

ILLINOIS POLLUTION CONTROL BOARD
July 21, 1994

BURLINGTON ENVIRONMENTAL INC.,)
)
 Petitioner,)
)
 v.) PCB 94-177
) (Variance)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by E. Dunham):

On June 9, 1994, Burlington Environmental Inc. (Burlington) filed a petition for a variance from 35 Ill. Adm. Code 721.104(f)(3) and (4) to the extent those regulations limit the quantity of media contaminated with acute hazardous wastes that may be treated or stored during treatability studies. On July 7, 1994 Burlington filed an amended petition pursuant to the Board's order of June 23, 1994. Burlington seeks this variance in order to enable it to use a large scale model to conduct treatability studies of an innovative thermal technology for treating contaminated soils. In conjunction with its variance petition, Burlington submitted a request for trade secret protection for Exhibit I of its petition, entitled "System Overview: Burlington Environmental Inc.'s Mercury Recovery Pilot System Revised Preliminary Description" (System Overview).

Under Section 7 of the Environmental Protection Act (Act), (415 ILCS 5/7) all files and records of the Board must generally be open to reasonable public inspection. Several exceptions are provided, including an exception for information which constitutes a trade secret.

Part 120 of the Board's procedural rules governs how trade secrets are to be identified and protected. Subparts B and C thereunder contain the rules under which Burlington is to proceed to protect the delineated portion of its variance petition as a trade secret. The standards for making a trade secret determination are found at Section 120.230(a), which provides that an article shall be determined to represent a trade secret if and only if:

- 1) the owner has substantially complied with the procedures for making a claim and justification...; and
- 2) The statement of justification demonstrates that:
 - A) The article has not otherwise been published, disseminated or otherwise become a matter of public knowledge; and

B) The article has competitive value.

In determining whether the information has been treated as a trade secret, Section 120.230(b) provides that there is a rebuttable presumption that an article has not been published if the statement of justification contains a certification to that effect, and if the owner has taken reasonable steps to protect it from disclosure to persons other than those designated to have access.

Compliance with Procedural Requirements

Burlington has submitted a claim letter as required in Section 120.201(a)(1), which describes with particularity the article claimed to represent a trade secret. It has also submitted a marked copy of its petition which indicates the portion for which trade secret protection is sought, and an additional copy of the petition from which the portion for which trade secret protection is sought has been deleted, in accordance with Section 120.305. Finally, Burlington has submitted a statement of justification in accordance with the requirements of Section 120.202. The statement of justification includes a description of the procedures used to protect the information, a description of the persons who have access to the information, a discussion of why Burlington believes the information is of competitive value, and a certification by Burlington's Manager of Engineering that the information has not to his knowledge been published, disseminated, or otherwise become a matter of general public knowledge. We therefore find that Burlington has complied with the procedural requirements for submitting a trade secret protection claim. We now examine the substantive merit of that claim.

Measures Taken to Prevent Disclosure

In its statement of justification, Burlington indicates that it employs several measures to protect information pertaining to the Mercury Recovery Pilot System, including the information contained in the System Overview attached as Exhibit I to the variance petition. First, Burlington asserts that its offices and facilities are restricted to Burlington employees, authorized representatives and visitors. The offices are locked during non-business hours and have an alarmed security system. Second, Burlington asserts that hardcopy information pertaining to the Mercury Recovery Pilot System is kept on the Burlington premises or under the control of authorized employees or representatives.

Burlington asserts that information pertaining to the Mercury Recovery Pilot System is disclosed to persons outside Burlington only on a need to know basis. While specific components of the process have been discussed with vendors for design data, the specific process has not been discussed. When

Burlington has submitted this information to regulatory agencies, it has done so only under a claim of confidentiality. Internally, disclosure of the System Overview is limited to professional and clerical personnel directly involved in its preparation.

Again, Section 120.230(b) provides that there is a rebuttable presumption that an article has not been published if the statement of justification contains a certification to that effect, and if the owner has taken reasonable steps to protect it from disclosure to persons other than those designated to have access. Burlington has provided the necessary certification, and has described ample measures employed to protect the information from disclosure. We therefore find that Burlington has taken reasonable steps to protect the information from disclosure.

Competitive Value

Finally, the Board must determine whether the information for which protection is sought has competitive value. Burlington asserts that it is currently competing with another company to develop a technology that will effectively remediate soil with high levels of mercury contamination. The System Overview contains information that describes the innovative process by which Burlington will recover mercury from mercury-contaminated soil.

Burlington asserts that one of its clients plans to make use of this technology once it is proven, and that a multi-million dollar contract depends upon its successful demonstration. Furthermore, Burlington asserts that once this technology is demonstrated, it could be applied at thousands of remediation sites. Public disclosure of the information in the System Overview could jeopardize Burlington's competitive edge in developing this technology.

We find that Burlington has demonstrated that the information contained in the System Overview, attached to its variance petition as Exhibit I, is entitled to protection as a trade secret. It is apparent that this information would be of significant competitive value in the marketplace.

For the reasons stated above, the Board hereby grants Burlington's request for trade secret protection for Exhibit I of its variance petition, entitled "System Overview: Burlington Environmental Inc.'s Mercury Recovery Pilot System Revised Preliminary Description." The Clerk of the Board is hereby directed to protect Exhibit I of Burlington's petition for variance from disclosure as representing a trade secret.

This matter is accepted for hearing. The hearing must be scheduled and completed in a timely manner, consistent with

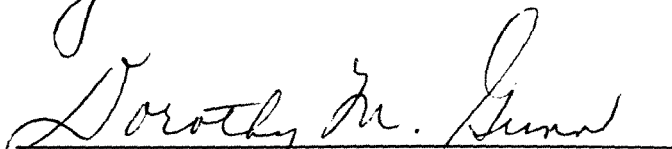
Board practices and the applicable statutory decision deadline, or the decision deadline as extended by a waiver (petitioner may file a waiver of the statutory decision deadline pursuant to 35 Ill. Adm. Code 101.105). The Chief Hearing Officer shall assign a hearing officer to conduct hearings. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. Any briefing schedule shall provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days prior to the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. Absent any future waivers of the decision deadline, the statutory decision deadline is now November 4, 1994; the Board meeting immediately preceding the due date is scheduled for November 3, 1994.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible. The Board notes that Board rules (35 Ill. Adm. Code 104.180) require the Agency to file its recommendation for disposition of the petition within 30 days of filing of the petition.

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 21st day of July, 1994, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board