ILLINOIS POLLUTION CONTROL BOARD
April 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 vacate the trade secret denial of the Illinois Environmental Protection Agency (IEPA) and dismiss this appeal as moot. The basis for Midwest's motion is the withdrawal of Sierra Club's Freedom of Information Act (FOIA) request that IEPA disclose Midwest's claimed trade secret materials. IEPA opposes Midwest's motion. For the reasons below, the Board grants the motion.

In this order, the Board provides background on the case before describing the parties' arguments concerning Midwest's motion to vacate and dismiss. The Board then discusses its reasons for granting the motion.

BACKGROUND

On November 6, 2003, Midwest submitted documents to the United States Environmental Protection Agency (USEPA) in response to USEPA's information request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). Midwest claimed to USEPA that the submitted materials constituted "confidential business information." Also on November 6, 2003, Midwest provided a copy of the submittal to IEPA and claimed trade secret protection for the information under the Environmental Protection Act (Act) (415 ILCS 5 (2008)). Sierra Club made a federal FOIA request to USEPA for disclosure of the information. On November 3, 2003, under Illinois' FOIA (415 ILCS 140 (2008)), Sierra Club submitted a request to IEPA for a copy of the same information.

On January 5, 2004, IEPA asked Midwest to provide a statement justifying the trade secret claim. IEPA's letter stated that the reason for requesting the justification was the FOIA request IEPA had received from Sierra Club. Midwest submitted its statement of justification to IEPA on January 23, 2004. IEPA issued its final determination on March 10, 2004, denying trade secret protection.

On April 19, 2004, Midwest timely filed a petition with the Board for review of IEPA's trade secret determination. In its petition, Midwest set forth its grounds for contesting IEPA's determination. Midwest also requested that even if the Board were to affirm IEPA's trade secret determination, the Board should remand the matter to IEPA (1) for a determination on whether the information qualifies for another exception to public disclosure under the Act and (2) to require that IEPA comply with FOIA regulations before releasing the information to a requestor under FOIA.

Midwest has maintained that the information submitted to IEPA is entitled to trade secret status, exempt from public disclosure requirements under the Act. *See* 415 ILCS 5/7, 7.1 (2008). The information relates to Midwest's six coal-fired power stations, all of which are in Illinois. Midwest describes the claimed information as consisting of two types: (1) "information Midwest [] compiled concerning capital projects at each of its coal-fired electric generating units"; and (2) "information identifying the monthly and annual net generation, the monthly coal heat content, and the monthly net heat rate for each of its coal-fired units." Petition at 2.

In a May 6, 2004 order, the Board accepted the case for hearing. On May 27, 2004, Sierra Club filed a motion to intervene. On July 1, 2004, Midwest filed a motion for the Board to partially reconsider its May 6, 2004 order, asking the Board to review IEPA's trade secret denial *de novo*. In a November 4, 2004 order, the Board denied Sierra Club's motion to intervene, but ruled that Sierra Club could participate in this proceeding in various ways. In the same order, the Board denied Midwest's motion to partially reconsider, but held that Midwest may present new evidence at the Board hearing in specified circumstances. Additionally, while retaining jurisdiction, the Board ordered a limited remand to IEPA, directing IEPA to issue a supplemental determination stating IEPA's reasons for denying trade secret protection. The Board required Midwest to file a pleading responsive to IEPA's supplemental determination.

On November 30, 2004, the Office of the Attorney General for the State of Illinois, acting as counsel for IEPA, filed with the Board a "Clarification of Trade Secret Determination." On or about December 13, 2004, Midwest petitioned the Third District Appellate Court to review the portions of the Board's order of November 4, 2004, relating to the proper scope of hearing. On March 4, 2005, the court dismissed Midwest's appeal, granting the Board's motion to dismiss the appeal for lack of jurisdiction.

In an April 6, 2006 order, the Board granted the first motion to stay the appeal before the Board due to the pending USEPA determination on whether to exempt the claimed materials from release under federal FOIA. An agreed motion for stay was granted on August 17, 2006. On February 15, 2007, the Board denied a contested motion for stay extension. With that denial, the Board, on April 19, 2007, granted Midwest's motion to strike portions of IEPA's supplemental determination. Consistent with the Board's November 4, 2004 order, the Board's April 19, 2007 order required Midwest to file a pleading responsive to IEPA's supplemental determination, as amended. On May 29, 2007, Midwest filed a responsive pleading. Further agreed motions for stay were thereafter filed and granted. The last stay was in effect through November 18, 2008, during and after which the parties pursued settlement. The case has not been to hearing.

On December 15, 2010, Midwest filed a motion to vacate IEPA's trade secret determination and dismiss Midwest's petition for review (Mot.). With the hearing officer's leave, IEPA filed a response on January 14, 2011 (Resp.), and Midwest filed a reply on January 28, 2011 (Reply). On December 15, 2010, Midwest filed a waiver of the Board's deadline for deciding this appeal, extending the deadline to September 21, 2011.

The Board today, in a separate order, is granting petitioners' joint motion to vacate IEPA trade secret determinations and dismiss petitions for review in two other related trade secret appeals: Commonwealth Edison Company v. IEPA, PCB 04-215, and Midwest Generation EME, LLC v. IEPA, PCB 04-216 (consol.).

PARTIES' ARGUMENTS

Midwest's Motion

Midwest argues that because of Sierra Club's FOIA request withdrawal, the Board should grant Midwest's motion to vacate IEPA's trade secret determination and subsequently dismiss the petition for review as moot. Mot. at 6. Midwest explains that in 2009, Sierra Club entered into a "Stipulation and Protective Order Regarding Confidential Information and Documents" in connection with United States of America v. Midwest Generation, LLC, Civil Action No. 09-cv-05277, in the United States District Court, Northern District of Illinois, Eastern Division. *Id*. at 3. Under the stipulation, Sierra Club withdrew its FOIA request to IEPA. *Id.*, Exh. B.

Midwest emphasizes that the only reason IEPA asked the company for a statement of justification was the submission of Sierra Club's FOIA request. Mot. at 2, Exh. A. According to Midwest, there are currently no requests for public disclosure of the claimed trade secret materials. *Id*. at 3. Midwest maintains that the decision in Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3rd Dist. 1990), "does not limit IEPA's authority to vacate the trade secret determination in this case on its own motion" because IEPA "would not be reconsidering its application of the law, but rather vacating a determination after the FOIA request which formed the basis for that determination has been withdrawn." *Id.*, n.1, citing Reichhold, 204 Ill. App. 3d at 677-80. Midwest states that it has asked IEPA to voluntarily withdraw the trade secret determination, but IEPA has declined. *Id*. at 3.

Midwest urges the Board to follow Monsanto Co. v. IEPA and John E. Norton, PCB 85-19 (Oct. 31, 1988; Nov. 3, 1988). Mot. at 3-4. According to Midwest, in Monsanto, as in the instant case, IEPA issued a trade secret determination "only in response to a FOIA request" and the FOIA requestor later withdrew the FOIA request during the pendency of the appeal before the Board. *Id*. at 4. Midwest asserts that in Monsanto, the Board vacated IEPA's trade secret determination and found that it would be appropriate to dismiss the matter as moot. *Id*. at 4-5.

Midwest argues that Sierra Club's FOIA request "authorized [IEPA] to make [the trade secret] determination." Mot. at 3. Midwest explains that the Board's rule requires IEPA to include a reason for requesting that a party submit a statement of justification and describes "the limited circumstances under which IEPA may undertake a review of such claims." *Id*. at 4, citing 35 Ill. Adm. Code 130.201(b). Midwest argues that with the withdrawal of Sierra Club's

FOIA request, IEPA's stated purpose for making the trade secret determination "no longer exists." *Id*. at 5. Midwest asserts that vacating an IEPA trade secret determination "where the determination is no longer necessary" serves the important public policy that trade secret determinations "not be made without a valid reason." *Id*. at 4. According to Midwest, this policy "avoids wasting judicial resources litigating the correctness of a trade secret determination regarding information that no third party is interested in obtaining." *Id*. at 5.

Because Midwest maintains that the claimed materials continue to require protection from disclosure, and IEPA has not withdrawn the trade secret determination, Midwest asserts that the company is "compelled to maintain this appeal." Mot. at 5. In this way, IEPA is prohibited from disclosing "in the event, however unlikely, that another member of the public requests these documents in the future." *Id*. According to Midwest, allowing this litigation to continue would be a "considerable waste" of Board and party resources. *Id*. If anyone were to request the claimed materials in the future, Midwest continues, "IEPA may, of course, make what it believes to be the appropriate determination at that time and [Midwest's] interests would be protected by the process afforded to [Midwest] under Illinois law." *Id*. at 5-6.

IEPA's Response

IEPA opposes Midwest's motion to vacate and dismiss. IEPA does not believe that its final trade secret determination became moot when Sierra Club withdrew the FOIA request. Resp. at 2. IEPA argues that "the actual controversy giving rise to this litigation remains" and that "the only thing that has become moot in this case is the Sierra Club's FOIA request." *Id*. at 2, 3. According to IEPA, "[t]he trigger" for its trade secret determination here and in all other cases is a claimant's statement of justification, which may be submitted with the claimed trade secret article or at a later time. *Id*. at 3. IEPA maintains that Midwest's argument about IEPA making another trade secret determination should any member of the public request to see the claimed documents in the future:

> 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. *Id*. at 4

Even if this case is moot, IEPA argues, the three criteria of the "public interest exception" to the mootness doctrine are met. Resp. at 4. First, IEPA maintains that the question on appeal is of a "public nature" because it involves information that a public agency has determined should be available to the public. *Id*. at 5. Second, IEPA asserts that an "authoritative resolution" on the merits of this appeal will help to "guide public officers" of IEPA on trade secret matters generally and in this case particularly. *Id*. Third, because the claimed documents here will remain in IEPA's files subject to public disclosure, "this litigation is likely to recur at great expense to all involved." *Id*. IEPA therefore argues that the Board should resolve this appeal on the merits. *Id*.

Next, IEPA asserts that neither the Act nor the Board's trade secret regulations authorize IEPA or the Board to vacate IEPA's trade secret determination under these circumstances. Resp. at 4. IEPA maintains that it is not authorized under Reichhold "to reconsider or modify and

alter" its final determination, and the Board may do so only on a motion for summary judgment or after a hearing on the merits. *Id*. at 5-6, n.1. IEPA adds that "it is not at all clear" that the Board vacated IEPA's trade secret determination in Monsanto. *Id*. at 7. IEPA states that in Monsanto, the Board's mention of vacatur in an interim order was dicta and the Board's final order does not mention vacatur. *Id*. at 7-8.

IEPA concludes by arguing that public policy favors disclosure of "environmental compliance information" and that the parties and the Board should use their resources to "take the next step" of having a hearing on the merits "so there will be no need to repeat the litigation path that has brought us to this point." Resp. at 9-10.

Midwest's Reply

Midwest reiterates that the trade secret issues under both the Act and FOIA are moot because Sierra Club has withdrawn its request for the claimed materials and no other member of the public is seeking their disclosure. Reply at 2. As to IEPA's argument that IEPA's trade secret determination is not moot because it was prompted by Midwest's statement of justification, Midwest states:

> If the existence of Petitioner's statement of justification somehow provides a basis for the continued life of this matter, then Petitioner hereby withdraws that statement of justification. Indeed, if Respondent's argument is correct, then all a party must do to prevent IEPA from making a trade secret determination in the future is to refuse to submit a statement of justification. Obviously, this cannot be true. The Sierra Club FOIA request initiated this matter and nothing else. *Id*.

Midwest argues that even if the Board affirmed IEPA, the claimed materials "would still be exempt from disclosure" under FOIA and, with Sierra Club's withdrawal of its FOIA request, IEPA now "lacks the authority" to review Midwest's claims that the materials are exempt from disclosure. Reply at 2.

Midwest next asserts that the Board should not hear this case under the "public interest exception" to mootness because "there is no public interest in the disclosure of these documents." Reply at 3. Midwest notes that in seven years, "no member of the public other than Sierra Club, which has now withdrawn its request, has expressed interest in these documents by requesting them." *Id*.

Midwest further argues that the public interest exception to the mootness doctrine "must be narrowly construed and requires a clear showing of each criterion for the exception to apply." Reply at 3. According to Midwest, IEPA failed to meet its burden of demonstrating that this case falls within the exception. Even if the Board affirms IEPA on the trade secret issue, according to Midwest, it is unlikely that the materials will ever be publicly disclosed because (1) there is no indication that any member of the public will ever seek the claimed materials, and (2) IEPA has never made a FOIA determination and "thus cannot legally release the documents." *Id*. Midwest maintains that continued litigation here over what it characterizes as "accounting

and production records" would not serve the public interest and would only result in a "considerable waste of public resources." *Id*.

It is Midwest's position that when a controversy has become moot, "the reviewing body should not review the matter 'merely to decide moot or abstract questions, establish a precedent, . . . or in effect, to render a judgment to guide potential future litigation.'" Reply at 3-4, quoting People v. Weaver, 50 Ill. 2d 237, 241 (1972). Midwest argues that it would be "improper" for the Board to decide the merits of this case "because such decision would be an advisory opinion." *Id*. at 4.

Midwest then argues that failing to vacate IEPA's trade secret determination would deny Midwest its due process rights if another member of the public requests the materials in the future, and would be inconsistent with the Board's regulations, which "only authorize IEPA to request a justification . . . when it has a legitimate reason to do so." Reply at 4. Midwest also does not believe that another request for public disclosure of these materials would doom the parties repeat this same litigation path. *Id*. at 5. According to Midwest, the Board should "save this fight for another day (or not at all)" by vacating IEPA's determination and dismissing the petition for review as moot. *Id*.

Midwest further asserts that IEPA's reliance on Reichhold is misplaced as Midwest "is not seeking an order to require IEPA to do anything." Reply at 5. Rather, Midwest seeks "an order from the Board dismissing the action and vacating the Trade Secret Determination." *Id*. Nor is there any merit to the notion, Midwest continues, that the Board "is powerless in this case other than to rule on a motion for Summary Judgment or to 'modify' IEPA's Determination after a full hearing on the merits." *Id*. Midwest maintains that this "constraining view" of the Board's authority is inconsistent with the Act and the Board's procedural rules. *Id*. at 5-6, citing 415 ILCS 5/5(d) (2008); 35 Ill. Adm. Code 101.500, 105.108(e).

Finally, Midwest argues that the IEPA trade secret determination in Monsanto was vacated by operation of law. Reply at 6. According to Midwest, the Board's Monsanto order of October 6, 1988, stated that upon the withdrawal of the FOIA request and the filing of a joint motion to dismiss the appeal, IEPA's determination would be vacated and the matter dismissed as moot. *Id*. Thereafter in Monsanto, continues Midwest, the parties filed a joint motion to dismiss and the requestor filed a motion to withdraw the FOIA request. Midwest concedes that the Board's Monsanto order of November 3, 1988, dismissing that matter, "does not explicitly repeat that the trade secret determination will be vacated." *Id*. "Despite the lack of an explicit restatement," Midwest argues, "the natural, and the only sensible, conclusion" is that IEPA's trade secret determination "was vacated by operation of law." *Id*. Without the vacatur, Midwest concludes, Monsanto's claimed information logically "would then have been public and the company would have been deprived of its due process rights should another individual come forward with a new request for the same information." *Id*. at 6-7.

DISCUSSION

In this section of the order, the Board first discusses whether this appeal is moot and, if so, whether the Board should nevertheless reach the merits of the case under the "public interest

exception" to the mootness doctrine. Next, the Board addresses whether dismissal of the appeal is all that is called for, or whether it is also necessary and appropriate to vacate IEPA's trade secret denial.

Mootness

Midwest and IEPA agree that "[a]n 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 & North Western Transp. Co., 151 Ill. 2d 108, 116, 601 N.E.2d 704 (1992); Krohn v. Arthur, 301 Ill. App. 3d 138, 141, 703 N.E.2d 602 (1st Dist. 1998) ("An appeal is considered moot if one of [the] two circumstances arises."). Midwest and IEPA disagree, however, over whether Midwest's appeal of IEPA's trade secret denial has been rendered moot by the withdrawal of Sierra Club's FOIA request for disclosure of the articles claimed by Midwest to be trade secrets. Midwest argues that there is no actual controversy anymore and that proceeding with this litigation would therefore be a waste of the resources of the parties and the Board. IEPA asserts that the litigation should proceed because the actual controversy remains.

Much of the parties' dispute over mootness centers upon the Board's trade secret rules (35 Ill. Adm. Code 130). When revising these rules, the Board was concerned with preventing the unnecessary use of both private and public resources. *See* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 21 (Nov. 2, 2000). Specifically, if no one wanted the claimed trade secret information to be made public, the Board intended to avoid *requiring* that the article owner prepare a statement of justification and, in turn, avoid *requiring* that the State agency render a trade secret determination. *Id*. To that end, the Board explicitly declined to require that a statement of justification accompany the submittal of the claimed article because doing so "would require the State agencies and the owners of articles to waste resources." *Id.*[1] The Board instead opted for:

> letting the State agency require the justification later *when it is needed*, such as when the State agency receives *a request from the public for a copy of the article*. *Id*. at 21-22 (emphasis added).

Accordingly, the Board adopted a rule providing that when a State agency requests a statement of justification from the owner of an article, the State agency "must set forth in the request the reasoning for the request." Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, order at 243 (Dec. 21, 2000) (35 Ill. Adm. Code 130.201(b)).[2]

Here, IEPA's request for a statement of justification states:

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[1] *See* 35 Ill. Adm. Code 130.206 (absent waiver by article owner, the deadline for issuing trade secret determination is 45 days after date of receiving complete statement of justification).

[2] In the same rulemaking, the Board specifically refused to adopt a procedure for issuing "declaratory rulings." Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 18 (Mar. 16, 2000).

> The Illinois EPA is hereby requesting a statement of justification within 10 working days of receiving this letter *as the Illinois EPA has received a FOIA request* pertaining to the Section 114 request response. (35 Ill. Adm. Code 130.201(a) and 130.202(a)) *Specifically, on November 3, 2003, the Illinois EPA received a Freedom of Information Act (FOIA) request from the Sierra Club* seeking records relating to all coal-fired power plants in Illinois. Mot., Exh. A at 1 (emphasis added).

The Board need not resolve the parties' argument over precisely *when* IEPA becomes authorized to make a trade secret determination under the Board's rules. In this case, the Board finds that IEPA's request for submission of a statement of justification, and the resulting IEPA trade secret determination, were precipitated by Sierra Club's FOIA request.

The Board further finds that proceeding to a decision on the merits of this case would likely require the expenditure of considerable resources. No briefs or motions for summary judgment have been filed on the substantive issues and the case has not been to hearing. In addition, as Midwest has alleged grounds for non-disclosure other than trade secret, it is unclear that the claimed materials would be made available to the public even if the Board affirmed IEPA's trade secret determination. The Board remains "mindful of the strong policy interest, evidenced in the Act, favoring public disclosure of environmental compliance information, particularly emission data." Midwest Generation EME, LLC v. IEPA, PCB 04-185, slip op. at 8 (Apr. 6, 2006). Sierra Club's FOIA request, however, has been withdrawn. Further, there are no other requests of IEPA that the claimed documents be publicly disclosed, nor has IEPA articulated any other reason necessitating the release of the claimed documents into the public domain.

Under these circumstances, the Board finds that no actual controversy remains in this appeal and that the matter before the Board is therefore moot. IEPA correctly observes, however, that there is a "public interest exception" to the mootness doctrine which "allows a court to resolve an otherwise moot issue if that issue involves a substantial public interest." Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill. 2d 200, 208, 886 N.E.2d 1011 (2008). The criteria for applying the public interest exception are as follows:

> (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. Cinkus, 228 Ill. 2d at 208.

As Midwest points out, "[t]he exception is narrowly construed" (Felzak v. Hruby, 226 Ill. 2d 382, 393, 876 N.E.2d 650 (2007)) and "[a] clear showing of each criterion is necessary to bring a case within the public interest exception" (Cinkus, 228 Ill. 2d at 208).

The Board finds that even if the first two criteria of the public interest exception are satisfied, the third criterion is not. IEPA simply notes that Midwest's claimed documents will remain in IEPA's files. It is uncontested that in some seven years, however, IEPA has received only the Sierra Club request for public disclosure of the documents. Again, IEPA reveals no reason for needing to disclose Midwest's claimed information to the public. Nor does IEPA

demonstrate that the type of information at issue in this appeal is commonly submitted and the subject of trade secret determinations.

The Board finds that there has been no clear showing that the trade secret question before the Board is likely to recur. Accordingly, this case does not meet the "exacting standard" required to satisfy the public interest exception. *In re* Adoption of Walgreen, 186 Ill. 2d 362, 365, 710 N.E. 2d 126 (1999). As IEPA has raised no other exception to the mootness doctrine, the Board finds that it would be appropriate to dismiss the petition for review as moot.

Vacatur

"'Vacate' means '[t]o annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment.'" People v. Barwicki, 365 Ill. App. 3d 398, 400, 849 N.E.2d 462 (2nd Dist. 2006), citing Black's Law Dictionary 1548 (6th ed. 1990). For the reasons below, the Board finds that it is necessary to vacate IEPA's trade secret denial and that the Board has the power to do so.

Midwest and IEPA dispute whether the IEPA trade secret determination at issue before the Board in Monsanto was vacated. There, a FOIA request similarly formed the basis of a company's appeal of an IEPA trade secret denial. *See* Monsanto, PCB 85-19, slip op. at 1 (Apr. 4, 1985). After a hearing and briefing on the merits, an agreed motion for stay was filed, through which Monsanto and IEPA sought time to pursue settlement. In an October 6, 1988 order, the Board denied the agreed motion for stay and explained the parties' alternatives. *See* Monsanto, PCB 85-19, slip op. at 1-2 (Oct. 6, 1988). The Board stated, among other things, that if Monsanto were to move for voluntary dismissal of the petition for review, IEPA's trade secret determination "would become final, and the documents would then fall into the public domain." *Id*. The order also provided that if the FOIA requestor were to move for withdrawal of his information request on file with IEPA, and if Monsanto and IEPA were to jointly move to dismiss the appeal, this "would result in [IEPA's] decision being *vacated* and this matter being dismissed as moot." *Id*. (emphasis added). Three weeks later, the requestor filed a motion to withdraw the FOIA request, while Monsanto and IEPA filed a joint motion to dismiss the action. The Board granted the motions in a November 3, 1988 order without explicitly referring to vacatur of IEPA's trade secret denial. *See* Monsanto, PCB 85-19, slip op. at 1 (Nov. 3, 1988).

The Board finds that the reasonable inference to draw from the Board's Monsanto orders is that IEPA's trade secret determination was vacated. The logic for vacutur enunciated in Monsanto remains sound in any event. The 35-day period within which to appeal IEPA's determination is long expired. By dismissing Midwest's appeal without vacatur, IEPA's unreviewed determination would become unreviewable or "final," risking entry of the claimed documents into the public domain. Monsanto, PCB 85-19, slip op. at 1-2 (Oct. 6, 1988). It is plain that Midwest is not acquiescing in IEPA's determination. The Board finds that vacatur of the IEPA trade secret denial here is necessary.

"As an administrative agency, the Board has the inherent authority to do all that is reasonably necessary to execute its specifically conferred statutory power." People v. Archer Daniels Midland, 140 Ill. App. 3d 823, 825, 489 N.E.2d 887 (3rd Dist. 1986); *see also* Freedom

Oil Co. v. PCB, 275 Ill. App. 3d 508, 514, 655 N.E.2d 1184 (4th Dist. 1995) ("In performing its specific duties, an administrative agency has wide latitude to accomplish its responsibilities."). The Act authorizes the Board to conduct proceedings on appeals of trade secret determinations. *See* 415 ILCS 5/5(d), 7.1(b) (2008); *see also* 35 Ill. Adm. Code 130.214. This trade secret appeal has been rendered moot and, as just found, vacating IEPA's determination is needed. Under these circumstances, the Board finds that it has the authority to vacate IEPA's trade secret determination. *See* Chemetco v. PCB, 140 Ill. App. 3d 283, 286-87, 488 N.E.2d 639 (5th Dist. 1986) ("where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred.").

Finally, a Board order vacating IEPA's trade secret determination does not run afoul of Reichhold. The Reichhold court found that after IEPA denied a permit application, IEPA lacked the authority to simply reconsider the denial absent an amended permit application. *See* Reichhold, 204 Ill. App. 3d at 676-80. Here, IEPA would in no instance be reapplying the trade secret provisions of the Act and the Board's regulations to arrive at a new determination. If the Board were to grant Midwest's motion, it would be the Board, not IEPA, vacating IEPA's trade secret determination. The Board finds that so vacating IEPA's determination would not constitute improper reconsideration by IEPA of the trade secret denial.

CONCLUSION

For the reasons set forth above, the Board grants Midwest's motion to vacate IEPA's trade secret determination and dismiss this petition for review as moot. Accordingly, the Board vacates IEPA's determination, dismisses this appeal, and closes the docket.

ORDER

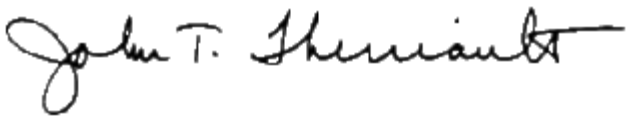
1. The Board vacates IEPA's trade secret determination of March 10, 2004, issued to Midwest.

2. The Board dismisses Midwest's petition for review, filed on April 19, 2004.

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) (2008); *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 April 7, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board