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April 24, 2023

VIA ELECTRONIC AND FIRST CLASS MAIL

Molly Breslin, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-6500

Re: *NYCO Submission of Proposed Land Swap Map and Request for Exemption
from Freedom of Information Law Disclosure*

Dear Ms. Breslin:

I am writing on behalf of NYCO Minerals, LLC ("NYCO") to submit a proposed land swap map related to the mining of wollastonite by NYCO on certain forest preserve land contained in Lot 8, Stowers survey, Town of Lewis, Essex County (the "NYCO Submission") and the land swap authorized under the amendment to Article XIV of the New York State Constitution. Given the confidential nature of the information contained in the NYCO Submission, we request that the information submitted by NYCO to the New York State Department of Environmental Conservation ("DEC" or "Department") be withheld from future disclosure under the Freedom of Information Law ("FOIL").

Under 6 NYCRR § 616.7(c)(2), the following factors are among those the Department may consider in making a determination to grant or continue an exception from disclosure under Sections 87(2)(d) and 89(5)(a)(1-a) of the Public Officer's Law:

- (i) (a) definition of a trade secret – a *trade secret* may consist of, but shall not necessarily be 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;

- (b) definition of confidential commercial information – *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;

(c) definition of critical infrastructure – *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;

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

(iii) the extent to which it is known by the person's employees and others involved in his business;

(iv) the extent of the measures taken by the person to guard the secrecy of the information;

(v) the value of the information to the person and to his competitors;

(vi) the amount of effort or money expended by the person in developing the information; and

(vii) the ease or difficulty with which the information could be properly acquired or duplicated by others.

The information sought to be exempt from disclosure contains trade secret or confidential commercial information in that such information is not publicly available and, if disclosed, would allow competitors to develop such specialized information at little or no cost and would cause substantial injury to NYCO's competitive position in acquiring the properties identified on the map. The location of potential land swap properties is particularly sensitive information given the unique, site-dependent nature of the anticipated transaction with the State of New York.

The parcels identified in the NYCO Submission are those which NYCO believes to be of potential equivalent value to Lot 8 that NYCO proposes to acquire in the land exchange authorized under the Constitutional Amendment to Article XIV of the New York State Constitution. These parcels were selected following significant expenditures on data developed specifically for NYCO. If this information were disclosed to other parties, it could enable those parties to interfere with NYCO's negotiations for the ultimate purchase

of those parcels. Disclosure of this information would likely cause substantial injury to NYCO's competitive position, particularly in relation to parcels for which NYCO has only obtained an option thus far. Based on the foregoing, this document would therefore constitute "Confidential Commercial Information" under 6 NYCRR § 616.7(c)(2)(i)(b).

In addition, the NYCO Submission has not otherwise been published in any kind of journal or article and contains information not known outside of NYCO (see 616.7(c)(2)(ii)). The NYCO Submission is the same type of document which, in the past, NYCO has previously sought and been granted confidential treatment (see 616.7(c)(2)(iv)), is very valuable given the nature of the unique expertise utilized to prepare such document (see 616.7(c)(2)(v and vi)), and cannot be easily duplicated without studying the data developed specifically for NYCO, which data would not otherwise be available or attainable by those other than NYCO or its agents (see 616.7(c)(2)(vii)).

Note that NYCO's request for exemption from disclosure does not immediately obligate DEC to make a final determination concerning NYCO's entitlement to such exemption. However, pursuant to 6 NYCRR § 616.7(b)(1), the NYCO Submission must be maintained apart from other records and excepted from disclosure by the Department until 15 days after the entitlement to such exception has been finally determined by the Department. The Department may choose to make a final determination on its own initiative at any time, or it may defer the determination until such time as it receives a FOIL request involving the NYCO Submission (see NYCRR § 616.7(c)(1)).

Under either circumstance, 6 NYCRR § 616.7(c)(1) imposes certain procedural requirements upon DEC when it determines whether to grant or continue and exception from disclosure. Under 6 NYCRR § 616.7(c)(1), DEC must:

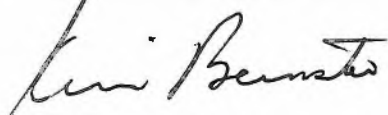
- (i) inform the person who requested the exception of the department's intention to determine whether such exception should be granted or continued;
- (ii) permit the person who requested the exception, within 10 business days of receipt of notification from the department, to submit a written statement of the necessity for the granting or continuation of such exception; and
- (iii) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor. Copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the Committee on Open Government.

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For the foregoing reasons, we request that the content of the NYCO Submission be deemed confidential commercial information and that DEC withhold such document from future disclosure under FOIL. Please do not hesitate to contact me with any questions that may arise during the course of DEC's determination concerning NYCO's entitlement to such exemption.

Very truly yours,

BOND, SCHOENECK & KING, PLLC

A handwritten signature in black ink, appearing to read "Kevin M. Bernstein". The signature is written in a cursive style with a large initial "K".

Kevin M. Bernstein

/ntk