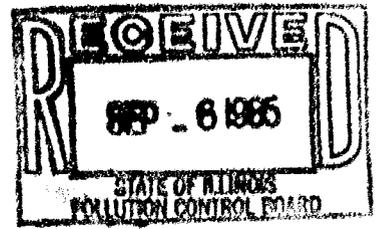


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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MONSANTO COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 85-19
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY and)	
JOHN E. NORTON,)	
)	
Respondents.)	

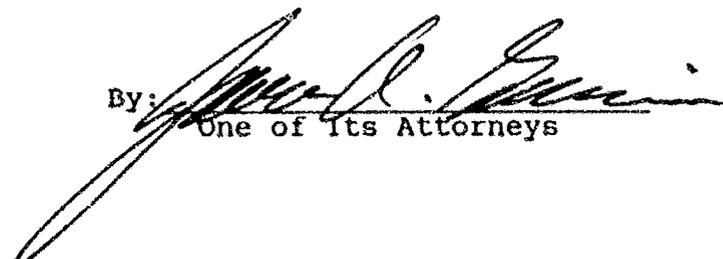
NOTICE OF FILING

TO: William D. Ingersoll
Mary V. Rehman
ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY
2200 Churchill Road
Springfield, IL 62706

John E. Norton
JOHN E. NORTON & ASSO-
CIATES, P.C.
105 W. Washington Street
P. O. Box 565
Belleville, IL 62222

PLEASE TAKE NOTICE that I have today filed with the Clerk of the Pollution Control Board of the State of Illinois, Petitioner's Post-Hearing Reply Brief, a copy of which is being served on you with this Notice.

THE MONSANTO COMPANY

By: 
One of Its Attorneys

James A. Geocaris
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Dated: September 6, 1985

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MONSANTO COMPANY,)	
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Petitioner,)	
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JOHN E. NORTON,)	
)	
Defendants.)	

PETITIONER'S POST-HEARING REPLY BRIEF

INTRODUCTION

Respondents Illinois Environmental Protection Agency ("IEPA") and John E. Norton ("Norton") agree that the information at issue in this case is of high commercial value to Monsanto. They further agree that Monsanto has met the substantive and procedural requirements to protect the information as trade secret under Sections 7(a) and 7.1 of the Environmental Protection Act, Ill. Rev. Stat., ch. 111 1/2, §§ 1007 and 1007.1. Transcript of Proceedings in Monsanto Company v. IEPA and John Norton, PCB No. 85-19, June 11, 1985 ("Tr."), at 76; Response Brief of Respondent Illinois Environmental Protection Agency (the "IEPA Brief"), at 1-2; and Respondent's Post-Hearing Brief (the "Norton Brief"), at 4.

The record in this proceeding shows that Section 7(d) of the Environmental Protection Act (Ill. Rev. Stat., ch. 111 1/2, § 1007(d)) does not apply to this detailed data regarding waste characteristics for two fundamental reasons. First, this information from air construction and operating permits for facilities that were not built or that are manufacturing processes do not pertain to substances "being placed or to be placed" in waste disposal sites under the controlling decision of the Pollution Control Board (the "Board"), Outboard Marine Corporation v. IEPA and American Toxic Disposal, Inc., PCB 84-26 (June 20, 1984). Second, this detailed data is more than the "identity" of a substance being placed in a waste disposal facility.

In response, the IEPA and Norton have presented a variety of arguments. But none of these arguments are supported by the plain language of the statutes,^{1/} a fair reading of the Outboard Marine case, or any evidence in the record of this proceeding. Therefore, the trade secret information at issue should be protected from disclosure.

^{1/} The IEPA claims as a general matter that non-disclosure of trade secrets under Section 7(a) is the exception to a general orientation favoring disclosure, and, therefore, must be construed narrowly. IEPA Brief, at 2-4. This argument ignores the fundamental point that the parties already have stipulated that this information is covered by Section 7(a). The central legal issue is whether the information also falls within Section 7(d), an exception to the admittedly applicable Section 7(a). It is Section 7(d), not 7(a), that the Board must construe in this case, and under recognized rules of statutory construction, this exception must be construed narrowly. See Petitioner's Post-Hearing Brief, at 4-5.

I.

THIS INFORMATION DOES NOT CONCERN SUBSTANCES
"BEING PLACED OR TO BE PLACED"
IN HAZARDOUS WASTE FACILITIES

The Board's major trade secrets decision, Outboard Marine, supra, formulates a standard for determining when information qualifies for disclosure under Section 7(d) in terms of the purpose of the document containing that information. Section 7(d) applies only at the point where the substance is about to be moved off-site for disposal, and information associated with disposal permits is submitted to the IEPA. Id. 5-6.

The information at issue here is contained in air pollution construction or operating permits, not waste disposal permits. Two of the documents come from permits for facilities that were never built. A.R. Ex. 16 and 22. The other comes from a permit for a manufacturing process. A.R. Ex. 17. Therefore, under Outboard Marine, disclosure of this information is not required. When any of the wastes covered by these documents and produced by Monsanto finally are moved off-site for disposal, Monsanto prepares waste manifests identifying the wastes. These manifests are available to the public. See Petitioner's Post-Hearing Brief, at 5-9.

Both respondents attempt to distinguish Outboard Marine from this case, but neither points to any real differences. The IEPA claims that these air pollution permits should be viewed independently of whatever land waste disposal

documents may be required later. IEPA Brief, at 6. But air pollution construction permits were precisely what was at issue in Outboard Marine. There the Board reasoned that disclosure of waste information in those permits would be premature. The proper point for disclosure is the point of actual waste disposal and the documents to be disclosed are the documents associated with that disposal. Outboard Marine, supra, at 5-6.

Respondent Norton argues that the information at issue here pertains to wastes in the final form in which they will be disposed. But there is no indication in Outboard Marine that the waste residues from the manufacturing process at issue in that case would be altered in any way before their final disposal. The Board ruled that the waste generator still could wait until it disposed of those wastes to disclose information in the form of the documents actually associated with the disposal. The original air permit documents did not fall under Section 7(d) and, therefore, did not have to be disclosed. Outboard Marine, supra, at 5-6.

Both respondents also complain, without citing any authority pertaining to trade secrets,^{2/} that it is somehow

2/ The IEPA cites a Federal Freedom of Information Act case interpreting the "investigatory records" exemption to disclosure, Bast v. U.S. Department of Justice, 665 F.2d 1251 (D.C. Cir. 1981). But, contrary to the IEPA's claim, the status of investigatory records for disclosure purposes under the Federal FOIA is, as a general rule, directly

(Footnote continued on following page.)

improper for Monsanto to be able to take information out of the coverage of Section 7(d) by cancelling the construction of a facility for which it has obtained air permits. IEPA Brief at 5-6, and Norton Brief, at 9. But this Board has held in Outboard Marine that the proper point for disclosure of waste information is the point of disposal. If a facility is not constructed, obviously it will never generate waste to be disposed. Moreover, if the wastes are not generated or disposed, the public health concerns that support disclosing waste disposal documents are not implicated.

The IEPA also complains, without citing anything in the record, that if Monsanto does not have to disclose the information at issue here, it can hide all information on the wastes involved completely. IEPA Brief, 7. Norton makes a similar claim regarding A.R. Ex. 16 and the manufacturing process to which it pertains that was never constructed. Norton Brief, at 10. These claims are wrong. As the evidentiary record in this proceeding shows, whenever Monsanto moves any

(Footnote continued from previous page.)

affected by the government's decision not to proceed with the investigation. When an investigation is closed, and a decision not to prosecute made, investigatory records generally become open to public disclosure. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 870 (D.C. Cir. 1980). Information in closed investigatory files may be kept confidential only when the particular piece of information at issue raises some special concern explicitly identified in the statute, such as invading personal privacy, disclosing the identity of a confidential informant, or disclosing investigative techniques and procedures of a law enforcement agency. 5 U.S.C. § 552(d)(7). In Bast, the court held that personal privacy concerns justified non-disclosure of the information. 665 F.2d at 1254.

wastes off-site for disposal, it prepares waste manifests which it sends to the IEPA and which can be disclosed. Any wastes described in the three exhibits at issue that are generated at the Krummrich plant and disposed will be covered by such manifests. Tr. 31-38 and Petitioner's Exhibits 1-3. If any process that Monsanto has not yet built is later put into effect, all waste generated by such a process and disposed off-site will be described in the manifests.

II.

THIS INFORMATION IS NOT THE "IDENTITY" OF A SUBSTANCE

Monsanto has shown that the detailed waste composition data at issue in this proceeding is not the identity of a substance being placed in a hazardous waste facility and that Monsanto does disclose the identity of all wastes that it disposes in its waste manifests. This conclusion is based on sound rules of statutory construction, the utility of the identifying information already disclosed in the waste manifests for protecting public health, and the confusion of the IEPA's own witness regarding whether the information at issue qualifies as "identity" under Section 7(d). See Petitioner's Post-Hearing Brief, at 9-13.

The statutory construction point is based on the legislature's use of the broader term "data" as the standard for what information must be disclosed relating to water and air. Ill. Rev. Stat., ch. 111 1/2, § 1007(c) and (d)(i). The well known rule of statutory construction holds that the

legislature's use of such different language in different sections of the same statute shows that the legislature intended different results.

The IEPA concedes that the legislature used "data" for air and water but merely required disclosure of "identity" for wastes, and recognizes the basic rule of statutory construction that the use of different terms shows a different intent. But the IEPA then strains to argue that mere identity is somehow just as broad as all data.

The IEPA's claim is contrary to the common meaning of these two terms. The identity of something is a name. Data covers all sorts of information regarding the nature and characteristics of a thing, information that can go well beyond identity. A striking example of the difference in the breadth of these two terms is provided by one of the documents at issue in this proceeding, the detailed waste chart, A.R. Ex. 22. This chart identifies wastes by name in the fourth column from the left. Columns further to the right provide several different kinds of data about the wastes already identified, including the carbon, hydrogen, oxygen, and nitrogen content, specific gravity, ash composition, viscosity, pH, flash points and pour points.

As for public health concerns, the IEPA concedes that Monsanto's expert witness, Ken Storms, established that the information Monsanto discloses about wastes on its wastes manifests (Petitioner's Ex. 1-3) is adequate to aid in protecting the public health for the principal hazard of

waste disposal, transportation emergencies. IEPA Brief, at 9. The IEPA mentions possible long term health effects and generalized public concerns about waste disposal, but says nothing regarding how the detailed waste composition data at issue in this case relates to either the health effects or public concerns. Nor does the IEPA show how this data would significantly enhance protection of the public health if in addition to being supplied to appropriate government agencies, it also was disclosed to the public. Id. Neither respondent has put anything in the record of this proceeding on these points.

As for the testimony of the IEPA's only witness, Mr. Gregory Zak, the IEPA takes great care to assure the Board that Mr. Zak was not the IEPA official who made the determination that this information should be disclosed under Section 7(d). Someone else made that determination. IEPA Brief, at 9-10. Indeed, the IEPA offered no evidence or testimony at all to support its position that the data at issue falls within the statutory exception requiring disclosure.

Monsanto does not dispute the IEPA's claim that Zak failed to make this determination. Instead, Monsanto simply pointed out that Zak, an IEPA official who has substantial responsibilities regarding waste disposal data (Tr. 121-22 and 130), was confused regarding whether the information at issue was the identity of wastes being placed in disposal facilities. His confusion is relevant to indicate

that the detailed waste composition data at issue is not plainly the mere identity of these substances, even to an experienced hazardous waste regulator. No other IEPA official testified on these points.

Finally, the IEPA summarizes Zak's testimony regarding the release of similar waste composition data on IEPA forms derived from waste applications submitted by Monsanto to the IEPA several years ago. IEPA Brief, at 10-11. This other information is not relevant to any of the issues to be determined in this proceeding. The parties have stipulated that the information at issue here is protectable trade secret information under Sections 7(a) and 7.1. This other information cannot overturn these stipulations.^{3/} In addition, the key determinations for the applicability of Section 7(d) are whether the information at issue here relates to substances "being placed or to be placed" in hazardous waste facilities and whether this information constitutes the "identity" of such substances. Information about other substances and different kinds of documents that

^{3/} Moreover, Mosanto submitted this information to the IEPA in the late 1970's and early 1980's with a reasonable expectation that the IEPA would keep it confidential. Mosanto gave this information to the IEPA for its use only in conneciton with ongoing regulatory functions. There is no evidence that Monsanto ever authorized disclosure of this information. In any event, the whole matter of the trade secret and confidetal status of this type of information submitted by Monsanto to the IEPA several years ago is now before the Board on a separate appeal, Mosanto Company v. Illinois Environmental Protection Agency and John E. Norton, PCB 85-123.

may or may not have been disclosed properly in the past are not relevant to these statutory standards.

Respondent Norton focuses his comments for the identity issue on public health effects.^{4/} Norton claims that it is too complex and difficult for the public to use the waste information Monsanto discloses in its waste manifests and that the information has nothing to do with long term health effects. Norton Brief, at 13-15.

The record in these proceedings shows that, contrary to Norton's claims, the information Monsanto discloses in its waste manifests is helpful in protecting the public. Ken Storms showed how the information from the waste manifests can be used in conjunction with a widely circulated government handbook, Petitioner's Ex. 4, to identify hazards and proper responses. This handbook is an understandable and accessible guide for use by laymen involved in emergency response. Tr. 84-94.

Moreover, there is nothing in the record to show that the more detailed waste composition data at issue would be any more helpful to the public than the information Monsanto already discloses. Indeed, if the identifying

^{4/} Norton makes several statements that are absolutely false and wholly unsupported by any record anywhere. In particular, Norton claims that Monsanto has "callous disregard" for the lives of 300 poor people near Monsanto's Krummrich plant, fails to cooperate with local hospitals when residents flock to these institutions after hazardous emissions, and has produced long-term emissions that have had significant environmental impacts. Norton Brief, at 2 and 14. These inflammatory, untrue, and unsupported assertions must be disregarded.

information in the waste manifests is too obscure for public use, the detailed waste composition data would be even more difficult for the public to analyze meaningfully.

In his discussion of long term health effects, Norton does not dispute that transit accidents constitute the principal hazard of the waste disposal process. Moreover, Norton can point to nothing in this record to show that the public disclosure of the detailed waste composition data at issue would do substantially more to protect the public from any long term effects than does the disclosure of identity Monsanto already makes to the public in its waste manifests and the broader disclosures that Monsanto makes continuously to relevant government agencies such as the IEPA.

Norton also complains that the waste manifests do not disclose concentrations of particular hazardous components. Norton Brief, at 14. But nothing in Section 7(d) requires disclosure of waste concentration data. This section mandates disclosure of the identity and quantity of the substance being disposed. Monsanto discloses both in its waste manifests. See, e.g., Petitioner's Ex. 1-3.

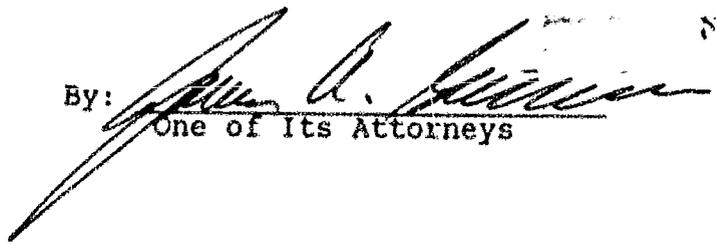
CONCLUSION

It is undisputed that the information at issue here is of high commercial value to Monsanto and is trade secret. Monsanto has demonstrated that the exception to trade secret protection of Section 7(d) does not apply to this information because, under Outboard Marine and the

evidentiary record in this proceeding, the information does not pertain to substances being placed in waste disposal facilities and the information is not the identity of the substances. Therefore, the Board should reverse the IEPA's determination, and order that the detailed waste composition data at issue not be disclosed.

Respectfully submitted,

MONSANTO COMPANY

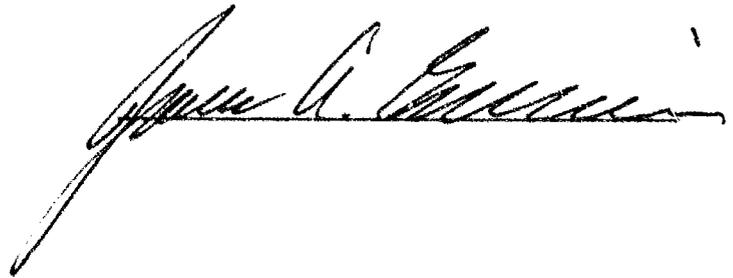
By: 

One of Its Attorneys

John H. Mathias, Jr.
James A. Geocaris
Susan E. Spangler
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

CERTIFICATE OF SERVICE

I, James A. Geocaris, certify that I have caused copies of the foregoing Petitioner's Post-Hearing Reply Brief to be sent to William Ingersoll and Mary V. Rehman, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706, and to John E. Norton, 105 W. Washington Street, P.O. Box 565, Belleville, Illinois, 62222, by U.S. Mail with first class postage fully prepaid on September 6, 1985.

A handwritten signature in cursive script, appearing to read "James A. Geocaris", written over a horizontal line.