

ILLINOIS POLLUTION CONTROL BOARD
February 20, 1985

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

ORDER OF THE BOARD (by J. D. Dumelle):

On February 7, 1985 Monsanto Company (Monsanto) filed a petition for review of a trade secret determination made by the Illinois Environmental Protection Agency (IEPA) finding that certain articles filed by Monsanto cannot be treated as trade secrets under the Environmental Protection Act. The petition is filed pursuant to Section 120.250 of the Board's regulations governing the Identification and Protection of Trade Secrets. (35 Ill. Adm. Code 120.) Section 120.250(a) provides that "an owner or requester who is adversely affected by a final determination of either the Environmental Protection Agency or the Department of Energy and Natural Resources pursuant to [the Board's regulations governing the identification and protection of trade secrets], may petition the Board for review within 35 days after the entry of a final agency determination."

The petition alleges that Monsanto is adversely affected by the IEPA's determination that the subject articles cannot be treated as representing trade secrets due to Section 7(d) of the Act. The petition was filed with the Board within 35 days after the entry of a final IEPA determination (notice of which was given by certified letter dated January 3, 1985 and received by Monsanto January 11, 1985.) On this basis, the Board accepts this petition for review.

On February 15, 1985 Monsanto filed a Motion requesting that the Board set a filing and briefing schedule similar to that set by Board Order in Outboard Marine Corporation v. IEPA and American Toxic Disposal, Inc., PCB 84-26 (April 5, 1984). However, Monsanto also requests a specific filing and briefing schedule which varies somewhat from that established in the OMC case. The Board believes that the timeframes laid out in the OMC case are the appropriate timeframes to ensure adequate time for all parties, including the requester (if there is one), to participate in this proceeding. Therefore, the same timeframes will be applied in this case. These and an outline of other procedural aspects of this proceeding follow.

The parties to this type of proceeding are the requester (as defined in Section 120.103(b)), the owner of the article, and the agency whose determination is the subject of appeal. In this case, Monsanto has not named a requester. If, in fact, there is a requester other than the IEPA, that person should be named as a party respondent and should be properly served. This does not place a responsibility on the requester to participate in this appeal, but rather affords the requester a right to participate if that person chooses to do so.

Due to the policy concern for expeditious decisions in appeals of this type, the petition should be verified and should state facts and arguments of law sufficient to enable the Board to rule on the petition. Monsanto will be allowed 21 days from the date of this Order to amend its petition, if necessary, to meet the requirements of this Order.

The IEPA will be responsible for filing a certified copy of the record which forms the basis of its determination, including, as a minimum, properly marked copies of the article itself (including a copy of any version of the article containing the trade secret which was given to the requester), a copy of the Statement of Justification and claim letter submitted by Monsanto, any material submitted by the owner pursuant to Part 120 and any other material the IEPA relied upon in making its determination. In addition to the actual documents which comprise the record, the IEPA shall also prepare and file a list of the documents comprising the record. IEPA's record must be filed with the Clerk of the Board within 21 days from the date of this Order. IEPA's and any requester's answers to the petition must be filed within 14 days after the record is filed or 14 days after an amended petition is filed, whichever is later.

The trade secret article in question will be handled by the Board pursuant to the applicable Part 120 procedures. In addition, upon a motion by any party, the Board may order that the pleadings, transcripts and exhibits or any portion thereof be segregated from materials which are open to public inspection and be kept secure from unauthorized access in accordance with the Part 120 procedures.

In its February 15, 1985 Motion, Monsanto has requested a hearing, but has not indicated whether it is requesting an in camera hearing or a public hearing. The request for hearing is granted. The Board will presume that a public hearing is requested unless the Petitioner moves the Board to conduct the hearing, in part or in whole, in camera. Any such Motion shall be made within 21 days of this Order and shall be accompanied by supporting legal memorandum regarding the conduct of such an in camera hearing.

The burden of proof in these appeals rests with the petitioner. In addition, the Board notes that Part 120 does not provide an opportunity for a requester to submit evidence to rebut a claim of trade secrecy in the proceeding below.

Therefore, although the Board is standing in a review posture, new evidence will be accepted upon a demonstration 1) that it was unavailable to the parties and the IEPA at the time that the IEPA made its determination or 2) the party was not given an opportunity under Part 120 to present it to the IEPA.

IT IS SO ORDERED.

Board Member Bill Forcade concurred and Board Member J. Theodore Meyer voted present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 20th day of February, 1985 by a vote of 4-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board