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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MONSANTO COMPANY, Petitioner, -vs- ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and JOHN E. NORTON, Respondent.	)	NO. PCB 85-19

NOTICE OF FILING

TO: James A. Geocaris
Jenner & Block
One IBM Plaza
Chicago, IL 60611

William D. Ingersoll
Illinois Environmental Protection Agency
2200 Churchill Rd
Springfield, IL 62706

Please take notice that I have today filed with the Clerk of the Pollution Control Board of the State of Illinois Respondent's Post Hearing Brief, a copy of which is being served on you with this Notice.

DATED THIS 19th DAY OF August, 1985.

John E. Norton & Associates, P.C.
By: Thomas C. Rich

LAW OFFICES
John E. Norton & Associates, P.C.
100 West Washington Street
P O Box 565
Belleville, IL 62222
(618) 235-1550; 271-3570

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RESPONDENT'S POST HEARING BRIEF

SUMMARY OF ARGUEMENT

This matter began when Respondent John E. Norton & Associates made a request under the Freedom of Information Act for information from Monsanto's air, water and land files. The request was made in November, 1984 and is just now coming before the Board. Although petitioner in this proceeding claims that there are only 3 documents out of 2,400 which were submitted which are of the subject of the present dispute, there is a far greater overriding principle at stake. To allow trade secret determination for these three documents would mean a complete evanescence of Section 7(d) of the Environmental Protection Act. Illinois Revised Statutes, Chapter 111-1/2, Section 10007(d). A reversal of the Illinois Environmental Protection Agency's ruling denying trade secret determination would in fact make part of the pollution control board's function obsolete and render the Act itself useless. A ruling in favor of Monsanto would make disclosure of the quantity and identity of substances as set forth in 7(d) meaningless and there would be no protection for the public.

Respondent John E. Norton & Associates is a Belleville law firm which represents over 300 very poor people in the Rush City area of East St. Louis, Illinois. These people have been subjected repeatedly to hazardous chemical emissions by Monsanto in addition to other chemical companies. When the residents of the surrounding areas flock to the hospitals after the hazardous emissions, the doctors and nurses of the hospitals throw up their hands in despair for lack of knowledge as to the nature, amount or composition of the chemical exposure. The Law Offices of John E. Norton & Associates has brought suit against the various chemical companies involved in an attempt to stop this callous disregard for the lives of people and in so doing, has made a Freedom Of Information Act request concerning hazardous and toxic emissions for all three chemical companies. Respondents contend that it is the purpose of the Environmental Protection Act to allow complete disclosure of these hazardous substances to the public.

There is no dispute on either side that Monsanto has presented information which is protected as a trade secret and is confidential under Sections 7(a) and 7.1 of the Environmental Protection Act. Illinois Revised Statutes, Chapter 111-1/2, Sections 1007(a) and 1007.1. There have also been stipulations to the effect that Monsanto has met all procedural requirements for making a proper trade secrets claim.

Respondents contend that the aforesaid information is and has been public in nature and is discloseable under Section 7(d) of the Environmental Protection Act, which requires disclosure of "the quantity and identity of substances being placed or to be placed" in hazardous waste facilities. (See Illinois Revised Statutes Chapter 111-1/2, Section 1007(d).) This exception to the confidentiality provisions must apply to the information at issue here for a variety of reasons. First, Monsanto should not be able to unilaterally declassify public information merely by changing its internal policy regarding waste disposal. Secondly, the information provided by Monsanto which is equated with "quantity and identity" of substances being placed or to be placed is grossly inadequate for emergency response unless one is in possession of a virtual library of safety material and furthermore gives absolutely no information as to possible long-term hazards. Third, while Monsanto claims that they no longer use a incineration facility, and indeed did not build one, the wastes that were to be disposed of in this incinerator are still present. Lastly, Monsanto has incorporated permits which are no longer active into still active permits which can be and may be used at any time, because the incorporation is still in effect.

ARGUMENT

I.

RESPONDENT HAS STIPULATED TO A TRADE SECRET DETERMINATION FOR THE MATERIAL IN QUESTION

Both the IEPA and the Law Offices of John E. Norton & Associates have stipulated that the information in debate is of commercial value to Monsanto's competitors and that Monsanto has met the procedural requirements for making a trade secret claim for this information. Transcript of Proceedings in Monsanto Company v. IEPA and John E. Norton, PCB No. 85-19, June 11, 1985 (hereinafter "Tr." at 9). Therefore, this information is protected under Section 7(a) and 7.1 of the act unless Section 7(d) of the Act mandates its disclosure.

II.

THE INFORMATION REGARDING THE INCINERATOR FALLS UNDER THE SECTION 7(d) RULE WHICH MANDATES DISCLOSURE

Section 7(d) of the Environmental Protection Act provides important guidance in considering the nature of recorded information that is trade secret or confidential. Section 7(d) reads as follows:

> Notwithstanding Subsection A above, the quantity and identity of substances as 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. Illinois Revised Statutes, Chapter 111-1/2, Section 1007(d).

Monsanto begins by citing cases that supposedly mandate a "narrow" construction of the 7(d) provision which by its own terms plainly states that certain substances "may under no circumstances" be kept confidential. See People vs. Charles Levy Circulating Company, 17 Ill. 2d 168, 161 N. E. 2d 112, (1959), County of Will vs. Arcole Midwest Corp., 45 Ill. App.3d 656, 359 N.E. 2d 1245 (3rd Dist. 1977). These cases mandate strict construction of exceptions to statutory rulings, not a narrow construction. Indeed, the word "narrow" fails to appear anywhere in either case and one would gather from the strong language of 7(d) that "trade secrets" are the exception and disclosure is the rule, and that rule, by Monsanto's own admission, should be given a broad construction.

Even though Monsanto contends that protection of its trade secrets is more important than public safety, even a limited reading of Section 7(d) would require disclosure of the contested information. The reading of Section 7(d) in the manner that Monsanto recommends would mean that chemical companies could merely state generic or trade names of hazardous wastes in such documents as annual reports and waste manifests and would mean the complete evanescence of Section 7(d).

Monsanto contends that Section 7(d)'s coverage of substances "being placed" or "to be placed" in hazardous waste facilities does not include the information at issue here relating to

facilities that were never built or to manufacturing processes not currently in existance. (See Petitioner's Brief page 2.) Instead, it contends that Section 7(d) applies only at the point which a substance is about to be moved off site for disposal and information associated with that off site disposal is submitted to the IEPA for a permit. (See Petitioner's Brief, page 5.) In support of that contention, it sites the case of Outboard Marine Corporation vs. IEPA and American Toxic Disposal, Inc., PCB 84-26. Monsanto's reliance on those propositions is misplaced for several important reasons.

Monsanto claims that because it did not build an incinerator it, therefore does not have to give the information associated with waste to be disposed of in that incinerator. On direct examination, Monsanto's own witness, Mr. Andrew Quick, testified that sixty percent (60%) of the wastes which were generated at the Krummrich Plant and which were to be disposed of in the incinerator are still being generated at that plant. T.R. at 29-30. Since the same is waste being produced, that waste would be detailed in the permit for the incinerator. Respondent is not concerned about the proposed waste from the incinerator, but the wastes that were to be disposed of in the incinerator. These active wastes are still posing a haz rd to the surrounding community and should be disclosed.

In addition, these wastes are final in composition and are ready for disposal. Indeed, petitioner already knows where the wastes are to be sent. (See Exhibit J - Petitioner's Amended Petition.) In Outboard Marine, the wastes were not ready to be disposed of, and in fact the materials were not even wastes, but residues to be stored. The important distinction to make is that waste that is ready to be "disposed of" or "to be placed" cannot be altered. In the Outboard Marine case the substance could have been altered before it was "disposed of" or "to be placed", therefore rendering it nonhazardous and not subject to disclosure. The Pollution Control Board's ruling in Outboard Marine was that the residues simply were not ready to be placed. Here, the material is in its final form and is a waste ready to be placed in a definite location.

Another major distinction in Outboard Marine, is that the Outboard Marine company had to apply for an additional permit before disposal would be allowed. In Monsanto's case, the wastes are ready to be placed with no additional permit required. Because sixty percent (60%) of these wastes are still present and being disposed of at the Krummrich Plant, the wastes are certainly going somewhere. In Monsanto's Exhibits I and J of it's Amended Petition, it is apparent that Monsanto not only knows what waste is "to be placed" but knows where it is to be placed.

Furthermore, the final condition of the substances here are determined and final. Thus, the classification "waste". In the Outboard Marine case, the Pollution Control Board correctly defined the substances in question as residues which were not final state of the substances and were subject to change or alteration.

Because there is no other operating permit application which must be filed, because the waste is in a final condition and to be placed, because Monsanto knows where the waste is going to be placed, and more importantly, because this waste is still being placed, Section 7(d) must be applied. In Outboard Marine, the focus was on anticipated residues and sludges from the process. In this case, the focus is on actual wastes which are unalterable which are to be placed and in fact which are being placed.

Monsanto also contends that because it withdrew the waste permit application for the incinerator the nature of the information is now nonpublic. Monsanto also contends in it's brief on page 7 that;

> "Several of the wastes listed in A-R Exhibit 21 as being from the Krummrich Plant no longer are generated due to the closing of operations that produced these wastes." T.R. 29-30.

What Monsanto fails to mention is that fifteen (15) of the twenty-five (25) wastes generated in accordance with that permit are still being generated. Not only is Monsanto asking the Board to allow it to unilaterally change the nature of public information by its own internal policy decisions but it is asking to Board to carve out an exception for wastes for which are still being generated at that plant.

III.

THE SANTOFLEX PROCESS IS STILL COVERED UNDER PERMIT AND WAS AND IS NOT WITHDRAWN

Similar to the incinerator issue is Monsanto's contention that the Santoflex process never implemented at the Krummrich plant by virtue of policy decisions, but which are still possible to implement, should not be subjects of disclosure. By the testimony of it's own witness, Mr. Andrew Quick, Monsanto stated that the application for the Santoflex Processes which were detailed in A.R. Exhibit 16, were incorporated into A.R. Exhibit 17 and the permit therin. T.R. 46-47. In addition, Mr. Quick testified that for all intents and purposes the same wastes were being produced. T.R. 46-47. In simpler terms, Monsanto can effectively use the process delineated in A.R. Exhibit 16 because the permit was incorporated in A.R. Exhibit 17. Any attempt by Monsanto to intimate to the Pollution Control Board that this is

a process which never could be implemented is grossly misleading, because this process may be implemented tomorrow. If the Board sides with Monsanto on this issue the wastes from the Santoflex process in A.R. Exhibit 16 will never be disclosed even though they are covered under an active permit. This is precisely the type of abuse which the Act was designed to prevent.

IV.

MONSANTO'S DESCRIPTION OF THE MATERIALS AND SUBSTANCES IN QUESTION DOES NOT SATISFY THE IDENTITY AND QUANTITY OF THE SUBSTANCE REQUIREMENTS OF SECTION 7(d)

Both in its argument before the hearing officer and in its brief, Monsanto represents that it has provided adequate information to the public to satisfy the strict "identity and quantity of the substance" requirements of Section 7(d). In its brief on page 8, Monsanto erroneously states that:

> "None of the documents at issue are associated with the authorization for actual disposal of waste, which is the point at which substances fall under Section 7(d)."

Monsanto would have the words "actual disposal" replace the words "being placed" or "to be placed". The Outboard Marine case clearly does not say this, and Monsanto's attempt to substitute its language for the ruling of the Board is grossly misleading. The actual quote in Outboard Marine is that:

> "In contrast, the focus of Section 7(d) is on the disposition of the waste stream and its actual content or identity".

The focus is on the actual content or identity of the waste and not that it is ready for actual disposal. The actual content of the waste is determined in Monsanto's case. In Outboard Marine it was not. Monsanto is seeking to attempt to substitute the words "actual disposal" for the words "actual content or identity" in an underhanded effort to push through a major policy shift. In short, Monsanto is going for the "home run" and is trying to sap the life's blood out of the 7(d) standard.

In addition, on page 9 of its brief, Monsanto states that:

> "Section 7(d) requires disclosure of only the basic quantity and identity of substances being disposed in hazardous waste facilities. It does not require disclosure of extensive details and data about the waste composition beyond basic quantity and identity."

Monsanto has used the word "basic" twice in its opening paragraph, although the word "basic" is nowhere to be found in Section 7(d). Monsanto has stated that in drafting the legislation, the legislature could have used broader language to require that all information or data relating to waste data be disclosed. However, Monsanto is trying to read the word basic into the 7(d) standard even though the legislature never put it there. In fact, in the next three pages of its brief, Monsanto uses the words "basic identity" no less than eight times.

> "Monsanto has no objection to disclosure of basic identity of substances..."
>
> "The information Monsanto seeks to protect goes beyond the basic identity..."
>
> "If the legislature intended that more than the basic identity..."

consideration was drinking water or a lethal dose of chlorine. This is something the public surely has a right to know.

Monsanto also contends that the basic chemical names on the manifest and identifying numbers allow for reference to "readily available" publications regarding emergency response, such as the "U.S. Department of Transportation Handbook". See Petitioners Amended Petition, paragraphs 14-16. Given the complexity of these books, in order for the public to formulate a proper response, they would all have to be industrial hygenists and also have to be carrying with them all the materials in order to be able to understand the responses discussed.

Mr. Storms also testified that different substances listed in the same category have different toxicity levels and carcinogenic qualities. T.R. 95-97. However, when specifically asked about general responses given to different substances in the same I.D. number, however, could not name the response given. T.R. 96. However, in all his testimony, both on cross examination and recross examination, Mr. Storms made no claims as to the information provided in any of the manifests or publications by the U.S. Department of Transportation as related to long range health or environmental impacts. T.R. 98-99. However, when asked by Mr. Norton on cross examination, Mr. Storms stated that it was certainly foreseeable that there could be long term environmental impacts on both human beings and plant life if an emergency was not responded to properly and it would be

conceivable that there would be environmental effects even if the emergency were responded to properly. T.R. 108-109. Mr. Storms also admitted on cross examination that the concentration of the material was one factor to be considered in forming an emergency response, See T.R. 113, but then stated that concentration of the material was nowhere listed on the manifests or publications provided. T.R. 117. In addition, Mr. Storms stated that in transportation of the materials, there could be some emissions into the air and with some materials there could be long term and long range health and environmental effects. T.R. 115.

Mr. Storms also agreed that there could be emissions into the air during either the manufacturing process or during the process from manufacturing to go into storage tanks or tankcars for transportation. T.R. 115. All the foregoing testimony emphasizes Respondent's position that if these emissions occurred over a long period of time, as happened in the Rush City area, the long term environmental impacts would certainly be significant. What Monsanto is advocating is that these hazards are of no concern and should not be dealt with but rather glossed over. In its brief on page 12, Monsanto states:

> "Mr. Storms testimony related to the <u>principal hazard</u> of concern in the transportation of these substances to waste disposal sites, accidental release in loading, transit and unloading. The transportation containers for these wastes are well designed and well sealed, therefore, low emissions that would cause chronic health effects should not occur."

As long as the materials are kept in trucks and railroad cars, which are impregnable and never break, Monsanto sees no problems. However, its own witness admitted that leaks could occur during transportation and that emissions over a long period of time could well cause chronic health effects. T.R. 115-116. The idea that transportation containers for the wastes are well designed and well sealed has absolutely nothing to do with this hearing. When Monsanto starts designing tank cars, perhaps then it can vouch for their safety. To say that Mr. Storms testimony is uncontradicted, as petitioner does in its brief on page 11, is hardly believable when he contradicts himself on numerous occasions as respondent has just demonstrated.

Lastly, respondent attempts to discredit the testimony of the I.E.P.A.'s witness, Mr. Greg Zak, by stating his testimony was equivocal on the issue of who made the determination that the detailed information in Exhibit 21 was information constituting the quantity or identity of substances being placed or to be placed in hazardous waste facilities. Before the question was even asked, Mr. Zak stated that the standard procedure for a situation like this would be for the technical staff to refer this type of situation to the legal staff of the I.E.P.A. for a legal determination. T.R. 181. Mr. Zak then stated it was difficult for him to tell counsel exactly what his policy would be or what the I.E.P.A's policy would be since it was a legal

question and he was a technical person and would normally defer to his legal staff.

In fact, Mr. Zak answered "Yes" to counsel's question even before counsel was finished and any attempt to discredit his answers on these questions should not go to the credibility of the witness. Respondent is simply attempting to cloud the issue by cross examining a witness on a permit review with which he had nothing to do. T.R. 184-185. Mr. Zak did not make a personal determination of the detailed waste composition or that the waste composition information constituted the identity of substances being placed in land fills or hazardous waste treatment facilities because that was not his job. Counsel asking the question knew in advance who the permit reviewer was (T.R.185) and merely asked these questions in an attempt to mislead the witness. All these questions were posed over strenuous objection by Mr. John Norton.

CONCLUSION

The purpose of the Environmental Protection Act is to prevent exposure of the public to hazardous emissions, and to provide the public with the knowledge they need to formulate responses to dangerous situations. Monsanto is seeking to justify nondisclosure of public documents now claimed as trade secrets because they no longer use the process or tools involved. In fact, what is important and relevant are the wastes involved, and those are still being produced at the plant.

In addition, Monsanto must not be allowed to water down the standard of "quantity and identity" in Section 7(d) by referring the public to its Annual Report, waste manifests or a myriad of publications which are not readily available and which are even less understandable by the layman. By claiming that these problems pose no real danger to the public, Monsanto is seeking to effectively discharge the Board from its obligation to interpret Section 7(d) and to render its function useless. This must not be allowed to happen.

Respectfully submitted,

John E. Norton & Associates
By: Thomas C. Rich

LAW OFFICES
John E. Norton & Associates, P.C.
105 West Washington Street
Post Office Box 565
Belleville, Illinois 62222
(618) 235-1550; 271-3520

CERTIFICATE OF SERVICE

I, Thomas C. Rich, certify that I have caused copies of the foregoing Respondent's Post-Hearing Brief to be sent to William Ingersoll, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706, and to James Geocaris, Jenner & Block, One IBM Plaza, Chicago, Illinois 60611, by U.S. Mail with first class postage fully prepaid on August 19, 1985.

Thomas C. Rich