

ILLINOIS POLLUTION CONTROL BOARD
April 5, 1984

OUTBOARD MARINE)
CORPORATION,)
)
Petitioner,)
)
v.) PCB 84-26
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY, and)
AMERICAN TOXIC DISPOSAL, INC.,)
)
Respondents.)

ORDER OF THE BOARD (by J. Anderson):

This action is before the Board on a petition by Outboard Marine Corporation (OMC) for review of a trade secret determination made by the Illinois Environmental Protection Agency (IEPA) finding that articles filed by American Toxic Disposal, Inc. (ATD) constitute a trade secret. This 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."

This petition alleges that OMC is adversely affected by the IEPA's determination that the subject articles represent trade secrets within the meaning of the Act, and that the petition was filed with the Board within 35 days after the entry of a final IEPA determination (notice of which was given by certified letter dated January 26, 1984.) On this basis, the Board accepts this petition for review.

Given the fact that neither the Environmental Protection Act nor Part 120 establish specialized procedures for this review, an outline of the procedural framework for this proceeding follows.

First, the parties to this type of proceeding are the requester (as defined in Section 120.103(b)), the owner of the article, and the agency whose determination is the subject of appeal. While an agency is always the respondent on an appeal of its determina-

tion, in this situation an owner or requester (as the case may be, depending on the agency's determination) is the "real party in interest" and should be named as a co-respondent in each case. In this case, the parties appear to be properly named.

To commence Board review, OMC appears to have properly served a copy a of the petition upon all respondents and filed 10 copies of the petition with the Clerk of the Board. Due to the policy concern for expeditious decisions in appeals of this type, the petition should be verified and should state facts and arguments of law sufficient to enable the Board to rule on the petition. OMC will be allowed 21 days from the date of this Order to amend its petition, if necessary, to meet the requirements of this Order.

The IEPA 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 ATD, any material submitted by the owner pursuant to Part 120 and any other material the IEPA relied upon in making its determination. In addition to the actual documents which comprise the record, the IEPA shall also prepare and file a list of the documents comprising the record. IEPA's record must be filed with the Clerk of the Board within 21 days from the date of this Order. IEPA's and ATD's answers 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 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.

Unless a petitioner files a request for hearing with the petition or, in this case, in an amended petition, any right to a hearing shall be deemed waived. A hearing, if necessary, will be scheduled expeditiously and will be conducted by a qualified Board assistant or other Board - appointed hearing officer who will have the authority to close the hearing or otherwise structure the hearing upon finding that such action may be necessary to ensure the protection of the article in question until the issue is decided. Other procedural aspects of such a hearing will be addressed by a later Board order, if a hearing is requested.

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, Christian L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5th day of April, 1984 by a vote of 4-1.

Christian L. Moffett
Christian L. Moffett, Clerk
Illinois Pollution Control Board

