ILLINOIS POLLUTION CONTROL BOARD
April 7, 2011

COMMONWEALTH EDISON COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 04-215
	)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MIDWEST GENERATION EME, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 04-216
	)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

Commonwealth Edison Company (ComEd) and Midwest Generation EME, LLC (Midwest) separately appealed two trade secret determinations of the Illinois Environmental Protection Agency (IEPA). In each determination, IEPA denied trade secret protection from public disclosure for information about six coal-fired generating stations. The stations are formerly owned by ComEd and currently owned by Midwest. The information claimed to be trade secret in each appeal was submitted to IEPA by ComEd and some of the same information is at issue in each appeal. The two appeals were eventually consolidated at the companies' request.

Pending now is a December 15, 2011 motion jointly filed by ComEd and Midwest (collectively, petitioners). Petitioners move to vacate the trade secret denials of IEPA and dismiss these consolidated appeals as moot. The basis for petitioners' motion is the withdrawal of Sierra Club's Freedom of Information Act (FOIA) request that IEPA disclose the materials submitted by ComEd and claimed by petitioners to be trade secret. IEPA opposes the joint motion. For the reasons below, the Board grants petitioners' motion.

In this order, the Board provides background on this case before describing the parties' arguments concerning the joint motion to vacate and dismiss. The Board then discusses its reasons for granting the motion.

BACKGROUND

On January 30, 2004, ComEd submitted documents to the United States Environmental Protection Agency (USEPA) in response to USEPA's information request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). ComEd claimed to USEPA that the submitted materials constituted "confidential business information." ComEd provided a copy of the submittal to IEPA and claimed trade secret protection for the information under the Environmental Protection Act (Act) (415 ILCS 5 (2008)). Sierra Club made a federal FOIA request to USEPA for disclosure of the information. On February 12, 2004, under Illinois' FOIA (415 ILCS 140 (2008)), Sierra Club submitted a request to IEPA for a copy of the same information.

The information included "excerpts from a Continuing Property Record ('CPR') and Generating Availability Data System ('GADs') data relating to six coal-fired generating stations formerly owned by ComEd." ComEd Petition at 1. The excerpts from the CPR are allegedly "compiled listings of confidential detailed financial information related to expenditures at the six coal-fired generating stations." *Id*. The GADs data purportedly contain "compiled information relating to the operation of the electric generating units at the six coal-fired generating stations." *Id*. at 2. The CPR is also considered trade secret by the current owner of the six coal-fired generating stations, Midwest. *Id*. at 3. Midwest purchased the six stations in December 1999 and received a copy of the CPR pursuant to an asset sale agreement between ComEd and Edison Mission Energy, Midwest's parent company. Midwest Petition at 2.

On February 26, 2004, IEPA asked ComEd to provide a statement justifying the trade secret claim. IEPA's letter stated that the reason for requesting the justification was the FOIA request IEPA had received from Sierra Club. Midwest was also informed of IEPA's request for a statement of justification. Midwest and ComEd each submitted independent statements of justification to IEPA, with Midwest's statement only addressing the CPR. IEPA issued determination letters dated April 23, 2004, to both Midwest and ComEd, denying trade secret protection.

On June 2, 2004, ComEd timely filed a petition asking the Board to review the trade secret determination of IEPA. The Board docketed the ComEd appeal as PCB 04-215. On June 3, 2004, Midwest timely filed a petition asking the Board to review the separate trade secret determination of IEPA. The Board docketed the Midwest appeal as PCB 04-216. ComEd's petition contests IEPA's determination on the CPR and GADs, while Midwest's petition contests IEPA's determination concerning the CPR only. Both petitions maintain that the respective information is entitled to trade secret status, exempt from public disclosure requirements under the Act, and also required to be kept confidential pursuant to FOIA and another of the Act's exceptions to public disclosure.

On June 17, 2004, the Board issued an order accepting the petitions for hearing, granting petitioners' requests that any hearings be held *in camera*, and directing the parties to address whether the appeals should be consolidated. In the responsive filings, petitioners opposed consolidation and IEPA favored consolidation. The Board's July 7, 2005 order declined to consolidate the appeals at that time. In separate orders of August 18, 2005, the Board denied Sierra Club motions to intervene in these appeals. The August 18, 2005 orders provided, however, that Sierra Club could participate in these proceedings in various ways.

Since then, among other things, both appeals have (1) had numerous status conferences conducted by the hearing officer who presides over both cases; (2) been stayed at the request of the parties for several periods of time while a related confidentiality proceeding has pended before USEPA; and (3) entered into discovery. Neither case has been to hearing. Each case has pending a motion for interlocutory appeal of a hearing officer discovery ruling. Those motions are denied as moot in light of the Board rulings made below. The last stay of each proceeding was in effect through November 21, 2008. On June 12, 2009, ComEd and Midwest filed a motion for consolidation of the two trade secret appeals. In an order of July 23, 2009, the Board granted the joint to consolidate for purposes of hearing, but not necessarily for decision. Since consolidation, the parties have pursued settlement. The consolidated appeals have not been to hearing.

On December 15, 2010, ComEd and Midwest filed a joint motion to vacate IEPA's trade secret determinations and dismiss their respective petitions for review (Mot.). With the hearing officer's leave, IEPA filed a response on January 14, 2011 (Resp.), and petitioners filed a reply on January 28, 2011 (Reply). On December 13, 2010, ComEd and Midwest filed a waiver of the Board's deadline for deciding these consolidated appeals, extending the deadline to September 21, 2011.

The Board today, in a separate order, is granting Midwest's motion to vacate an IEPA trade secret determination and dismiss a petition for review in another related trade secret appeal: Midwest Generation EME, LLC v. IEPA, PCB 04-185.

PARTIES' ARGUMENTS

Joint Motion of ComEd and Midwest

ComEd and Midwest argue that because of Sierra Club's FOIA request withdrawal, the Board should grant their motion to vacate IEPA's trade secret determinations and subsequently dismiss their petitions for review as moot. Mot. at 6. Petitioners explain that in 2009, Sierra Club entered into a "Stipulation and Protective Order Regarding Confidential Information and Documents" in connection with United States of America v. Midwest Generation, LLC, Civil Action No. 09-cv-05277, in the United States District Court, Northern District of Illinois, Eastern Division. *Id*. at 3. Under the stipulation, Sierra Club withdrew its FOIA request to IEPA. *Id*., Exh. B.

Petitioners emphasize that the only reason IEPA asked for a statement of justification was the submission of Sierra Club's FOIA request. Mot. at 2, Exh. A. According to ComEd and

Midwest, there are currently no requests for public disclosure of the claimed trade secret materials. *Id*. at 3. Petitioners maintain that the decision in Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3rd Dist. 1990), "does not limit IEPA's authority to vacate the trade secret determination in this case on its own motion" because IEPA "would not be reconsidering its application of the law, but rather vacating a determination after the FOIA request which formed the basis for that determination has been withdrawn." *Id*. at 4, n.1, citing Reichhold, 204 Ill. App. 3d at 677-80. ComEd and Midwest states that they have asked IEPA to voluntarily withdraw the trade secret determinations, but IEPA has declined. *Id*. at 3.

Petitioners urge the Board to follow Monsanto Co. v. IEPA and John E. Norton, PCB 85-19 (Oct. 31, 1988; Nov. 3, 1988). Mot. at 3-4. According to ComEd and Midwest, in Monsanto, as in each of these consolidated appeals, IEPA issued a trade secret determination "only in response to a FOIA request" and the FOIA requestor later withdrew the FOIA request during the pendency of the appeal before the Board. *Id*. at 4. Petitioners assert that in Monsanto, the Board vacated IEPA's trade secret determination and found that it would be appropriate to dismiss the matter as moot. *Id*.

ComEd and Midwest argue that Sierra Club's FOIA request "authorized [IEPA] to make [the trade secret] determination." Mot. at 3. Petitioners explain that the Board's rule requires IEPA to include a reason for requesting that a party submit a statement of justification and describes "the limited circumstances under which IEPA may undertake a review of such claims." *Id*. at 5, citing 35 Ill. Adm. Code 130.201(b). Petitioners argue that with the withdrawal of Sierra Club's FOIA request, IEPA's stated purpose for making the trade secret determination "no longer exists." *Id*. ComEd and Midwest assert that vacating an IEPA trade secret determination "where the determination is no longer necessary" serves the important public policy that trade secret determinations "not be made without a valid reason." *Id*. According to petitioners, this policy "avoids the waste of resources by litigation over the correctness of a trade secret determination regarding information that no third party is interested in obtaining." *Id*.

Because ComEd and Midwest maintain that the claimed materials continue to require protection from disclosure, and IEPA has not withdrawn the trade secret determination, petitioners assert that they are "compelled to maintain this appeal." Mot. at 5-6. In this way, IEPA is prohibited from disclosing "in the event, however unlikely, that another member of the public requests these documents in the future." *Id*. at 6. According to petitioners, allowing this litigation to continue would be a "considerable waste" of Board and party resources. *Id*. If anyone were to request the claimed materials in the future, ComEd and Midwest continue, "IEPA may, of course, make what it believes to be the appropriate determination at that time and the Petitioners' interests would be protected by the process afforded to them under Illinois law." *Id*.

IEPA's Response

IEPA opposes petitioners' motion to vacate and dismiss. IEPA does not believe that its final trade secret determinations became moot when Sierra Club withdrew the FOIA request. Resp. at 2. IEPA argues that "the actual controversy giving rise to this litigation remains" and that "the only thing that has become moot in this case is the Sierra Club's FOIA request." *Id*. at

3. According to IEPA, "[t]he trigger" for its trade secret determination here and in all other cases is a claimant's statement of justification, which may be submitted with the claimed trade secret article or at a later time. *Id*. IEPA maintains that petitioners' argument about IEPA making another trade secret determination should any member of the public request to see the claimed documents in the future:

> only reinforces the fact that IEPA's final determination will only have to be revisited in the event that the Board ruled in Petitioners' favor, since the controversy underlying this litigation has not been resolved and is therefore not moot. *Id*. at 4

Even if this case is moot, IEPA argues, the three criteria of the "public interest exception" to the mootness doctrine are met. Resp. at 5. First, IEPA maintains that the question on appeal is of a "public nature" because it involves information that a public agency has determined should be available to the public. *Id*. Second, IEPA asserts that an "authoritative resolution" on the merits of this appeal will help to "guide public officers" of IEPA on trade secret matters generally and in this case particularly. *Id*. Third, because the claimed documents here will remain in IEPA's files subject to public disclosure, "this litigation is likely to recur at great expense to all involved." *Id*. IEPA therefore argues that the Board should resolve this appeal on the merits. *Id*.

Next, IEPA asserts that neither the Act nor the Board's trade secret regulations authorize IEPA or the Board to vacate IEPA's trade secret determination under these circumstances. Resp. at 6. IEPA maintains that it is not authorized under Reichhold "to reconsider or modify and alter" its final determination, and the Board may do so only on a motion for summary judgment or after a hearing on the merits. *Id*. at 6-7, n.1. IEPA adds that "it is not at all clear" that the Board vacated IEPA's trade secret determination in Monsanto. *Id*. at 7. IEPA states that in Monsanto, the Board's mention of vacatur in an interim order was dicta and the Board's final order does not mention vacatur. *Id*. at 7-9.

IEPA concludes by arguing that public policy favors disclosure of "environmental compliance information" and that the parties and the Board should use their resources to "take the next step" of having a hearing on the merits "so there will be no need to repeat the litigation path that has brought us to this point." Resp. at 9-10.

Reply of ComEd and Midwest

ComEd and Midwest reiterate that the trade secret issues under both the Act and FOIA are moot because Sierra Club has withdrawn its request for the claimed materials and no other member of the public is seeking their disclosure. Reply at 2. As to IEPA's argument that IEPA's trade secret determinations are not moot because they were prompted by petitioners' statements of justification, ComEd and Midwest state:

> If the existence of Petitioners' statements of justification somehow provides a basis for the continued life of this matter, then Petitioners hereby withdraw those statements of justification. Indeed, if Respondent's argument is correct, then all a party must do to prevent IEPA from making a trade secret determination in the

future is to refuse to submit a statement of justification. Obviously, this cannot be true. The Sierra Club FOIA request initiated this matter and nothing else. *Id.*

Petitioners argue that even if the Board affirmed IEPA, the claimed materials "would still be exempt from disclosure" under FOIA and, with Sierra Club's withdrawal of its FOIA request, IEPA now "lacks the authority" to review petitioners' claims that the materials are exempt from disclosure. Reply at 3.

ComEd and Midwest next assert that the Board should not hear this case under the "public interest exception" to mootness because "there is no public interest in the disclosure of these documents." Reply at 3. Petitioners note that in seven years, "no member of the public other than Sierra Club, which has now withdrawn its request, has expressed interest in these documents by requesting them." *Id.*

Petitioners further argue that the public interest exception to the mootness doctrine "must be narrowly construed and requires a clear showing of each criterion for the exception to apply." Reply at 3. According to petitioners, IEPA failed to meet its burden of demonstrating that this case falls within the exception. Even if the Board affirms IEPA on the trade secret issue, according to ComEd and Midwest, it is unlikely that the materials will ever be publicly disclosed because (1) there is no indication that any member of the public will ever seek the claimed materials, and (2) IEPA has never made a FOIA determination and "thus cannot legally release the documents." *Id.* Petitioners maintain that continued litigation here would not serve the public interest and would only result in a "considerable waste of public resources." *Id.* at 3-4.

It is the position of ComEd and Midwest that when a controversy has become moot, "the reviewing body should not review the matter 'merely to decide moot or abstract questions, establish a precedent, . . . or in effect, to render a judgment to guide potential future litigation.'" Reply at 4, quoting People v. Weaver, 50 Ill. 2d 237, 241 (1972). Petitioners argue that it would be "improper" for the Board to decide the merits of this case "because such decision would be an advisory opinion." *Id.*

ComEd and Midwest then argue that failing to vacate IEPA's trade secret determination would deny them their due process rights if another member of the public requests the materials in the future, and would be inconsistent with the Board's regulations, which "only authorize IEPA to request a justification . . . when it has a legitimate reason to do so." Reply at 4. ComEd and Midwest also do not believe that another request for public disclosure of these materials would doom the parties repeat this same litigation path. *Id.* at 5. According to petitioners, the Board should "save this fight for another day (or not at all)" by vacating IEPA's determinations and dismissing the petitions for review as moot. *Id.*

ComEd and Midwest further assert that IEPA's reliance on Reichhold is misplaced as petitioners "are not seeking an order to require IEPA to do anything." Reply at 5-6. Rather, ComEd and Midwest seek "an order from the Board" dismissing the appeals and vacating the trade secret determinations. *Id.* at 6. Nor is there any merit to the notion, petitioners continue, that the Board "is powerless in this case other than to rule on a motion for Summary Judgment or to 'modify' IEPA's Determination after a full hearing on the merits." *Id.* ComEd and Midwest

maintain that this "constraining view" of the Board's authority is inconsistent with the Act and the Board's procedural rules. *Id*., citing 415 ILCS 5/5(d) (2008); 35 Ill. Adm. Code 101.500, 105.108(e).

Finally, petitioners argue that the IEPA trade secret determination in Monsanto was vacated by operation of law. Reply at 6-7. According to ComEd and Midwest, the Board's Monsanto order of October 6, 1988, stated that upon the withdrawal of the FOIA request and the filing of a joint motion to dismiss the appeal, IEPA's determination would be vacated and the matter dismissed as moot. *Id*. at 6. Thereafter in Monsanto, continues petitioners, the parties filed a joint motion to dismiss and the requestor filed a motion to withdraw the FOIA request. *Id*. at 6-7. ComEd and Midwest concede that the Board's Monsanto order of November 3, 1988, dismissing that matter, "does not explicitly repeat that the trade secret determination will be vacated." *Id*. at 7. "Despite the lack of an explicit restatement," petitioners argue, "the natural, and the only sensible, conclusion" is that IEPA's trade secret determination "was vacated by operation of law." *Id*. Without the vacatur, petitioners conclude, Monsanto's claimed information logically "would then have been public and the company would have been deprived of its due process rights should another individual come forward with a new request for the same information." *Id*.

DISCUSSION

In this section of the order, the Board first discusses whether these consolidated appeals are moot and, if so, whether the Board should nevertheless reach the merits of the case under the "public interest exception" to the mootness doctrine. Next, the Board addresses whether dismissal of the appeals is all that is called for, or whether it is also necessary and appropriate to vacate IEPA's trade secret denials.

Mootness

Petitioners and IEPA agree that "[a]n issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." Dixon v. Chicago & North Western Transp. Co., 151 Ill. 2d 108, 116, 601 N.E.2d 704 (1992); Krohn v. Arthur, 301 Ill. App. 3d 138, 141, 703 N.E.2d 602 (1st Dist. 1998) ("An appeal is considered moot if one of [the] two circumstances arises."). Petitioners and IEPA disagree, however, over whether petitioners' appeals of IEPA's trade secret denials have been rendered moot by the withdrawal of Sierra Club's FOIA request for disclosure of the articles claimed by petitioners to be trade secrets. ComEd and Midwest argue that there is no actual controversy anymore and that proceeding with this litigation would therefore be a waste of the resources of the parties and the Board. IEPA asserts that the litigation should proceed because the actual controversy remains.

Much of the parties' dispute over mootness centers upon the Board's trade secret rules (35 Ill. Adm. Code 130). When revising these rules, the Board was concerned with preventing the unnecessary use of both private and public resources. *See* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 21 (Nov. 2, 2000). Specifically, if no one wanted the claimed trade secret information to be made public, the Board intended to avoid *requiring* that the article owner prepare a statement of justification and, in turn,

avoid *requiring* that the State agency render a trade secret determination. *Id*. To that end, the Board explicitly declined to require that a statement of justification accompany the submittal of the claimed article because doing so "would require the State agencies and the owners of articles to waste resources." *Id.*[1] The Board instead opted for:

> letting the State agency require the justification later *when it is needed*, such as when the State agency receives *a request from the public for a copy of the article*. *Id*. at 21-22 (emphasis added).

Accordingly, the Board adopted a rule providing that when a State agency requests a statement of justification from the owner of an article, the State agency "must set forth in the request the reasoning for the request." Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, order at 243 (Dec. 21, 2000) (35 Ill. Adm. Code 130.201(b)).[2]

> Here, IEPA's request for a statement of justification states:
>
> The Illinois EPA is hereby requesting a statement of justification within 10 working days of receiving this letter *as the Illinois EPA has received a FOIA request* pertaining to the Section 114 request response. (35 Ill. Adm. Code 130.201(a) and 130.202(a). *Specifically, on February 12, 2004, the Illinois EPA received a Freedom of Information Act (FOIA) request from the Sierra Club* seeking the responses of Midwest Generation and ComEd to USEPA's Section 114 information request. Mot., Exh. A at 1 (emphasis added).

The Board need not resolve the parties' argument over precisely *when* IEPA becomes authorized to make a trade secret determination under the Board's rules. In this case, the Board finds that IEPA's request for submission of a statement of justification, and the resulting IEPA trade secret determinations, were precipitated by Sierra Club's FOIA request.

The Board further finds that proceeding to a decision on the merits of this case would likely require the expenditure of considerable resources. No briefs or motions for summary judgment have been filed on the substantive issues and the case has not been to hearing. In addition, as petitioners have alleged grounds for non-disclosure other than trade secret, it is unclear that the claimed materials would be made available to the public even if the Board affirmed IEPA's trade secret determinations. The Board remains "mindful of the strong policy interest, evidenced in the Act, favoring public disclosure of environmental compliance information, particularly emission data." Midwest Generation EME, LLC v. IEPA, PCB 04-185, slip op. at 8 (Apr. 6, 2006). Sierra Club's FOIA request, however, has been withdrawn. Further, there are no other requests of IEPA that the claimed documents be publicly disclosed, nor has

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[1] *See* 35 Ill. Adm. Code 130.206 (absent waiver by article owner, the deadline for issuing trade secret determination is 45 days after date of receiving complete statement of justification).

[2] In the same rulemaking, the Board specifically refused to adopt a procedure for issuing "declaratory rulings." Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 18 (Mar. 16, 2000).

IEPA articulated any other reason necessitating the release of the claimed documents into the public domain.

Under these circumstances, the Board finds that no actual controversy remains in these consolidated appeals and that the matter before the Board is therefore moot. IEPA correctly observes, however, that there is a "public interest exception" to the mootness doctrine which "allows a court to resolve an otherwise moot issue if that issue involves a substantial public interest." Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill. 2d 200, 208, 886 N.E.2d 1011 (2008). The criteria for applying the public interest exception are as follows:

> (1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable to guide public officers; and (3) the question is likely to recur. Cinkus, 228 Ill. 2d at 208.

As ComEd and Midwest point out, "[t]he exception is narrowly construed" (Felzak v. Hruby, 226 Ill. 2d 382, 393, 876 N.E.2d 650 (2007)) and "[a] clear showing of each criterion is necessary to bring a case within the public interest exception" (Cinkus, 228 Ill. 2d at 208).

The Board finds that even if the first two criteria of the public interest exception are satisfied, the third criterion is not. IEPA simply notes that petitioners' claimed documents will remain in IEPA's files. It is uncontested that in some seven years, however, IEPA has received only the Sierra Club request for public disclosure of the documents. Again, IEPA reveals no reason for needing to disclose petitioners' claimed information to the public. Nor does IEPA demonstrate that the type of information at issue in these consolidated appeals is commonly submitted and the subject of trade secret determinations.

The Board finds that there has been no clear showing that the trade secret question before the Board is likely to recur. Accordingly, this case does not meet the "exacting standard" required to satisfy the public interest exception. *In re* Adoption of Walgreen, 186 Ill. 2d 362, 365, 710 N.E. 2d 126 (1999). As IEPA has raised no other exception to the mootness doctrine, the Board finds that it would be appropriate to dismiss the petitions for review as moot.

Vacatur

"'Vacate' means '[t]o annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment.'" People v. Barwicki, 365 Ill. App. 3d 398, 400, 849 N.E.2d 462 (2nd Dist. 2006), citing Black's Law Dictionary 1548 (6th ed. 1990). For the reasons below, the Board finds that it is necessary to vacate IEPA's trade secret denials and that the Board has the power to do so.

Petitioners and IEPA dispute whether the IEPA trade secret determination at issue before the Board in Monsanto was vacated. There, a FOIA request similarly formed the basis of a company's appeal of an IEPA trade secret denial. *See* Monsanto, PCB 85-19, slip op. at 1 (Apr. 4, 1985). After a hearing and briefing on the merits, an agreed motion for stay was filed, through which Monsanto and IEPA sought time to pursue settlement. In an October 6, 1988 order, the

Board denied the agreed motion for stay and explained the parties' alternatives. *See* Monsanto, PCB 85-19, slip op. at 1-2 (Oct. 6, 1988). The Board stated, among other things, that if Monsanto were to move for voluntary dismissal of the petition for review, IEPA's trade secret determination "would become final, and the documents would then fall into the public domain." *Id*. The order also provided that if the FOIA requestor were to move for withdrawal of his information request on file with IEPA, and if Monsanto and IEPA were to jointly move to dismiss the appeal, this "would result in [IEPA's] decision being *vacated* and this matter being dismissed as moot." *Id*. (emphasis added). Three weeks later, the requestor filed a motion to withdraw the FOIA request, while Monsanto and IEPA filed a joint motion to dismiss the action. The Board granted the motions in a November 3, 1988 order without explicitly referring to vacatur of IEPA's trade secret denial. *See* Monsanto, PCB 85-19, slip op. at 1 (Nov. 3, 1988).

The Board finds that the reasonable inference to draw from the Board's Monsanto orders is that IEPA's trade secret determination was vacated. The logic for vacutur enunciated in Monsanto remains sound in any event. The 35-day period within which to appeal either of IEPA's determinations is long expired. By dismissing petitioners' appeals without vacatur, IEPA's unreviewed determinations would become unreviewable or "final," risking entry of the claimed documents into the public domain. Monsanto, PCB 85-19, slip op. at 1-2 (Oct. 6, 1988). It is plain that ComEd and Midwest are not acquiescing in IEPA's respective determinations. The Board finds that vacatur of the IEPA trade secret denials here is necessary.

"As an administrative agency, the Board has the inherent authority to do all that is reasonably necessary to execute its specifically conferred statutory power." People v. Archer Daniels Midland, 140 Ill. App. 3d 823, 825, 489 N.E.2d 887 (3rd Dist. 1986); *see also* Freedom Oil Co. v. PCB, 275 Ill. App. 3d 508, 514, 655 N.E.2d 1184 (4th Dist. 1995) ("In performing its specific duties, an administrative agency has wide latitude to accomplish its responsibilities."). The Act authorizes the Board to conduct proceedings on appeals of trade secret determinations. *See* 415 ILCS 5/5(d), 7.1(b) (2008); *see also* 35 Ill. Adm. Code 130.214. These consolidated trade secret appeals have been rendered moot and, as just found, vacating IEPA's determinations is needed. Under these circumstances, the Board finds that it has the authority to vacate IEPA's trade secret determinations. *See* Chemetco v. PCB, 140 Ill. App. 3d 283, 286-87, 488 N.E.2d 639 (5th Dist. 1986) ("where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred.").

Finally, a Board order vacating IEPA's trade secret determinations does not run afoul of Reichhold. The Reichhold court found that after IEPA denied a permit application, IEPA lacked the authority to simply reconsider the denial absent an amended permit application. *See* Reichhold, 204 Ill. App. 3d at 676-80. Here, IEPA would in no instance be reapplying the trade secret provisions of the Act and the Board's regulations to arrive at new determinations. If the Board were to grant petitioners' motion, it would be the Board, not IEPA, vacating IEPA's trade secret determinations. The Board finds that so vacating IEPA's determinations would not constitute improper reconsideration by IEPA of the trade secret denials.

CONCLUSION

For the reasons set forth above, the Board grants petitioners' motion to vacate IEPA's trade secret determinations and dismiss these petitions for review as moot. Accordingly, the Board vacates IEPA's determinations, dismisses these consolidated appeals, and closes the dockets.

ORDER

1. The Board vacates IEPA's trade secret determination of April 23, 2004, issued to ComEd.

2. The Board vacates IEPA's trade secret determination of April 23, 2004, issued to Midwest.

3. The Board dismisses ComEd's petition for review, filed on June 2, 2004.

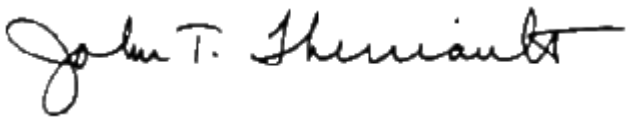
4. The Board dismisses Midwest's petition for review, filed on June 3, 2004.

IT IS SO ORDERED.

Board Member C.K. Zalewski abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 7, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board