

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

MIDWEST GENERATION EME, LLC,	)	
	)	
Petitioner,	)	PCB 04-185
	)	Trade Secret Appeal
v.	)	
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 13TH day of May, 2011, I filed with the Clerk of the Illinois Pollution Control Board Respondent's Motion to Clarify, Reconsider, and/or Modify the Board's April 7, 2011 Order, copies of which are attached hereto and are hereby served upon you.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

BY:



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**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

**SERVICE LIST**

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**CERTIFICATE OF SERVICE**

I, STEPHEN J. SYLVESTER, an Assistant Attorney General in this case, do certify that I caused to be served this 13th day of May, 2011, the foregoing Respondent's Motion to Clarify, Reconsider, and/or Modify the Board's April 7, 2011 Order and Notice of Filing upon the persons listed on the Service List by electronic mail and by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.

  
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**RESPONDENT'S MOTION  
TO CLARIFY, RECONSIDER AND/OR MODIFY  
THE BOARD'S APRIL 7, 2011 ORDER**

Pursuant to the April 7, 2011 Pollution Control Board ("Board") Order and Section 101.520 of the Board Procedural Regulations, 35 Ill. Adm. Code 101.520, Respondent, the Illinois Environmental Protection Agency ("IEPA"), submits this motion to clarify, reconsider, and/or modify the Board's April 7, 2011 Order. In support thereof the IEPA states as follows:

**I. INTRODUCTION**

On December 15, 2010, Petitioner Midwest Generation EME, LLC ("Midwest Gen") filed its Motion to Vacate IEPA's Trade Secret Determination and to Dismiss the Petition for Review as Moot ("Motion"). With the hearing officer's leave, the IEPA filed its response on January 14, 2011, and Midwest Gen filed a reply on January 28, 2011. On April 7, 2011, the Board issued an Order ("Order") granting Midwest Gen's Motion.

**II. ARGUMENT**

**A. Legal Standard for Motions for Reconsideration and Clarification.**

In setting forth the standard for ruling on a motion for reconsideration, the Board has stated:

The Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902; *Jersey County Sanitation v. IEPA*, PCB 00-82 (Sept. 20, 2001). In *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993), we observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." *Koroghlyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

*People of the State of Illinois v. Doren Poland*, PCB 98-148, 2002 WL 126132, slip op. at 2 (Jan., 24, 2002). Counsel for the IEPA is unaware of any Board Procedural Regulations or Board cases that set forth any pleading requirements or standards specifically for motions for clarification.

**B. The Board Found that the IEPA's Trade Secret Determination was Moot and It also "Vacated" the Determination.**

In its Order, the Board granted Midwest Gen's Motion. (Order at p. 10.) The Order first addressed the issue of whether the IEPA's March 10, 2004 trade secret determination ("Trade Secret Determination") was moot. The Board found that since Sierra Club had withdrawn its Freedom of Information Act ("FOIA") request, this litigation had become moot. (Order at p. 8.) Furthermore, the Board found that this case did not meet the Public Interest Exception to the Mootness doctrine, since the Board did not find that this matter was likely to recur based on the parties' papers. (Order at pp. 8-9.)

Having found the IEPA's Trade Secret Determinations to be moot, the Board next considered the issue of whether it was proper to also vacate them. (Order at pp. 9-10.) The Board found that since the matter was moot, if it did not vacate the IEPA's unreviewed determinations, such determinations would become unreviewable or "final," risking entry of the claimed documents into the public domain. (Order at p. 9.) However, the effect of the Board's vacatur of IEPA's Trade Secret Determination leaves the IEPA with issues that remain unclear.

**C. The IEPA Seeks Clarification as to the Disposition of the Supplemental Trade Secret Filings, which Were Filed with the Board after the IEPA's March 10, 2004 Trade Secret Determination.**

The Board in its Order vacated the March 10, 2004 Trade Secret Determination only. (Order at p. 10.) The Board made no specific mention of the disposition of the following: 1) the IEPA's November 30, 2004, "Clarification of Trade Secret Determination," which was subsequently modified by Board Order on April 19, 2007, and 2) Midwest Gen's May 29, 2007 responsive pleading to IEPA's supplemental determination (collectively the "Supplemental Trade Secret Filings"). (Order at p. 2.) As a result, the IEPA seeks clarification as to whether the Board intended its Order to encompass, and thereby vacate, the aforementioned Supplemental Trade Secret Filings as well as the IEPA's March 10, 2004 Trade Secret Determination. In addition, the IEPA requests that if the Board determines that it intended to explicitly include the Supplemental Trade Secret Filings, that it enter an order modifying its April 7, 2011 Order to reflect such clarification.

**D. The IEPA Seeks Clarification as to its Request to Midwest Gen to Justify its Trade Secret Claims and Midwest Gen's Subsequent Trade Secret Justification.**

In its Order, the Board found that it "need not resolve the parties' argument over precisely *when* IEPA becomes authorized to make a trade secret determination under the Board's rules," instead the Board found that Midwest Gen's Petition was moot, since Sierra Club withdrew its FOIA request. (*Emphasis added in original.*) (Order at p. 8.) This leaves open the question of the documents preceding the IEPA's Trade Secret Determination. Although the Board has vacated the IEPA's Trade Secret Determination, arguably Midwest Gen's request for trade secret protection of the documents at issue remains outstanding. In its Order, the Board specifically vacated *only* the following document -- IEPA's March 10, 2004 Trade Secret Determination. (*Emphasis added.*) (Order at p. 10.) However, there is no explicit language in the

Order regarding the status of the IEPA's January 5, 2004 request to Midwest Gen for a statement justifying its trade secret claims or for Midwest Gen's January 23, 2004 statement of justification to the IEPA.

Section 130.206(a) of the Board Trade Secret Regulations, 35 Ill. Adm. Code 130.206(a), requires the IEPA to determine whether an "article represents a trade secret within 45 days after the date it receives a complete statement of justification as prescribed in Section 130.203 of this Subpart." The clear language of Section 130.206(a) does not condition its applicability upon the specific manner by which the IEPA receives a complete statement of trade secret justification (*e.g.*, pursuant to a request from the IEPA or voluntarily submitted from the entity claiming the trade secret without a request from the IEPA).

Although the Board unequivocally vacated the IEPA's March 10, 2004 Trade Secret Determination, the Order's silence as to the IEPA's request for a justification and Midwest Gen's subsequent trade secret justification, still leaves unresolved the issue of whether those documents are still pending and subject to final trade secret determination by the IEPA. Thus, although the IEPA's Trade Secret Determination has been vacated, absent the Board's explicit vacatur, the 45 day period for review under Section 130.206(a) has potentially begun to run, since the IEPA is still in possession of Midwest Gen's complete statement of trade secret justification (*i.e.*, Midwest Gen's unreviewed trade secret justification would re-start the IEPA's clock for making a "final" trade secret determination).

Accordingly, the IEPA seeks clarification from the Board as to whether the vacatur applies to its January 5, 2004 request to Midwest Gen for a statement of justification and/or to Midwest Gen's January 23, 2004 statement of justification. In addition, the IEPA requests that if the Board determines that it intended to explicitly include the IEPA's January 5, 2004 request to

Midwest Gen for a statement justifying its trade secret claims and/or for Midwest Gen's January 23, 2004 statement of justification to the IEPA, that it enter an order modifying its April 7, 2011 Order to reflect such clarification.

**E. Absent the Board Vacating the IEPA's Underlying Request to Midwest Gen for Justification and Midwest Gen's Subsequent Trade Secret Justification, IEPA Could Run Afoul of the *Reichhold Chemicals* Holding.**

In the Order, the Board stated that the IEPA would not run afoul of the appellate court holding in *Reichhold Chemicals, Inc. v. Illinois Pollution Control Bd.*, 204 Ill.App.3d 674, 677 (3rd Dist. 1990) (administrative agency may allow a rehearing, or modify and alter its decisions only when authorized to do so by statute). (Order at p. 10.) Specifically, the Board stated that:

Here, IEPA would in no instance be reapplying the trade secret provisions of the Act and the Board's regulations to arrive at a new determination. If the Board were to grant Midwest's motion, it would be the Board, not IEPA, vacating IEPA's trade secret determination. The Board finds that so vacating IEPA's determination would not constitute improper reconsideration by IEPA of the trade secret denial.

(Order at p. 10.) However if the Order does not apply to the IEPA's January 5, 2004 request to Midwest Gen for a statement of justification and/or to Midwest Gen's January 23, 2004 statement of justification to the IEPA, the IEPA would be saddled with its previous basis for requesting a justification from Midwest Gen (*i.e.*, a FOIA request from Sierra Club, which of course is now moot). Therefore, if another person requested the information from the IEPA via FOIA or if the IEPA sought a justification from Midwest Gen based on Section 130.201(b)(6)<sup>1</sup> of the Board Trade Secret Regulations, 35 Ill. Adm. Code 130.201(b)(6), the IEPA could potentially be foreclosed from "reconsidering" its rationale for requesting a justification from

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<sup>1</sup> Reasons for a request for justification may include that "determining the validity of the claim will facilitate the timely performance of State agency responsibilities."



Midwest Gen based on the appellate court decision in *Reichhold Chemicals*, which forbids the IEPA from reconsidering its prior decisions. 204 Ill.App.3d at 677.

Consequently, the IEPA requests that the Board clarify whether its vacatur in the Order applies to the IEPA's January 5, 2004 request to Midwest Gen for a statement of justification and/or to Midwest Gen's January 23, 2004 statement of justification to the IEPA. In addition, the IEPA requests that if the Board determines that it intended to explicitly include the IEPA's January 5, 2004 request to Midwest Gen for a statement justifying its trade secret claims and/or for Midwest Gen's January 23, 2004 statement of justification to the IEPA, that it enter an order modifying its April 7, 2011 Order to reflect such clarification.

**III. CONCLUSION**

For the foregoing reasons, the IEPA respectfully requests that the Board grant its Motion to Clarify, Reconsider, and/or Modify the Board's April 7, 2011 Order.

Respectfully submitted,

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PROTECTION AGENCY

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