf” (last modified 8/22/2014). The confidential documents CD also contains (1) an October 5, 2009 “DEC Letter with attachments.pdf” (last modified 10/9/2012), and (2) “Reservoir Suitability Report with attachments.pdf” (last modified 10/9/2012). These two additional documents are incomplete versions of the October 2009 storage permit application. Accordingly, they are releasable to the extent the Item No. 1 is releasable.

⁶ I have not been supplied with copies of items 1, 8, 9, 10 and 18 released by EPA. Nevertheless, to the extent the records were released in part by EPA, they are releasable in this proceeding.

compromised, competitors of Finger Lakes could potentially exploit access to this information to their own benefit without having made this otherwise-necessary investment”

(id. ¶ 18).

For the confidential commercial information exemption to apply, the party claiming the exemption must demonstrate not only that the information was obtained from a commercial enterprise, but that release of the information would cause substantial injury to the competitive position of the subject enterprise (see Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 421 [1995]). Demonstration of “substantial injury” requires a showing that the subject enterprise is in actual competition with other entities, and that the release of the information would likely cause it substantial competitive injury (see id.). Moreover, the party claiming the exemption has the burden of presenting specific, persuasive evidence that disclosure will cause it to suffer competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm (see Matter of Markowitz, 11 NY3d at 51; Matter of Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 567 [1984]).

Applying the above standards, courts have concluded that cost and inventory data identifying and tracking property assets a utility used to transmit and distribute electricity had significant commercial value to the utility’s competitors and, therefore, was subject to the exemption for confidential commercial information (see Matter of City of Schenectady v O’Keeffe, 50 AD3d 1384, 1386-1387 [3d Dept], lv denied 11 NY3d 702 [2008]). Similarly, the Court of Appeals held that release of a booklist compiled by a college textbook seller could cause the seller competitive injury because a competitor could use the list to sell books to the seller’s customers (see Matter of Encore Coll. Bookstores, 87 NY2d at 421).

On the other hand, the courts and this Department have concluded that information that is unique to a project sponsor’s project and could not be used by a competitor in support of its own project lacks value to the competitor and, thus, would not cause competitive harm if released (see Matter of Akzo-Nobel Salt, Inc., Letter Decision from Asst. Commissioner Peter Bergen to Kenneth A. Payment RE: FOIL Appeal [12-1-95] [Bergen Letter], at 4; see also Matter of Sunset Energy Fleet, L.L.C. v New York State Dept. of Env’tl. Conservation, 285 AD2d 865, 868 [3d Dept 2001]). If a competitor could not rely on the engineering and consulting work of the project sponsor but, instead, would have to expend resources on engineering and consulting work of its own, the project sponsor’s information is not exempt from disclosure as confidential commercial information (see Akzo-Nobel Salt, Bergen Letter at 4-5; see also Matter of Hecht, Letter Decision from Asst. Commissioner Louis A. Alexander to Kevin G. Roe RE: FOIL Appeal No. 02-29-7A [7-11-05], at 16-17).

Here, many of the records Finger Lakes LPG claims are confidential commercial information contain information concerning the volumes of and interconnections among its caverns, and the pressures at which brine and LPG are stored. This information would allow a

competitor to determine Finger Lakes LPG's product storage capacity, reserve storage capacity, and other information about its operations that would place Finger Lakes LPG at a disadvantage if released to its competitors in the LPG storage and transportation business (see Matter of City of Schenectady, 50 AD3d at 1386-1387). Accordingly, these records should be withheld on the ground that they constitute confidential commercial information. The records include gallery maps (see Appdx A, Item Nos. 2, 13, 21, 41, 53, 55, 66, 67, 68, 72, 73, 74, 75), a FLAC3D model (see id. Item No. 4), vertical sections except for the Vertical Section A-A' discussed above (see id. Item Nos. 5, 33, 44, 56, 67, 72, 75), hydrotest data (see id. Item Nos. 7, 19, 27, 28), well head brine pressures (see id. Item Nos. 76 and 77), cavern sonars (see id. Item Nos. 25, 57, 63, 65, 70, 71), finite element analyses (see id. Item Nos. 36 and 43), and cavern capacity matrices and charts (see id. Item Nos. 47 and 59).

Records that should be partially redacted to withhold information concerning cavern pressures or volumes include applicant's MIT procedures (see id., Item Nos. 11 [remainder was released by EPA and is subject to release here (see discussion above)], 38, and 64), portions of two letters from Barry Moon to Linda Collart (see id., Item Nos. 14 and 71), portions of applicant's May 14, 2010 response to staff's first NOIA redacted or withheld by EPA (see id., Item Nos. 16 and 18), the dimensions on well completion reports and diagrams (see id., Item Nos. 69⁷ and 71), and portions of applicant's Gallery 10 work plan report (see id., Item No. 61).

For the remaining records, Finger Lakes LPG has failed to carry its burden of providing specific, persuasive evidence that release of the records will cause it to suffer substantial competitive injury. For example, several maps provide an overall site plan of applicant's proposed facility (see Appdx A, Item Nos. 3, 12, and 22).⁸ Mr. Istvan's conclusory assertion quoted above, Finger Lakes LPG's claims asserted on prior FOIL requests, and Department staff's prior FOIL determinations, if any, do not specifically explain how applicant's site plans are confidential or how release of the site plans to applicant's competitors would cause applicant any competitive injury.

Some records withheld as confidential contain the same or substantially the same information as records that have been released. For example, U.S. Salt's application to convert well 58 (see Appdx A, Item No. 14), which was withheld, contains the same information as Inergy's application to convert the well, which was released (see OHMS Doc. No. 00003, Doc. List I.A.3). Mr. Istvan's statement above does not specifically explain how the information on

⁷ Item no. 69 also contained a cross section for well 58 that Department staff withheld on the ground that ECL 23-0313(1)(b) applied. Applicant has not provided an unredacted copy of the well 58 cross section to the ALJ. Accordingly, applicant is directed to provide the cross section to the ALJ for in camera review and further determination regarding its confidentiality.

⁸ To the extent Finger Lakes LPG claimed the site plans are critical infrastructure, those claims are discussed below.

U.S. Salt's application is confidential or how its release will cause competitive injury to applicant.⁹

Similarly, portions of Finger Lakes LPG's October 9, 2009 Reservoir Suitability Report (RSR) (see Appdx A, Item No. 1, sections 1-3, 12, 13, 14 [except the fourth paragraph], 16 and 17), which were withheld by the Department, contain virtually the same information as the same sections contained in its May 14, 2010 RSR submitted in response to staff's first NOIA, which were released by the Department (see id., Item No. 20). Mr. Istvan's statement above, applicant's response to prior FOIL requests, and Department staff's prior FOIL determinations do not specifically explain how the information in the above-referenced redacted sections of the 2009 report are confidential given the release of the same information in the 2010 report, or how release of the redacted section from the 2009 report will cause competitive injury to applicant.

With respect to the remaining sections of the October 2009 RSR, and the redacted sections of the May 2010 RSR, applicant's conclusory assertions fail to carry its burden of demonstrating that they are confidential or how release of the sections will cause competitive injury to applicant. Sections 4 and 7.2 in both RSRs appear to be based on publicly available information. The circumstance that applicant had to compile, verify and analyze the information does not render the information exempt from disclosure (see Matter of Sunset Energy Fleet, 285 AD2d at 867). The remaining sections contain information unique to the specific wells and caverns involved in Finger Lakes LPG's project. Applicant fails to explain how a competitor could use the information for its own wells and caverns without conducting its own tests. Accordingly, Finger Lakes LPG fails to carry its burden of establishing that the information is confidential commercial information. Nevertheless, the remaining sections of the RSRs should be redacted to remove cavern volumes and pressures, which is confidential commercial information as concluded above. In addition, the fourth paragraph of section 14 of the October 2009 RSR and the fifth paragraph of section 14 of the May 2010 RSR should be redacted on the ground that they constitute critical infrastructure information, as discussed further below.¹⁰

Applicant also fails to carry its burden demonstrating that three exhibits to the October 2009 RSR -- Exhibits 8, 9 and 10 (see Appdx A, Item Nos. 8-10) -- have value to any competitors. As noted above, the EPA released these three exhibits in part and, thus, they are releaseable in part here. With respect to any redactions by EPA, the core descriptions for well 59 (see id., Item No. 8) and the rock mechanics report for wells 58 and 59 (see id., Item No. 9) are unique to the wells at issue. Any competitor would not be able to rely on these reports, but would have to evaluate its own wells as part of any application to the Department. Applicant's conclusory assertions fail to establish that release of these documents would cause competitive injury to applicant and, thus, the information is not confidential commercial information. As to the geomechanical evaluation for Gallery 2 (see id., Item No. 10), those portions containing cavern volumes and storage pressure are redactable as confidential commercial information.

⁹ The record before the ALJ does not contain any communication from Finger Lakes LPG asserting any ground for withholding U.S. Salt's application, or any FOIL determination by the Department with respect to the record.

¹⁰ To the extent the EPA released any of this information, however, it should be released as discussed above.

Applicant has failed to establish that the remainder of the evaluation -- including the figures that repeat information contained on Vertical Section A-A' (see id., Item No. 74) -- which is specific to the subject gallery, would cause competitive injury if released.

With respect to several exhibits to the May 2010 RSR, applicant again fails to demonstrate that they have value to competitors. The well 58 core log (Exh 5, Appdx A, Item No. 23) is unique to well 58 and lacks value for other wells. The well 58 mechanical integrity test (Exh 13, Appdx A, Item No. 29) is also unique to that well, except for the test pressures, which should be redacted as confidential commercial information. The remainder of exhibit 14, which consists of a sonar of the well 58 well bore (see Appdx A, Item No. 30), contains information that could easily be calculated by a competitor, and gives no insight into applicant's storage capacity or reserves. The isopach maps of the Camillus shale (see Exhs 15-16, Appdx A, Item Nos. 31-32) are unique to the Watkins Glen brine field and would not be useful in other brine fields. The structural cross sections in exhibit 17 (see Appdx A, Item No. 33) are also unique to the wells depicted and lack value for other wells. Exhibits 18 and 19 (see Appdx A, Item Nos. 34 and 35) are the same documents as Item Nos. 8 and 9, and lack value to competitors as discussed above. Again, Mr. Istvan's conclusory statement above, applicant's response to prior FOIL requests, and Department staff's prior FOIL determinations do not specifically explain how release of the above information will cause competitive injury to applicant.

The same analysis applies to applicant's response and revised response to the Department's second NOIA (see Appdx A, Item Nos. 40 and 51).¹¹ As noted above, each of the two responses contains information exempt from disclosure under ECL 23-0313(1)(b). The responses also contain information regarding cavern volumes that should be redacted as confidential commercial information. Applicant otherwise fails to establish how the remainder of the responses, which contain information specific to the wells and galleries under discussion, could be used by a competitor to cause competitive injury to applicant. Similarly, with respect to applicant's Gallery 10 Work Plan Report and its proposed hydrostatic test procedures (see Appdx A, Item Nos. 61 and 64), other than those sections that contain information regarding cavern dimensions, and the pressures reported in the test procedures, both of which are confidential, the remainder of the report and test procedures contain information specific to the wells at issue. Applicant has failed to demonstrate how a competitor could use the information in regard to its own wells. Moreover, the test procedures are standard and are not confidential to applicant. Finally, a December 18, 2012 letter from Barry Moon to the Department concerning plugging procedures for well 34 contains information unique to that well and applicant fails to demonstrate how that information could be of use to a competitor (see Appdx A, Item No. 71).

In response to FOIL request no. 10-2517 (Mantius), Department staff withheld as confidential portions of several exhibits and one entire exhibit attached to applicant's response to the second NOIA (see Letter from Peter Briggs to Kevin Bernstein RE: Trade Secret

¹¹ Applicant failed to provide the ALJ with an unredacted version of item no. 51. Accordingly, applicant is to provide item no. 51 to the ALJ and the parties subject to the confidentiality Order with the redactions indicated on the attached Appendix A.

Determination -- FOIL #10-2517 [11-15-10], OHMS Doc. No. 00004, Doc. List II.D; see also Appdx A, Item Nos. 45, 48, and 49). In response to FOIL request no. 11-1732 (Campbell), staff also withheld as confidential interpretive information contained in exhibits to applicant's response to staff's third NOIA (see Briggs 8-9-11 Letter, OHMS Doc. No. 00004, Doc. List II.F; see also Appdx A, Item Nos. 54, 57 and 58). Staff withheld the information on the ground that it contained interpretive reports by applicant's experts subject to the confidential commercial information exemption. Similarly, staff redacted portions of applicant's October 29, 2010 supplemental filing that contain interpretive information (see Appdx A, Item No. 50). This interpretive information, however, is unique to the wells and well fields at issue and, again, staff and applicant fail to establish how a competitor could apply the information to its own wells and well fields. Thus, applicant fails to establish how release of the interpretive information would cause it competitive injury.

c) Trade Secret

On its motion, Finger Lakes LPG argues that its maps, drilling reports, well logs, reports, and various other project-related materials also constitute trade secrets. In arguing that these materials are trade secrets, applicant focuses primarily on the circumstances that these materials took considerable time, effort and money to develop, that the materials were produced and compiled by experts, that the materials are unique and cannot be duplicated without the same investment in expertise, time, effort, and money, and that the materials have been kept strictly confidential by applicant.

Although applicant focuses on several of the factors to be considered when determining whether to apply the trade secret exemption (see 6 NYCRR 616.7[c][2][ii-vii]), applicant fails, as an initial matter, to carry its burden of establishing that the referenced materials constitute trade secrets, as opposed to confidential commercial information (see Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 137 AD3d 66, 69-70 [3d Dept 2016]). To qualify as a trade secret, applicant must first establish that the information in question is a "formula, pattern, device or compilation of information which is used in one's business, and which gives an advantage over competitors who do not know or use it" (Matter of Verizon New York, 137 AD3d at 72 [quoting Matter of New York Tel. Co. v Public Serv. Commn., 56 NY2d 213, 219 n. 3, quoting Restatement of Torts § 757, Comment b]); see also 6 NYCRR 616.7[c][2][i][a]). If the information fits this general definition, the remaining criteria under 6 NYCRR 616.7(c)(2)(ii) through (vii) are evaluated (see id. at 72-73).

Applicant fails to carry its burden of establishing that the referenced materials fit the general definition of a trade secret. In its motion papers, applicant asserts that these materials constitute a "plan" vital to the future operation of the proposed project. This reading of the definition of trade secret would render virtually all materials supplied with a permit application a trade secret and is overly broad.

In response to FOIL request no. 10-0541 (Mantius), applicant argued that its MIT procedures submitted with the May 2010 RSR (see Appdx A, Item No. 38) were specifically developed by applicant or its predecessor and not available to the public (see Letter from Kevin Bernstein to Peter Briggs RE: Freedom of Information Law Request [No. 10-0541] [8-6-10] [Bernstein 8-6-10 Letter], Chart, at 4, OHMS Doc. No. 00004, Doc. List II.A). Applicant noted that “[w]hile MIT procedures may have some common components generally, these procedures were prepared by experts specifically retained by Finger Lakes or its predecessors and should be excluded from disclosure” (id.). To the extent this is read as providing a justification for treating the MIT procedures as a trade secret,¹² it is insufficient. Other than the test pressure, which as concluded above is confidential commercial information, examination of the procedures fails to reveal anything unique to applicant. Indeed, the EPA released the procedures as not confidential as part of its FOIA determination (see Letter from Eric Schaaf, Regional Counsel, EPA, to Joseph Campbell RE: FOIA Request 02-FOI-00738-12 [12-18-12], OHMS Doc. No 00036, Exh A, Chart, at second unnumbered page).

In its remaining responses to prior FOIL requests and in correspondence accompanying permit application submissions, applicant asserted the trade secret privilege only generally (see e.g. Letter from Kevin Bernstein to Peter Briggs RE: Freedom of Information Law Request [No. 10-0834 (Mantius)] [3-29-10], OHMS Doc. No. 00004, Doc. List II.B). Applicant did not otherwise specifically explain how any of the materials constitute a formula, pattern, device or compilation of data developed by and unique to applicant. Thus, applicant fails to establish that the trade secret exemption applies to any of its materials.

3. Critical Infrastructure Information

On its motion, Finger Lakes LPG argues that its proposed storage system and facilities constitute critical energy infrastructure for the State of New York and the northeast United States (see POL § 89[5][a][1-a]). As a result, applicant claims that documents that portray the specific location of certain aspects of its system and the technical specifications of the facilities are exempt from disclosure under FOIL (see 6 NYCRR 616.7[c][2][i][c]). In support of its arguments, applicant cites the federal regulatory definition of “critical energy infrastructure information,” which includes information that “relates details about the production, generation, transportation, transmission, or distribution of energy” and “could be useful to a person in planning an attack on critical infrastructure” (18 CFR 388.113[c]). Applicant also relies on the Department’s prior FOIL appeal determination, which held that portions of applicant’s May 2010 RSR were exempt from disclosure not only as trade secrets or confidential commercial information, but also as critical infrastructure (see Letter from James Eckl to Peter Mantius RE: Freedom of Information Law appeal # 10-20-8A, Freedom of Information Law request # 10-0541 [9-15-10], OHMS Doc. No. 00004, Doc. List II.A [Mantius FOIL Appeal]).

¹² While applicant referred to the MIT procedures as confidential commercial information, it did not specifically invoke the trade secret exemption (see Bernstein 8-6-10 Letter, Chart, at 4).

In further support of its arguments, applicant offers Mr. Istvan's affidavit, in which he states:

“[M]uch of the information contained within these documents could be used to identify specific locations of, and technical details related to, key LPG storage-system components. With LPG serving as a critical means of providing heat, especially to those living in New York and its surrounding states, Finger Lakes believes disclosure of this information outside of the Confidentiality Agreement could jeopardize the availability of necessary utility services to the public”

(Istvan aff [1-26-15] ¶ 19).

In response, SLPWA argues that applicant has not carried its burden of establishing that any of the documents contain critical infrastructure information. SLPWA asserts that the location of the wells and storage caverns applicant proposes for LPG storage, as well as the location of pipelines serving the TEPPCO facility, are publicly known. GFS asserts that the claimed impact the disruption of applicant's proposed facility would have on LPG supplies is unsupported and does not rise to the level of impact required to qualify the facility as critical infrastructure. In addition, GFS asserts that the information applicant seeks to withhold merely gives the general location of applicant's facilities and, therefore, does not fall within the federal definition. In its response, Department staff does not expressly address applicant's critical infrastructure claims.

Under FOIL, an entity furnishing records to an agency may, at any time, identify those records or portions thereof that may contain critical infrastructure information and request that the agency except those records from disclosure under POL § 87(2) (see POL § 89[5][a][1-a]; see also 6 NYCRR 616.7[a][1]). “Critical infrastructure” means “systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy” (POL § 86[5]; see also 6 NYCRR 616.7[c][2][i][c]).

Applicant does not cite, and research fails to reveal, New York case law interpreting and applying the critical infrastructure exemption under FOIL.¹³ The New York State Department of State's Committee on Open Government has concluded that information designated as critical infrastructure must fall within one or more grounds for denial provided for in POL § 87(2)(a) through (j) to be exempt from disclosure (see Comm on Open Govt FOIL-AO-17747 [2009]). This Department's prior FOIL appeal decisions concerning critical infrastructure information are consistent with the Committee's approach (see e.g. DEC FOIL Appeal No. 05-12-0A [David M. Klein], Dec. 1, 2005). In addition, the Department's regulations require consideration of the definition of critical infrastructure as well as the additional factors

¹³ Applicant cites Matter of New York Regional Interconnect, Inc. v Oneida County Indus. Dev. Corp. (21 Misc 3d 1118[A], 2007 WL 5632958 [Sup Ct, Oneida County 2007]). However, in that case, the court noted that petitioner did not raise the critical infrastructure exemption and the court did not consider its relevance (see id. at *10).

applicable to trade secrets and confidential commercial information to determine whether to grant or continue an exception from disclosure on the basis of the critical infrastructure exemption (see 6 NYCRR 616.7[c][2][ii]-[vii]).

As the proponent for application of the exemption, applicant bears the burden of establishing that the subject infrastructure meets the threshold definition of critical infrastructure. Here, applicant's proposed LPG storage facilities and transmission pipelines meet that threshold definition. Petroleum and natural gas transmission facilities and pipelines are recognized by statute as being critical infrastructure (see Executive Law § 716). Applicant's proposed LPG storage and transmission facilities, and pipelines fall within this general definition.

With respect to the specific grounds for denying access provided for under POL § 87(2), on prior FOIL requests, in addition to invoking the trade secret and confidential commercial exemption under POL § 87(2)(d), applicant also invoked the POL § 87(2)(f) public safety exemption. POL § 87(2)(f) provides that an agency may deny access to records or portions of records that "if disclosed could endanger the life or safety of any person." As with the other POL § 87(2) exemptions, the party invoking the public safety exemption has the burden of articulating a specific and particularized justification for denying disclosure (see Matter of Flores v Fischer, 110 AD3d 1302, 1303 [3d Dept 2013], lv denied 22 NY3d 861 [2014]). At a minimum, the party must demonstrate a possibility of endangerment sufficient to invoke the exemption (see Matter of New York Times Co. v City of New York Police Dept., 103 AD3d 405, 407 [1st Dept], lv dismissed 21 NY3d 930, and lv denied 22 NY2d 854 [2013]; Matter of Stronza v Hoke, 148 AD2d 900, 901 [3d Dept], lv denied 74 NY2d 611 [1989]).

Here, information concerning applicant's safety and security devices and protocols could be used by persons planning an attack on applicant's facilities (see 18 CFR 388.113[c][ii]; see also Matter of Flowers v Sullivan, 149 AD2d 287, 297-298 [1989] [access to specifications and other data relating to the electrical, security, and transmission systems of a prison exempt from disclosure under section 87(2)(f)]; Matter of Connolly v New York Guard, 175 AD2d 372, 372-373 [3d Dept 1991]). Accordingly, the documents containing such information should be redacted to withhold the information from disclosure (see Appdx A, Item No. 1, at 13 [section 14, 4th ¶]; id., Item No. 20, at 18 [section 14, 5th ¶]). Similarly, cross-sections that reveal where LPG is proposed to be stored could also be used by persons seeking to cause harm and should be withheld (see id., Item Nos. 44, 56, 72, 75).

With respect to the remaining documents applicant claims contain critical infrastructure information, applicant fails to provide a specific and particularized explanation as to how disclosure of the information could be used by persons seeking to do harm. Applicant claimed that the maps submitted with its application materials contain critical infrastructure information. However, as noted by SLPWA and GFS, the location of applicant's wells and the TEPPCO facilities are publicly known (see 6 NYCRR 616.7[c][2][ii]). Moreover, applicant's maps only show the general location of its proposed facilities (see 18 CFR 388.113[c][iv] [critical energy infrastructure information does not include information that "simply give[s] the

general location of the critical infrastructure])). Applicant's conclusory assertions above are insufficient to establish that release of the maps in this proceeding could possibly result in harm.

As to applicant's responses to the Department's NOIAs, the remaining portions of their RSRs, sonars, MITs, core logs, geological reports, and other reports for which applicant claimed the critical infrastructure exemption, applicant fails to explain how persons seeking to do harm can use that information to disrupt applicant's operations and possibly cause harm to the State's residents or economy. In addition, some of applicant's information was released by the Department in response to prior FOIL requests and, as noted above, by EPA in response to a FOIA request. Accordingly, applicant has failed to carry its burden of establishing that the remaining documents should be exempt from disclosure under the public safety exemption.

Applicant relies on the Department's determination on the Mantius FOIL appeal applying the critical infrastructure exemption to withhold portions of applicant's May 2010 RSR (see Mantius FOIL Appeal at 3rd and 4th unnumb pgs). However, that determination failed to require, or make findings regarding, a specific and particularized showing about how disclosure of the information could possibly be used to harm to the State's residents or economy. Accordingly, I decline to follow the determination.

In sum, information concerning applicant's safety and security measures, devices, and protocols, and information specifically detailing where LPG will be stored should be withheld on the ground that such information constitutes critical infrastructure information which, if disclosed, could endanger the life or safety of any person. Applicant's request that the remaining information identified as critical infrastructure information be exempt from disclosure is denied on the ground that applicant failed to provide a specific and particularized showing that release of such information could possibly be used to harm the State's residents or economy.

B. SLPWA's May 7, 2015 Request

By letter dated May 7, 2015, SLPWA requests a ruling pursuant to paragraph 3(g) of the Order allowing it to release certain documents to the public without redaction (see Letter from Rachel Treichler to Chief ALJ [5-7-15], OHMS Doc. No. 00049). SLPWA argues that because applicant posted certain documents, including the executive summary of two documents previously designated as protected materials, on a public website, applicant waived its claims to confidentiality in documents that form the basis of its public assertions. Accordingly, SLPWA requests a ruling allowing it to release its petition and issues conference brief to the public without redaction, and to release documents that refute applicant's public assertions.

SLPWA's request is denied. Although applicant's public release of documents previously designated as confidential waives the confidentiality privilege for those specific documents, no basis exists under the Order for concluding that applicant waived the confidentiality of any documents it did not release. Nor has SLPWA cited any authority that would support such a proposition. Accordingly, applicant's release of documents to the public

website does not constitute a waiver of the documents that have not been publicly released by applicant and which have been determined to be confidential pursuant to this ruling.

III. RULING

For the reasons stated above, applicant's motion to confirm the confidentiality of documents contained on the compact disk of protected materials provided to petitioners by applicant is granted in part and otherwise denied.

Those documents for which access has been granted in whole are identified in Appendix A, attached. Those documents for which access has been granted in part are also identified in Appendix A, and redacted versions of those documents are being provided to the parties subject to the Confidentiality Agreement and Order. Applicant has five (5) business days from the date of issuance of this ruling to provide the ALJ and parties subject to the Order with a copy of (i) item no. 51 redacted as provided for in the attached Appendix A, and (ii) item no. 62 without redactions. Within five (5) business days, applicant is further directed to provide an unredacted copy of the well 58 cross section (see Appdx A, item no. 69) to the ALJ for in camera review and determination regarding its confidentiality.

SLPWA's May 7, 2015 request is denied.

Pursuant to paragraph 5(b)(i) of the Confidentiality Agreement and Order, those materials the ALJ has determined are not entitled to protection remain subject to the protection afforded by the Order for five (5) business days from the date of issuance of this ruling and, if applicant Finger Lakes LPG files a motion for reconsideration with the ALJ pursuant to 6 NYCRR 624.6(c) or seeks leave to file an expedited appeal to the Commissioner pursuant to 6 NYCRR 624.8(d), for an additional five (5) days.

Any other party seeking to challenge this ruling has five (5) business days from the date of issuance of this ruling to file a motion for reconsideration with the ALJ pursuant to 6 NYCRR 624.6(c) or seek leave to file an expedited appeal to the Commissioner pursuant to 6 NYCRR 624.8(d) (see 6 NYCRR 624.6[e], [g]).

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: September 8, 2017
Albany, New York

Appendix A attached

Attachments (redacted records by email only)

Cc: Louis A. Alexander, Asst. Commissioner for Hearings and Mediation Services
Robert J. Freeman, Executive Director, Committee on Open Government (w/o
attachments)

TO: Attached Service List (w/o redacted records to parties not subject to the Confidentiality
Agreement and Order)