

ILLINOIS POLLUTION CONTROL BOARD

July 7, 2011

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

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

On December 15, 2011, Midwest Generation EME, LLC (Midwest) filed a motion to (1) vacate the March 10, 2004 trade secret denial of the Illinois Environmental Protection Agency (IEPA) and (2) dismiss Midwest's April 19, 2004 petition for review as moot. The basis for Midwest's motion was the withdrawal of Sierra Club's Freedom of Information Act (FOIA) request that IEPA disclose Midwest's claimed trade secret materials. IEPA opposed Midwest's motion. On April 7, 2011, the Board issued a final order granting Midwest's motion, vacating IEPA's trade secret determination, dismissing Midwest's petition as moot, and closing the docket. On May 13, 2011, IEPA filed a motion for clarification and corresponding modification of the Board's April 7, 2011 order (Mot.). On May 27, 2011, Midwest filed a response (Resp.). Today's order rules upon IEPA's motion.

In the motion, IEPA claims that it is "unclear" as to whether several documents related to IEPA's vacated trade secret determination or Midwest's dismissed petition are still pending or instead encompassed by the Board's April 7, 2011 final order. Mot. at 3-6. The documents with questionable status, according to IEPA, are as follows: (1) IEPA's January 5, 2004 request to Midwest, based upon receipt of Sierra Club's FOIA request, for a statement justifying the trade secret claim; (2) Midwest's January 23, 2004 statement of justification to IEPA; (3) IEPA's November 30, 2004 filing of a "Clarification of Trade Secret Determination," which was amended by the Board's April 19, 2007 grant of Midwest's motion to strike; and (4) Midwest's May 29, 2007 filing of a pleading responsive to the amended clarification. *Id.*

Midwest responds that the latter two documents were "[o]bviously" included in the Board's vacatur and dismissal, respectively, reasoning that "[a]ny other reading of the Order would be illogical." Resp. at 2. Additionally, Midwest asserts that the former two documents, as "[t]he necessary consequence of the Board's Order," are no longer pending before IEPA, and that IEPA's contrary suggestion would lead to an "absurd result." *Id.* at 2-3. While Midwest believes it is unnecessary to clarify the Board's order, Midwest does not object to the Board making explicit statements as to the status of the four documents. *Id.*

The Board agrees with Midwest as to the necessity of clarification, but finds no harm in explicitly stating what logically followed from the Board's April 7, 2011 final order. The Board therefore grants the Agency's motion and sets forth in the modified order below the disposition of the documents questioned by IEPA.

**ORDER**

1. The Board vacates the following:
  - a. IEPA's January 5, 2004 request to Midwest for a statement justifying the trade secret claim;
  - b. Midwest's January 23, 2004 statement of justification submitted to IEPA;
  - c. IEPA's March 10, 2004 trade secret determination issued to Midwest; and
  - d. IEPA's "Clarification of Trade Secret Determination" filed with the Board on November 30, 2004.
2. The Board dismisses the following:
  - a. Midwest's petition for review filed with the Board on April 19, 2004; and
  - b. Midwest's responsive pleading filed with the Board on May 29, 2007.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 7, 2011, by a vote of 5-0



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board

