

ILLINOIS POLLUTION CONTROL BOARD

April 19, 2007

MIDWEST GENERATION EME, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 04-185
	)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

Today, the Board rules on a motion to strike filed by petitioner, Midwest Generation EME, LLC (Midwest). Midwest seeks to strike portions of a supplemental determination filed by respondent, the Illinois Environmental Protection Agency (IEPA), pursuant to the Board's limited remand. The Board has until now reserved ruling on the motion to strike because of several stays that have been in effect during this trade secret appeal. For the reasons below, the Board grants Midwest's motion.

The Board is not addressing the merits of the trade secret appeal today. The case has not yet been to hearing. In this order, the Board first provides procedural background on the case. The Board then discusses, in turn, IEPA's denial letter, the Board's limited remand, IEPA's supplemental determination, Midwest's motion to strike and related pleadings, and the Board's ruling on the motion.

**PROCEDURAL BACKGROUND**

On April 19, 2004, Midwest appealed a March 10, 2004 trade secret determination of IEPA under the Environmental Protection Act (Act) (415 ILCS 5 (2004)). In the IEPA determination, IEPA partially denied Midwest's claim for trade secret protection of information that Midwest submitted to IEPA. IEPA made the determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (FOIA) (415 ILCS 140 (2004)), for a copy of Midwest's submittal.

In its petition for review, Midwest states that it submitted information to IEPA on November 6, 2003, claiming trade secret protection for the information.<sup>1</sup> Pet. at 1-2. The company explains that it provided the submittal in response to an information request that the United States Environmental Protection Agency (USEPA) made pursuant to Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). Midwest states that, as required by USEPA's Section 114 request, the company sent a copy of its response to IEPA. *Id.* On January 5, 2004, IEPA

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<sup>1</sup> The Board cites Midwest's petition for review as "Pet. at \_."

asked Midwest to provide a statement justifying the trade secret claims. *Id.*, Attachment 2. Midwest submitted its statement of justification to IEPA on January 23, 2004. *Id.*, Attachment 3. As noted, IEPA issued its final determination on March 10, 2004, partially denying trade secret protection, and Midwest has timely appealed to the Board. *Id.* at 2, Attachment 1.

IEPA denied trade secret protection for what Midwest describes as two types of information: (1) “information Midwest Generation compiled concerning capital projects at each of its coal-fired electric generating units,” including “a description of the capital project, the date the project was completed or the planned completion date, the dollars expended, or to be expended, on each project, and the work order number for the project” (the so-called “project chart”); and (2) “information identifying the monthly and annual net generation, the monthly coal heat content, and the monthly net heat rate for each of its coal-fired units” (the so-called “generation chart”). Pet. at 2. The claimed information relates to Midwest’s six coal-fired power stations, all of which are in Illinois. IEPA determined that only the work order number in the project chart was entitled to trade secret protection. *Id.*

The Board docketed the trade secret appeal as PCB 04-185 and, in a May 6, 2004 order, accepted the case for hearing and granted Midwest’s request that any hearings be held *in camera*. On May 20, 2004, IEPA filed the administrative record of its trade secret determination, which consists of approximately 2,700 pages, in two volumes: Volume I is redacted so as not to disclose claimed trade secret information; Volume II contains the unredacted documents claimed to contain trade secrets.<sup>2</sup> On May 27, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. IEPA supported Sierra Club’s motion, but Midwest opposed intervention. On July 1, 2004, Midwest filed a motion for the Board to partially reconsider its May 6, 2004 order, asking the Board to review IEPA’s trade secret denial *de novo*. IEPA opposed Midwest’s motion for partial reconsideration.

In a November 4, 2004 order, the Board denied Sierra Club’s motion to intervene, but ruled that Sierra Club could participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing. In the same order, the Board denied Midwest’s motion to partially reconsider, but held that Midwest may present new evidence at the Board hearing in specified circumstances. Additionally, while retaining jurisdiction, the Board ordered a limited remand to IEPA, directing IEPA to issue a supplemental determination stating IEPA’s reasons for denying trade secret protection. The Board required Midwest to file a pleading responsive to IEPA’s supplemental determination.

On November 30, 2004, the Office of the Attorney General for the State of Illinois, acting as counsel for IEPA, filed a “Clarification of Trade Secret Determination.”<sup>3</sup> On December 9, 2004, Midwest filed a “Motion to Strike the Attorney General’s Clarification of IEPA’s Trade Secret Determination.” On January 11, 2005, IEPA filed its response to Midwest’s motion to strike with the hearing officer’s leave. On January 19, 2005, Midwest filed

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<sup>2</sup> In this order, the Board cites only to the redacted IEPA record, which is Volume I, and does so as “AR, Vol. I at \_.”

<sup>3</sup> The Board cites this supplemental determination as “Supp. Det. at \_.”

a motion for leave to file a reply to IEPA's response, attaching the reply. In light of the stays of this trade secret appeal, discussed below, the Board reserved ruling on Midwest's motion to strike and related motion for leave. The Board now grants Midwest's motion for leave, which IEPA did not oppose. *See* 35 Ill. Adm. Code 101.500(d) (failure of non-movant to respond to motion constitutes a waiver of objection to grant of motion). The Board accordingly accepts the filing of Midwest's reply.<sup>4</sup>

On or about December 13, 2004, Midwest petitioned the Third District Appellate Court to review portions of the Board's November 4, 2004 order. In a January 20, 2005 order, the Board stayed the trade secret proceeding before the Board until the Third District Appellate Court disposed of Midwest's appeal or the Board ordered otherwise. On March 4, 2005, the court dismissed Midwest's appeal, granting the Board's motion to dismiss the appeal for lack of jurisdiction.

Sierra Club submitted a federal FOIA request to USEPA for the same claimed information as is at issue in this proceeding. USEPA has been and is currently in the process of determining whether to exempt the materials claimed to be confidential business information from release under federal FOIA. In an April 6, 2006 order, the Board ruled on Midwest's first motion to stay this appeal based on the pending USEPA determination of confidentiality. Midwest sought to stay this proceeding before the Board until the USEPA process concluded. IEPA opposed the motion. The Board issued a short-term stay, staying this proceeding for 120 days or until August 4, 2006. On August 3, 2006, Midwest filed an agreed motion to extend the original stay through December 4, 2006. The Board granted the agreed motion in an order of August 17, 2006.

Midwest filed a motion to further extend the stay on December 11, 2006. On December 19, 2006, IEPA filed a response opposing Midwest's motion. On February 15, 2007, the Board denied Midwest's motion to further extend the stay, stating: "With the denial of Midwest's motion for another stay extension, the Board will turn to address Midwest's motion to strike and related pleadings in a separate order." The Board does so today in this order.

Midwest has waived to September 26, 2007, the Board's deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for September 20, 2007. The case has not been to hearing.

## **DISCUSSION**

In this portion of the order, the Board will discuss: (1) IEPA's partial denial of trade secret protection, which is the subject of this appeal; (2) the Board's decision ordering a limited remand to IEPA; (3) IEPA's supplemental determination; (4) Midwest's motion to strike IEPA's supplemental determination; (5) IEPA's response to Midwest's motion to strike; (6) Midwest's reply to IEPA's response to the motion to strike; and (7) the Board's ruling on the motion to strike.

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<sup>4</sup> The Board cites Midwest's motion to strike as "Mot. to Strike at \_"; IEPA's response as "Resp. at \_"; and Midwest's reply as "Reply at \_."

### **IEPA's Denial Letter**

IEPA's March 10, 2004 letter partially denying trade secret protection reads in relevant part as follows:

This letter serves as the Illinois EPA's response to Midwest's Statement of Justification.

The Illinois EPA acknowledges Midwest's withdrawal of its confidentiality claim pertaining to information contained on pages MWG0017 through MWG0022, information contained in column 7 on pages MWG0024 through MWG000056, and the boiler cross-sectionals. Notwithstanding the withdrawn information on pages MWG0024 through MWG000056, the Illinois EPA has determined that only columns 2 and 4 constitute confidential business or trade secret information. Midwest failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge (*i.e.*, the Illinois EPA was able to locate the information in sources available to the public) and/or failed to demonstrate that the information has competitive value. The Illinois EPA denies trade secret protection to the abovementioned information with the exception of the information contained in columns 2 and 4.

Regarding the information contained in the response to USEPA's request #3, the Illinois EPA is denying trade secret protection to all information except that found in column 2. Midwest failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge (*i.e.*, the Illinois EPA was able to locate the information in sources available to the public) and/or failed to demonstrate that the information has competitive value. Further, Midwest has failed to demonstrate that the information does not constitute emission data. AR, Vol. I at 205-06.

### **The Board's Limited Remand**

In its November 4, 2004 order, the Board stated:

Here, IEPA's denial letter states that Midwest failed to demonstrate that the claimed information is not publicly available "and/or" has competitive value. The denial is ambiguous as to whether one or both grounds apply. In addition, given that a trade secret is statutorily defined as information that has been kept private and has competitive value, IEPA's denial letter appears circular. In effect, the denial letter seems to say that trade secret protection is denied because Midwest failed to demonstrate that the information is a trade secret.

IEPA's denial provides no specific reasoning for the decision. The letter suggests that IEPA was able to locate the claimed information in "sources

available to the public,” without saying where. The letter gives no reasons *why* IEPA apparently believes Midwest failed to show that the claimed information has competitive value, or for that matter, does not constitute emission data.

\* \* \*

Under these particular circumstances, the Board directs IEPA to issue a supplemental decision stating the reasoning for its denial of Midwest’s trade secret request. Specifically, the Board requires IEPA to specify which grounds apply (*i.e.*, matter of general public knowledge, lacks competitive value, emission data) *and* why.

\* \* \*

The Board recognizes that IEPA lacks the authority to simply reconsider its final decision. *See Reichhold Chemicals, Inc. v. PCB*, 204 Ill. App. 3d 674, 678-80, 561 N.E.2d 1343, 1345-46 (3d Dist. 1990) (IEPA lacks authority to reconsider final decision absent amended application). The Board is not, however, directing IEPA to reconsider its decision. Instead, the Board is remanding this matter to IEPA for the limited purpose of having IEPA articulate, in compliance with Section 130.210(b)(1), the reasoning behind IEPA’s March 10, 2004 denial of trade secret protection. *Midwest Generation EME, LLC v. IEPA*, PCB 04-185, slip op. at 30-31 (Nov. 4, 2004) (emphasis in original).

The Board retained jurisdiction over the appeal and required IEPA to file the supplemental determination by November 30, 2004, with service on Midwest. The Board gave Midwest until December 31, 2004, to file a document that either amends Midwest’s grounds for appeal based on the supplemental determination or states the company chooses not to amend its April 19, 2004 petition for review. *See Midwest Generation*, PCB 04-185, slip op. at 31, 33-34.

### **IEPA’s Supplemental Determination**

On November 30, 2004, IEPA filed its supplemental determination in response to the Board’s November 4, 2004 limited remand order. In the supplemental determination, IEPA states that by the submittal, it is “clarifying the reasoning behind its denial of certain information claimed trade secret by Midwest.” Supp. Det. at 1. For purposes of today’s order, the Board will not describe all of IEPA’s seven-page supplemental determination in detail. Rather, the Board will describe the supplemental determination only to the extent necessary to rule on Midwest’s motion to strike.

IEPA states that two categories of information are at issue. Supp. Det. at 1. First, there is the capital projects list for each of Midwest’s coal-fired electric generating units, which the Agency refers to as the “capital project list” and Midwest refers to as the “project chart.” *Id.* at 1-2. IEPA states that the capital project list was submitted by Midwest to USEPA in response to USEPA’s information request number three. *Id.* at 2, n.1. The supplemental determination states that IEPA denied trade secret protection to all information in the capital projects list except for the work order numbers. *Id.* at 6.

Second, there is the information identifying the monthly net and annual net generation, the monthly and annual coal heat content, and the monthly and annual net heat rate for each of

Midwest's coal-fired units, which IEPA refers to as the "generation data" and Midwest refers to as the "generation chart." Supp. Det. at 1-2. IEPA states that the generation data were submitted by Midwest to USEPA in response to USEPA's information request number two. *Id.* at 2, n.2. The supplemental determination states that the generation data are contained in pages MWG0024 through MWG00056 of Midwest's information response to USEPA. *Id.* at 4. IEPA determined:

that certain generation data (i.e. information regarding gross generation (Mwhr) and gross heat rate (BTU/GKwhr)) constituted confidential business or trade secret information. The Illinois EPA denied trade secret protection to the information regarding net generation rate (Mwhr), net heat rate (BTU/NKwhr), and average coal heat content (BTU/lb). *Id.*

IEPA states that before making its trade secret determination, IEPA informed Midwest of various purported shortcomings in Midwest's statement of justification. IEPA continues that "[d]espite these pre-decisional discussions, Midwest failed to address the Illinois EPA's concerns in a supplemental statement of justification prior to the Agency's trade secret determination." Supp. Det. at 2; *see also id.* at 5, n.11.

According to IEPA, the supplemental determination explains why IEPA determined that specified generation data are a matter of general public knowledge, lack competitive value, and constitute emission data. Supp. Det. at 3-6. Further, IEPA states that the supplemental determination explains why IEPA determined that the capital project list contains information that is publicly available, lacks competitive value, and constitutes emission data. *Id.* at 3, 6-7.

### **Midwest's Motion to Strike**

On December 9, 2004, Midwest filed a motion to strike the supplemental determination or, alternatively, portions of the supplemental determination. In the motion, Midwest first seeks to have the entire supplemental determination stricken because it was submitted on the letterhead of the Attorney General's Office and signed by an Assistant Attorney General on behalf of an IEPA employee. Mot. to Strike at 1-2, n.1. Midwest argues that the Board directed IEPA, not the Attorney General, to make the supplemental determination, and IEPA has "the exclusive legislative authority to decide such matters." *Id.* at 2.

Alternatively, Midwest moves the Board to strike portions of the supplemental determination as being beyond the scope of the Board's November 4, 2004 order. Mot. Strike at 2. First, Midwest states that the supplemental determination "articulates a new ground for denying trade secret protection" rather than merely stating the reasons for the March 10, 2004 denial as required by the Board order. *Id.* Midwest argues that the Board did not authorize IEPA to "revisit IEPA's determination to create new grounds for denying protection." *Id.* Instead, asserts Midwest, IEPA was "limited to its original decision and only ordered to explain the reasons that supported [it]." *Id.*

Midwest quotes from IEPA's March 10, 2004 denial letter regarding the generation chart information and argues that the supplemental determination "now asserts, for the first time, that

the Generation Chart constitutes emissions data.” Mot. Strike at 3. Midwest moves to strike the portions of the supplemental determination “pertaining to the new argument that the Generation Chart is emissions data.” *Id.* at 3-4.

Second, Midwest moves the Board to strike portions of the supplemental determination that contain “false and irrelevant statements regarding conversations between the IEPA and Midwest Generation.” Mot. Strike at 3. Midwest describes as false the claims in the supplemental determination that IEPA had “pre-decisional conversations” with Midwest about alleged deficiencies in Midwest’s statement of justification. *Id.* Midwest provides the affidavit of Mary Ann Mullin, attorney for Midwest, to support its conclusion that Midwest had no conversations with IEPA about the statement of justification before IEPA’s March 10, 2004 denial was issued. *Id.*, Mullin Affidavit at 1.

Moreover, Midwest continues, even if such conversations did take place before the IEPA denial issued, they are “not relevant to the limited purpose of the November 4, 2004 Order.” Mot. Strike at 3. Midwest asserts that the supplemental determination’s discussion of purported “pre-decisional conversations” does not explain the reasoning of IEPA for its denial, but rather is:

only a self-serving, belated and misguided attempt to create the false impression with the Board, and in the record, that Midwest Generation had an opportunity to know, discuss and respond to the reasoning for IEPA’s decision in advance of it becoming final in the March 10, 2004 Denial. *Id.* at 3-4.

Midwest therefore moves to strike the references in the supplemental determination alleging that Midwest and IEPA had conversations about the statement of justification before IEPA issued its March 10, 2004 denial letter. *Id.* at 4.

### **IEPA’s Response to Motion to Strike**

On January 11, 2005, IEPA filed its response, opposing Midwest’s motion to strike. As for Midwest’s request to strike the entire supplemental determination, IEPA provides the affidavit of IEPA attorney Chris Pressnall, whose name and title are typed as signatory of the supplemental determination. Resp. at 2, Pressnall Affidavit at 2; *see also* Supp. Det. at 7. Citing Pressnall’s affidavit, IEPA states that the supplemental determination was, in fact, drafted by IEPA, not by the Attorney General’s Office. Pressnall attests that the original signed supplemental determination could not be faxed to the Assistant Attorney General representing IEPA because of multiple equipment malfunctions. Resp. at 2, Pressnall Affidavit at 1-2. According to Pressnall, to meet the filing deadline, he instead electronically mailed the supplemental determination to the Assistant Attorney General “and bestowed signature authority to same.” Resp., Pressnall Affidavit at 2.

As for Midwest’s alternative motion to strike portions of the supplemental determination, IEPA responds first to the issue of alleged pre-decisional conversations and then to the issue of a purported new ground for denial. IEPA now “acknowledges” that “after further review,” the

specific discussions referred to in the supplemental determination actually “occurred after the March 10, 2004 trade secret determination.” Resp. at 2. IEPA then nevertheless argues:

While the IEPA agrees that the timing of these statements is irrelevant, the statements are not, in that they consist of discussions concerning Midwest’s failure to demonstrate that their alleged trade secret information is not publicly available. *Id.*

Lastly, IEPA maintains that in the supplemental determination, IEPA merely “clarified” that the information in the generation chart is emission data and therefore must be publicly available. Resp. at 2-3. IEPA then states that “[a]lthough the IEPA did not mention emissions data specifically with regard to the Generation Chart in its original March 10, 2004 determination, it was implicit in its decision.” *Id.* at 3. IEPA asserts that the Board ordered IEPA to specify “which grounds apply and why” and IEPA’s supplemental determination “did just that.” *Id.* IEPA further argues that whether or not the generation chart is trade secret “is not germane when it must be released pursuant to Section 130.110, 35 Ill. Adm. Code 130.110, and the Clean Air Act.” *Id.* Moreover, IEPA concludes:

The Board does not require the IEPA to state whether information constitutes emission data when evaluating and responding to a statement of justification, as, by definition, it must be available to the public. *Id.* at 4.

### **Midwest’s Reply to Response to Motion to Strike**

On January 19, 2005, Midwest filed a motion for leave to file a reply to IEPA’s response, attaching the reply. The Board granted Midwest’s unopposed motion for leave earlier in this order. In its reply, Midwest states that with IEPA’s presentation of the Pressnall affidavit, Midwest withdraws its motion to strike the entire supplemental determination, but not its alternative motion to strike portions of the supplemental determination. Reply at 1-2.

Midwest maintains that the paragraph in the supplemental determination concerning alleged conversations between IEPA and Midwest should be stricken for several reasons. First, according to Midwest, IEPA states three times in the supplemental determination that these communications took place *before* the March 10, 2004 denial. Reply at 2. Midwest argues that because IEPA “now acknowledges these statements are erroneous, admitting that any such conversations between IEPA and Midwest Generation took place after” the original determination was issued, the paragraph should be stricken from the supplemental determination. *Id.*

Second, asserts Midwest, the erroneous misrepresentations about conversations should be stricken because they “create the mis-impression with the Board, and in the record, that Midwest Generation had an opportunity to know, discuss and respond to the reasoning of IEPA” before IEPA’s determination became final. Reply at 2. Midwest states that it “is not at all sure with whom IEPA is agreeing” when IEPA states in its response that “IEPA agrees that the timing of these statements is irrelevant.” *Id.* at 3, quoting Resp. at 2. Midwest states that IEPA is not



agreeing with Midwest, which maintains that the timing of the conversations is particularly relevant. Reply at 3.

Third, as to IEPA's apparent argument that the statements are relevant irrespective of when they took place, Midwest asserts that IEPA gives no reason why the statements are relevant to the supplemental determination. Reply at 3. Midwest suggests that the statements actually have no relevance to the bases for the denial of trade secret protection, and are therefore irrelevant to the Board-ordered task of IEPA supplementing the March 10, 2004 denial "in order to explain the reasoning supporting its decision." *Id.*

Finally, Midwest disagrees with IEPA's representations as to the content of the conversations between IEPA and Midwest. Midwest cites to the affidavit of Mullin, who swore that even during her post-decisional discussions with IEPA, IEPA never discussed Midwest's apparent failure to follow its own procedures to protect trade secret information or Midwest's apparent failure to address the complete chain of custody for the information at issue. Reply at 3, Mullin Affidavit at 2. Midwest states that:

the silence of the IEPA's response and accompanying affidavit on the question of the accuracy of the description of these conversations may be more eloquent than anything Midwest Generation can argue. Reply at 3, n.2.

Midwest also maintains that the portions of IEPA's supplemental determination pertaining to the generation chart being emission data should be stricken as "new grounds for denial not allowed by the [Board's] Order." Reply at 4. Midwest initially points out that IEPA admits that "IEPA did not mention emissions data specifically with regard to the Generation Chart in its original March 10, 2004 determination." *Id.* at 2, quoting Resp. at 4.

Midwest describes as "untenable" IEPA's position that the emission data argument is not a new ground for denying trade secret protection but rather just a clarification of the original determination. Reply at 4. According to Midwest, IEPA's original determination "clearly identified the grounds (but not the reasons supporting these grounds)" for its denial of trade secret protection to the generation chart and the project chart. *Id.* IEPA claimed that the project chart constituted emission data, but IEPA "made no such claim as to the Generation Chart," asserts Midwest. *Id.*

Midwest disagrees with IEPA's argument that this ground (the generation chart constituting emission data) is "somehow 'implicit'" in the original determination. Reply at 5. IEPA admits, Midwest continues, that the question of whether the generation chart is a trade secret is not "germane" to whether it is emission data. *Id.*, quoting Resp. at 3. Accordingly, Midwest argues, that IEPA now considers the generation chart to be emission data cannot possibly be a "clarification" of one of the grounds identified in the March 10, 2004 determination. Reply at 5. Midwest asks:

Which ground could it possibly support? Does the fact that IEPA now considers the Generation Chart emissions data support the IEPA determination that the information is publicly available? Does it support the IEPA determination that

the data has no competitive value? Neither position makes sense . . . . *Id.*

Midwest asserts that IEPA, “[a]pparently recognizing the speciousness of its ‘emissions data’ argument,” appears to argue that the Board order requiring the supplemental determination gave IEPA “license to add grounds not identified” in the original determination. Reply at 6. Midwest argues, however, that the Board order “clearly does not.” *Id.* Midwest states that for the generation chart, for which IEPA denied trade secret protection on grounds of public availability and lack of competitive value, the Board order required IEPA to “specify whether one or both grounds applied, and why.” *Id.* at 6. The Board did not, argues Midwest, authorize IEPA to “revisit its decision and create new grounds not previously identified.” *Id.*

Finally, Midwest responds to IEPA’s argument that the Board does not require IEPA to state whether information constitutes emission data when responding to a statement of justification, “as by definition, it must be available to the public.” Reply at 6, quoting Resp. at 6. According to Midwest, the Board order “has laid to rest any uncertainty as to what is required in IEPA’s denial letter.” Reply at 6. Midwest notes that the Board order includes emission data among trade secret protection denial grounds. *Id.* at 7.

### **The Board’s Analysis**

Under Section 7 of the Act (415 ILCS 5/7 (2004)), all files, records, and data of the Board, IEPA, and the Illinois Department of Natural Resources are open to public inspection and copying. However, the Act provides that certain materials, including trade secrets, are protected from public disclosure. *See* 415 ILCS 5/7(a) (2004); *see also* 415 ILCS 5/7.1 (2004). Even so, the Act denies trade secret protection for several categories of information, including emission data to the extent required by the federal Clean Air Act. *See* 415 ILCS 5/7(b)-(d) (2004).

As Midwest has withdrawn its motion to strike the entire IEPA supplemental determination, the Board turns to Midwest’s alternative motion to strike portions of the supplemental determination. Specifically, Midwest moves the Board to strike passages of the supplemental determination concerning (1) the generation chart as emission data and (2) conversations between IEPA and Midwest.

### **Generation Chart as Emission Data**

IEPA concedes that its original determination letter of March 10, 2004, failed to include the emission data ground for denying trade secret protection to the generation chart. IEPA nevertheless insists both that the ground was “implicit” in the original determination and that IEPA was not required to state the ground in the denial. The Board disagrees on both counts.

IEPA’s position that the generation chart is emission data appears for the first time in the supplemental determination, filed on November 30, 2004. In the original determination, IEPA denied trade secret protection to the generation chart solely because:

Midwest failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public

knowledge (*i.e.*, the Illinois EPA was able to locate the information in sources available to the public) and/or failed to demonstrate that the information has competitive value. AR, Vol. I at 205-06.

On its face, IEPA's original determination denies trade secret protection to the *project* chart in part because IEPA claimed that the project chart is emission data: "Further, Midwest has failed to demonstrate that the information does not constitute emission data." AR, Vol. I at 206. That same determination letter, as shown above, makes no mention of IEPA believing that the *generation* chart also constitutes emission data.

In its limited remand order of November 4, 2004, the Board stated:

IEPA's denial provides no specific reasoning for the decision. The letter suggests that IEPA was able to locate the claimed information in "sources available to the public," without saying where. The letter gives no reasons *why* IEPA apparently believes Midwest failed to show that the claimed information has competitive value . . . . Midwest Generation, PCB 04-185 at 30 (emphasis in original).

The Board accordingly remanded the matter to IEPA for IEPA to "articulate . . . the reasoning behind IEPA's March 10, 2004 denial of trade secret protection." Midwest Generation, PCB 04-185, slip op. at 31.

The Act defines "trade secret" as follows:

[T]he whole or any portion or phase of any scientific or technical information, design, process (including a manufacturing process), procedure, formula or improvement, or business plan which is secret in that it has not been published or disseminated or otherwise become a matter of general public knowledge, and which has competitive value. 415 ILCS 5/3.48 (2004); *see also* 35 Ill. Adm. Code 101.202.

Even if information qualifies as trade secret, the information must be made publicly available if it constitutes "emission data," as Section 7(c) of the Act provides:

Notwithstanding any other provision of this Title or any other law to the contrary, all emission data reported to or otherwise obtained by the Agency, the Board or the Department in connection with any examination, inspection or proceeding under this Act shall be available to the public to the extent required by the federal Clean Air Act, as amended. 415 ILCS 5/7(c) (2004); *see also* 35 Ill. Adm. Code 130.110(a).

The Board's trade secret procedural rules at Section 130.110 define "emission data" as follows:

b) For purposes of this Section, "emission data" means:

- 1) The identity, amount, frequency, concentration, or other characteristics (related to air quality) of any contaminant that:
  - A) Has been emitted from an emission unit;
  - B) Results from any emission by the emission unit;
  - C) Under an applicable standard or limitation, the emission unit was authorized to emit; or
  - D) Is a combination of any of the items described in subsection (b)(1)(A), (B), or (C) of this Section.
- 2) The name, address (or description of the location), and the nature of the emission unit necessary to identify the emission unit, including a description of the device, equipment, or operation constituting the emission unit.
- c) In addition to subsection (b) of this Section, information necessary to determine or calculate emission data, including rate of operation, rate of production, rate of raw material usage, or material balance, will be deemed to represent emission data for the purposes of this Section if the information is contained in a permit to ensure that the permit is practically enforceable. 35 Ill. Adm. Code 130.110(b), (c).

The March 10, 2004 denial of trade secret protection for the generation chart was based only on grounds of public availability and lack of competitive value (*i.e.*, the components of the trade secret definition), neither of which has anything to do with whether the generation chart constitutes emission data. *See Devro-Teepak, Inc. v. IEPA*, PCB 98-160, PCB 98-161 (cons.), slip op. at 2 (Dec. 3, 1998) (if claimed information is emission data, “that ends the Board’s inquiry,” but if it is not, the “second issue . . . is whether the information . . . is a trade secret”). IEPA’s introduction of the emission data argument in the supplemental determination therefore cannot be a “clarification” of the original denial of trade secret protection or an articulation of the reasoning behind the stated denial grounds. Contrary to IEPA’s claims, the Board finds that this new ground is in no way “implicit” in IEPA’s original determination.

Nor are “implicit” denial grounds permissible. Owners of articles denied trade secret protection cannot be left to guess on which grounds IEPA has based the denial. Grounds for denial must be explicit in the determination letter. If IEPA is denying trade secret protection based on the emission data disclosure provisions, that ground must be stated in the written decision. *See* 35 Ill. Adm. Code 130.100(b)(1), 130.110, 130.210(b)(1). The Board’s procedural rules make the emission data provisions applicable to trade secret proceedings. Specifically, Section 130.100 (entitled “Purpose and Applicability”) states: “Subpart A of this Part sets forth general provisions that apply with respect to both trade secrets and other non-disclosable information.” 35 Ill. Adm. Code 130.100(b)(1). Subpart A of Part 130 sets forth the emission

data provisions. *See* 35 Ill. Adm. Code 130.110 (entitled “Articles Containing Emission Data”). IEPA was presumably aware of these requirements because its original determination included the emission data denial ground for the project chart.

As the Board has discussed in this proceeding, the Board’s Part 130 procedural rules provide that trade secret appeals before the Board are to proceed like permit appeals. *See Midwest Generation*, PCB 04-185, slip op. at 19-22; 35 Ill. Adm. Code 130.214(a). The Board has often stated that the IEPA denial letter frames the issue on appeal:

[T]he information in the denial statement frames the issues on review. [citations omitted] Such information is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof before the Board to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support permit denial. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990); *see also* 35 Ill. Adm. Code 130.214(a); Midwest Generation, PCB 04-185, slip op. at 29.

When the Board’s November 4, 2004 order directed IEPA to address which grounds applied, the Board was plainly requiring IEPA to remedy the impermissible equivocation of the original determination letter, which states that Midwest failed to show that the generation chart is not publicly available “and/or” has competitive value. The Board specifically stated that the “denial is ambiguous as to whether one or both grounds apply.” Midwest Generation, PCB 04-185 at \_\_.

In ordering the supplemental determination, the Board did not, and cannot, empower IEPA to create new grounds for denial. With permit appeals, the Illinois Supreme Court has held:

We believe that the Agency had a duty, reading sections 39 and 40 of the Act together, to specify reasons for denial, including, if it intended to raise the issue before the Board, the lack of compliance Rule 203(f), or be precluded from raising that issue. IEPA v. PCB, 86 Ill. 2d 390, 404-05, 427 N.E.2d 162 (1981).

Based on this Illinois Supreme Court precedent, the Board has held:

In its permit denial letter, the Agency must specify all reasons for its denial of a permit, and is precluded from raising new reasons for the first time before the Board. Joliet Sand & Gravel Co. v. IEPA, PCB 86-159, slip op. at 5 (Feb. 5, 1987) (citing IEPA v. PCB, 86 Ill. 2d 390, 404-05).

The Board has also applied this permit appeal precedent in the context of Underground Storage Tank Fund reimbursement appeals, which, like trade secret appeals, proceed before the Board in the manner of permit appeals under Section 40 of the Act (415 ILCS 5/40 (2004)). For example, in Galesburg Cottage Hospital v. IEPA, PCB 92-62 (Aug. 13, 1992), the Board stated:

As the Board has previously held, the Agency is bound on review by the reasons given in its letter communicating its decision. The Agency cannot, at the Board level, raise new reasons for denying reimbursement. Galesburg Cottage Hospital, PCB 92-62, slip op. at 6.

IEPA's addition of a new denial ground now is, under these circumstances, tantamount to IEPA simply reconsidering its original determination, which IEPA cannot do, as the Board has noted in this proceeding. *See Midwest Generation*, PCB 04-185, slip op. at 31 (citing Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 678-80, 561 N.E.2d 1343, 1345-46 (3d Dist. 1990) (IEPA lacks authority to reconsider final decision absent amended application)).

Consistent with this case law, the Act, and the Board's procedural rules, as well as the scope of the Board's limited remand, the Board finds that IEPA's supplemental determination improperly includes a new denial ground, *i.e.*, one not specified in its original denial letter. Accordingly, the Board grants Midwest's motion to strike references in the supplemental determination to the generation chart containing emission data. By so granting Midwest's motion, the Board is not finding that IEPA is precluded, under any circumstances, from determining whether the generation chart constitutes emission data to be made publicly available under Section 7(c) of the Act. Rather, the Board is finding that the issue is not properly before the Board in this appeal.

### **Conversations Between IEPA and Midwest**

IEPA admits that what it originally characterized as "pre-decisional" communications with Midwest actually took place *after* IEPA issued its March 10, 2004 determination. IEPA maintains, however, that its description of those communications in the supplemental determination remain relevant because they concern "Midwest's failure to demonstrate that their alleged trade secret information is not publicly available." Resp. at 2.

The Board's November 4, 2004 order directed IEPA to provide the reasoning behind its original determination. Communications that took place *after* that determination obviously cannot have served as a basis for that determination. The references to these communications in the supplemental determination are therefore beyond the scope of the Board's limited remand order.

Additionally, independent of the supplemental determination's descriptions of conversations between IEPA and Midwest (the contents of which Midwest disputes), the supplemental determination contains several explanations of why IEPA felt that certain claimed information was publicly available. The references to these communications then are redundant of IEPA's articulated reasoning elsewhere in the supplemental determination and as such are unnecessary.

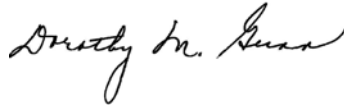
For these reasons, the Board grants Midwest's motion to strike references to conversations between IEPA and Midwest from the supplemental determination.

**CONCLUSION**

The Board grants Midwest's motion to strike portions of IEPA's supplemental determination, as described above. Consistent with the Board's November 4, 2004 order, Midwest must, within 30 days after receiving this order, file a pleading with the Board responsive to IEPA's supplemental determination, as amended by today's order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 19, 2007, by a vote of 3-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board