

ILLINOIS POLLUTION CONTROL BOARD
April 6, 2006

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

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

Midwest Generation EME, LLC (Midwest) has appealed a trade secret determination of the Illinois Environmental Protection Agency (IEPA) under the Environmental Protection Act (Act) (415 ILCS 5 (2004)). In the determination, IEPA denied Midwest's claim for trade secret protection of information that Commonwealth Edison Company (ComEd) submitted to IEPA. Midwest states a portion of the information submitted by ComEd is also owned by Midwest. IEPA made the trade secret determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (Illinois FOIA) (415 ILCS 140 (2004)), for a copy of ComEd's submittal. Midwest maintains that the information ComEd submitted to IEPA is entitled to trade secret status, exempt from public disclosure requirements. The information relates to six coal-fired power stations, all of which are in Illinois. The stations are formerly owned by ComEd and currently owned by Midwest.¹

The Board is not addressing the merits of the trade secret appeal today. The case has not yet been to hearing. What the Board is addressing today is Midwest's motion to stay this appeal. Midwest wants the appeal stayed until resolution of a separate federal process that is underway for determining whether the same information at issue here is exempt from public disclosure under federal standards. IEPA opposes a stay.

For the reasons below, the Board grants a short-term stay. This proceeding is stayed for 120 days (*i.e.*, until August 4, 2006), unless the Board terminates the stay earlier by order. As a condition of the stay, Midwest must promptly file with the Board any final confidentiality determination of the United States Environmental Protection Agency (USEPA) concerning the information in question.

¹ ComEd has appealed a separate IEPA trade secret determination concerning the same information and other information submitted to IEPA by ComEd. That pending ComEd appeal is docketed as PCB 04-215.

The Board today, in separate orders, is likewise issuing short-term stays in two other trade secret appeals involving claimed information that is also the subject of a confidentiality request pending before USEPA: Midwest Generation EME, LLC v. IEPA, PCB 04-185; and Commonwealth Edison Company v. IEPA, PCB 04-215. In this order, the Board first provides a brief background on public disclosure requirements under the Act. Second, the Board sets forth the procedural history of this appeal, PCB 04-216. Next, the Board describes the parties' arguments for and against a stay. The Board then discusses the applicable legal standards and rules on Midwest's motion for stay.

BACKGROUND

Under Section 7 of the Act (415 ILCS 5/7 (2004)), all files, records, and data of the Board, IEPA, and the Illinois Department of Natural Resources are open to reasonable public inspection and copying. However, the Act provides that certain materials may represent "trade secrets," "privileged" information, "internal communications of the several agencies," or "secret manufacturing processes or confidential data" and, accordingly, be protected from public disclosure. *See* 415 ILCS 5/7(a) (2004); 415 ILCS 5/7.1 (2004) (trade secrets).

Even so, the Act denies protection from public disclosure for: effluent data under the National Pollutant Discharge Elimination System (NPDES) permit program; "emission data" to the extent required by the federal Clean Air Act; and the quantity, identity, and generator of substances being placed or to be placed in landfills or hazardous waste treatment, storage, or disposal facilities. *See* 415 ILCS 5/7(b)-(d) (2004).

PROCEDURAL HISTORY

On June 3, 2004, Midwest filed its appeal of IEPA's April 23, 2004 trade secret determination. In a June 17, 2004 order, the Board accepted for hearing Midwest's petition for review. On July 13, 2004, IEPA filed the administrative record of its trade secret determination. On August 3, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. IEPA supported Sierra Club's motion, but Midwest opposed intervention. In a July 7, 2005 order, after reviewing pleadings on the issue from the parties, the Board declined to consolidate this appeal with PCB 04-215. In an August 18, 2005 order, the Board denied Sierra Club's motion to intervene, but ruled that Sierra Club could participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing.

On August 18, 2004, Midwest filed a motion for the Board to partially reconsider its June 17, 2004 order, asking the Board to review IEPA's trade secret denial *de novo*. IEPA opposes Midwest's motion for partial reconsideration. By a November 4, 2004 order in PCB 04-185, the Board denied a similar motion to partially reconsider from Midwest. On August 25, 2005, the hearing officer issued an order setting a discovery schedule. The hearing officer noted in orders of October 7, November 10, and December 21, 2005, that discovery was proceeding as scheduled. On February 8, 2006, the hearing officer granted an agreed motion to amend the discovery schedule. On February 16, 2006, ComEd filed a motion to compel. On March 2, 2006, IEPA filed a response opposing the motion to compel. On March 7, 2006, the hearing officer issued a revised discovery schedule. On March 16, 2006, Midwest filed motion

for leave to file a reply to IEPA's response concerning the motion to compel, attaching the reply. On March 28, 2006, IEPA filed a response opposing Midwest's motion for leave. In light of the stay granted today, rulings are reserved on these pending motions.

On September 27, 2005, Midwest filed a motion to stay this proceeding, which the Board rules on today. Attached to Midwest's motion are a supporting memorandum and a status report. On October 6, 2005, IEPA filed a response, opposing Midwest's motion for stay. On October 21, 2005, Midwest filed a motion for leave to file a reply to IEPA's response, attaching the reply. IEPA did not oppose Midwest's motion for leave to file a reply, which the Board now grants.² Sierra Club made no filings in response to Midwest's motion for stay.

On December 21, 2005, Midwest waived to September 22, 2006, the Board's deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for September 21, 2006. On March 21, 2006, Midwest filed a status report pursuant to hearing officer directive.³ The case has not been to hearing and has not concluded discovery.

DISCUSSION

Midwest's Motion for Stay

Midwest states that ComEd originally submitted the claimed information to USEPA in response to USEPA's 2003 information request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). The information requests concern six coal-fired generating stations owned by ComEd until 1999 and currently owned by Midwest. Mot. at 1, Memo at 1. Midwest states that some of the information submitted by ComEd is also owned and considered confidential by Midwest. At the time of submittal, Midwest explains, certain information in the response was marked as "confidential business information" (CBI) exempt from disclosure under the federal Freedom of Information Act (federal FOIA) (5 U.S.C. § 552) and 40 C.F.R. Part 2, Subpart B. Mot. at 1-2, Memo at 2. According to Midwest, at USEPA's suggestion, ComEd sent a copy of this submittal to IEPA. Mot. at 1, Memo at 2.

Sierra Club submitted an Illinois FOIA request to IEPA requesting a copy of ComEd's submittal. Mot. at 2. Midwest states that after IEPA received Sierra Club's FOIA request, IEPA asked ComEd, by letter of February 26, 2004, to provide IEPA with a "Statement of Justification" for ComEd's confidentiality claims. Mot. at 2, Memo at 2. Midwest was informed of the pending FOIA request for the ComEd submittal. ComEd submitted a "Statement of Justification" to IEPA on March 11, 2004. Also on March 11, 2004, Midwest submitted an independent "Statement of Justification" to IEPA concerning the portion of the ComEd submittal in which Midwest is interested. IEPA denied both ComEd's and Midwest's trade secret claims in separate determinations. In early June 2004, ComEd and Midwest timely and

² The Board cites Midwest's motion for stay as "Mot. at _" and Midwest's memorandum as "Memo at _." The Board cites IEPA's response as "Resp. at _" and Midwest's reply as "Reply at _."

³ The Board cites Midwest's March 21, 2006 status report as "Status at _."

separately appealed to the Board. Both ComEd's trade secret appeal (PCB 04-215) and Midwest's trade secret appeal (PCB 04-216) have been accepted for hearing by the Board and are in discovery. Mot. at 2-3, Memo at 2-3.

According to Midwest, Sierra Club also submitted a federal FOIA request to USEPA for the same ComEd submittal on May 20, 2004. On June 29, 2005, USEPA informed ComEd of this FOIA request and provided ComEd an opportunity to submit information supporting its confidentiality claim. Mot. at 3, Memo at 4. ComEd informed Midwest of this development, and by letter of August 4, 2005, Midwest provided USEPA with its own substantiation of its confidentiality claims. ComEd submitted its justification to USEPA on August 5, 2005. Mot. at 3. Midwest states that USEPA is currently reviewing the confidential status of the ComEd submittal. Mot. at 3, Memo at 4. Midwest maintains therefore that "at this time both the Board and USEPA are addressing the same fundamental question: Is the [claimed information] exempt from disclosure?" Mot. at 3, Memo at 4-5.

Midwest notes that ComEd moved the Board on September 23, 2005 to stay PCB 04-215 "pending resolution of the federal CBI determination process." Mot. at 3, Memo at 3. Midwest further observes that ComEd argues granting a stay would:

(1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings, (2) avoid practical difficulties that might arise from contrary determinations by state and federal agencies, and (3) allow the Board to be informed by a closely related federal determination. Mot. at 3.

Midwest likewise moves for a stay of PCB 04-216. Midwest incorporates ComEd's September 23, 2005 arguments for a stay in PCB 04-215 into Midwest's memorandum supporting Midwest's motion for a stay of PCB 04-216. Midwest attaches ComEd's memorandum in support of ComEd's motion for stay.⁴ Mot. at 3, Memo at 3.

Because Midwest incorporates and attaches ComEd's PCB 04-215 arguments for a stay, the Board describes those arguments here. ComEd asserts that the Illinois courts have recognized that "multiplicity of litigation" leads to the inefficient expenditure of resources (both for the forums and the parties involved) and is a valid consideration in granting motions to stay. ComEd Memo at 5. ComEd cites to the Board procedural rules' definition of "duplicative" and maintains that a "substantially similar proceeding involving ComEd's confidentiality claims is currently under way at the federal level." *Id.* ComEd states that USEPA is analyzing the confidentiality of the identical information that is before the Board, and USEPA's review was triggered by a Sierra Club FOIA request identical to the one sent to IEPA. *Id.*

ComEd further argues that besides the shared "factual commonality" of the State and federal proceedings, the "applicable legal standards governing both confidentiality determinations are also substantially similar." ComEd Memo at 6. In support, ComEd cites to Illinois court and Board decisions on Illinois FOIA and trade secrets that reference federal case law interpreting the corresponding federal FOIA standards. *Id.* A stay, ComEd continues, will

⁴ The Board cites ComEd's PCB 04-215 stay memorandum as "ComEd Memo at _."

facilitate “consistent construction” between confidentiality determinations at the State and federal levels by allowing the Board to be “informed by the federal confidentiality determination during its own analysis.” *Id.*

ComEd adds that a stay of the Board proceeding “avoids the serious, practical difficulties that could arise from contrary determinations by the two forums.” ComEd Memo at 7. According to ComEd, though the company “does not contend that the Board would be bound by USEPA’s or a federal court’s determination, principles of comity encourage the Board to consider that determination.” *Id.*

In addition to the arguments made by ComEd, Midwest further argues that USEPA has the “primary duty” to interpret the federal Clean Air Act and USEPA regulations, and the Board therefore:

at the least, owes deference to those interpretations. [citation omitted] In fact, the Board may be bound by USEPA’s interpretations but, even if not bound, principles of comity encourage the Board to consider that determination. Mot at 3-4, Memo at 4.

Midwest adds that if the claimed information is released to Sierra Club at the end of the federal process, “the Board proceedings will be largely moot.” Memo at 5.

IEPA’s Response Opposing a Stay

IEPA urges the Board to deny Midwest’s motion for stay. IEPA asserts that there is no “proceeding” underway before USEPA concerning the information at issue. Resp. at 1. Instead, IEPA continues, “USEPA is in the preliminary stages of making its initial administrative decision” and once that is finalized, Midwest or Sierra Club may “commence a federal court challenge to that decision.” *Id.* Now, however, a stay of PCB 04-216 would be “woefully premature,” according to IEPA. *Id.*

Specifically, IEPA maintains that because there is no “ongoing, duplicative” proceeding before USEPA, there is no “multiplicity of *litigation*” to be avoided by staying the Board proceeding. Resp. at 2-4 (emphasis in original). According to IEPA, a case before the Board can be rendered “duplicative,” as defined in the Board’s procedural rules, only by a “pending adjudicatory proceeding,” not by an “agency’s internal decisionmaking process.” *Id.* at 3. IEPA further argues that there is no basis for concluding now that an adjudicatory proceeding will eventually arise out of the USEPA process in the form of a federal court challenge. *Id.* at 4.

Besides the lack of “duplicativeness,” IEPA states that other factors militate against a stay. Resp. at 4. IEPA notes that USEPA may decide the matter “solely on general rules governing confidentiality,” without addressing whether the documents constitute “emission data” under the federal Clean Air Act: “No principle of comity renders USEPA a more appropriate forum for interpreting those rules than the Board.” *Id.* at 4-5. USEPA also may not afford “complete relief,” IEPA asserts, by choosing to release some documents but not others. IEPA

adds that a USEPA decision, while “persuasive authority,” would have no *res judicata* effect on the Board. *Id.* at 5.

IEPA also argues that a stay would be extremely prejudicial to IEPA because:

IEPA has a strong interest in ensuring that the public receives promptly the information regarding environmental compliance to which it is entitled—particularly where, as here, the information concerns compliance with Clean Air Act provisions essential to protecting public health. Resp. at 1, 5.

IEPA notes that Sierra Club sought ComEd’s responses to USEPA’s Section 114 information requests. Those USEPA requests, according to IEPA, were directed toward determining whether the facilities were “emitting pollutants in violation of the Clean Air Act New Source Review standards, which require older coal-fired plants that perform major modifications resulting in increased emissions to upgrade their pollution control equipment.” *Id.* at 5, n.2.

IEPA maintains that USEPA’s “track record in this matter thus far does not suggest an inclination to decide it expeditiously.” Resp. at 5. IEPA argues that its interest in prompt public disclosure would be “grossly and unjustifiably” interfered with by staying the Board proceeding “until USEPA gets around to making a decision, and possibly until a federal court rules on a challenge to that decision.” *Id.*

Midwest’s Reply & Status Report

Midwest states that IEPA is “wrong” to assert that no “proceeding” is underway before USEPA. Reply at 1. On the contrary, maintains Midwest, “USEPA’s legal office is in the midst of making a final confidentiality determination in accordance with the administrative process set forth in 40 CFR Part 2.” *Id.* Midwest points out that USEPA made a preliminary determination on confidentiality, finding that the documents may be entitled to confidential treatment. According to Midwest, USEPA then allowed the affected businesses to submit supporting comments, and now USEPA is in the process of making a final determination, which will constitute “final agency action.” *Id.* Midwest concludes that IEPA’s claim that USEPA is merely in the process of evaluating a FOIA request before making an initial determination is “simply inaccurate.” *Id.* at 1-2.

In its March 21, 2006 status report, Midwest states that as of March 20, 2006, USEPA (1) advised the company that USEPA’s confidentiality determination was still pending; and (2) “informally estimated that the determination would be finalized in three months.” Status at 1.

Board Analysis and Ruling

Section 101.514(a) of the Board’s procedural rules addresses motions for stays:

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status

report detailing the progress of the proceeding must be included in the motion. (See also Section 101.308 of this Part.) 35 Ill. Adm. Code 101.514(a).

The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” See People v. State Oil Co., PCB 97-103 (May 15, 2003), *aff’d sub nom* State Oil Co. v. PCB, 822 N.E.2d 876 (2d Dist. 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. See A. E. Staley Mfg. Co. v. Swift & Co., 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980); *see also* Environmental Site Developers v. White & Brewer Trucking, Inc.; People v. White & Brewer Trucking, Inc., PCB 96-180, PCB 97-11 (July 10, 1997) (applying the Illinois Supreme Court’s A.E. Staley factors). The Board may also weigh the prejudice to the nonmovant from staying the proceeding against the policy of avoiding duplicative litigation. See Village of Mapleton v. Cathy’s Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000).

Comity is the principle under which courts will give effect to the decisions of a court of another jurisdiction, not as a matter of obligation but as a matter of deference and respect. See Environmental Site Developers, PCB 96-180, PCB 97-11 (citing *Black’s Law Dictionary*, 6th Ed. (1990)). USEPA may determine whether Midwest’s claimed information includes “emission data” under the federal Clean Air Act and USEPA regulations. The Act requires that such “emission data” be made publicly available, regardless of whether the information constitutes a trade secret. See 415 ILCS 5/7(c) (2004); *see also* Classic Finishing Co., Inc. v. IEPA, PCB 84-174 (Feb. 7, 1985). A stay diminishes the opportunity for potentially conflicting determinations.

There has been no allegation of vexation or harassment in this case, but Midwest does contend that staying this appeal may avoid a wasteful multiplicity of litigation. Both parties rely on the Board’s procedural rule definition of “duplicative.” Section 101.202 of the procedural rules defines “duplicative” as follows: “the matter is identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202.⁵ USEPA has made a preliminary determination on confidentiality under 40 C.F.R. § 2.204(d). In turn, USEPA has given the affected businesses the opportunity to submit supporting documentation under 40 C.F.R. § 2.204(e). USEPA is presently making a final confidentiality determination under 40 C.F.R. § 2.205. Final determinations are made by the “EPA legal office,” meaning the Office of General Counsel or the Office of Regional Counsel. See 40 C.F.R. §§ 2.201(n), 2.205(a). A final determination denying a business confidentiality claim may be subject to judicial review

⁵ The term “duplicative” is not used in the Act’s provisions concerning trade secrets. Rather, the Act employs the term, for example, in the context of citizen enforcement complaints and third-party NPDES permit petitions for review. Specifically, in deciding whether to accept for hearing such complaints and petitions, the Board determines whether they are, among other things, “duplicative.” See 415 ILCS 5/31(d)(1), 40(e)(3) (2004). Though technically not applicable here, the Board’s definition of “duplicative” is nevertheless useful in evaluating Midwest’s motion for stay.

under the federal Administrative Procedure Act (Chapter 7, Title 5, United States Code). *See* 40 C.F.R. § 2.205(f)(2).

The information claimed by Midwest at the federal and State levels to be protected from disclosure is identical. The potentially applicable legal standards for each proceeding are also similar if not the same. *See* 40 C.F.R. § 2.201(e) (reasons of business confidentiality include trade secrecy), 2.301 (emission data), 2.208 (criteria for confidentiality determination); 35 Ill. Adm. Code 101.202 (trade secret), 130.110 (emission data), 130.208 (standards for trade secret determination). In these respects, the Board finds that the pending federal process is “substantially similar” to PCB 04-216. A stay of the latter may avoid multiplicity and the potential for unnecessarily expending the resources of the Board and those before it.

Res judicata is the legal doctrine providing that “once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in a new proceeding.” Burke v. Village of Glenview, 257 Ill. App.3d 63, 69, 628 N.E.2d 465, 469 (1st Dist. 1993). Midwest does not assert that USEPA’s final confidentiality determination will necessarily have *res judicata* effect in this Board proceeding, but both parties agree that USEPA’s determination would constitute persuasive authority. Resolution of the federal matter may or may not address *all* of the like grounds at issue in PCB 04-216 (*e.g.*, emission data). IEPA does not dispute, however, that public release by USEPA of the documents at issue may render this appeal before the Board moot. *See* People v. Saint-Gobain Containers, Inc., PCB 03-22 (Dec. 15, 2005) (granting People’s motion to stay enforcement action due to federal initiative, the resolution of which, according to the People, “in all probability . . . will also resolve and render technical and legal issues in the instant case moot.”).

The Board is mindful of the strong policy interest, evidenced in the Act, favoring public disclosure of environmental compliance information, particularly emission data. *See* 415 ILCS 5/7(b)-(d) (2004). The risk of prejudice to IEPA from a stay of PCB 04-216 would be greatly diminished, however, by limiting the duration of the stay to a date-certain in the near future, rather than simply granting a stay “until completion of the federal CBI process” as Midwest requests. The USEPA process under 40 C.F.R. Part 2, Subpart B does not, on its face, include a hearing. USEPA may produce “final agency action” at a faster pace than PCB 04-216, which is still in discovery. Based on Midwest’s most recent status report, a USEPA final determination on confidentiality is anticipated in three months. Under these circumstances, and considering all of the relevant factors, the Board finds a stay of 120 days is appropriate, unless the Board by order ends the stay sooner. To that extent, the Board grants Midwest’s motion for stay.

During the stay, if USEPA issues a final confidentiality determination, Midwest must promptly file a copy of USEPA’s determination with the Board. The basis for USEPA’s determination may then be known and inform the Board’s own deliberations on analogous issues. *See* Duo Fast Corporation Trade Secret Determination, PCB 87-4 (Mar. 5, 1987) (looking to federal case law on and USEPA definition of “emission data”); Outboard Marine Corp. v. IEPA, PCB 84-26 (June 20, 1984) (looking to federal FOIA). This would be so even if judicial review of USEPA’s determination is sought. If USEPA’s final determination is not

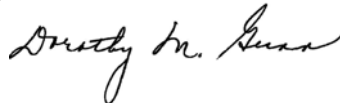
forthcoming during the four-month stay, any request by Midwest to extend the stay must be accompanied by a report on the status of the USEPA process.

CONCLUSION

The Board grants Midwest's motion to stay this trade secret appeal in part. Specifically, PCB 04-216 is stayed for 120 days (*i.e.*, until August 4, 2006), unless the Board issues an order terminating the stay earlier. To ensure compliance with the Board's deadline for deciding this appeal, the Board will terminate the stay as needed to allow time for hearing and a final decision. If, during the stay, USEPA issues a final confidentiality determination concerning the claimed information, Midwest must promptly file with the Board a copy of USEPA's determination. As necessary, Midwest may make the filing consistent with the procedures of 35 Ill. Adm. Code 130 for protecting information from disclosure. Any request by Midwest to extend the stay must be directed to the Board and include a status report and, as appropriate, a waiver of the Board's decision deadline. *See* 35 Ill. Adm. Code 101.514.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 6, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board