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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MONSANTO COMPANY, Petitioner,	)	
v.	)	PCB 85-19
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

N O T I C E

TO:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60606

James Geocaris
Gabrielle Siegel
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

John E. Norton & Assoc.
105 West Washington Street
Post Office Box 565
Belleville, Illinois 62222

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Response Brief of Respondent Illinois Environmental Protection Agency of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

BY: William D. Ingersoll
William D. Ingersoll
Attorney
Enforcement Programs

DATE: August 20, 1985
Agency File #:

2200 Churchill Road
Springfield, Illinois 62706
217/782-5544

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MONSANTO COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 85-19
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

RESPONSE BRIEF OF RESPONDENT
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

As a result of a request for information by Respondent JOHN E. NORTON & ASSOCIATES ("Norton"), the Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Agency") requested the Petitioner MONSANTO COMPANY ("Monsanto") to provide justification for its claims of "trade secret" status in Agency files. The Agency, by letter of January 3, 1985, notified Monsanto that the Agency had determined that certain information contained in Division of Air Pollution Control permit files could not be given protected status pursuant to section 7(d) of the Illinois Environmental Protection Act ("Act"). Monsanto appealed that decision in the present action. The information at issue is contained in Exhibits 16, 17, 21, and 22 of the Agency Record filed on March 13, 1985.

A hearing was held in this matter on June 11, 1985. Testimony was heard and exhibits were received into evidence. In addition, both Respondents stipulated that a) Monsanto had "substantially complied with the procedures for making and jsutifying a trade secret claim..." for the deleted portions of the Agency Record Exhibits 16, 17, 21, and 22; and b) those deleted portions had not been published, disseminated

or otherwise become a matter of public knowledge and they have competitive value. Agency counsel further stated on the record (Reporter's Transcript ("RT") at pp. 117-119) that Exhibit 22 of the Agency Record was merely a copy of pages exerpted from Exhibit 21 of the Agency Record, with some handwriting added, and that it was not needed or used to make the Agency's determination.

I. THE FREEDOM OF INFORMATION PROVISIONS OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT REQUIRE DISCLOSURE OF THE TYPE OF INFORMATION AT ISSUE

Monsanto seeks to argue that Section 7(d) of the Act is an exception to the general rule protecting trade secrets from disclosure. Section 7(a) provides for disclosure of Agency records except (emphasis added) for trade secrets and other types of information. Section 7.1 does not act to expand the confidentiality of trade secret articles. Rather, it describes the authority by which such information may be disclosed to other governmental agencies in pursuit of carrying out the Act. The logic advanced by Monsanto is actually reversed from the proper approach to the analysis of whether or not disclosure is required.

The general rule is in favor of disclosure. Section 7(a) provides generally for disclosure of information contained in Agency records. Section 7 then continues with several subsections which act to limit the applicability of the four exceptions to disclosure found in Section 7(a). These subsequent subsections prevent certain types of information from being held confidential even if it would

otherwise fit into a Section 7(a) category exception from disclosure.

There are numerous cases decided under the federal Freedom of Information Act 4 U.S.C. §552, which hold that the emphasis favors disclosure and that exemptions are to be construed very narrowly. Miller v. Bell, 661 F. 2d 623 (1981); In re Special September 1978 Grand Jury (II), 640 F. 2d 49 (1980); City of West Chicago v. U.S.N.R.C., 547 F. Supp. 740 (1982); Antonelli v. FBI, 536 F. Supp. 568 (1982). Section 7 of the Act favors disclosure and the trade secret exception should be construed narrowly. Here the articles at issue were stipulated to be of competitive value and that they had not been published, disseminated or otherwise become a matter of public knowledge. However, the analysis of whether an article can be protected as trade secret does not stop there. The other subsections of Section 7 contain further conditions on granting trade secret protection. Petitioner consistently, but incorrectly, characterizes the articles at issue as "trade secret". However, the Section 7(d) conditions were not satisfied so no trade secret protection is available. Section 7(d) reads as follows:

> Not withstanding subsection (a) above, the quantity and identity of substances being placed or to be placed in landfills or hazardous waste treatment, storage or disposal facilities, and the name of the generator of such substances may under no circumstances be kept confidential.

Throughout Petitioner's brief the claim is repeated that Section 7(d) is the exception and that non-disclosure is the general rule. Petitioner cites cases which properly indicate that statutory exceptions are to be narrowly construed. However, as mentioned above, disclosure is the rule and non-disclosure is the exception when it comes to statutory provisions of a Freedom of Information nature.

II. THE ARTICLES AT ISSUE FALL WITHIN THE PURVIEW OF THE SECTION 7(d) PROVISIONS

A. These Articles Contain Information About Substances "Placed or to be Placed" in Hazardous Waste Facilities.

Petitioner seeks to make a distinction in that Exhibits 21 and 22 of the Agency Record relate to an incinerator never built and Exhibit 16 "is part of a process never implemented at the Krummrich plant". Monsanto does not mention that the permitting process for constructing the incinerator and using the manufacturing process was complete. Under the incinerator construction permit, some wastes could have been incinerated. Generally operation is begun under a construction permit while modifications are made and testing is done to seek an operating permit. Therefore, Monsanto had the legal ability to incinerate wastes found in Exhibit 21 of the Agency Record.

Exhibit 16 of the Agency Record is drawn from Permit Application No. 84060008. This construction permit was granted on August 30,

1984. This process was also incorporated into the operating permit under Application No. 84010045 which does not expire until June 30, 1987. (See Exhibits 6, 7, and 8 to the Agency's March 29, 1985 "Response to Amended Petition.")

The fact that the incinerator was never built and the Exhibit 16 process was never used is not relevant in determining the status of information found in Agency files. This status is determined by its nature when the information comes into Agency possession. A similar issue was addressed in Bast v. U.S. Dept. of Justice, 665 F. 2d 1251 (D.C. Cir.). In Bast, the plaintiff sued for disclosure of documents which were denied him because they were claimed to be "investigatory records". Bast argued that the documents lost this status because the government had subsequently decided not to prosecute. The court rebuffed this argument saying "(t)o the contrary, it is well settled that the Agency's purpose in compiling documents, not the ultimate use of the documents, determines whether they are in the exemption..." This holding would be applicable here to direct that Monsanto's decisions not to implement certain things should have no bearing on information which had previously come into Agency files.

Apart from the Bast consideration, it should be considered that the effect of Monsanto's argument about the "never built" or "never used" argument would be to cause a serious burden on Agency record keeping responsibilities. For example when the incinerator permit was still viable and Monsanto planned the construction, certain information would be disclosable pursuant to Section 7 of the Act.

Subsequently Monsanto decided not to build the incinerator. Agency staff should not be expected to re-review the files to then amend them to indicate the changed circumstances and thereby delete information which was previously disclosable.

Monsanto claims that under Outboard Marine Corp. v. IEPA and American Toxic Disposal, Inc., PCB 84-26 (6-20-84) the wastes at issue here are only anticipated wastes and that therefore the information need not be disclosed. With regard to the incinerator permit information (Agency Record, Exhibit 21) the discussion above would apply. The permitting process for the incinerator was already adequately complete to allow some incineration of the wastes. Once again, the subsequent decision not to build does not alter that fact.

The wastes identified in Item 10 on both Agency Record Exhibit 16 and 17 should not be limited by any interpretation of the Outboard Marine decision. Identification of the wastes is a necessary part of an air pollution permit. The requirements of an air pollution permit allow evaluation of air pollution capabilities and do not necessarily anticipate further permits. The air pollution permitting process is independent of land pollution waste disposal permit requirements that may be necessary for further handling of the wastes.

The reporting requirements of identifying the wastes in the air pollution permits do not offend the concerns that the Board expressed in Outboard Marine. The identification of the wastes does not come near to requiring "disclosure of products and consumer items as they

come off the assembly line." Item 10 on those air pollution permits is for the reporting of the identity of waste products of the process being permitted.

This distinction is important in analyzing this case in light of the Outboard Marine decision. The information at issue was already in Agency records to identify wastes, not process components. Further, to allow the confidentiality of these waste products on the air pollution permit applications would effectively eliminate public reivew of this information. Monsanto could then prevent public knowledge of this information by transporting it to a site outside of Illinois. For sites outside of Illinois, a "Special Waste Stream Application" is not required and the residents of Illinois would have no means of composition, and possible risks, of materials being handled here. Therefore, the information on these air pollution permits may indeed be the only source of this level of information to the public, which deserves to evaluate the risks present in citizens' own neighborhoods.

B. The Information at Issue Equates to the Quantity and Identity of Substances.

Petitioner attempts to claim that "quantity and identity" under Section 7(d) only extends to the generic descriptions given on "Uniform Hazardous Wast Manifest" forms and in the "Waste Name" columns in Agency Record Exhibits 21 and 22. The Agency contends that the identities in Item 10 on Agency Record Exhibits 16 and 17

and in the "Waste Composition" columns in Agency Record Exhibits 21 and 22 and in the Agency's Special Waste Stream Applications. The information about carbon, hydrogen, oxygen and nitrogen content, specific gravity, ash composition, viscosity, pH flash points, and pour points is indeed part of the information at issue however the Agency is most concerned with the "Waste Composition" level of information.

Petitioner points to the use of the word "data" in Section 7(b) and Section 7(c) to show a different legislative intent than in Section 7(d) where "quantity and identity" is used. Petitioner cites cases for the proposition that the legislature's use of different language in different sections of the same statute evidences different intended results. These cases give an accurate outline of a general rule of statutory interpretation. However, the terms "effluent data" and "emissions data" were actually drawn from federal law and do not show a conscious difference in intent by the legislature from its intent in Section 7(d).

Even if that were not so, there is little to support an argument that the word "data" is more specific than "quantity and identity". Webster's N ew World Dictionary defines "data" as "things known or assumed; facts or figures from which conclusions can be inferred; information". "Identity" is defined as "1. the condition or fact of being the same or exactly alike; sameness; oneness..." Giving information which is "exactly alike", as in "identity", is surely

more specific "information", as in "data". Petitioner further tries to link "basic" with "identity" in an attempt to make it appear less specific. Surely the definition of "identity" shows it to be the more specific term.

Petitioner spends nearly one and one-half pages of its brief, on pp. 11-12 arguing that the generic names on the waste manifests are adequate to provide protection from accidental releases during transportation to out-of-state disposal sites. The Agency responds to this claim by saying "so what". Section 7(d) has been adequately laid out earlier and nowhere in it is its scope limited to transportational accidents. Mr. Storms did indeed testify that the information on waste manifests (Petitioner's Ex. 1-3) is adequate to direct emergency response in case of such an accident. That part is uncontroverted. His testimony did not go so far as to say this information did anything toward providing direction to the public in any concerns for long-range health or environmental impacts involving the listed substances. (See R.T. - pp. 96-108.) There are many proper concerns of the public in at least having the opportunity to evaluate the possible impact of substances being handled in Illinois.

Petitioner misquotes Agency witness Gregory Zak on page 12 of Petitioner's brief. Petitioner claims that "Mr. Zack (sic) first testified that no one at the IEPA had made the determination..." Actually, at R.T. - p. 182, Mr. Zak was asked if "someone made that determination..." Mr. Zak responded "(n)ot to my knowledge in this

specific instance". That is not the same as claiming that he said that no one had made the determination. He merely said he had no knowledge of the determination. Petitioner then goes on to make a point about Mr. Zak's unfamiliarity with the review of the applications in question here. However, Mr. Zak was never qualified in testimony as having knowledge of the review of the air pollution permits at issue here. He was only claimed to have knowledge of the Agency's Division of Land Pollution files and to provide foundation for the Agency's exhibits. The fact that Mr. Zak did not make an independent review of the permit information for "trade secret" status is irrelevant. Mr. Zak made no claims related to any such review. Further, the "Certification of Agency Record" shows that Vir V. Gupta made that review. Petitioner made no effort to have Mr. Gupta made available for testimony.

An issue left untouched by Petitioner is that information of a similar level to that at issue here has been, for years, available to the public for the asking. On the Agency's "Special Waste Stream Applications" a generic waste name is required which is comparable to the description on the waste manifests and in the "Waste Name" column of Agency Record Exhibits 21 and 22. Further, the "component name" and percentage is required. This information is comparable to that in Item 10 of Exhibits 16 and 17 and in the "Waste Composition" column of Exhibits 21 and 22 of the Agency Record. This is the crux of the case before us. Mr. Zak testified at R.T. - pp. 130-133 that

the information found on the Special Waste Stream Applications (See Agency Exhibits A and F) is transferred to microfiche and is routinely released by the Agency. So this level of information, comparable to that at issue here, has been released many, many times. This includes some from Monsanto.

Counsel for Monsanto claimed at hearing (R.T. - pp. 123-125) that there was a "grave error on the part of IEPA or internally at Monsanto" in disseminating the Special Waste Stream Application information to the public. Counsel further claimed a proprietary, confidential concern over this information, at least from Monsanto. The Agency directs attention to Agency Exhibit A, admitted into evidence at the hearing. This exhibit includes 34 pages of such applications from the Monsanto Krummrich plant. Many of these applications include submission of information on Monsanto letter-head and signed by Richard H. Sinise. At no place on these applications is any designation made that would indicate any desire for confidentiality. Even though these submissions were made prior to passage of the Freedom of Information Act and subsequent regulations, Monsanto should have been expected to make some designation indicating confidentiality. In fact, please note from Agency Record Exhibits 21 and 22 that Monsanto previously used the designation of "Company Confidential" to indicate the desire for confidentiality. Monsanto did not expect this level of information to be held in confidence when it was submitted and should not expect it now.

As previously cited, Monsanto witness, Mr. Storms, gave absolutely no testimony to indicate that the level of information offered as acceptable to Monsanto would give any value in analyzing the long-range health or environmental impact of releases of the substances at issue here. No adequate determination of the health risks could be made based on the generic waste names. It may be true that it would indicate toxicity, but it does not go to indicating a toxicity level or the carcinogenic properties of a substance. Either of these latter concerns would weigh heavily in the minds of the citizenry in evaluating the risks it may or may not be willing to accept. Section 7(d) was intended to provide the citizens of Illinois at least the opportunity to make these determinations in an informed manner.

CONCLUSION

As outlined above, the information at issue is not "trade secret" because Section 7(d) of the Act prevents the inclusion of that information into the Section 7(a)(i) exception to the general rule of disclosure. Further, such status is determined by the nature of the information at the time of submission and is not changed by later decisions by the submitter. The level of information offered by Monsanto is not adequate under section 7(d) to provide the public with the ability to make informed decisions. Finally, a comparable level of information has already been disseminated many times and should not now be limited. Therefore, the Board should sustain the

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Notice and Response Brief of Respondent, Illinois Environmental Protection Agency upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

James Geocaris
Gabrielle Siegel
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

John E. Norton & Assoc.
105 West Washington Street
Post Office Box 565
Belleville, Illinois 62222

and sending it by first class mail from Springfield, Illinois, on August 20, 19 85, with sufficient postage affixed.

Deborah M. Stoll
Deborah M. Stoll

SUBSCRIBED AND SWORN TO BEFORE ME
this 20th day of August 1985.

Barbara K. McGee
Notary Public

IL 532-0917
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