ILLINOIS POLLUTION CONTROL BOARD
June 4, 1992

THE GRIGOLEIT COMPANY, an Illinois Corporation,	)	
Petitioner,	)	
v.	)	PCB 90-135 (Trade Secret)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

THOMAS E. LITTLE APPEARED ON BEHALF OF PETITIONER[1] AND

JAMES G. RICHARDSON APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on the July 23, 1990, petition for review filed by the Grigoleit Company (Grigoleit). The petition seeks Board review of the Illinois Environmental Protection Agency's (Agency) refusal to provide trade secret protection to Grigoleit's material safety data sheets (MSDSs). Grigoleit requests that the Agency be reversed because of the Agency's failure to timely render its determination in accordance with Board regulations found at 35 Ill. Adm. Code 120.

PROCEDURAL HISTORY

At the outset, the Board notes that the documents at issue here were a part of various documents that had been seized on January 26, 1990 from Grigoleit's premises by the Illinois Environmental Protection Agency (Agency) under an administrative search warrant.

After Grigoleit filed its petition for review, the Board on August 30, 1990, ordered the Agency to respond to the petition for review. The Agency filed its response on September 19, 1990. On October 9, 1990, Grigoleit filed a reply to the Agency's response. On October 25, 1990, the Board ordered the case to hearing and ordered the Agency to maintain confidentiality of the documents. Hearing was held on June 20, 1991. No members of the public participated. Subsequent to hearing, on July 1, 1991, the Agency filed the record, including the MSDSs, with the Board. Having received unmarked documents, because of the unusual manner

[1] On June 1, 1992, the law firm of Booth and Little filed a notice of withdrawal of appearance.

in which this proceeding arose and because of some imprecise testimony at hearing, the Board, on July 25, 1991, ordered Grigoleit to specify, and to properly mark in conformance with the Board's regulations, the documents in the possession of the Board that Grigoleit asserts to be trade secrets. On August 20, 1991, Grigoleit specified that it claimed trade secret status only for Joint Ex. 2, some-200 MSDSs and submitted copies of each MSDS properly stamped "TRADE SECRET".[2] On August 22, 1991, the Board ordered that the MSDSs continue to be protected until resolution of this matter and that all other exhibits be placed in the public file. On September 4 and October 3, 1991, Grigoleit filed a brief and reply brief respectively; on September 23, 1991, the Agency filed its brief.

The unusual sequence of events that occurred, combined with misapplication of the Board's regulations, contributed to this matter going awry to an unusual degree. We will first discuss the statutory and regulatory framework applicable to trade secrets.

STATUTORY AND REGULATORY FRAMEWORK

Statutory Framework. Sections 7 and 7.1 of the Environmental Protection Act (Act) contain the provisions regarding the availability of public documents and exceptions thereto. All files, records, and data of the Agency, the Board, and the Department of Energy and Natural Resources are subject to these provisions.

All information that is obtained by the above agencies, in any manner, is open to public inspection except for:

1. information that constitutes a trade secret;

2. information privileged against introduction in judicial proceedings;

3. internal communications of the several agencies;

4. information concerning secret manufacturing processes or confidential data submitted by any person under the Act.

(Section 7(a))

However, the above information must be disclosed if it is effluent data for NPDES permits (Section 7(b)), emission data

---

[2] We note that the rest of the exhibits consisted of the six letters attached to the Agency's September 19, 1990 response, and Agency and USEPA regulations related to confidentiality.

relating to the federal Clean Air Act (Section 7(c)), or the quantity or identity of a substance being placed in a landfill, hazardous waste treatment, storage or disposal facility (Section 7(d)).

There are two provisions in Section 7.1 of special note in this case.

Section 7.1(a) provides in pertinent part:

> All articles representing a trade secret reported to or otherwise obtained by the Agency, . . . in connection with any . . . inspection . . . under this Act, shall be considered confidential . . .

Section 7.1(b) of the Act provides:

> The Board shall adopt regulations under Title VII of this Act which prescribe: (1) procedures for determining whether articles represent a trade secret; and (2) procedures to protect the confidentiality of such articles. All such regulations shall be considered substantive regulations for purposes of Section 28 of this Act.

Regulatory Framework. The Board adopted the mandated regulations in 35 Ill. Adm. Code 120, applicable to the three agencies, i.e. the Board, the Agency and the Department of Energy and Natural Resources. In adopting the regulations concerning trade secrets the Board sought to balance the interests of the information submitter, the agencies handling the information, and members of the public. Of particular note here, the procedures include quick "turnaround" times when an agency is to determine whether or not documents should be in the public domain. Procedures For Identifying and Protecting Trade Secrets, R81-30 (November 3, 1983).

In summarizing the Board's regulations, we first note that they include the following provision under "Internal Agency Procedures" in Part 120, Subpart D, Section 120.401:

> Each agency may adopt additional procedures which are not inconsistent with this Part for the protection of articles which are claimed or determined to represent a trade secret.

Thus, the agencies may adopt additional procedures in the area of providing for confidentiality of documents in their possession that are eligible for protection because a claim or determination of trade secret status has been made, and only insofar as those procedures are not inconsistent with Part 120. Rules adopted by the Agency were utilized in this case (See Joint

Exh. 1), and Agency reliance on them are part of the controversy. In any event, it is the Board's Part 120 regulations which must be the basis for the Board's determination.

Part 120 is contained in the Board's General Provisions, commonly called its "Procedural Rules". (35 Ill. Adm. Code 101-120.) Part 120 prescribes the procedures for requesting protection of an article that is claimed to represent a trade secret and the procedures to protect trade secrets. The owner of an article may seek trade secret protection of the article in two ways. The owner may submit to an agency - we will reference the Agency in this case - a detailed claim letter, a set of properly marked documents, and either a statement of justification or, in lieu of a statement of justification, simply a limited waiver of any Agency statutory deadlines pursuant to Section 120.201. A request that an article be treated as a trade secret can be made to the Agency at any time.

If a claim letter, properly marked documents and a statement of justification (See Sections 120.201 and 202) are submitted to the Agency, the Agency shall make a determination on the trade secret status of the documents within 10 working days from the receipt of the information. (This period can be extended for an additional 10 working day period if necessary.)[3] (Section 120.225). If the owner of the article chooses to submit a waiver in place of the statement of justification, the Agency must provide trade secret protection. (Section 102.203). However, if a request for the information is received from the public, or if the Agency initiates a request under one of the situations in Section 120.215, then it is the owner claiming trade secret status who, upon notification of such a request, must submit a statement of justification within 10 (plus 10) working days. (Section 120.220). In this case also, the Agency must then make a determination of trade secret status within the 10 (plus ten) working day time frames in Section 120.225 noted above.

A threshhold issue is whether the Agency made a timely determination in accordance with the Board's trade secret regulations, 35 Ill. Adm. Code Part 120. Determinations on other issues, such as whether the documents receive trade secret status by operation of law, or whether Grigoleit's claim and statement of justification suffices for trade secret protection under the Board's regulations, will depend on the Board's determination regarding the threshhold issue.

---

[3] The opinion will henceforth identify this timeframe as 10 (plus 10) working days.

BACKGROUND

On January 25 and 26, 1990, the Agency, under an administrative search warrant, entered Grigoleit's Decatur plant. On January 26, 1990, the Agency seized a number of documents. On the same day, January 26, 1990, Grigoleit's president hand-delivered to an Agency field inspector at the site his hand-signed trade secret claim letter and statement of justification, dated January 25, 1990. Citing Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 120, the letter claims any documents seized as trade secret, to be kept confidential. Grigoleit then states that the letter constitutes the Company's initial statement of justification, and the following paragraph was included:

> 1. The Company does not disclose information to any persons outside the Company and provides only limited access to certain management employees concerning its products, processes, equipment, materials, components, etc., on a "need to know" basis only. The Grigoleit Company further certifies that it has no knowledge that any such records have ever been published, disseminated or otherwise become a matter of general public knowledge. The above articles represent a combination of years of experience, practical application, innovation and in-house technology which have been applied in such a manner as to make the Company's production processes unique and have enabled the Company to maintain a competitive edge and provide the highest quality product.

(Pet. for Review, Exh. A, July 23, 1990; Agency Res. Exh. A, Sept. 19, 1990; Rec. Pet. Exh. 1; Tr. p. 9.)

It was not until 2 and 1/2 months later, April 11, 1990, that an Agency enforcement attorney responded. The Agency letter states that it had been determined that the Agency cannot make a determination regarding Grigoleit's "memorandum" because Grigoleit has not complied with the "specificity and detail required by Sections 120.201 [Claim That Article Represents a Trade Secret] and 120.202 [Contents of Statement of Justification]". The Agency letter then tells Grigoleit that it has 10 working days to reply pursuant to Section 120.220, if it wishes "to persist in seeking trade secret status and protection for these seized articles..." (Agency Res. Exh B, April 11, 1990; Rec. Pet. Exh. 2.)

On April 19, 1990; Grigoleit responded. This letter was date stamped by the Agency on April 23, 1990. Grigoleit's letter states that Section 120.225 required the Agency to make a trade secret determination within ten working days of its January 26, 1990 statement of justification, and that no extension was granted. It also states that the Agency's April 11, 1990 letter

is well beyond that time, and therefore the Agency's "purported denial of trade secrecy status is untimely". The letter then asserts that the documents are "deemed to constitute trade secrets", the documents therefore must be protected, and then notes that the Agency's letter "does not indicate otherwise". (Agency Res. Exh. D, April 23, 1990; Rec. Pet. Exh. 3.)

At this juncture, we must note that the section the Agency is referring to in asserting the 10 day requirement for submitting a justification references provisions where there is either a public request for disclosure (Section 120.210) or an Agency request for justification (Section 120.215). The letter is silent on which it was. There is no record of a public request. Nor does the letter on its face make clear that the Agency was intending to formally initiate its own request, having left the decision to Grigoleit "to persist" with its request. Also, the letter does not follow Section 120.215, which provides an "including but not limited to" list of circumstances warranting the request and requires that the letter state the circumstances.

On June 1, 1990, an Agency attorney responded. The Agency letter this time referenced its own rules, 2 Ill. Adm. Code 1827. (See Rec. Joint Exh. 1.) The letter asserted that the prior April 11, 1990 letter asked Grigoleit to substantiate its claim with a "more comprehensive identification and detailing of which articles are to be treated as a Trade Secret." The letter then added, "There is reasonable doubt that all articles obtained from Grigoleit represent Trade Secret information." The Agency in this letter disputed that it had made a final determination in its April 11, 1990 letter, stating that, pursuant to its rules, Section 1827.201, Grigoleit's January 25, 1990 letter was "insufficient and non-specific". The Agency again asserted that Grigoleit had only 10 (plus 10) working days to respond, but this time without citing to any rule at all. The letter then detailed portions of the applicable Agency rules regarding submittal requirements; Agency standards for a determination in its rules; and, the Agency timetable for Agency determination upon receipt of Grigoleits statement of justification, i.e., within ten (plus ten) working days, but citing no rule for the latter assertion. (Agency Resp., Exh. C, September 19, 1990; Rec. Pet. Exh. 4.)

We note here that the Agency's Part 1827 rules include in its statement of authority that it is "implementing and authorized by" Section 7 of the Act and Section 3(g) of the Freedom of Information Act. There is no tie-in to the Board's regulations, including no reference to Section 120.401 quoted above giving the agencies authority to adopt internal procedural rules. However, for the most part, the portions of the Agency's rules detailed or referred to in the Agency's June 1, 1991 letter substantially "track" the Board's regulations. We also note that we do not see any language in the Agency's rules

substantively different from the language in the Board regulations related to its assertion that Grigoleit had only 10 (plus 10) working days to respond.

On June 19, 1990, (by letter date stamped June 21, 1990 by the Agency), Grigoleit replied to the Agency's June 1, 1990 letter. Grigoleit stated that the Agency acknowledged receipt of Grigoleit's January 25, 1990 letter and again asserted that the Agency had to make a trade secret determination within 10 working days. Grigoleit also asserted that, since the "Agency remained silent on Grigoleit's statement of justification for a period of time in excess of that required by statute for it to render a decision", the documents constituted trade secrets and by law must be protected. Consequently, Grigoleit asserted, there was no determination for the Agency to make and neither the law nor regulations support the position the Agency was attempting, i.e., "a determination after the mandated date for action by the Agency". Finally, Grigoleit offered to provide additional information for the Agency files if the Agency would "advise what it is you want". (Agency Resp. Exh. E; Rec. Pet. Exh. 5.)

On June 20, 1990, the Agency noted that on June 1, 1990, pursuant to 2 Ill. Adm. Code 1827.201 (which significantly "tracks" Sections 120.201 and 120.202 - contents of claim letter and statement of justification), the Agency requested substantiation by Grigoleit of its claim. Without citing any rule, the letter asserted that Grigoleit failed to submit the required information within the "specified period of time", and therefore confidentiality must be denied. The letter finally stated that the documents would be protected during the appeal process. (Agency Resp. Exh. F, September 19, 1990; Rec. Pet. Exh. 6.)

We note here that the Agency made no reference at all to its first letter of April 11, 1990, which is the only letter that relies on Board regulations. Also, the Agency supplied no explanation for substituting Agency rules in place of the Board's regulations.

We finally note that the Agency's letter did not deny confidentially on a determination as to whether the documents satisfy the requirements of a trade secret. Rather, confidentially was denied because Grigoleit did not submit the information within the time limit asserted by the Agency.

Before going to the hearing record, the Board will first summarize the Agency's and Grigoleit's initial response and reply, respectively, to the Board's August 19, 1990 pre-hearing Order.

PRE-HEARING ARGUMENTS

As noted above, the Agency attached to its pre-hearing response of September 19, 1990 the six letters that are at the heart of this case. The Agency argues that: Grigoleit's claim letter was not concurrently delivered to the "appropriate" Agency personnel - i.e, those who make trade secret/confidentiality determinations, as is the customary manner of notification - and thus the letter was not received by these individuals for 30 days;[4] the delay is attributable to the unusual manner in which the claim was made, in that field personnel normally don't handle such matters, rather than indifference to the regulatory requirements; in the April 11 and June 1, 1990 letters the Agency informed Grigoleit that it did not meet the requirements of 2 Ill. Adm. Code 1827.201,[5] and thus the Agency's 10 working day response time had not commenced; Grigoleit had an opportunity to supplement its January 26, 1990 claim; the Agency finds no specific language in its Section 1827.204(a) (which provides for the Agency's 10 (plus 10) working day response time) mandating the result put forth by Grigoleit; and, while the Agency did not exhibit its normal vigilence, the result propounded by Grigoleit would allow the "mechanics of the regulation to triumph over its substance" and thus defeat the public purpose articulated in its rules. (Agency Resp. pp. 1-3)

Grigoleit, in its October 9, 1990 reply to the Agency's response, argues that: its delivery of the claim letter to the Agency's inspectors was most appropriate, certainly under the circumstances; its claim letter complied with Board regulations; neither the Act nor the regulations designate "appropriate personnel" but rather state that the claim must be made to the "Agency"; the inspectors are in a far better position than Grigoleit to know who makes confidentiality determinations in the Agency, and did in fact get it to them, albeit late; Section 7.1 of the Act provides for protecting the confidentiality of trade secrets obtained during an inspection and thus the Agency inspectors must be aware of this and were the appropriate ones to whom to deliver the claim. (Pet. Reply, 1-4.)

Grigoleit then asserts that: the Agency's April 11, 1990 letter could have used Section 1827.203(a)(2), Requests for Justification of a Claim, as a means of getting supplemental information, but the Agency did not timely make such a decision under the ten (plus ten) working day requirements of Section

---

[4] The 30 day timeframe became an issue at hearing.

[5] Regarding the April 11 letter, the Agency relied on the Board regulations, not on its own rules as it incorrectly asserts here.

120.225;[6] there is simply no provision in the Act or regulations for the Agency to wait an indefinite period of time to respond; the Agency may request the submitter to provide additional information, seek an additional ten working days, and/or deny the claim within the mandatory time limits imposed by Section 120.225. Grigoleit argues that the time limit is in fact serving the purposes of the statute, and that it is untenable for the Agency to invoke time limits on Grigoleit but ask that its own time limits be waived. Grigoleit, citing to the Agency's June 1, 1990 letter, argues that the Agency nowhere claims that Grigoleit has not substantially complied with the regulations or that its claim letter was not a "statement of justification". Finally Grigoleit points to its April 19, 1990 letter, where it offered more information but without giving up its right to require the Agency to act timely under Section 120.225. (Pet. Reply, pp. 4-8.)

BOARD HEARING

As noted at the outset of this opinion, at the start of hearing the Agency and Grigoleit stipulated that the trade secret status of all the MSDSs was the subject at issue, although this had to be clarified and the MSDS's properly marked pursuant to a post-hearing Board Order.[7]

At hearing the six letters exchanged were introduced by Grigoleit. (Pet. Exh. 1-6.)

The only person to testify at hearing was Mr. Michael G. McCabe, a legal investigator at the Agency since mid-1987. At the time of hearing, Mr. McCabe was the Agency-wide Freedom of Information Act (FOIA) coordinator, whose duties include reviewing trade secret requests from those turning over documents to the Agency. Mr. McCabe had never had a trade secret claim

---

[6] Grigoleit was probably referring to language in the Agency rule that includes as a circumstance for the Agency initiating a request " . . .the timely performance of Agency responsibilities." However, while that Agency Section contains the Board's 10 (plus 10) working day requirement for Agency response, it does not fully reflect the related Board Section 120.215, particularly insofar as the Agency rule does not require that the circumstances warranting the request be in writing.

[7] Documents stipulated to as confidential included a number of employee related training, interview, and safety related documents, as well as company planning, site sketch, and internal chemical compliance audits documents. Documents stipulated to as not confidential included Grigoleit's contingency plan, plant maintenance call schedule, waste hauling manifests and "cutter" documents. None of these documents were made exhibits at hearing.

where the documents were obtained by an administrative search warrant. (Tr. p. 17-20.)

Mr. McCabe testified that he uses the Agency rules 2 Ill. Adm. Code 1827 to review trade secret claims, stating that the rules flow from authorization given in the "statement of purpose" in the Board's Part 120 regulations, and that they closely track each other. However, Mr. McCabe stated that he uses only Part 1827 - the Agency rules, and testifying, incorrectly we note, that Part 1827 supersedes any contrary language in Part 120 of the Board's regulations. (Tr. 21, 22, 55.)

He testified that he determined that Grigoleit's justification was inadequate because: there was no detailed listing of what articles were seized; no detailed identification of the persons allowed access, or information regarding Grigoleit's procedure for keeping the information confidential, or information regarding competitive harm or whether it was ever published or disseminated. (Tr. p. 23.) He also stated that, since Grigoleit's January 25, 1990 letter used the words "initial" justification, he felt more comprehensive justification was coming. He also stated that no "FOIA" requests have been made. (Tr. p. 24.)[8]

Mr. McCabe testified that MSDSs are documents that identify a chemical - its hazardous qualities, ignitability, corrosiveness, etc. - and give procedures for first aid, how to extinguish a fire, etc. He stated that as part of his determination he looked to whether Grigoleit had showed him that it had complied with federal trade secret requirements where chemical reporting to the local emergency entity, the fire department and ESDA is required, citing 42 CFR 11021 and 11042. (Tr. 26-34.)[9]

---

[8] We note that the Agency's Part 1827 references Part 1826 regarding internal Agency appeals to the Director prior to appeal to the Board (see, e.g. Section 1827.205 (b)(3)(A) and 1827.304(b)(4), the latter providing for appeal to the circuit court (sic)).

[9] The Agency made an offer of proof following the Hearing Officer's ruling sustaining an objection by Grigoleit as to the relevancy of the federal regulation to this proceeding. The Board sustains the Hearing Officer and his statement that "If I can be shown that reference to CFR provisions are somehow or other devolved from Illinois regulations, I would be much more interested in hearing it. Whether or not CFR requires something doesn't mean that the Illinois Environmental Protection Agency may require the same thing in the absence of regulatory authority." (Tr. p. 29.).

Mr. McCabe testified that he did not receive Grigoleit's January 25, 1990 letter until the first week in April, although the Agency attorney received it 30 days after submittal. (Tr. 36, 39, but see Agency Res. September 19, 1990, p. 2.) He also acknowledged that the Agency had no policy that all trade secret claims were to be sent to him. He also acknowledged that, while it was generally known, particularly in the division of Land Pollution Control, that trade secret claims were to come to him, in January of 1990 he did not think everyone knew, particularly the field inspectors. (Tr. 40-42.)

Mr. McCabe asserted that he derived his authority to ask Grigoleit for more information by invoking the Agency rule provisions that are companion to Section 120.215, which provide for the Agency initiation of a request for justification, and specifically for the reasons in 120.215(c), which states that "[T]here is reasonable doubt that the article represents a trade secret and there has been a practice, on the part of the owner of the article, of indiscriminately claiming that articles submitted to the agency represent trade secrets". Mr. McCabe acknowledged that this language was not stated in the June 1, 1990 letter to Grigoleit. However, Mr. McCabe in his testimony showed lack of familiarity with Part 120.215, and he again stated that he was following Part 1827.201 as indicated in the letter and that the two parts are not identical and that he did not think Grigoleit had complied with them in sufficient detail. (Tr. 43-50.).

He testified that, regarding the requirement for a detailed statement in Section 120.202(b) identifying the "persons or class of persons" to whom the article has been disclosed, that he liked to see an employee-signed confidentiality agreement, but admitted that the regulations do not require this. (Tr. 51,54). He also acknowledged that the regulations do not require that the company keep confidential information under lock and key. (Tr. 55).

Mr. McCabe testified that he was confused as to whether trade secret status was being sought for the documents in that they did not bear any confidential or trade secret stamp in red as required, but that he was told to process them for a determination. He testified that he was not at the search of the Grigoleit facility conducted by the inspectors and had no independent knowledge as to whether there was an opportunity to have the stamps placed on them. (Tr. 57,58.)

POST HEARING BRIEFS

As is discussed below, the Board has concluded that the Agency has defaulted and that the Board, as one of the trade secret decisionmaking agencies under the statute and regulations, will assume responsibility for this matter. Thus, we will not recap the briefs, which essentially expand upon or recast earlier arguments addressing the Agency's actions made in the earlier

response and reply to the Board's August 30, 1990 Order. We do note, however, that both parties have now reverted to citing solely to the Board regulations.

DISCUSSION

In reviewing the unhappy history of the events recounted above, it is clear that the procedural breakdowns started at the beginning and continued throughout. In spite of all the assertions and testimony, a number of questions remain unanswered. Both parties jumped back and forth between citing Board regulations, Agency rules, or no rules at all in support of actions taken. As a result, the record is full of inconsistencies, contradictions, or no explanation at all for the actions taken. For example, one obvious question is why Grigoleit felt it had to make a statement of justification the day its documents were seized, rather than simply making a claim with a limited waiver of Agency decision, which would have held the documents as confidential until either the Agency or a member of the public caused a statement of justification to be made.

One thing is clear, however. There is no argument that the the claim letter was misrouted through the Agency at least for the 30 days before it reached an attorney, and that the Agency waited two and one half months, not 10 working days, before responding to Grigoleit's claim. The Agency presented two arguments in its defense, both seeking to shift the responsibility to Grigoleit. First, the Agency asserted that Grigoleit had failed to make its claim to the proper person, thus suggesting that no proper claim was made at all. Next, the Agency appeared to be initiating its own subsequent request for justification, although this is not at all clear. What is clear is that the Agency denied trade secret status because Grigoleit did not timely respond.

We reject these arguments. The Agency had neither rule nor policy for handling trade secret claims, and at the time it was not of general knowledge even within the Agency as to whom to send such claims. As for the second argument, in essense the Agency is trying to retroactively rehabilitate its untimely response by claiming that Grigoleit untimely responded to the Agency's untimely response. We find that the Agency defaulted in its decision.

Next is Grigoleit's argument that the MSDSs are accorded trade secret protection by operation of law. We disagree.

The Board does not find support for Grigoleit's argument that, when the Agency fails to reach a trade secret determination or seek an extension of time within the 10 day timeframe of the regulation, the material is granted trade secret protection by default. Section 120.250(c) states 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." Other than providing that it is an appealable determination, the Act and the regulations are silent as to the consequences of the Agency's failure to make a final determination. When the Agency fails to make a timely determination on a trade secret, the owner or person requesting to view the material can appeal the Agency's non-decision to the Board for a final determination. In failing to respond in a timely manner the Agency waives its right to make the determination as to trade secret status. Allowing a default finding of trade secret status would result in denying the public access to the information even if it has no trade secret value. Grigoleit has not cited to any statutory or case law authority empowering this Board to deem trade secret status be granted by default. Absent specific statutory language, the Board finds that the MSDSs do not have confidential status as a trade secret as a result of the Agency's default.

As a final note, the Board emphasizes that the regulations adopted by the Board are applicable to all three agencies pursuant to the statutory mandate, and therefore must supersede any inconsistent provisions in other rules that the three agencies may have adopted. (35 Ill. Adm. Code 120.401.)

REMEDY

The Board declines to attempt to make any further decision based on the record it finds here. The whole proceeding was aborted. Grigoleit's initial claim was made in an involuntary setting. The record is clear that the Agency did not timely address the claim, and that Grigoleit subsequently was not forthcoming with further information in order to preserve its position that the Agency had already defaulted. What is not clear is why the documents were never properly stamped, and why the Agency in none of its letters ever identified this failing as a deficiency in the claim. Moreover, the record does not enlighten us as to whether Grigoleit had access to the documents. Also, while it seems evident that Grigoleit did not have the option of withdrawing its documents, it is not at all clear, as noted above, why Grigoleit could not have simply made a claim with waiver.

In any event, we have concluded that this record cannot be used as a basis for determining whether Grigoleit justified trade secret status. We have also concluded that it would not be the best course to remand this matter to the Agency and have Grigoleit start the process all over again, and risking further delay resulting from another appeal. We believe that the public interest, as well as administrative economy, is best served by bringing this matter to a timely conclusion in a new proceeding before the Board. We note that under the statute and Board

regulations, the Board, the Agency, or DENR may handle de novo a trade secret matter. This is unlike other situations, such as in a permit appeal where there is no provision for the Board to be involved in the first instance in a permit determination. Therefore, the Board will dismiss this appeal after first retaining jurisdiction so as to give Grigoleit an opportunity to initiate a new request before the Board.

Within 45 days from the date of this order Grigoleit is to: either submit a Statement of Justification for the claim or simply a claim with a limited waiver. Since the properly marked documents are already in the Board's possession, they need not be resubmitted. Meanwhile, the documents are to remain confidential, including any in the Agency's possession. We caution Grigoleit that failure to respond within the 45 days will subject the documents to placement in the public file for failure to pursue a claim.

This constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Because no timely determination by the Agency was made in this matter:

2. The Material Safety Data Sheets (MSDSs) shall continue to remain confidential. If, however, within 45 days, Grigoleit fails to take action pursuant to paragraph 3, the documents will be subject by Board Order to placement in the public domain and this case will be dismissed.

3. If, within 45 days of the date of this order Grigoleit, pursuant to Section 120.201 of the Act, and with particular reference to Section 120.201(a)(3), either submits a Statement of Justification for the claim or, alternatively, a claim with a limited waiver, this case will be dismissed and the matter will be dealt with as a new case in a newly docketed proceeding before the Board. However, Grigoleit need not resubmit the documents which are in the Board's possession which the Board has previously found are properly marked.

4. The Board will retain jurisdiction in this matter.

IT IS SO ORDERED.

B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 4th day of June, 1992 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board