

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 14TH day of January, 2011 I filed with the Clerk of the Illinois Pollution Control Board Respondent's Response In Opposition To Petitioner's Motion To Vacate IEPA's Trade Secret Determination And To Dismiss The Petition For Review As Moot, 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

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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 14th day of January, 2011, the foregoing Respondent's Response In Opposition To Petitioner's Motion To Vacate IEPA's Trade Secret Determination And To Dismiss The Petition For Review As Moot 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 RESPONSE IN OPPOSITION TO
PETITIONER'S MOTION TO VACATE IEPA'S TRADE SECRET DETERMINATION
AND TO DISMISS THE PETITION FOR REVIEW AS MOOT**

Pursuant to the December 8, 2010 Hearing Officer Order, Respondent, the Illinois Environmental Protection Agency ("IEPA"), submits this memorandum in opposition to the motion by Petitioner Midwest Generation EME, LLC ("Midwest Gen") to Vacate IEPA's Trade Secret Determination And To Dismiss The Petition For Review As Moot.

I. INTRODUCTION

1. Background

On April 19, 2004, Midwest Gen filed a petition with the Illinois Pollution Control Board ("Board") appealing IEPA's final decision on the trade secret status of certain documents produced in response to the United States Environmental Protection Agency's request pursuant to §114 of the Clean Air Act ("Trade Secret Determination"). Motion at p. 2, ¶6. Midwest Gen's petition provided two purported bases for relief: 1) IEPA's "Trade Secret Determination was arbitrary, capricious, and contrary to law;" and 2) "IEPA improperly failed to consider whether the documents at issue were exempt from disclosure under the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.*" Motion at p. 2, ¶6. In its motion, Midwest Gen correctly

states that Sierra Club withdrew its Freedom of Information Act (“FOIA”) request for the documents at issue in this Trade Secret appeal. Motion at p. 3, ¶7. Based on Sierra Club’s withdrawal of its FOIA request, Midwest Gen sought to have the IEPA voluntarily vacate its final Trade Secret Determination. Motion at p. 3, ¶8. IEPA, lacking the statutory or regulatory authority, did not agree to vacate its Trade Secret Determination.

2. Summary of the IEPA’s Argument

First, the IEPA does not believe that its final Trade Secret Determination became moot with Sierra Club’s withdrawal of its FOIA request and even if it did the public interest exception to the mootness doctrine should apply. *See Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill.2d 200 (2008). Next, the IEPA does not believe that it has the legal authority to unilaterally vacate or modify its final Trade Secret Determination, based on the rationale laid down by the Supreme Court and adhered to by the Court of Appeals. *See Panhandle Eastern Pipe Line Co. v. Illinois E.P.A.*, 314 Ill.App.3d 296, 303 (4th Dist. 2000). In addition, the Board’s decision in *Monsanto Company v. IEPA*, PCB 85-19, is not dispositive. Finally, in this case, the Board stated that under the Act, there is a strong public policy interest favoring public disclosure of environmental compliance information and accordingly this case should be resolved via a hearing on the merits of Midwest Gen’s petition. *Midwest Generation EME, LLC v. IEPA*, PCB 04-185, at p. 8 (April 6, 2006).

II. ARGUMENT

1. Contrary to Midwest Gen’s Assertion, the IEPA’s Final Trade Secret Determination Remains at Issue and Accordingly is Not Moot.

Midwest Gen argues that since Sierra Club withdrew its FOIA request for the documents at issue in this Trade Secret appeal, the Board should vacate the IEPA’s Trade Secret Determination as moot. Motion at p. 4, ¶9. The Illinois Supreme Court has stated that “an issue

is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief.” *Dixon v. Chicago and North Western Transp. Co.*, 151 Ill.2d 108, 116 (1992). A review of the Board’s Trade Secret Regulations, 35 Ill. Adm. Code Part 130, will demonstrate that the actual controversy giving rise to this litigation remains. On the contrary, the only thing that has become moot in this case is the Sierra Club’s FOIA request and Midwest Gen’s purported second basis for relief in its petition relating to FOIA.

A. The Board Trade Secret Regulations Reinforce the Notion That IEPA’s Trade Secret Determination Remains an Ongoing Controversy Between the Parties.

In this case, the IEPA received Sierra Club’s FOIA request before Midwest Gen had even tendered the documents to the IEPA. Motion at p. 2, ¶¶ 2, 3. Midwest Gen states that the Sierra Club’s FOIA request was the IEPA’s “stated purpose” for making the Trade Secret Determination. Motion at p. 5, ¶11.

The trigger for the IEPA’s Trade Secret Determination in this case and all others is the submission of a claimant’s statement of justification. *See* 35 Ill. Adm. Code 130.206(a). The statement of justification may be submitted with a claimed trade secret article or at some later time. *See* 35 Ill. Adm. Code 130.200(c)). However, a claimant’s statement of justification must be submitted if the IEPA requests it, as it did in this matter. *See* 35 Ill. Adm. Code 130.201 and 130.202. Thereafter, the IEPA reviews the claimant’s statement of justification and makes its final determination on the articles claimed as a trade secret. *See* 35 Ill. Adm. Code 130.208, 130.210, and 130.212.

When a claimant disagrees with the IEPA’s final determination, like Midwest Gen in this case, an appeal may be brought pursuant to Section 130.214(a) of the Board’s Trade Secret Regulations, which states as follows:

Review of State Agency Trade Secret Determination

- a) An owner or requester who is adversely affected by a *final determination* of the Illinois Environmental Protection Agency or DNR pursuant to this Subpart may petition the Board to review the *final determination* within 35 days after service of the determination. Appeals to the Board will be pursuant to 35 Ill. Adm. Code 105.Subparts A and B.

(*Emphasis added*) 35 Ill. Adm. Code 130.214(a).

Although the FOIA request has been withdrawn, the IEPA has undertaken its trade secret determination in accordance with the Board Trade Secret Regulations and arrived at its final determination. In advocating that the Board dismiss this matter as moot, Midwest Gen contends that “if any member of the public should request the purported trade secret documents, IEPA may, of course, make what it believes to be the appropriate determination at that time.” Motion at pp. 5-6, ¶11. This statement only reinforces the fact that IEPA’s final determination will only have to be revisited in the event that the Board ruled in Midwest Gen’s favor, since the controversy underlying this litigation has not been resolved and is therefore not moot. In addition the withdrawal of the FOIA request is not an impediment to the Board “granting effectual relief” on the merits of the IEPA’s final Trade Secret Determination. *See Dixon*, 151 Ill.2d at 116. Consequently, Midwest Gen’s motion should be denied.

B. Even if the Board Determined That This Case is Moot, the Board Should Render a Final Decision in This Case on the Merits Based on the Public Interest Exception.

There is an exception to the mootness doctrine that allows a court to resolve an otherwise moot issue, if that issue involves a substantial public interest. The criteria for application of the public interest exception are:

(1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable to guide public officers; and (3) the question is likely to recur. A clear showing of each criterion is necessary to bring a case within the public interest exception.

(internal citations omitted) *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill.2d 200, 208 (2008).

The Board has stated in this case that under the Act, there is a strong public policy interest favoring public disclosure of environmental compliance information, which should form the backdrop to applying the aforementioned factors. See *Midwest Generation EME, LLC v. IEPA*, PCB 04-185, at p. 8 (April 6, 2006).

This case meets the first factor, because it involves a public agency and the dissemination of information that the IEPA has determined should be available to the public. The second factor is also met, since a resolution on the merits will provide the IEPA's public officers with information regarding claimed trade secret matters in general and specific knowledge of whether the articles at issue in this case are suitable for public disclosure. Finally, the documents at issue in this litigation will remain in the IEPA's files subject to public disclosure, and absent a final decision by the Board this litigation is likely to recur at great expense to all involved. Accordingly, the Board should deny Midwest Gen's motion, so that this litigation can be resolved, as it should be, on the merits.

2. Neither the IEPA Nor the Board Has the Authority to Modify the IEPA's Trade Secret Determination Without a Hearing on the Merits.

A. There is no Statute Authorizing the IEPA to Modify its Final Trade Secret Determination.

"The Illinois Supreme Court stated that it has been consistently held that an administrative agency may allow a rehearing, or modify and alter its decisions only when authorized to do so by statute." *Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 231 Ill.App.3d 278, 299 (1st Dist. 1992); see also *Panhandle Eastern Pipe Line Co. v. Illinois E.P.A.*, 314 Ill.App.3d 296, 303 (4th Dist. 2000); and *Reichhold Chemicals, Inc. v. Illinois Pollution*

Control Bd., 204 Ill.App.3d 674, 677 (3rd Dist. 1990). Counsel for the IEPA is unaware of any provision in the Illinois Environmental Protection Act (“Act”), 414 ILCS 5/1 *et seq.*, or the Board Trade Secret Regulations that authorizes the IEPA to reconsider or modify and alter its final Trade Secret Determination absent a Board hearing on the merits of Midwest Gen’s petition.

Midwest Gen attempts to distinguish *Reichhold Chemicals* in a footnote, claiming that because it was based on a permit denial the Court of Appeal’s rationale would not apply in a trade secret case. Motion at p. 3, fn. 1. Midwest Gen argues that such a distinction is relevant, since the IEPA would not be “reconsidering its application of the law,” but vacating its determination after the FOIA request had been withdrawn. *Id.*

However, the point of law elicited in *Reichhold Chemicals* above applies broadly to all Agency decisions, including the IEPA and the Board. As stated above, pursuant to the Board Trade Secret Regulations, the IEPA does not have the authority to vacate its final Trade Secret Determination. Unlike the IEPA though, the Board may modify the IEPA’s final Trade Secret Determination pursuant to Section 5(d) of the Act, 415 ILCS 5/5(d), and Section 130.214(a) of the Board Trade Secret Regulations, 35 Ill. Adm. Code 130.214(a), after a hearing on the merits¹ of Midwest Gen’s petition. Consequently, Midwest Gen’s motion should be denied and this matter should proceed expeditiously to hearing.

B. Midwest Gen’s Reliance on the *Monsanto Company v. IEPA* is Misplaced.

Midwest Gen devotes a substantial portion of its motion to a discussion of a 1985 Trade Secret case, *Monsanto Company v. IEPA*, PCB 85-19, claiming that the “Board should follow its

¹ Section 105.214(a) and (b) of the Board Procedural Regulations, 35 Ill. Adm. Code 105.214(a) and (b), require either a hearing on the merits or if the facts are undisputed a ruling on a motion for summary judgment.

past precedent” and “vacate” the IEPA’s final Trade Secret Determination. Motion at p. 3, ¶9.

As discussed in detail below and contrary to Midwest Gen’s contention, it is not at all clear that the Board “vacated” the IEPA’s trade secret determination in the *Monsanto* case. *See Monsanto*, PCB 85-19 Joint Filing (Oct. 31, 1988); and *Monsanto*, PCB 85-19 Order at 1 (Nov. 3, 1988).

Monsanto arose under similar circumstances to this case: 1) IEPA received a FOIA request for documents that the petitioner had claimed were entitled to trade secret protection; 2) IEPA made a final determination that the petitioner’s articles were not subject to trade secret protection; and 3) the FOIA request seeking the documents at issue was withdrawn. *Id.*; *see also* Motion at pp. 3-4, ¶9. Another distinguishing factor between this case and the *Monsanto* case is that the IEPA does not believe it has the legal authority to dismiss its final Trade Secret Determination, and as a result it will not join in any agreed motion to vacate and dismiss this matter.

The basis of Midwest Gen’s reliance on *Monsanto* appears to come from the Board’s Order on an Agreed Motion for a 90-day Stay. *Monsanto*, PCB 85-19 Op. at 1 (Oct. 6, 1988). In its Order, the Board denied the motion to stay and in *dicta* provided an advisory opinion as to the possible outcomes of the case. *Monsanto*, PCB 85-19 Order at 1 (Oct. 6, 1988). The three possible outcomes to the *Monsanto* case the Board discussed were: 1) the petitioner could dismiss its case, whereupon IEPA’s trade secret determination would be final and the documents would fall into the public domain; 2) the FOIA requestor could withdraw his request and the petitioner could *jointly* move to dismiss the action, which the Board claimed would “result in the Agency’s decision being vacated” and the case “being dismissed as moot;” and 3) the Board could render its decision on the hearing that was held earlier that year and that had been fully briefed. *Monsanto*, PCB 85-19 Order at 1-2 (Oct. 6, 1988).

Of note, in its Order, the Board recognized that the IEPA lacked “jurisdiction to alter its decision, and its underlying factual and legal conclusions,” by negotiation with petitioner.

Monsanto, PCB 85-19 Order at 1 (Oct. 6, 1988). Also, Board Chairman, Jacob D. Dumele, in his concurring opinion regarding the possible outcomes of the *Monsanto* case posited by the Board stated:

I do not, at this time, possess the Board’s perception that “*only three viable alternative courses of action*” exist and are as set forth in the Order. As there is not much precedent for the issues presented in this case, I would prefer to withhold judgment on possible courses of action until all the facts and arguments are presented.

(*Emphasis added.*) *Monsanto*, PCB 85-19 Concurring Op. at 1 (Oct. 6, 1988).

The record in the *Monsanto* case demonstrates that neither the petitioner nor the IEPA cited to any statute, regulation, or case law that provided a legal basis allowing the Board to dismiss the trade secret appeal, let alone “vacate” the IEPA’s final trade secret determination as “moot.” See *Monsanto*, PCB 85-19 Joint Filing (Oct. 31, 1988). Although the Board found that the IEPA did not have jurisdiction to alter its decision (*i.e.* its final trade secret determination),² it ultimately granted the petitioner’s and IEPA’s joint motion to dismiss the appeal. See *Monsanto*, PCB 85-19 Order at 1 (Nov. 3, 1988). However, the Board Order granting the joint motion to dismiss was devoid of any written opinion or citation to any legal authority or basis for granting the motion. *Id.*

Particularly problematic in the *Monsanto* record is that there is nothing in the parties’ joint motion to dismiss that even hints that the IEPA’s final trade secret determination was “vacated.” See *Monsanto*, PCB 85-19 Joint Filing (Oct. 31, 1988). Further, there is no language in the Board’s Order indicating that it “vacated” the IEPA’s trade secret determination either and accordingly there is no basis to infer that it did so. See *Monsanto*, PCB 85-19 Order at 1 (Nov. 3,

² *Monsanto v. IEPA*, 85-19 Order at 1 (Oct. 6, 1988).

1988). Consequently, whatever precedential value the *Monsanto* case may present it does not stand for the proposition put forth by Midwest Gen. Therefore, the Board should not consider the *Monsanto* case as any basis for granting Midwest Gen's motion.

3. Public Policy Favors Disclosure of Environmental Compliance Information.

Midwest Gen claims that "Illinois public policy, as reflected in regulations implementing the Trade Secrets Act and FOIA, dictates that trade secret determinations should not be made without a valid reason." Motion at p. 4, ¶10. However, this case does not involve regulations under either the Trade Secrets Act or FOIA, but the Environmental Protection Act and the Board Trade Secret Regulations. Moreover in its initial decision granting a stay of these proceedings, the Board stated that, "The Board is mindful of the strong policy interest, evidenced in the [Illinois Environmental Protection] Act, favoring public disclosure of environmental compliance information, particularly emission data. See 415 ILCS5/7(b)-(d) (2004)." *Midwest Generation EME, LLC v. IEPA*, PCB 04-185, at p. 8 (April 6, 2006). Since the public policy favors disclosure of non-trade secret information, the Board should deny the motion and allow a hearing on the merits of Midwest Gen's petition.

Midwest Gen further states that the public interest would be served by vacating the IEPA's final Trade Secret Determination, because it avoids wasting judicial resources litigating the issues presented in this case now that there is no third party requesting the articles at issue. Motion at p. 5, ¶10. In addition, Midwest Gen contends that if any member of the public requested the purported trade secret articles at issue in this case, the IEPA is free to repeat the exercise that has brought us to this point, seven years after IEPA's initial request for Midwest Gen's trade secret justification. Motion at pp. 5-6, ¶11. Clearly, the best use of the parties' and the Board's resources would be to take the next step and have a hearing on the merits of Midwest

Gen's petition, so there will be no need to repeat the litigation path that has brought us to this point.

III. CONCLUSION

For the foregoing reasons, the IEPA respectfully requests that the Board deny Midwest Gen's Motion to Vacate IEPA's Trade Secret Determination And To Dismiss The Petition For Review As Moot.

Respectfully submitted,

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