

ILLINOIS POLLUTION CONTROL BOARD  
April 4, 1985

MONSANTO COMPANY, )  
 )  
 Petitioner, )  
 )  
 7. ) PCB 85-19  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY AND )  
 JOHN E. NORTON, )  
 )  
 Respondents. )

ORDER OF THE BOARD (by J.D. Dumelle):

This Order responds to three motions received by the Board on March 14, 1985, March 15, 1985, and April 1, 1985. Each of these motions will be discussed separately below.

By a motion filed on April 1, 1985, the law firm of John E. Norton and Associates, P.C., moved the Board to name it as a party respondent in this proceeding. In that motion, the law firm states that it was the requestor at the Illinois Environmental Protection Agency (IEPA) level of the articles which are claimed to represent a trade secret in this proceeding. The Board also notes that pursuant to the Board's Order of February 20, 1985, the Petitioner has named and properly served John E. Norton as a respondent in its Amended Petition and subsequent filings, and that the IEPA (in its March 15, 1985 Motion) confirms that John E. Norton and Associates, P.C. made the request for information which forms the basis of this appeal. The Board, therefore, finds that John E. Norton and Associates, P.C. is the requestor involved in this case, as defined under 35 Ill. Adm. Code 120.103, and is entitled to participate in this proceeding as a party respondent. The April 1, 1985 motion is hereby granted and shall also be construed as an Appearance in this proceeding.

On March 15, 1985, the IEPA filed, along with a copy of the record which was the basis of its decision on the articles in question, a motion entitled "Motion to Segregate Portions of Agency Record". This motion requests that the Board Order that a) certain portions of the IEPA Record be segregated from materials which are open to public inspection, and b) the requester be served with those portions of the IEPA Record which are open to public inspection. The portions of the record which the IEPA requests be segregated are the articles which the IEPA has determined, pursuant to Part 120 procedures, represent trade secrets and which are not the subject of appeal in this proceeding, and other articles which the Petitioner claims to be trade secrets and which are the subject of this appeal. The

Board notes that both "claimed" and "determined" articles are required to be protected from disclosure pursuant to 35 Ill. Adm. Code 120.260 and 120.320. Therefore, the items listed in paragraphs 5 and 6 of the IEPA's March 15, 1985 motion shall be segregated from the record as submitted and shall be protected from public disclosure by the Clerk of the Board until otherwise ordered by this Board. This portion of the IEPA motion is granted.

Although the Board has not required the IEPA to serve a copy of its record on the Requester-Respondent, John E. Norton, the IEPA may do so, subject to the Section 120.240, 120.245, and 120.320 requirements for protection and segregation of those articles which are "claimed" or "determined" to represent trade secrets. Therefore, the Board finds it unnecessary for the Board to order the IEPA to serve the record on the requester or to order the IEPA to comply with the regulatory requirements for protection and segregation. That portion of the IEPA motion is hereby denied.

The third motion was filed by Monsanto Company, the Petitioner, on March 14, 1985 and is entitled "Motion to Segregate Documents and to Conduct a Hearing Partly In Camera." This motion responds to the Board's February 20, 1985 Order which stated that the requested hearing would be presumed to be a public hearing unless the Petitioner moved the Board to conduct the hearing, in part or in whole, in camera, and supported its motion with a legal memorandum regarding the conduct of such a hearing. Monsanto's motion is accompanied by a supporting memorandum regarding the conduct of the hearing. Monsanto requests that documents be segregated and the hearing be held in camera "only to the extent necessary to protect from disclosure the specific information claimed as trade secret and confidential." The Board agrees with this general approach. The Board also finds the procedures outlined in Monsanto's Supporting Memorandum to be a reasonable approach to the segregation of documents and the conduct of the hearing. Therefore, Monsanto's March 14, 1985 motion is hereby granted.

With regard to the documents submitted in this proceeding thus far, only those articles or portions thereof, which have been either "determined" or "claimed" to represent a trade secret shall be protected from public disclosure. (See above ruling on IEPA's March 15, 1985 motion.) These articles may be reviewed by Board and IEPA officers and employees who are either designated to review the articles for the purpose of making trade secret determinations or specifically authorized by the Board or IEPA to have access to the articles for the purpose of carrying out the Environmental Protection Act (Act) or regulations or where relevant to a proceeding under the Act. (See 35 Ill. Adm. Code 120.330.) These "protected" articles shall not be available to the Requester-Respondent, John E. Norton, or any other person, except by specific, written permission from Monsanto Company.

Monsanto, in its memorandum, suggests that IEPA create a "public index" regarding the "protected" articles which describes the deleted material in a way that does not reveal the "protected" articles, but which is sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt from required disclosure. This procedure is used under the federal Freedom of Information Act and has been reviewed by the federal courts. See, e.g. Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973) and Founding Church of Scientology, etc. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979). Board rule 35 Ill. Adm. Code 120.325, which requires that either the claim letter or an agency prepared statement describing the article must be open to public inspection, expresses the same policy concern. However, for purposes of appeal, the claim letter alone may not provide sufficient information. Therefore, the Board orders that the IEPA, in conjunction with Monsanto, prepare a "public index" on the protected articles which is sufficient to permit members of the public to make a reasoned judgment as to whether the material is required to be disclosed under Section 7(d) of the Act (IRS 1983, ch. 111-1/2, par. 1007(d)) and/or represents a trade secret as defined in the Act or Board regulations. This "public index" shall be filed with the Board and the Requester-Respondent, John E. Norton, within 14 days from the date of this Order.

With regard to the hearing and post-hearing procedures, the Board agrees with Monsanto's proposal that a prehearing conference should be called by the Hearing Officer to identify which documents, witnesses, arguments, etc. require in camera treatment. All parties, including the Requester-Respondent, will be allowed to participate in the prehearing conference. As soon as possible after the prehearing conference, the Hearing Officer will rule on requests for in camera treatment and notify all parties. The hearing shall be scheduled so as to allow the Board to rule on appeals from the Hearing Officer's order prior to hearing. The parties shall have 10 days after the date of the Hearing Officer's order to appeal any portion of that order to the Board and 7 days to file responses to such appeals.

The Hearing Officer shall also have the authority to "close" the hearing at any time should he or she find it necessary to protect the "claimed" or "determined" trade secret material. The transcript of the hearing shall be separated into "public" and "non-disclosable" sections. The non-disclosable sections shall be protected pursuant to the Part 120, Subpart C procedures. Post-hearing briefs shall not include non-disclosable material, but may reference the protected portions of the transcript or record.

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 4<sup>th</sup> day of April, 1985, by a vote of 5-0.

Dorothy M. Gunn  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board