ILLINOIS POLLUTION CONTROL BOARD
June 20, 1984

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

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

This matter is before the Board on the February 29, 1984 Petition for Review of Trade Secret Determination filed by Outboard Marine Corporation (OMC). It is the first appeal of a trade secret determination brought pursuant to Part 120 of the Board's regulations (35 Illinois Administrative Code 120) entitled "Identification and Protection of Trade Secrets" which became effective November 23, 1983. Section 120.250(a) provides that "an owner or requester who is adversely affected by a Final Determination of either the Environmental Protection Agency or the Department of Energy and Natural Resources pursuant to [the Board's regulations governing the identification and protection of trade secrets], may petition the Board for review within 35 days after the entry of a final agency determination". On April 5, 1984 the Board issued an Interim Order in this case outlining the basic format for this type of appeal. In addition, on June 8, 1984 the Board adopted a Resolution (RES 84-1) designating personnel authorized to have access to "trade secret" material for purposes of ruling on appeals of this type.

Briefly, OMC alleges that it is adversely affected by an Illinois Environmental Protection Agency (IEPA) determination that certain portions of a permit application filed by American Toxics Disposal, Inc. (ATD) represent trade secrets within the meaning of Part 120 and the Act. At issue are approximately 30 pages (including several design drawings) of an application for a permit for the construction and short-term operation of a demonstration project which would thermally extract polychlorinated biphenyls (PCBs) from contaminated sediment. The short-term permit was issued (effective from February 17 to August 31, 1984) for "a demonstration project to thermally extract polychlorinated biphenyls (PCBs) from contaminated sediment along with necessary air pollution control equipment, water pollution control equipment and storage facilities...".

The permit limits the amount of sediment to be processed to 25 wet tons or about 15 yd^3. (IEPA answer, Attach. 1, June 1, 1984.) OMC has urged the Board to rule quickly on this matter.

I. STANDING

As an initial matter, the Board finds that OMC has standing to appeal under Section 120.250(a) as an adversely affected party. The Environmental Protection Act's general mandate that "all files, records, and data of the Agency, to the Board, and the Department shall be open to reasonable public inspection" requires that the Board adopt a broad construction of the required standing to contest determinations affecting public access to information. In this type of appeal, a petitioner is adversely affected if he can demonstrate that he made a request for access to an article within the possession of an agency and that the agency has made a final determination which denied the request. The Board notes that this broad construction of standing comports with the federal courts' interpretation of standing under the "Freedom of Information Act" (5 USC 552, as amended).

On a related issue, the Board also finds that OMC's amended petition was properly verified in that the attached affidavit of John Roger Crawford contained the allegations of fact in question.

II. COMPLIANCE WITH THE PART 120 PROCEDURES FOR IDENTIFYING A TRADE SECRET

OMC alleges that ATD failed to comply with the Part 120 procedures for claiming a trade secret and that as a result OMC was prejudiced in its ability to comment on the experimental permit prior to its issuance. The specific question is whether ATD complied with Section 120.201(a) in making its claim. Section 120.201(a) provides...

> "An agency shall consider any article submitted to or otherwise obtained by the agency as claimed to represent a trade secret and shall protect such article form disclosure pursuant to Subpart C of this Part, only if the agency is provided with the following...
>
> 3) Either a Statement of Justification for the claim meeting the requirements of Section 120.202 or a limited waiver of the statutory deadlines for any agency decision as provided in Section 120.203."

On December 5, 1983, when the request was made ATD had neither a Statement of Justification nor a Limited Waiver on file with the IEPA. Under Section 120.201(a), the absence of both of these documents would relieve the agency from considering the article as claimed to represent a trade secret. However, Section

120.265(b) provides a 60 day "grace period" for articles which were claimed to represent a trade secret prior to the effective date of Part 120. During this "grace period" such an article is deemed to have been claimed to represent a trade secret for the purpose of Part 120.

The dates involved here are not in dispute. The articles in question were filed and claimed to represent a trade secret on November 8, 1983. Thus, Section 120.265(b) applies. The request for access to these articles was made on December 5, 1983. Since Part 120 became effective on November 23, 1983, the 60 day grace period was in effect at that time and extended until January 22, 1984. During this time IEPA properly treated the articles in question as though they had been claimed pursuant to Section 120.201(a). On January 18, 1984 ATD fulfilled the Section 120.201(a) requirements by filing its Statement of Justification. Thus, the Board finds that the "claim" and IEPA's treatment of the claim complied with Part 120.

OMC did not directly address the effect of the 60 day grace period, but rather argued that ATD should have been required to extend the IEPA decision date by the 30 plus days that had been taken for submission of the Statement of Justification. As noted above, the Section 120.203 "Optional Limited Waiver of Statutory Deadlines" was not required to be filed in this situation, and IEPA was therefore bound by the statutory 90 day decision period. (See Section 39(a) of the Environmental Protection Act (Act), Ill. Rev. Stat. 1981, ch. 111½, par. 1039(a).) The Board notes that, absent this waiver, IEPA did not have the option of extending this deadline pursuant to Section 120.270 even if that Section were found to apply in this situation.

III. DATA REQUIRED TO BE DISCLOSED BY STATUTE

Having found that the respondents properly complied with the Part 120 procedures regarding the claim, the next issue to be addressed is the substantive question of fact as to whether the undisclosed articles contain emissions, effluent or waste data which is required to be disclosed by Section 7(b), (c) or (d) of the Act. These statutory provisions require disclosure of certain articles notwithstanding their trade secret (or otherwise confidential or privileged) status. Thus, this is always among the first questions that must be addressed by agencies making trade secret determinations.

OMC states that in reviewing the permit application in question it found certain information relating to projected emissions to the atmosphere to be unavailable, and no information concerning the point of discharge of the wastewater from the dredged spoils or the pilot plant itself. From this, plus the fact that some of the undisclosed application material was submitted by ATD in response to specific IEPA questions about

emissions, wastewater and waste solids, OMC infers that the undisclosed articles contain the type of data which is statutorily required to be disclosed.

ATD responds that neither the permit application nor the permit itself allow discharge into the receiving waters of the State or to any sewers, nor does it allow incineration or landfill deposits. With regard to air emissions, ATD states that any data relating to emissions in the confidential portion of the application is also set forth in the disclosed portion.

The question here is obviously one of fact requiring the Board to review the undisclosed articles. The Board will review each of these catagories of data individually.

A. EFFLUENT DATA REQUIRED TO BE DISCLOSED UNDER SECTION 7(b) OF THE ACT

Section 7(b) states that effluent data may under no circumstances be kept confidential where the information involved is from or concerns persons subject to NPDES permit requirements. By its own terms this provision does not apply in this case as there is no NPDES permit involved. The permit in fact specifically prohibits the discharge of treated or untreated wastewater without obtaining additional approvals or permits. All wastewater generated by the demonstration project is to be stored in tanks onsite. (See Special Condition 10 of the February 17, 1984 permit, ATD Exhibit "A".) After a review of the undisclosed material the Board finds that this material contains no data relating to effluent from a point source which would be subject to an NPDES permit.

B. EMISSIONS DATA REQUIRED TO BE DISCLOSED UNDER SECTION 7(c) OF THE ACT

Section 7(c), in pertinent part, requires that all emission data reported to IEPA in connection with any proceeding under the Act shall be available to the public to the extent required by the Federal Clean Air Act Amendments of 1977 (P.L. 95-95), as amended. Section 114 of the Clean Air Act, which was readopted in P.L. 95-95, (42 USC 7414) requires disclosure of any "emission data" which the USEPA Administrator (or the State when so authorized) may reasonably require of any person who owns or operates an emission source. Both the disclosed and undisclosed material at issue here appears to contain data on emissions, i.e. gases which are being emitted to the atmosphere. The question before the Board is whether Section 7(c) requires that such data be disclosed repeatedly where ever it appears in the permit application. In this case the Board finds that there is no apparent advantage to the public interest in requiring the agency handling the information to "white-out" or "cut and paste" around the trade secret material. Therefore, the Board will not require that this be done.

The question remains whether there is any emissions data in the undisclosed material which has not been identified as having been disclosed elsewhere in the disclosed portions of the article. Answering this question has presented the Board with the difficult task of deciphering and comparing the undisclosed material with the disclosed material. In particular, the Board encountered certain information in the undisclosed material which may or may not be emission data depending upon whether it is exiting into the atmosphere. The Board was unable to determine this from the record before it. The Board believes the respondents bear the responsibility of demonstrating that this information does not fall within the statutory mandate for disclosure. Therefore, the Board will reverse the IEPA determination with regard to this specific piece of information.* With regard to the rest of the undisclosed material, the Board finds that it contains no new emissions data.

C. SUBSTANCES REQUIRED TO BE DISCLOSED UNDER SECTION 7(d) OF THE ACT

Section 7(d) states that "the quantity and identity of substances being placed or to be placed in landfills or hazardous waste treatment, storage or disposal facilities... may under no circumstances be kept confidential." As the permit application which is the subject of the OMC request does not authorize landfilling or placing any substance in a hazardous waste treatment, storage or disposal facility,** the question before the Board is how to interpret the statutory phrase "to be placed." Broadly construed, this phrase could require disclosure of products and consumer items as they come off the assembly line on the basis that they are eventually destined for landfilling or hazardous waste facility. In this instance, a residue is involved which is to be stored on-site and may eventually be incinerated in a hazardous waste incinerator. In addition, there is reference to a non-hazardous sludge which is also to be stored on-site and eventually landfilled off-site. Special Condition 7 of the permit states that "Residues generated at this site as a result of the treatment process for disposal, storage, incineration or further treatment elsewhere shall be transported to the receiving facility under the Agency's supplemental waste stream permit and manifest system." Thus, another permit, specifically authorizing transport for treatment, storage or

*The Board notes that in the future where an owner argues that this problem of duplication exists, the owner must clearly indicate for the Board exactly what and where the information is duplicated. This may be done in a confidential addendum to the owner's brief.

**The storage involved here is not "hazardous waste storage" within the context of the Act and the Board's regulations.

disposal must be obtained before the substances involved can be moved off-site. The Board believes that this is the point at which these substances can be said to be substances which are "to be placed" in a landfill or hazardous waste facility. To rule otherwise, especially in this instance, could lead to absurd results. The data contained in this application for a construction and operating permit relates only to the anticipated content of the residues and sludges from the process. In contrast, the focus of Section 7(d) is on 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.

IV. APPLICATION OF THE SECTION 120.230 STANDARDS FOR DETERMINING A TRADE SECRET

Having concluded that the articles involved are not required to be disclosed by Section 7 of the Act, we now turn to the question of whether IEPA correctly determined that the undisclosed articles represent trade secrets within the Act's definition of "trade secret" and the standards established in Section 120.230. As stated previously, the record supports a finding that ATD substantially complied with the Part 120 procedures for making a claim and justifying it. The remaining question is whether the statement of justification demonstrates that 1) the articles have not been published, disseminated or otherwise become a matter of general public knowledge; and 2) the articles have competitive value.

A. HAVE THE ARTICLES BEEN PUBLISHED, DISSEMINATED OR OTHERWISE BECOME A MATTER OF GENERAL PUBLIC KNOWLEDGE?

Both the statutory definition of "trade secret" and Section 120.230(b) provide for a presumption of secrecy when the owner has taken reasonable measures to prevent an article from becoming available to other than selected persons for limited purposes. This type of presumption is useful in a situation such as this where the claimant is asked to "prove a negative." Pursuant to Section 120.202, the claimant has provided in the Statement of Justification a detailed description of the procedures used to safeguard the articles as well as a list of the persons to whom the articles have been disclosed. The Board notes that the owner has limited, and accounted for, access to both originals and copies of the articles, and has kept all copies stored in locked quarters when not in use. (Statement of Justification, p. 1.) ATD lists 11 persons to whom the articles have been disclosed. The list consists of regulators, equipment vendors, engineering consultants, investors and potential investors and business associates who have signed non-disclosure agreements, and attorneys of the owner and other permit application signatories. (Statement of Justification, p. 1.) ATD has also submitted a certification signed by its chairman and vice-president that it

has no knowledge that the undisclosed information has ever been published, disseminated or otherwise become a matter of general public knowledge. (See IEPA's "Agency Record of Decision".) The Board finds that the Statement of Justification and Certification provide an adequate basis for raising the rebuttable presumption in Section 120.230.

This presumption having been established, the burden shifts to the requester to rebut this presumption with facts demonstrating that the secrecy of the article has been breached. OMC argues that the articles in question have in fact been published because the process for which the permit was sought has been patented. OMC concludes that because the patent process is sought to be permitted here, none of the information in the permit application can be withheld as a trade secret. (Petitioner's Memorandum of Law in Support of Amended Petition, p. 9.)

The Board acknowleges the legal proposition that the subject of a patent is by definition publicly disclosed. However, OMC's conclusion that the existence of a patent for the process requires disclosure of all information in the permit application is unsupported. We note that the Federal District Court cases cited by OMC do not address this issue. In fact the quotation from the Permagrain Products case cited by OMC may support the opposite proposition, i.e. that a patent is public disclosure only of trade secrets described in the patent specifications. (See Permagrain Products, Inc. v. U.S. Matt and Rubber Company, Inc., 489 F. Supp. 108 (E.D. Pa. 1980) as cited in Petitioner's Memorandum of Law, pp. 10-11.) The Board agrees with ATD that the fact that a patent exists on a portion of a process does not strip the rest of the process or all related information of its otherwise trade secret status. ATD's position is clearly supported by the case law as well as the common sense notion that the implementation of a patented process may require a work product, whether developed before or after the issuance of a patent, that goes well beyond the abstraction contained in the patent.

The question remains as to whether any of the undisclosed articles has been published in the patent. After reviewing the undisclosed articles, the Board finds that to the extent that any patented material exists in the undisclosed articles it cannot be conveniently separated from other trade secret material, and that furthermore such patented material is disclosed elsewhere in the application.

In conclusion on this point, the Board finds that OMC has failed to rebut the presumption that the undisclosed articles have never been published, disseminated or otherwise become a matter of general public knowledge.

B. DO THE ARTICLES HAVE COMPETITIVE VALUE?

The second component of a trade secret under the Act and Section 120.230 is that it must have competitive value. In its Statement of Justification (p. 2) ATD argues that the undisclosed articles contain paid-for work product the public closure of which would make costly secret design and planning information readily available to potential competitors. ATD also notes that the system involved is the first of its kind to be developed and that the potential market for a system which economically extracts hazardous material from sludge is enormous. OMC incorrectly states that "the sole justification given for non-disclosure was that ATD would incur economic harm because it would have to spend time defending patent claims rather than developing the process." (Petitioner's Memorandum of Law, p. 14.) While ATD does mention this under the heading "ANY OTHER PERTINENT INFORMATION WHICH WILL SUPPORT THE CLAIM," ATD also provides a detailed and persuasive discussion of the competitive value of the system in the preceding paragraph. On this basis, the Board finds that the undisclosed materials do have competitive value.

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

ORDER

For the reasons stated in paragraph III (B) above, the Board reverses IEPA's determination that with regard to the sentence beginning on line 9 and ending on line 10 of page 47, excluding the last four words on line 9 and the first word on line 10. Pursuant to Section 120.240 (c) and (d), the IEPA and the Clerk of the Board are hereby ordered to continue to protect this article as a trade secret pursuant to Subpart C of Part 120 for 35 days from the date of this Order. If within that 35 days, the Board does not receive notification of a petition for review of this Order by a court with proper jurisdiction with regard to this article, this article shall be made available for public inspection and both the petitioner and respondents shall be so notified.

In accord with the rest of the above discussion, the Board upholds IEPA's determination that the other articles and portions thereof which are the subject of this appeal represent trade secrets which are not subject to disclosure. Pursuant to Section 120.245(a), IEPA and the Clerk of the Board are hereby ordered to continue to protect these articles as trade secrets pursuant to Subpart C of Part 120.

IT IS SO ORDERED.

Board Member J. Theodore Meyer absent for the vote on the Opinion due to other Board business.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted by a vote of 5-0 and the above Order was adopted by a vote of 6-0 on the 20th day of June, 1984.

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