BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

PETITIONER'S POST-HEARING BRIEF

SUMMARY OF ARGUMENT

The three documents at issue in this proceeding are excerpts from three different air permit applications for Monsanto's Wm. G. Krummrich plant in Sauget, Illinois. Monsanto submitted these three documents to the Illinois Environmental Protection Agency ("IEPA") in the course of Monsanto's continuing cooperation with the agency's normal regulatory processes. These three documents are among the thousands of pages of Krummrich documents subject to the Freedom of Information Act request by respondent John E. Norton. They are the only three about which Monsanto and the IEPA disagree concerning whether disclosure is required.

Monsanto seeks to protect only portions of these three documents, which give detailed information and data on the composition and characteristics of certain wastes associated

with various production processes at Krummrich. Administrative Record Exhibits 16, 17, and 21 (hereinafter A.R. Ex. 16, 17 and 21).

It is undisputed both that this information would be of great value to Monsanto's competitors and that Monsanto has met all requirements for making a proper trade secrets claim. Therefore, this information is protected from disclosure as trade secret and confidential under Sections 7(a) and 7.1 of the Environmental Protection Act. Ill. Rev. Stat., ch. 111-1/2, §§ 1007(a) and 1007.1.

The IEPA contends that this admittedly confidential information is disclosable under Section 7(d) of the Environmental Protection Act (Ill. Rev. Stat., ch. 111-1/2, § 1007(d)). This section requires disclosure of "the quantity and identity of substances being placed or to be placed" in hazardous waste facilities.

This exception to the Act's confidentiality protection does not apply to the information at issue here for two independent reasons. First, these documents pertain to facilities or processes that were never built (A.R. Ex. 16 and 21) or that were for production rather than waste disposal (A.R. Ex. 16 and 17). Second, this information is far more than the "identity of substances." Instead, it is highly detailed information and data on waste characteristics and composition that would be of great value to Monsanto's competitors.

ARGUMENT

I.

THE INFORMATION MONSANTO SEEKS TO PROTECT IS UNDISPUTEDLY TRADE SECRET AND CONFIDENTIAL

The Environmental Protection Act generally affords complete protection from disclosure to information that is trade secret or business confidential. Section 7(a) of the Act provides that the IEPA and the Board should not disclose, inter alia,

> (i) information which constitutes a trade secret;
>
> (ii) information privileged against introduction into judicial proceedings;
>
> * * *
>
> (iv) information concerning secret manufacturing processes or confidential data submitted by any person under this Act.1/

Section 7.1 of the Act prohibits disclosure of trade secret material, except in confidence to public employees who are administering the Act, and mandates the Board to adopt regulations to keep such material confidential. Under Board regulations, information is trade secret if it has competitive value and if the company submitting the information has taken proper steps to protect it from becoming a matter of general public knowledge. 35 Ill. Admin. Code §§ 161.201-.204.

1/ The Illinois Freedom of Information Act similarly affords protection from disclosure to trade secret and business confidential information. Ill. Rev. Stat., ch. 116, § 207(g).

Here, the IEPA and respondent John Norton have stipulated that this information "is specifically of a high commercial value to [Monsanto's] competitors." Transcript of Proceedings in Monsanto Company v. IEPA and John Norton, PCB No. 85-19, June 11, 1985 (hereinafter "Tr.") at 21. The IEPA and respondent Norton also stipulated that Monsanto has followed the procedural requirements for making a trade secret claim for this information. Tr. 76. Therefore, this information must be protected under Sections 7(a) and 7.1 of the Act unless some exception to the general protection afforded trade secrets applies.

II.

THIS INFORMATION DOES NOT FALL UNDER THE SECTION 7(d) EXCEPTION TO NON-DISCLOSURE

Section 7(d) of the Environmental Protection Act provides for an exception to the general protection from disclosure afforded information that is trade secret or confidential:

> (d) Notwithstanding subsection (a) above, the quantity and identity of substances being placed or to be placed in landfills or hazardous waste treatment, storage or disposal facilities, and the name of the generator of such substances may under no circumstances be kept confidential.

As an exception to the confidentiality protection of Sections 7(a) and 7.1, Section 7(d) should be strictly and narrowly construed. People v. Chas. Levy Circulating Company, 17 Ill. 2d 168, 171, 161 N.E.2d 112, 114 (1959) (exception to application of state personal property tax law

narrowly construed so that the defendant must pay the tax) and County of Will v. Arcole Midwest Corp., 45 Ill. App. 3d 656, 660, 359 N.E.2d 1245, 1248 (5th Dist. 1977) (statutory proviso allowing temporary use of land for construction purposes without local zoning approval narrowly construed to disallow land use by the defendant construction company).

The IEPA's attempt to rely on this exception to force disclosure of this trade secret information construes Section 7(d) too broadly. A fair reading of the terms "being placed or to be placed" and "quantity and identity of substances" and a reasonable application of those terms to the facts of this case does not require disclosure of the information at issue here.

A. This Trade Secret Information Does Not Concern Substances "Being Placed or to be Placed" in Hazardous Waste Facilities.

Section 7(d)'s coverage of substances "being placed or to be placed" in hazardous waste facilities does not include the information at issue here relating to facilities that were never built or to manufacturing processes. Instead, Section 7(d) applies only at the point which a substance is about to be moved off-site for disposal, and information associated with disposal permits is submitted to the IEPA. Outboard Marine Corporation v. IEPA and American Toxic Disposal, Inc., PCB 84-26 (June 20, 1984).

In Outboard Marine, the Board's only reported decision construing Section 7(d), the petitioner sought to protect about 30 pages of information submitted to the IEPA

CORRECTIO

THIS DOCUMENT

HAS BEEN REPHOTOGRAPHED

TO ASSURE LEGIBILITY

> the disposition of the waste stream and its actual content or "identity". Thus, the Board finds that Section 7(d) does not require disclosure of data on the anticipated residues of the process at this time. Id. at 6.

As in Outboard Marine, the documents at issue here have nothing to do with an actual waste disposal process. In fact, as the Krummrich plant's Environmental Specialist, Andrew Quick, testified, two of the documents concern facilities that Monsanto never built. The waste chart, A.R. Ex. 21, was part of an air permit application for a proposed waste incinerator planned for the Krummrich plant. Monsanto did not construct this facility and withdrew the permit applications for it. Tr., 26-27. Because the Krummrich plant incinerator was not constructed, wastes listed in A.R. Ex. 21 as being from the Queeny plant and the research facility in Missouri never came to the Krummrich plant for incineration or any other purpose. Tr. 29. Moreover, several of the wastes listed in A.R. Ex. 21 as being from the Krummrich plant no longer are generated due to the closing of the operations that produced these wastes. Tr., 29-30.

Similarly, A.R. Ex. 16 is part of a process never implemented at the Krummrich plant. This exhibit concerned a manufacturing process for materials used as rubber additives that Monsanto calls Santoflexes. Because this process was not implemented, the waste it would have generated, which is described in Item 10 of A.R. Ex. 16, was never produced. Tr., 38-40.

The final document at issue, A.R. Ex. 17, is part of an operating air permit for a Santoflex manufacturing process that is operating at the Krummrich plant. Tr., 40-41. Item 10 of A.R. Ex. 17 describes the constituents of the waste residue to be generated by this Santoflex manufacturing process. Tr., 41. This residue, as in Outboard Marine, was to be stored on-site, in this case in two storage tanks in the Santoflex process area. Tr., 41.

The waste generated by the process relating to A.R. Ex. 17 and the wastes listed in A.R. Ex. 21 that the Krummrich plant still generates eventually are sent off-site to waste incinerators, landfills and other facilities outside Illinois. Tr., 30-31 and 41-42. At this point, waste manifests are specifically prepared for the waste disposal process. Tr. 31 and 42, and Petitioner's Ex. 1-3. These waste manifests contain, inter alia, both the identity and quantity of the substance being disposed. In fact, the substance is identified both by name and by various codes recognized in the industry, including the widely used hazardous waste codes developed by the U.S. Department of Transportation. Tr., 32-38 and Petitioner's Exhibits 1-3. Monsanto prepares these waste manifests in several copies, and sends one copy to the IEPA. Tr., 31-32.

None of the documents at issue are associated with the authorization for actual disposal of waste, which is the point at which substances fall under Section 7(d). Outboard Marine, supra, at 5-6. The facilities related to A.R. Ex. 21

and 16 were not even built. A.R. Ex. 17, like the documents at issue in Outboard Marine, relates to an operating permit, not actual waste disposal, and describes anticipated residues, not wastes actually being disposed. Thus, Section 7(d) does not apply to this information. Accordingly, these trade secrets should remain protected from disclosure.

B. This Trade Secret Information is not the Quantity or Identity of Substances.

Section 7(d) requires disclosure only of the basic "quantity and identity of substances" being disposed in hazardous waste facilities. It does not require disclosure of extensive details and data about the waste composition beyond basic quantity and identity.

Monsanto has no objection to disclosure of basic identity of substances, such as the waste names that appear in the waste manifests, Petitioner's Ex. 1-3, or in the publicly available portions of the documents at issue, A.R. Ex. 16, 17 and 21. The information Monsanto seeks to protect goes beyond this basic identity to describe detailed waste composition in terms of percentages of components associated with particular manufacturing processes. Also, in the case of A.R. Ex. 21, the chart for the waste incinerator that was never built, this information includes detailed data for carbon, hydrogen, and oxygen and nitrogen content, specific gravity, ash composition, viscosity, pH, flash points, and pour points.

If the legislature intended that more than the basic identity of the substance to be placed in hazardous waste facilities should be disclosed, it could have used broader language. For example, the legislature could have required that all information or data relating to waste data be disclosed. In fact, the legislature used the term "data" to require broader disclosure of information relating to water and air. Section 7 requires that "effluent data" from or concerning entities subject to water pollution permits be disclosed (Ill. Rev. Stat., ch. 111-1/2, § 1007(d)(i)) and also that "all emission data" obtained by the IEPA be disclosed (Ill. Rev. Stat., ch. 111-1/2, § 1007(c)).

The legislature's use of different language in different sections of the same statute show that the legislature intended different results. Nelson v. Union Wire Rope Corporation, 31 Ill. 2d 69, 100, 199 N.E.2d 769, 786 (1964) and Aurora Pizza Hut v. Hayter, 79 Ill. App. 3d 1102, 1105-6, 398 N.E.2d 1150, 1153-54 (1st Dist. 1979). The legislature chose not to mandate such broad disclosure in the case of wastes going to disposal facilities by using different language and requiring that only the basic identity of such substances rather than all waste data be disclosed. The waste manifests contain the basic identity of each substance disposed by the Krummrich plant, and already are disclosed to the public. See, e.g., Petitioner's Ex. 1-3. The information and data at issue in this proceeding, however, are much

more than this basic identity. Therefore, this data does not fall under Section 7(d), and should remain confidential.

Moreover, the identifying information provided in Monsanto's waste manifests gives just as much protection to the public from the hazards of the transport of these wastes from the Krummrich plant to disposal sites outside Illinois. The additional detailed waste data at issue in these proceedings is not necessary to protect the public health.

Ken Storms, an experienced industrial hygienist, made this point in testimony that was uncontradicted by any evidence presented by other parties to this proceeding. Storms testified that the waste identities in the waste manifests, Petitioner's Ex. 1-3, provide adequate information to formulate a response to protect the public in the case of an accidental release during transportation of these materials. The basic chemical names on the manifests, and also identifying numbers, allow for reference to readily available publications regarding emergency response, such as the U.S. Department of Transportation handbook that Storms discussed. Petitioner's Ex. 4. These reference materials provide information for a proper response for each chemical identified, such as health hazards, first-aid measures, and fire and explosion hazards. See, generally, Tr., 83-91.

The availability of the information at issue in A.R. Ex. 16, 17, and 21 does not significantly change the way officials would respond to a public release of these substances from the way they would respond based on the

information in the waste manifests. There would be no significant change because the basic identity of the substances in the waste manifests indicate the general chemical family, and consequently, the general toxicological impact of the substances. The detailed data at issue in this proceeding add nothing significant to this basic information. Tr., 92-94.

Mr. Storms' testimony related to the principal hazard of concern in the transportation of these substances to waste disposal sites, accidental release in loading, transit, and unloading. The transportation containers for these wastes are well designed and well sealed. Therefore, low level emissions that could cause chronic health effects should not occur. Tr., 103.

The unreasonableness of characterizing the detailed waste data at issue as the "identity" of the substance is underscored by the equivocal testimony of the IEPA's own witness, Gregory Zack. Mr. Zack first testified that no one at the IEPA had made the determination that the detailed information in A.R. Ex. 21 is information constituting "the quantity or identity of substances being placed or to be placed in hazardous waste facilities." Tr., 182. Then, after a lengthy objection by Mr. Norton, Zack testified that a "permit reviewer" made the determination. Zack, however, did not know that person's name nor on what that person based his or her determination. Tr., 184-185. Finally, Zack admitted that he did not personally make an independent

determination that the detailed waste composition information in Item 10 of A.R. Ex. 16 and 17 constituted the identity of substances being placed in landfills or hazardous waste treatment facilities. Tr., 185-186.

Conclusion

The detailed information concerning waste composition and characteristics at issue here would be of tremendous commercial value to Monsanto's competitors if it were disclosed to them. It must be protected as trade secret and business confidential under Sections 7(a) and 7.1 of the Act unless some exception, reasonably construed, applies. For all the reasons stated above, no exception applies here. Therefore, the Board should reverse the IEPA's determination, and order that the information at issue not be disclosed.

Respectfully submitted,

MONSANTO COMPANY

By: _____
One of Its Attorneys

John H. Mathias, Jr.
James A. Geocaris
Susan E. Spangler
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

CERTIFICATE OF SERVICE

I, James A. Geocaris, certify that I have caused copies of the foregoing Petitioner's Post-Hearing Brief to be sent to William Ingersoll and Mary V. Rehman, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706, and to John E. Norton, 105 W. Washington Street, P.O. Box 565, Belleville, Illinois, 62222, by U.S. Mail with first class postage fully prepaid on July 15, 1985.