

ILLINOIS POLLUTION CONTROL BOARD

June 17, 1998

DEVRO-TEEPAK, INC.)	
(Permit Application 95120325),)	
)	
Petitioner,)	
)	
v.)	PCB 98-160
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.A. Manning):

On May 29, 1998, Devro-Teepak, Inc. (Devro-Teepak) located in Danville, Vermilion County Illinois, filed a petition for review of an April 24, 1998, trade secret determination made by the Illinois Environmental Protection Agency (Agency), finding that certain articles filed by Devro-Teepak in permit application 95120325 cannot be treated as trade secrets under the Environmental Protection Act (Act). The petition 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. Section 120.250(a) provides that "an owner or requester who is adversely affected by a final determination of either the Environmental Protection Agency or the Department of Energy and Nature Resources pursuant to [the Board's regulations governing the identification and protection of trade secrets], may petition the Board for review within 35 days after the entry of a final agency determination."

The petition alleges that Devro-Teepak is adversely affected by the Agency's determination that the subject articles cannot be treated as trade secrets due to Section 7(c) of the Act. 415 ILCS 5/7(c) (1996). The petition was filed with the Board within 35 days after the entry of the final Agency determination. Devro-Teepak requests a hearing in this matter, and waives its right to a decision until September 29, 1998.

Neither the 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., 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 this type proceeding are the requester (as defined in 35 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, Devro-Teepak has not named a requester and states its belief that there is none.

Due to the policy concern for expeditious decisions in appeals of this type, ordinarily the petition should be verified and should state facts and arguments of law sufficient to enable the Board to rule on the petition. However, as Devro-Teepak has requested a hearing, we will not require the filing of an amended petition in this case as we have in some previous cases.

The Agency will be 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 relied upon in making its determination. (This would ordinarily include the statement of justification required by 35 Ill. Adm. Code 120.215, but Devro-Teepak asserts that this was not provided in this case. Petition at 3.) In addition to the actual documents which comprise the record, the Agency shall prepare and file a list of the documents comprising the record. The record must be filed with the Clerk of the Board within 21 days from the date of this order. The Agency's answer to the petition must be filed within 14 days after the record is filed or 14 days after an amended petition is filed, whichever is later.

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.

In its petition, Devro-Teepak has requested a hearing, but has not requested an in camera hearing or a public hearing. The request for hearing is granted. The Board will presume that a public hearing is requested unless Devro-Teepak moves the Board or hearing officer to conduct the hearing, in part or in whole, in camera. Any motion shall be made within 21 days of this order and shall be accompanied by a supporting legal memorandum regarding the conduct of such an in camera hearing.

The burden of proof in these appeals rests with the 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.

The hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline, or the decision deadline as

extended by a waiver. (Petitioner may file a waiver of the statutory decision deadline pursuant to 35 Ill. Adm. Code 101.105.) The Board will assign a hearing officer to conduct hearings consistent with this order, and the Clerk of the Board shall promptly issue appropriate directions to that assigned hearing officer.

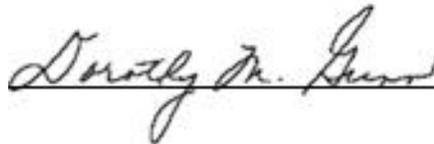
The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days prior to the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. Absent any future waivers of the decision deadline, pursuant to the waiver contained in the petition, the statutory decision deadline is now September 29, 1998; the Board meeting immediately preceding the decision deadline is scheduled for September 17, 1998.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

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 17th day of June 1998 by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board