

ILLINOIS POLLUTION CONTROL BOARD
August 21, 1985

MONSANTO COMPANY,)
)
)
 Petitioner,)
)
 v.) PCB 85-123
)
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY AND)
 JOHN E. NORTON,)
)
 Respondents.)

ORDER OF THE BOARD (by J. Anderson):

On August 19, 1985 Monsanto Company (Monsanto) filed a verified petition for review of a trade secret determination made by the Illinois Environmental Protection Agency (Agency) finding that certain articles filed by Monsanto cannot be treated as trade secrets under the Environmental Protection Act. The petition is filed pursuant to Section 120.250 of the Board's regulations governing the Identification and Protection of Trade Secrets. (35 Ill. Adm. Code 120.) 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 Natural 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 Board hereby accepts this petition. The Board finds that the petition is timely filed within the 35 day period following entry of the Agency's final determination on July 15, 1985 [see Section 120.250(a)]. The requester has been properly joined and served [see Section 120.103(b)]. The verified petition asserts that Monsanto is adversely affected by the Agency's determination, and appears to "state facts and arguments of law sufficient to enable the Board to rule on the petition" (see Monsanto v. IEPA and John E. Norton, PCB 85-19, PCB 85-19, Order of February 20, 1985).

By a filing of August 21, 1985, any otherwise applicable decision periods of Section 120.225 have been waived. The initial petition was also amended to include a request for hearing, and to suggest that the date for the filing of the Agency record in this matter be extended from the 21 days period customarily ordered by the Board in these cases (see Monsanto, supra) to 40 days. Monsanto asserts that the purpose of the extension would be to allow it and the Agency to enter into settlement negotiations in "early September" which could obviate any need for the filing of an administrative record.

The request for a delayed filing of the administrative record is granted. 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 (including a copy of any version of the article containing the trade secret which was given to the requester), a copy of the Statement of Justification and claim letter submitted by Monsanto, any material submitted by the owner pursuant to Part 120 and any other material submitted by the owner pursuant to Part 120 and any other material the Agency relied upon in making its determination. In addition to the actual documents which comprise the record, the Agency shall also prepare and file a list of the documents comprising the record. The Agency's record must be filed with the Clerk of the Board within 40 days from the date of this Order. The Agency's and any requester's answers to the petition must be filed within 14 days after the record is filed.

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 the 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.

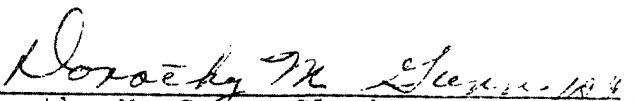
The request for hearing is granted. The Board will presume that a public hearing is requested unless the Petitioner moves the Board to conduct the hearing, in part or in whole, in camera. Any such Motion shall be made within 40 days of this Order and shall be accompanied by supporting legal memorandum 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 that 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 a review posture, new evidence will be accepted upon a demonstration 1) that it was unavailable to the parties and the IEPA at the time that the IEPA made its determination or 2) the party was not given an opportunity under Part 120 to present it to the IEPA.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Order was adopted on the 21st day of August, 1985, by a vote of 7-0.


Dorothy M. Gunn, Clerk

Illinois Pollution Control Board