

ILLINOIS POLLUTION CONTROL BOARD
November 19, 1998

THE PILLSBURY COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 99-60
)	(Trade Secret - Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by R.C. Flemal):

On November 5, 1998, The Pillsbury Company (Pillsbury) filed a "Petition for Review and Trade Secret Determination" regarding the construction and operating permit issued by the Illinois Environmental Protection Agency (Agency) for Pillsbury's proposed food processing facility to be located in Geneva, Kane County, Illinois. The petition states that it is filed pursuant to Section 120.250 (35 Ill. Adm. Code 120.250) of the Board's regulations governing the identification and protection of trade secrets.

Pillsbury's permit application to the Agency included, *inter alia*, a written request that certain information in the permit application be treated as trade secret information and a statement of justification for that claim. The construction and operating permit issued on September 29, 1998, included raw material usage rates for process equipment, which Pillsbury had requested be given trade secret protection. The petition was filed with the Board within 35 days after the Agency issued the permit. Pillsbury does not request a hearing in this matter, and waives its right to a decision until December 4, 1998.

First, as Pillsbury does not challenge the substance of the permit except for inclusion of claimed trade secret material, the Board will treat this action as a trade secret appeal under Part 120 in which a hearing is optional, rather than as a permit appeal under Section 40 in which a hearing is mandatory.

Section 120.225 provides that "the agency shall determine whether the article represents a trade secret within 10 working days from the date of receipt of a complete statement of justification. . . ." The Agency failed to make a determination pursuant to Section 120.225, and instead responded by issuance of the permit at issue here. Section 120.250(c) provides that "the failure of an agency to make a final determination within the time limits prescribed in this part may be deemed to be a final determination for purposes of appeal." Therefore, pursuant to Section 120.250(c), the Agency's failure to make a final determination is deemed a final determination for purposes of appeal.

Neither the Illinois Environmental Protection Act (Act) nor Part 120 establish specialized procedures for this review. Although the Board's Part 105 permit appeal rules give the broad outlines for proceedings that challenge Agency permit determinations made under Section 40 of the Act, proceedings such as this for review of miscellaneous Agency final determinations under Section 5(d) of the Act have their own peculiarities. Accordingly, the Board has established the procedural framework for trade secret proceedings on a case by case basis. (See *e.g.*, Devro-Teepak, Inc. v. Illinois Environmental Protection Agency (June 17, 1998), PCB 98-160; Monsanto Co. v. Illinois Environmental Protection Agency (February 20, 1985), PCB 85-19; Outboard Marine Corp. v. Illinois Environmental Protection Agency and American Toxic Disposal, Inc. (April 5, 1984), PCB 84-26.) Since these types of cases are infrequently filed with the Board, we will repeat the procedural discussion here.

The parties to a trade secret case are the requester (as defined in 35 Ill. Adm. Code 120.103(b)), the owner of the article, and the agency whose determination is the subject of appeal. This does not place a responsibility on the requester to participate in this appeal, but rather affords the requester a right to participate if that person chooses to do so. In this case, Pillsbury has not named a requester.

The Agency is responsible for filing a certified copy of the record which forms the basis of its determination, including as a minimum, properly marked copies of the article itself, any material submitted by the owner pursuant to Part 120, and any other material the Agency has in its possession regarding this matter. In addition to the actual documents which comprise the record, the Agency must prepare and file a list of the documents comprising the record. The record must be filed with the Clerk of the Board by November 20, 1998.

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

The burden of proof in these appeals rests with petitioner. In addition, the Board notes Part 120 does not provide an opportunity for a requester to submit evidence to rebut a claim of trade secrecy in the proceeding below. Therefore, although the Board is standing in review posture, new evidence will be accepted upon a demonstration that: (1) it was unavailable to the party and the Agency at the time that the Agency made its determination; or (2) the party was not given an opportunity under Part 120 to present it to the Agency.

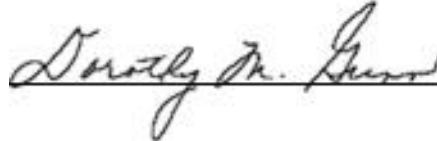
Based on Pillsbury's waiver of the decision period only through December 4, 1998, there is insufficient time in which to notice and hold a hearing in this case. However, the Board has assigned a hearing officer to manage and schedule briefing in this action to accommodate both petitioner's desire for a prompt resolution of its trade secret claim and the Board's need for adequate time to review and deliberate the parties' arguments.

Finally, the Board received from Gary P. Gengel and James A. Mennell a request to appear *pro hac vice*. Gengel and Mennell are both licensed Minnesota attorneys, and are a

partner and senior associate, respectively, with Oppenheimer Wolff & Donnelly in St. Paul and Minneapolis, Minnesota. They seek leave to represent petitioner in the above-captioned matter before the Board. The Board grants leave to Gengel and Mennell to appear *pro hac vice*.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of November 1998 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board