

ILLINOIS POLLUTION CONTROL BOARD
January 8, 1987

IN THE MATTER OF:)
)
VOLATILE ORGANIC MATERIAL) R82-14
EMISSIONS FROM STATIONARY)
SOURCES: RACT III)

INTERIM ORDER OF THE BOARD (by B. Forcade):

These matters come before the Board on a December 12, 1986, Confidential Trade Secret Claim and Record Submittal filed by the Duo Fast Corporation ("Duo Fast") and a December 22, 1986, Motion for Additional Hearing filed by the Minnesota Mining & Manufacturing Company ("3-M"). These two unrelated filings will be dealt with separately in this order.

Duo Fast Confidential Trade Secret Claim and Record Submittal

Duo Fast submits two documents to be included in the regulatory record before the Board, each of which it is claimed contain or constitute confidential trade secrets protectable under the Environmental Protection Act ("Act") and Board regulations. The first document, entitled "Areas of Activity Relating to VOC Emission Reduction," is a description of recent efforts by Duo Fast to comply with the existing Rule 215.204. This information was requested by the Board and Illinois Environmental Protection Agency ("Agency") at hearing in this proceeding. Duo Fast asserts that the entire document contains confidential trade secret information such that it is not reasonably practical to separate the trade secret portions from the remainder. Duo Fast requests protection for the entire document.

The second document, entitled "Duo Fast Corporation Control Equipment Evaluation", is a report by the consulting firm of Yates & Auberle concerning the costs and engineering considerations, associated with utilizing add-on control equipment to further control volatile organic materials ("VOM") emissions at Duo Fast's facility. Duo Fast only claims discreet portions of this document as confidential trade secret material. An expurgated copy of this document, with all claimed information deleted, was filed in accordance with the Board's regulations.

The Act and Board regulations provide the standards and procedures for filing and adjudicating claims of confidentiality. Section 7 of the Act provides four exceptions to the general requirement that the Agency, Board and Department of Energy and Natural Resources maintain public files. The four

exceptions are: 1) trade secret material; 2) privileges recognized in judicial proceedings; 3) internal agency communications; and 4) information regarding secret manufacturing processes or confidential data. Section 7 also provides an overriding directive that:

"notwithstanding any other provisions of this Title or any other laws to the contrary, all emissions data reported to or otherwise obtained by the Agency, the Board or the Department of Energy and Natural Resources in connection with any ... proceeding under this Act shall be available to the public to the extent required by the federal Clean Air Act Amendments of 1977 (P.L. 95-95) as amended."

35 Ill. Adm. Code 101.107 addresses the general issue of public information and implementation of Section 7 of the Act. Part 120 of the Board's procedural rules specifically creates a procedure for claiming, justifying, adjudicating and protecting trade secret information.

By making a general claim, Duo Fast has initiated the trade secret identification process and has invoked confidential treatment of the material at issue pursuant to 35 Ill. Adm. Code 120.204. Under the provisions of 35 Ill. Adm. Code 120.203, Duo Fast filed a limited waiver in lieu of a Statement of Justification. However, this waiver provision more appropriately relates to an adjudicatory proceeding such as a permit appeal or variance where a statutory decision deadline is imposed on the Board. Duo Fast does not presently seek a determination of the claimed trade secret material but, through the filing of a trade secret claim, requests that the information be treated confidentially for the duration of this proceeding.

Under the procedures established in Part 120, there are a number of ways a justification proceeding can be triggered. Typically, the "owner" of the trade secret may request a determination by filing a statement of justification or a third party may request to see the claimed material, thus triggering the filing of a justification. A final way a justification proceeding may be triggered is for the Board, itself, to request a statement of justification under certain circumstances. This type of decision entails an in camera review of the claimed material by the Board. 35 Ill. Adm. Code 120.215 provides, in pertinent part:

... Circumstances in which a request may be warranted include, but are not limited to, the following:

- a) Reasonable anticipation of requests from the public for disclosure of the article; or
- b) Facilitation of public participation in proceedings before the agency where notice and/or comment periods are short relative to the time required for a final determination in accordance with the requirements of this Part; or
- c) There is reasonable doubt that the article represents a trade secret and there has been a practice, on the part of the owner of the article, of indiscriminately claiming that articles submitted to the agency represent trade secrets; or
- d) The requirement in a specific regulation that a determination of whether the article represents a trade secret be made at the time that it is submitted to or obtained by the agency.

The Board has reviewed the two claimed documents and finds it necessary to trigger a justification proceeding. The Board believes that the present claim potentially falls within at least three of the four outlined circumstances in 35 Ill. Adm. Code 120.215 that would warrant a justification proceeding. Under subsection a), the Board reasonably anticipates requests from the public as certain of this material may constitute air emissions data. Under subsection b), the Board finds that the decision deadline in this proceeding is short and if opportunity to comment is necessary, it must be done in an expedited manner. Certain of the claimed materials also may fall under subsection c) as it appears that some of the material may already be part of the public hearing record although there has been no practice on the part of Duo Fast of indiscriminately claiming confidentiality. By finding that the claimed material may fall within the circumstances outlined in 35 Ill. Adm. Code 120.215, the Board is not pre-judging the issue of whether or not the material constitutes a trade secret and is protectable under the Act and regulations. The Board merely finds that a justification proceeding is warranted in this situation. During the pendency of the justification proceeding, the material will be kept confidential.

The Board also wishes to raise certain additional issues for consideration and briefing. This matter arises in the context of a rulemaking under the federal Clean Air Act. Consequently, certain federal requirements regarding public records and air emissions data are applicable. Section 7(d) of the Act specifically incorporates these standards regarding air emissions data and public access. 40 CFR 2.301 provides the definition of "emission data" and the special rules governing public access to this type of information:

(2)(1) "Emission data" means, with reference to any source of emission of any substance into the air-

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

In light of the circumstances in which this confidentiality claim arises, the Board requests that Duo Fast, in addition to the information required by 35 Ill. Adm. Code 102.202, address the following issues for each item of information for which a claim is asserted:

1. Does the claimed information constitute air emissions data as that term is used in the Act, Board and federal regulations and, if so, can it be afforded confidential treatment consistent with state and federal law?

2. In the event the claimed material is found not to be a trade secret, can the Board authorize Duo Fast to withdraw this material as it has requested?
3. If the material is determined to be air emissions data, must the Board, under state and federal law, make this information available to the public?
4. In the event Duo Fast withdraws the material at issue, will the Board's record be sufficient for decision-making and SIP submittal?

This Board Order, certified by the Clerk of the Board, constitutes this agency's formal written request for justification of claim. Duo Fast will have ten (10) working days from the date of receipt of this order to file a statement of justification with the Board. This time period may be extended by the agency for a second period of ten (10) working days if, within the first ten-day period, the owner demonstrates that the extension is necessary to complete the statement of justification and submits a request for an extension. A copy of Part 120 of the procedural rules which outlines the procedures and standards for determination of the trade secret claim, along with a copy of the Act will be included in the notice provided by this order. The Clerk of the Board is directed to open a new docket, PCB 87-4, for this justification proceeding.

3M Motion for Additional Hearing

3M filed its motion on December 22, 1986. The Agency filed a continuance for Agency response, requesting until January 7, 1987, to respond to 3M's motion. No Agency response has been filed. 3M's motion asserts that an additional hearing is necessary because the Agency's comment of December 10, 1986 (P.C. 99), contains "many new factual assertions that could have been raised sooner, and made various claims and conclusions that we [3M] believe are inaccurate." 3M further argues that the Agency's "true position" in this proceeding is unclear and can only be determined at hearing.

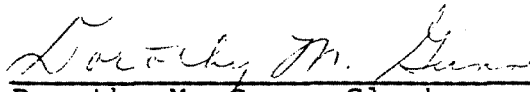
3M's motion for an additional hearing is denied. 3M has presented no compelling reason for an additional hearing in this matter. There is no prohibition against submitting factual information in a public comment in a Board regulatory proceeding. Such a practice is quite common. However, such factual information is generally accorded less weight because it is not supported by a sworn witness and the witness is not subject to cross-examination. The Board also believes that the

Agency's "true position" is not unclear from Public Comment No. 99 and is unconvinced that even if it were, a hearing is the appropriate method for determining that "true position."

Numerous hearings have been held in this proceeding, specifically dealing with 3M's site-specific proposal. It was the Board's hope that the vast majority of the factual information would come into the record during that hearing process. However, that often is not possible and the mechanism of public comments is used instead. This matter was placed on an expedited hearing schedule because of the impending Clean Air Act deadline for ozone attainment by December 31, 1987. A final Economic Impact Statement (EcIS) is expected in late January or early February, 1987. Decision in this matter can proceed after EcIS hearings. Opportunity for additional public comments and hearing on request is available during the first notice period. If 3M wishes to file comments or request hearing at that time, it may refile its motion. However, to reasonably manage this proceeding and move to decision, it is necessary to provide some date for closing the record. That end-point was December 12, 1986, at least until the Board goes to first notice. A hearing would only be appropriate at this stage if compelling circumstances were present. None are present in 3M's motion, therefore, motion for hearing is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Order was adopted on the 8th day of January, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board