

ILLINOIS POLLUTION CONTROL BOARD  
May 6, 1999

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

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

This matter is before the Board on an appeal of a denial by the Illinois Environmental Protection Agency (Agency) of a request by QST Environmental Inc. (QST) for trade secret protection. The administrative record<sup>1</sup> was filed on February 3, 1999. The parties filed cross-motions for summary judgment on March 16, 1999, and responses were filed on March 29, 1999, pursuant to a hearing officer order. After reviewing the record and arguments put forward, and for the reasons discussed herein, the Board grants the Agency's motion for summary judgment and affirms the Agency's denial of trade secret protection.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

LEGAL FRAMEWORK

Section 3.48 of the Act defines a "Trade Secret" as:

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<sup>1</sup> The administrative record will be cited as "R. at"; the petitioner's motion for summary judgment will be cited as "P.Mot. at" and the response will be cited as "PResp. at"; the Agency's motion will be cited as "A.Mot. at" and the response will be cited as "AResp. at".

“TRADE SECRET” means the whole or any portion or phase of any scientific or technical information, design, process (including a manufacturing process), procedure, formula or improvement, or business plan which is secret in that it has not been published or disseminated or otherwise become a matter of general public knowledge, and which has competitive value. A trade secret is presumed to be secret when the owner thereof takes reasonable measure to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. Section 3.48 of the Environmental Protection Act (Act) 415 ILCS 5/3.48.

Section 120.230 of the Board’s rules provides:

- a) 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 as prescribed by this Part; and
  - 2) The statement of justification demonstrates that:
    - A) The article has not been published, disseminated or otherwise become a matter of general public knowledge; and
    - B) The article has competitive value.
- b) There shall be a rebuttable presumption that an article has not been published, disseminated or otherwise become a matter of general public knowledge, if:
  - 1) The owner has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access thereto for limited purposes; and
  - 2) The statement of justification contains a certification that the owner has no knowledge that the article has ever been published, disseminated, or otherwise become a matter of general public knowledge.
- c) The agency may determine that any page, part or portion of the article represents a trade secret which meets the requirements of subsection (b).  
35 Ill. Adm. Code 120.230

## BACKGROUND

In August and September 1996, QST filed a remedial investigation report and an addendum to that report (hereinafter "Reports") with the Agency on behalf of Roadmaster Corporation (Roadmaster). A.Mot. at 2; P.Mot at 1; R. at 5-53-5-672. The material was not marked "Trade Secret". R. at 5-53-5-672. QST was working as a consultant for Roadmaster at the time the Reports were filed by QST. A.Mot. at 2; P.Mot at 2. QST remains the owner of the Reports pursuant to an agreement between QST and Roadmaster. P.Mot. at 2. On July 9, 1998, QST filed a request with the Agency to hold the Reports as a trade secret. R. at 1-3.

The Agency received four requests to view the Roadmaster file, including the Reports, in the time period after the Reports were filed in 1996 and before the trade secret protection was sought in 1998. A.Mot. at 2. Two requests were withdrawn prior to the Agency providing any information. *Id.* However, the remaining two requesters were allowed to view and copy parts of the Roadmaster file while in the Agency's possession. *Id.* Timothy J. Hahn, the Supervisor of Assessments in Richland County viewed the file and made copies of 106 pages of the file on April 23, 1997. *Id.* Timothy J. Hahn did not copy any pages of the reports. P.Mot. at 3. On February 16, 1998, Bob Ferguson, the City Manager of Olney, Illinois viewed the file and copied 954 pages on behalf of Olney which included the reports. A.Mot. at 2.

On July 29, 1998, the Agency denied QST's trade secret claim based upon the Agency's belief that QST failed to demonstrate the Reports had not been published, disseminated, or otherwise become a matter of general public knowledge contrary to Section 120.230(a)(2)(A). R. at 4; A.Mot. at 3.

#### QST MOTION

QST asserts in its motion that there are only two requirements that it must meet to have the Reports deemed a trade secret and those two requirements are in the Board's rules at Section 120.230(a)(2). Specifically, QST asserts that the Reports in question have not been made available to the general public and that the Reports have competitive value. QST contends that the Reports therefore meet the criteria of 35 Ill. Adm. Code 120.230 and should be classified as trade secrets.

More specifically, QST maintains that the Reports were made available directly to Roadmaster and the Agency. The Trustee in the Roadmaster bankruptcy has indicated he will not distribute the Reports to any third party and QST keeps only three complete copies which are marked "Confidential." P.Mot. at 2. QST further states that Olney has been informed that the "Reports are owned by QST and cannot be used by" Olney without "the consent of QST." P.Mot. at 3. QST asserts that Richland County's Timothy J. Hahn did not copy any portion of the Reports from the Roadmaster file. *Id.* Further, QST states that it has not disseminated the material except as described in its motion. Therefore, QST argue the Reports are not generally a matter of public record and QST meets the requirements of Section 120.230(a)(2)(A).

QST contends that the Reports have competitive value as the amount owed to QST for the preparation of the Reports is in excess of \$500,000. P.Mot. at 4. The Reports constitute

the only comprehensive compendium of information regarding the environmental problems at the Roadmaster site according to QST. *Id.* QST asserts that Olney may purchase the Roadmaster site and the Reports give QST a competitive advantage in the bidding for environmental work at the site. Therefore, QST argues the Reports meet the requirement of Section 120.230(a)(2)(B). P.Mot. at 4.

The Agency responds to QST's motion by arguing that QST admitted in its motion that QST failed to meet the standards of Section 120.230. AResp. at 1. More specifically, the Agency maintains that QST's acknowledgment that the Reports are in the possession of Olney and that another person had access to the Reports establishes that Section 120.230(a)(2)(A) has not been met. Therefore, the Agency asserts the Reports cannot be accorded trade secret status.

The Agency further maintains that the Reports are now in the possession of the bankruptcy trustee for Roadmaster. And, although the trustee has indicated to QST he will not distribute the Reports to a third party, this representation is non-binding and unenforceable. AResp. at 3. The Agency also argues that equally unenforceable is QST's direction to Olney that the Reports may not be used without the consent of QST. AResp. at 4. Thus, the Agency contends that the Reports are a matter of general public knowledge. AResp. at 4-5.

The Agency's second argument, in its response, is that the delay between the filing of the Reports and the request for trade secret protection should be to QST's detriment. AResp. at 7. The Agency agrees that Section 120.201 allows a claim to be asserted at anytime. AResp. at 5. However, a statement of justification must be made at the time the claim is submitted. AResp. at 7. Because QST had delayed seeking trade secret protection, the Reports had been viewed by two parties before the claim was made. Therefore, the Agency argues the delay resulted in QST being unable to meet the justification in Section 120.230 and the trade secret claim was denied. AResp. at 7.

The Agency did not respond to QST's argument regarding the competitive value of the material in the reports.

#### AGENCY MOTION

The Agency maintains that there are no issues of material fact and that the Agency is entitled to judgment as a matter of law. The Agency specifically argues that QST failed to meet the standards of Section 120.230(a)(2)(A) in the letter of justification filed with QST's trade secret claim. In support of this argument, the Agency points out that a trade secret claim may only be granted "if and only if" the statement of justification submitted demonstrates that the article has not been published, disseminated or otherwise become a matter of public record. A.Mot. at 3. The Agency asserts that QST cannot demonstrate that the article has not been published, disseminated or otherwise become a matter of public record. A.Mot. at 4.

The Agency points out that in QST's statement of justification, QST admitted that Olney had obtained copies of the Reports in the course of a Freedom of Information Act review. A.Mot. at 4; R. at 2. The Agency argues that even though QST informed Olney that

the Reports were the property of QST and should not be used without permission of QST, QST has no mechanism to guarantee or prevent Olney from distributing the Reports. A.Mot. at 4.

The Agency further points out that the statement of justification also indicates that the bankruptcy trustee for Roadmaster is in possession of the Reports. R. at 2. The statement of justification states that the trustee has “indicated that he will not distribute the Reports to any third party.” R. at 2. The Agency again asserts that there is nothing binding upon the trustee to adhere to the statement and QST has “availed itself of no other means of guaranteeing that the trustee will not distribute the Reports.” A.Mot. at 4. Thus, the Agency contends, QST admits the Reports have been disseminated to third parties. *Id.*

The Agency also argues that “it is worth noting” that the underlying basis for QST’s request for trade secret status for the Reports is that Roadmaster failed to pay for the Reports. A.Mot. at 5. The Agency asserts that prior to Roadmaster declaring bankruptcy, QST did not prevent the dissemination of the Reports or otherwise attempt to keep the Reports from becoming a matter of general public knowledge. *Id.* The Agency contends that “QST obviously did not feel the Reports presented a trade secret” until Roadmaster failed to pay its fees. *Id.* The Agency argues that the “intervening act” which has required QST to assert the trade secret claim is of a business nature which should be resolved through a private contractual action and not a trade secret appeal before the Board. *Id.*

QST responds to the Agency’s motion by arguing that the language of Section 120.230(a)(2)(A) includes the phrase “or otherwise become a matter of general knowledge” and that phrase makes it clear that a trade secret claim should only be disallowed if the article in question has been “generally” disseminated. PResp. 2. QST contends that the intent of Section 120.230(a)(2)(A) was “clearly not to deny trade secret status when an isolated event of access has occurred.” *Id.* QST maintains that to hold otherwise would make the phrase “or otherwise become a matter of general knowledge” superfluous. *Id.* QST argues that there is no evidence that the Reports have become a matter of public knowledge and in fact the evidence shows the limited availability of the Reports. *Id.*

QST also responds that the Agency’s argument regarding QST’s “motives” for seeking trade secret status have no basis in law and should be given no consideration. PResp. At 3.

### DISCUSSION

The language of the Act and the Board’s regulations is clear. If an article has been published, disseminated, or otherwise becomes a matter of general public knowledge, the article may not be given trade secret status. Therefore, the issue in this case is whether QST has demonstrated that the material has not been published, disseminated, or otherwise become a matter of general public knowledge. The Board finds that QST has not made such a demonstration. QST admits that at least two public parties have copies of the Reports (the

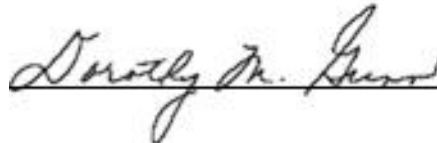
bankruptcy trustee and Olney).<sup>2</sup> There are no guarantees that those Reports will be held secret, even though, in one case, the bankruptcy trustee has indicated that he will not distribute the Reports to any third parties. More notably, there is nothing in the record which indicates that Olney will hold the information secret. QST has only stated that it informed Olney that the Reports could not be used without QST permission. The record does not indicate how or even if Olney will keep the Reports secret.

The Board finds that the Reports have been disseminated by the Agency to at least two public offices some five months before the trade secret claim was made and this meets the test that the reports are generally available. That fact is sufficient for the Board to affirm the Agency denial of trade secret status for the Reports. As to QST's argument that such a ruling makes the phrase "or otherwise become a matter of general public knowledge" superfluous, we disagree. The conjunction used is "or" which means that any action in the series which may occur is sufficient to deny a claim. The Agency need not demonstrate that the article has been published, disseminated, and otherwise become a matter of general public knowledge in order to deny a trade secret claim. Therefore, the Agency correctly denied the Reports trade secret status and the Board grants the Agency motion for summary judgment and affirms the Agency's decision.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 6th day of May 1999 by a vote of 6-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

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<sup>2</sup> The Board notes that the failure of QST to seek trade secret protection for almost two years allowed the materials to be made available to the public. As QST did not mark or otherwise protect the reports, the Agency appropriately allowed the reports to be reviewed and copied by the general public.