

ILLINOIS POLLUTION CONTROL BOARD
September 17, 1998

QST ENVIRONMENTAL INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 99-40
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by G.T. Girard):

On September 2, 1998, QST Environmental (QST) filed a petition for review of a July 29, 1998 trade secret determination made by the Illinois Environmental Protection Agency (Agency), finding that certain articles filed by QST, on behalf of Roadmaster, cannot be treated as trade secrets under the Environmental Protection Act (Act). The petition is filed pursuant to Section 120.250 (35 Ill. Adm. Code 120.250) of the Board's regulations governing the Identification and Protection of Trade Secrets. Section 120.250(a) provides that "an owner or requester who is adversely affected by a final determination of either the Environmental Protection Agency or the Department of Energy and Natural Resources pursuant to [the Board's regulations governing the identification and protection of trade secrets], may petition the Board for review within 35 days after the entry of a final agency determination." This petition was filed with the Board within 35 days after the entry of the final Agency determination.

Neither the Act nor Part 120 establishes specialized procedures for this review. Although the Board's Part 105 permit appeal rules give the broad outlines for proceedings challenging Agency permit determinations under Section 40 of the Act, proceedings such as this for review of miscellaneous Agency final determinations under Section 5(d) of the Act each have their own peculiarities. Accordingly, the Board has established the procedural framework for trade secret proceedings on a case by case basis. (See, e.g., Devro-Teepak, Inc., v. Illinois Environmental Protection Agency (June 4, 1998) PCB 98-160; Devro-Teepak, Inc., v. Illinois Environmental Protection Agency (June 4, 1998) PCB 98-161; Monsanto Co. v. Illinois Environmental Protection Agency (February 20, 1985) PCB 85-19; and Outboard Marine Corp. v. Illinois Environmental Protection Agency and American Toxic Disposal, Inc. (April 5, 1984) PCB 84-26. As these cases are so infrequently filed with the Board, we will repeat the procedural discussion here.

The parties to this type of proceeding are the requester (as defined in 35 Ill. Adm. Code 120.103(b)), the owner of the article, and the agency whose determination

is the subject of appeal. This does not place a responsibility on the requester to participate in this appeal, but rather affords the requester a right to participate if that person chooses to do so. In this case, QST has not named a requester.

Due to the policy concern for expeditious decisions in appeals of this type, ordinarily the petition should be verified and should state facts and arguments of law sufficient to enable the Board to rule on the petition. The petition fails to state facts and arguments sufficient for the Board to make a determination. However, rather than requiring QST to amend the petition, the Board directs QST to file a brief supporting its claim within 21 days of today's order. The Agency and any requester may respond 14 days after the QST brief is filed.

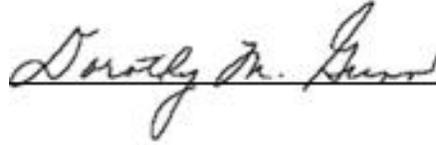
The Agency will be responsible for filing a certified copy of the record which forms the basis of its determination, including as a minimum, properly marked copies of the article itself, any material submitted by the owner pursuant to Part 120 and any other material the Agency relied upon in making its determination. In addition to the actual documents which comprise the record, the Agency shall prepare and file a list of the documents comprising the record. The record must be filed with the Clerk of the Board within 21 days from the date of this order. The Agency's answer to the petition must be filed within 14 days after the record is filed or 14 days after an amended petition is filed, whichever is later.

The trade secret article in question will be handled by the Board pursuant to the applicable Part 120 procedures. In addition, upon a motion by any party, the Board may order that pleadings, transcripts, and exhibits or any portion thereof be segregated from materials which are open to public inspection and be kept secure from unauthorized access in accordance with the Part 120 procedures.

The burden of proof in these appeals rests with the petitioner. In addition, the Board notes Part 120 does not provide an opportunity for a requester to submit evidence to rebut a claim of trade secrecy in the proceeding below. Therefore, although the Board is standing in review posture, new evidence will be accepted upon a demonstration: 1) that it was unavailable to the parties and the Agency at the time that the Agency made its determination; or 2) the party was not given an opportunity under Part 120 to present it to the Agency.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of September 1998 by a vote of 7-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board