BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REVISION OF THE BOARD'S	)	R00-20
PROCEDURAL RULES: 35 ILL. ADM.	)	(Rulemaking – Procedural)
CODE 101-130	)	

COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP UPON PROPOSED 35 ILL. ADM. CODE 130

NOW COMES HODGE & DWYER, on behalf of the Illinois Environmental Regulatory Group ("IERG"), and provides the following comments with respect to the proposed Part 130.

I. INTRODUCTION

IERG is a not-for-profit Illinois corporation comprised of 68 member companies engaged in industry, commerce, manufacturing, agriculture, trade, transportation or other related activity, and which persons, entities, or businesses are regulated by governmental agencies which promulgate, administer, or enforce environmental laws, regulations, rules or policies. IERG was organized to promote and advance the interests of its members before governmental agencies such as the Illinois Environmental Protection Agency ("IEPA") and the Board. IERG is also an affiliate of the Illinois State Chamber of Commerce, which has more than 5,000 members in the State.

IERG appreciates this opportunity to comment upon proposed Part 130. IERG has filed a separate comment with respect to proposed Parts 101-125.

As stated at the Illinois Pollution Control Board's ("Board") first hearing in this matter, IERG has particular interest in the proposed Part 130, given recent experiences with trade secret issues. Within this comment, IERG has proposed revisions to the

proposed Part 130 that deal not only with matters substantive to trade secret protection, but also with the procedure of trade secret claims and determinations. IERG respectfully requests that the Board consider the following comments and suggested revisions for the proposed Part 130.

II. DISCUSSION

A. GENERAL COMMENT

Recently, IEPA repealed its trade secret rules at 2 Ill. Admin. Code 1827, when it adopted 2 Ill. Admin. Code 1828. IEPA has stated to IERG that the newly adopted Part 1828 is not intended to govern trade secret matters at IEPA. IERG understands, from its discussions with IEPA, that the Board's trade secret rules are the only rules that govern trade secret protection for information handled by the IEPA. Further, though the Board's proposed rules allow IEPA to adopt its own trade secret procedures (consistent with the Board's rules), IEPA has stated to IERG that IEPA does not intend to adopt its own trade secret procedural rules. IERG seeks confirmation from the Board that its proposed Part 130 would apply to trade secret claims for information submitted not only to the Board, but also to IEPA, and any other agencies dealing with trade secret issues. IERG's comments herein stem from IERG's desire to make clear the Board's intent for the applicability of proposed Part 130.

B. SPECIFIC COMMENTS

1. Section 130.106(a) – Definitions

This section refers to the definitions in Section 101, Subpart B, instead of including specific definitions, as is the case in the existing Part 120. In Part 120, the Board defined "Agency" to include the Illinois Environmental Protection Agency

("IEPA"), the Board, or the Department of Natural Resources. The proposed Part 101 defines "Agency" to only refer to the IEPA, yet there are references throughout the proposed Part 130 to "agencies" (Section 130.206), "each agency" (Section 130.104), "an agency" (Section 130.110), (Section 130.200), "an agency" (Section 130.216(c)(1)), "one agency"/"other two agencies" (Section 130.218), "an agency" (Section 130.220(a)), "an agency" (Section 130.220(b)), "another agency" (Section 130.306). IERG requests that the Board review its terminology throughout the proposed Part 130 for consistency of terminology and clarity of the scope of the proposed rule's application, particularly with respect to the agency or agencies involved.

IERG also notes that "proceeding" has a different definition in the proposed Part 101, than that found currently at Section 120.103. This becomes relevant to IERG's comment as to Section 130.204, below.

2. IERG's Proposed Section 130.112: Articles Containing Emission Data

As discussed at the first hearing, IERG is very concerned about recent decisions at the IEPA, and the Board, concerning what type of information may secure trade secret protection. In particular, production information, such as process rates, raw material, usage, etc., can be used by competitors to achieve an unfair business advantage. Yet, this type of information is often provided to IEPA in permit applications and/or annual emission reports, because this information is commonly used to determine emission rates or emission limits. Though regulated industry has attempted to claim trade secret protection for its production information, it has been meeting with resistance recently from the IEPA and the Board. This resistance centers upon the "emission data" issue.

Section 7(c) of the Illinois Environmental Protection Act ("Act") provides that all emission data reported to, or otherwise obtained by, the IEPA or the Board, "in connection with any examination, inspection or proceeding" under the Act, shall be available to the public to the extent required by the Clean Air Act Amendments of 1977, as amended. Section 114(c) of the Clean Air Act allows for protection of trade secret information, with the exception of "emission data." The Clean Air Act does not define "emission data." A plain interpretation of this term would suggest that emission data are only the actual levels or rates of emissions that are reported. USEPA has defined the term by regulation to include, among other things, information necessary to determine the amount or other characteristics of emissions, which, under an applicable standard or limitation, the source was authorized to emit, including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source. 40 C.F.R. 2.301. However, USEPA has subsequently clarified this definition and its impact on the public release of information.

In 1991, USEPA published a Federal Register notice, concerning public release of emission data. Disclosure of Emission Data Claimed as Confidential Under Sections 110 and 114(c) of the Clean Air Act, 55 Fed. Reg. 7042 (February 14, 1991). The notice provided a list of information items that USEPA considered to be "emission data." USEPA stated that items on this list would be considered releasable and that items not on the list would continue to be evaluated on a case-by-case basis. Production rate information is noticeably absent from the list.

In a later NESHAPS rulemaking, USEPA stated that industry representatives had expressed concern about public review of supporting data for emissions, given the

confidential nature of such data. USEPA stated that it was sensitive to industry's need to keep certain information confidential and that it would continue to follow its current regulations concerning the treatment of confidential data. USEPA then listed the categories of data that it considered "emission data," and therefore nonconfidential. Again, the list did not include operation rates or production data. National Emission Standards for Hazardous Air Pollutants for Source Categories: Proposed Regulations Governing Compliance Extensions for Early Reductions of Hazardous Air Pollutants, 56 Fed. Reg. 27338 (June 13, 1991).

USEPA reiterated this position in the NOx SIP Call proceeding, stating that while "emissions data" would not be considered confidential, states could restrict the release of certain types of data, such as process throughput data. USEPA stated that certain process throughput data could be designated as "sensitive" by the states and would be treated as "state-sensitive" by USEPA. Supplemental Notice for the Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 25902 (May 11, 1998).

Therefore, USEPA has clearly provided the opportunity for this state to afford trade secret protection to confidential business information such as process rates. Other states have already done so. For example, Section 6254.7(e) of the California Public Records Act states that all air pollution emission data are public records, but that "[d]ata used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are used to calculate emission data are not public records." The approach taken in Missouri was to incorporate USEPA's

regulatory definition of "emission data," while leaving production rate information out of the definition. Mo. Code Regs. tit. 10, § 10-6.210(3)(B)(2).

USEPA has made it clear that states have the ability to protect production rates. Other states have been providing such protection for years. Accordingly, Illinois can certainly take steps to allow the regulated community to secure trade secret protection for sensitive production information. We believe that the Board's proceeding to revise its procedural rules provides an excellent opportunity to resolve this problem.

IERG is proposing a new section in Part 130, Section 130.112, entitled "Articles Containing Emission Data." This section incorporates Section 7(c) of the Act, and its requirement to provide emission data to the public. The proposed section then defines "emission data," using USEPA's regulatory definition, with the exclusion of production rate information. The proposed section also makes clear that "emission data" does not include data used to calculate emission data, which can include, but is not limited to, rates of operation, production or raw material usage, except when expressly stated as a practicably enforceable limitation in a permit issued by the Agency.

For example, if a permit includes a limitation on throughput, the permit itself will be releasable and not subject to trade secret protection. However, the permit application, which could contain throughput information, would not be disclosable and would be subject to trade secret protection. Similarly, an annual emission report typically contains throughput information. This also would not be releasable and would be subject to trade secret protection. In sum, a permit which contains limits on raw material usage or production, operation, etc., is releasable, while information regarding rates of production, operation or raw material usage in documents, such as permit applications or annual

emission reports, is subject to trade secret protection. The proposed Section 130.112 is as follows:

a) *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 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.* [415 ILCS 5/7(c).]

b) "Emission data" means:

1) The identity, amount, frequency, concentration or other characteristics (related to air quality) of any contaminant which

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 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) Notwithstanding subsection (b) of this section, "emission data" does not include data used to calculate "emission data," including, but not limited to, such information as rate of operation, rate of production, rate of raw material usage, or material balance, unless such data are expressly stated, in a permit issued by the Agency, as a practicably enforceable limitation.

IERG believes that this language will resolve the "emission data" problem for regulated industry, while providing the IEPA, the Board and any other agency governed by the proposed Part 130, with a clear framework for a decision as to what type of information can be granted trade secret protection. In addition, this approach will not

unduly restrict public access to information. Practically all other conceivable information about emissions will still be available to the public. Further, it is our understanding from discussions with public interest groups and the IEPA that production data has never been sought by anyone other than the subject facility's business competitors. Accordingly, this proposal will meet all parties' concerns.

3. Section 130.200 – Initiation of a Trade Secret Claim

In subsection (a), the proposed rule states that unless the subsection (b) information is provided at the time the article is submitted, the article cannot be protected as trade secret. The existing Section 120.201(b) provides that a trade secret claim may be made by submitting the subsection (b) information at any time. IERG prefers this approach, but does not necessarily take issue with an initial submittal requirement. However, revisions to this proposed section, as suggested by IERG, are necessary as set forth below.

First, IERG is concerned about the effect of subsection (a). This provision could be interpreted as only a statement as to the time at which certain things must be filed. However, it could also be read as allowing a determination that any insufficiency in the filings results in the loss of trade secret protection. For example, if IEPA concludes at some point that the claim letter submitted by the claimant does not actually contain all of the required information, could the IEPA maintain that the information required by subsection (b) was not provided at the required time, thus voiding any trade secret claim? It would seem unfair to have such a result, particularly if the "missing" information was minor in nature. Denial of trade secret protection, simply because the article's description in a claim letter is found to be insufficient, is inappropriate.

IERG suggests revision of this provision to allow the IEPA and the facility to work together to resolve any issues as to the filing of a claim. This can be accomplished by deletion of the last clause of the subsection and replacing it with language allowing some exchange between the facility and the IEPA to correct any perceived deficiencies in a trade secret claim. Timelines could be imposed to ensure that the process does not languish. See also IERG's comments below as to proposed Sections 130.208 and 130.210.

Proposed Section 130.200(b) requires filing of a trade secret claim with " any hearing officer." Proposed Section 130.200(d) requires that a person claiming trade secret protection must serve "all parties to the case" with certain information. IERG requests that the Board clarify these references to "any hearing officer" and "all parties to the case." Does this refer to an IEPA permit hearing, a Board case, or both? The regulated community would benefit from a clear understanding as to the context in which these requirements would arise.

Proposed Section 130.200(b)(3) requires that a statement of justification be provided when the trade secret claim is first submitted. This is a departure from Part 120, which allows the submittal of a statement of justification or a waiver of deadlines, that would allow the IEPA to call up the statement of justification at a later time. IERG believes that the IEPA does not need to review a trade secret claim in the first place, except in limited circumstances. As stated above, this could include situations where a permit limitation is needed for throughput, raw material usage, etc. The only other triggers for IEPA review of a trade secret claim should be where a FOIA request is pending that may involve the article, or where the IEPA or the Board finds that the article

must be made available to the public for a proceeding, such as a rulemaking. Absent those circumstances, a trade secret claim does not need to be reviewed, thus making the filing of a statement of justification unnecessary. This is exactly the approach taken by USEPA, as stated in a recent Federal Register notice:

> Currently, when EPA receives a ...FOIA request for information in EPA's control that was originally claimed as confidential by the submitter of the information, EPA...provides the submitter with notice of the FOIA request and an opportunity to comment and provide a substantiation. Once EPA receives the submitter's substantiation, it evaluates the information and makes a determination as to the confidentiality of the requested information.

Elimination of Special Treatment for Category of Confidential Business Information, 64 Fed. Reg. 57421, 57422 (October 25, 1999).

USEPA does not require the filing of a substantiation or statement of justification at the time a trade secret claim is submitted. IERG prefers that this be the approach in Illinois as well. However, IERG is willing to support the Board's approach for requiring the filing of a statement of justification at the time that a trade secret claim is made, if certain other changes to the proposed Part 130 are made, as set forth herein. IERG has proposed the addition of a new section to the proposed Part 130, which would delineate the circumstances for review of a trade secret claim. This section would provide a definitive starting point for IEPA review and determination of trade secret claims, as follows:

> Section 130.201: Agency Review of Claim
>
> The agency may review and make a determination on a trade secret claim only in the circumstances set forth in this section. The Agency's decision to conduct a review and determination of a trade secret claim shall be in writing, shall be signed by an authorized employee of the agency and shall state the circumstances warranting the decision, as set forth in subsections (a), (b) or (c) of this section.

a) The Agency has received a Freedom of Information Act request for material that includes the article;

b) The article is required to be available to the public in an Agency or Board proceeding; or

c) Information within the article is required to be expressly stated in a permit issued by the Agency.

This section would provide that the circumstances under which the trade secret claim review and determination process may begin, which are limited to a pending FOIA request for material that includes the article, or when the article is required to be provided to the public in an IEPA or Board proceeding, or when information within the article is required to be expressly stated in a permit issued by the Agency. This should provide a more efficient procedure for instituting trade secret claims and reviews, as discussed further below with respect to Section 130.208.

4. Section 130.204 – Waiver of Statutory Deadlines

This proposed section requires that when a trade secret claim is filed, it must include a waiver of any "statutory deadline for the agency to decide the underlying proceeding." As stated above, "proceeding" is no longer defined under the proposed rule. Rather, according to Section 130.106(a), the definition of " proceeding" is that found in proposed Part 101, which defines "proceeding" as only occurring before the Board, i.e., rulemakings, adjudications, etc. This would not include review and issuance or denial of a permit application or such other activity with IEPA. IERG questions whether this was the Board's intent. If not, "proceeding" should be redefined, or proposed Section 130.204 should be reworded, to reflect the appropriate scope of the required waiver.

5. Section 130.208 – Deadline for Agency Determination

This Section states that the "agency" must make a trade secret determination within 45 days of receiving a " complete" statement of justification. The reference to "complete" was arguably workable under Part 120, which included a procedure wherein the IEPA would request a statement of justification from the facility claiming trade secret protection, with timelines for the submittal and review process. There is no such procedure in the proposed Part 130.

IERG supports the concept of the IEPA working with a facility claiming trade secret protection to perfect the claim and address any issues or potential deficiencies with the claim. Therefore, IERG requests that the Board allow for such a process in the proposed Part 130. Once IEPA review of the trade secret claim has been triggered, as set forth in IERG's proposed Section 130.201, the IEPA should have a certain amount of time to contact the facility to address any perceived problems with the trade secret claim or justification. A deadline could be included for a facility to respond to the IEPA's concerns. Then, the IEPA would have a limited amount of time to make a final determination on the claim, in writing, pursuant to Sections 130.212 and 130.214. As with Part 120, extensions of these deadlines could be granted.

With such a process, there is no need for the deadline for the IEPA's decision, as currently provided in Section 130.208(a). In addition there would no longer be a need for waivers of such deadline, except for statutory deadlines, as provided in proposed Section 130.204. This scenario mirrors current practice between facilities and the IEPA and could be accomplished with the following revision to proposed Section 130.208:

Section 130.208 Deadline for Agency Trade Secret Determination

Within 30 days of the Agency's issuance of a written notice of trade secret claim review under Section 130.201, the Agency shall advise the owner of the article, in writing, of the Agency's preliminary determination on the trade secret claim. This preliminary determination shall not be a final appealable decision. The owner of the article must respond to the Agency's preliminary determination on the trade secret claim within 45 days of the owner's receipt of the Agency's preliminary determination. Within 30 days of the Agency's receipt of the owner's response to the Agency's preliminary determination, the Agency shall issue a final decision on the trade secret claim, in accordance with Sections 130.212 or 130.214. By mutual consent, the Agency and the owner of the article may agree to an extension of an additional 90 days for any of the deadlines in this subsection, to allow further discussions and/or justification of the trade secret claim.

~~a) The agency must determine whether the article is a trade secret within 45 days after the date of receipt of a complete statement of justification as prescribed in Section 130.202 of this Part.~~

~~b) The owner of an article may extend the time period for the agency decision to determine whether the article is a trade secret by filing with the agency:~~

~~1) Waiver of any statutory deadline for the agency to decide the underlying proceeding as provided for in Section 130.204 of this Part; and~~

~~2) a waiver of the deadline for the agency to determine whether the article is a trade secret.~~

~~c) The waiver described in subsection (b)(1) of this Section must be for at least the same amount of time as the waiver described in subsection (b)(2) of this Section, plus 45 days. This is to allow 35 days for any appeal of the agency's trade secret determination, plus mailing time~~.

This revision will serve many purposes. First, the changes to proposed Section 130.208 will allow the IEPA and facilities to work together to perfect trade secret claims, which should act to reduce unnecessary appeals. Second, the currently proposed IEPA deadline for review is unrealistic and unnecessary. As set forth below, the deadline sets

up the potential for numerous appeals of perceived "automatic" denials of trade secret claims. Elimination of this deadline, and inclusion of more realistic timeframes, should improve the trade secret claim review and determination process and reduce unnecessary appeals. Third, these proposed revisions do away with the dual waivers currently contained in proposed subsections (b) and (c). With the proposed changes to Sections 130.201 and 130.208, only the waiver of the statutory deadlines is needed, as set forth at Section 130.204. This should reduce confusion on the part of facilities that may submit trade secret claims.

6. Section 130.210: Standards for Agency Determination

Part 120 stated that an article would be determined to represent a trade secret if the owner substantially complied with the procedures for making a claim and justification. The Board has deleted the term "substantially" in proposed Section 130.210. IERG believes it is important to retain the language from Part 120. As stated previously in reference to proposed Section 130.200(a), it would be unfair to deny a trade secret claim over a subjective judgment as to the sufficiency of a trade secret claim letter or justification. IERG requests that the word "substantially" be reintroduced to proposed Section 130.210(a)(1). See also IERG's comments herein as to proposed Section 103.200(a).

7. Section 130.216: Review of Agency Determination

As set forth above in reference to proposed Section 130.208, this provision could lead to confusing and unworkable timing issues. If the IEPA does not make its trade secret determination within the required 45-day time period, and any periods of waiver filed with the claim, as currently proposed at Section 130.208, the facility would have to

deem the claim denied and institute an appeal within 35 days of the waiver's expiration, in order to preserve the trade secret claim. This would not be a problem where a facility files unlimited waivers with its claims. However, where a facility does not do so, it must track all of the IEPA review periods and appeal periods, to make sure it does not miss an appeal of a *de facto* trade secret denial.

If this is the result intended by the Board with this language, the Board could be inundated with trade secret appeals. It is not realistic to expect the IEPA to process every trade secret claim in the timeframe contemplated by the proposed rules. Furthermore, given the discussion above, there is no reason for IEPA to process the claims in the first place, nor is there a reason for facilities to appeal IEPA inaction on a trade secret claim, if there is nothing prompting the release of the claimed information (e.g., FOIA request, etc.). Thus, IERG proposes deletion of any automatic denial of a claim due to IEPA's failure to make a timely determination. IERG has suggested the following revised language for proposed Section 130.216(c):

(c) ~~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.~~ If the agency fails to make a final determination within the time limits prescribed by this Part, the agency must continue to protect the article as set forth in Subpart C of this Part until such time as the agency issues a written determination, pursuant to Sections 130.212 or 130.214, which also govern actions following the determination.

~~1)~~ ~~If an agency fails to make a final determination within the time limits, the agency must continue to protect the article as set out in Subpart C of this Part during the 35-day appeal time.~~

~~2)~~ ~~If after 35 days no appeal is taken, the article will be treated as if it received a negative determination~~

~~from the agency and the article will no longer be protected pursuant to Subpart C.~~

This revision would provide that where IEPA fails to make a determination within the time limits, the article remains protected until the procedures under proposed Section 130.212 or proposed Section 130.214 are invoked and followed. This is a practical approach for all parties involved, particularly with respect to avoidance of unnecessary litigation.

IERG notes that this change would still be necessary with the proposed changes to Section 130.208. No matter what process is instituted for trade secret claim reviews and determinations, facilities should not be put in a position of having to appeal a non-decision.

8. Section 130.218: Effect on Other Agencies

As stated above, proposed Part 101's definition of "agency" is limited to the IEPA, while proposed Section 130.218 refers to multiple "agencies." This section demonstrates the difficulty with the deletion of definitions and reference to those in proposed Part 101.

9. Section 130.220: Status of Article After the Effective Date of Part 130

Proposed Section 130.220 requires that a facility must refile all trade secret claims that are pending as of the effective date of the proposed Part 130. IERG respectfully suggests that this is an onerous requirement, not only for the regulated community, but also for IEPA. Pending trade secret claims could date back many years, perhaps as far back as 1983, when trade secret rules were adopted. To be cautious, facilities may feel compelled to review their files at IEPA, then prepare trade secret claims for each pending

claim found in those files. This would obviously be time-consuming for the individual facility to make arrangements to review the file, conduct the review and prepare the trade secret claims again. The burden will be heavy for IEPA as well, who will have to prepare numerous files for review in a short time, and then add potentially thousands of duplicative trade secret claims to its files.

IERG appreciates the Board's apparent concern that pending claims not be voided by the passage of new trade secret procedures. However, IERG suggests that the better approach is to state that trade secret claims that are pending on the effective date of proposed Part 130 will remain pending, as if filed under Part 130, with an unlimited waiver of decision deadlines. To that end, IERG has proposed the following revisions to Section 130.220(b):

> a) If an agency possesses an article that was claimed before the effective date of this Part to be a trade secret and the agency did not determine before the effective date of this Part whether the article is a trade secret in accordance with procedures adopted pursuant to the APA, the article is deemed to have been claimed to be a trade secret for the purposes of this Part. ~~for 180 days after the effective date of this Part. If the owner of the article fails to file within the foregoing 180-day period a claim with the agency under Section 130.200 of this Subpart with respect to the article, the article will be considered a matter of general public knowledge and cannot be protected as a trade secret.~~ Such claims shall be considered to remain pending with unlimited waivers of any decision deadlines.

10. Section 130.222: Extension of Deadlines to Participate in Proceedings

Proposed Section 120.270 provides that if an agency finds that a person would be adversely affected in a proceeding due to the timing of a trade secret determination, the deadline for such person's participation in the proceeding could be extended until after

the determination. Proposed Section 130.222 provides the same opportunity, with one modification. Part 120 places a burden upon the person to show that the article at issue was relevant to the proceeding, that the person would be adversely affected by the timing of the determination, and that the person could not have avoided the delay by making an earlier request. The first two elements of that burden are carried over into proposed Section 130.222, but the last element is not. The Board has not provided any explanation for this deletion. IERG questions why such persons will no longer have to show that they could not have avoided delaying proceedings by making an earlier request for the trade secret determination. IERG maintains that it is certainly appropriate to require such a showing and asks that the Board reinsert it into proposed Section 130.222.

11. Section 130.312: Unauthorized Disclosure or Use

Part 120 currently provides that any contract or agreement between the agency and its authorized representative must state that the trade secret protection requirements are expressly for the owner of the article and that a breach of those requirements will permit the owner to sue the authorized representatives directly. Proposed Section 130.312 does not contain this provision. IERG stresses the importance of maintaining the privacy of material that has been claimed or determined to be protected as trade secret. IERG questions the Board's deletion of the rule's requirement for the contract provision and deletion of the rule's reference to direct suit against the authorized representative. Such measures only bolster the likelihood that the trade secret rule will be followed. Consequently, IERG suggests that proposed Section 130.312(d) should be revised to mirror the current Section 120.340(d).

12. Subpart D: Non-Disclosable Information

Proposed Section 130.400 states that Subpart D only applies to filings of articles with the Board, that are non-disclosable for reasons other than trade secret. "Non-disclosable" is defined in proposed Part 101 as including trade secret information. Thus, Subpart D appears to be contradictory. IERG requests that the Board revise the definition of "non-disclosable" to address this confusion.

In addition, IERG is concerned with the numerous different procedures for protecting confidential information. IEPA has now promulgated Part 1828, which is supposed to apply to confidential information filed with the IEPA that is not "trade secret." Part 1828 requires marking the documents with "Public Record Claimed Exempt." Section 130.404 would appear to require marking the same type of material, if filed with the Board, as "Non-Disclosable Information." When considering the "trade secret" requirements, there would be three different requirements for marking confidential information filed with the IEPA or the Board. USEPA allows alternative markings, such as "trade secret," "proprietary" or "company confidential." IERG urges the Board to either consolidate the markings required for documents filed with IEPA and/or the Board, or allow alternative markings to be used. It would be inequitable to allow the loss of protection simply because the wrong stamp (out of several that will now be required) was used to mark a document.

III. CONCLUSION

The protection of confidential business information is of vital importance to IERG's members. At the same time, IERG understands the need for orderly management of information that is to be available to the public. IERG believes that the comments and proposed revisions herein will address both concerns. IERG appreciates the Board's anticipated consideration of these comments.

Respectfully submitted,

By: LaDonna Driver
N. LaDonna Driver

Dated: June 15, 2000

Katherine D. Hodge
N. LaDonna Driver
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

Karen L. Bernoteit, Esq.
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62704
(217) 522-5512

IERG:001/Misc/Part 130 Comment

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PRE-FILED TESTIMONY OF DEIRDRE K. HIRNER

NOW COMES the Illinois Environmental Regulatory Group ("IERG"), by one of its attorneys, N. LaDonna Driver of HODGE & DWYER, and submits the following pre-filed testimony of Deirdre K. Hirner for presentation at the July 10, 2000 hearing scheduled in the above-referenced matter:

Testimony of Deirdre K. Hirner

My name is Deirdre Hirner and I am the Executive Director of the Illinois Environmental Regulatory Group. On behalf of IERG, I want to express our appreciation to the Board for allowing an additional hearing in this proceeding. As I stated at the first hearing on the Board's proposed procedural rules, IERG has been concerned for some time about the handling of trade secret issues by the Board and the IEPA. IERG therefore views the Board's proposal for Part 130 as a valuable opportunity to address these concerns.

As you know, IERG filed comments on the Board's proposed Part 130. The comments discuss in detail IERG's proposals for revisions to the proposed Part 130. I will not discuss every point raised in those comments here, but will highlight the major issues.

The most pivotal matter is the definition of "emission data." The Board's proposed Part 130 did not address how specific types of information would be viewed for

purposes of trade secret protection. Therefore, IERG has proposed language in its comment that very specifically delineates what types of information may qualify for trade secret protection. IERG's proposed Section 130.112 states that "emission data" will not be subject to trade secret protection. "Emission data" includes the identity, amount, frequency, concentration or other characteristics of emissions. However, "emission data" does not include data used to calculate emissions, which could include operation or production rates or raw material usage. This exception does not apply to such data if the IEPA has determined that the information must be expressly stated as a limitation in a permit to assure that the terms and conditions of the permit are enforceable.

Thus, production limits contained in the permit document itself would be disclosable and not subject to trade secret protection. Portions of the permit application, which contain information as to operation or production rates or raw material usage, would not be disclosable and would be subject to trade secret protection. Similarly, portions of an annual emission report which contain information on operation or production rates or raw material usage would not be disclosable and would be subject to trade secret protection. The net effect of IERG's proposal is threefold: 1) IEPA has full access to all information necessary to determine limitations that must be included in the permit to insure its integrity; 2) the applicant is assured that vital information will not be released unless there is a demonstrated need for such release; and 3) the public will have access to verified emission information.

IERG has been discussing this proposed provision with the IEPA over the past several weeks. The IEPA has agreed with IERG's basic approach for this definition of "emission data." However, we could not agree on the precise wording of the permit

limitation aspect of proposed subsection (c). Nevertheless, we believe that IERG's proposed definition of "emission data" will help to prevent the vast number of current and future disputes concerning trade secret protection. Further, based on discussions with IEPA, IERG has established that the only parties that have ever requested production or operation rate data are competitors to the facility at issue. Informal discussions with representatives of the environmental community have led IERG to understand that their interests lie in having access to the actual emissions, not in confidential business information used to calculate or determine those emissions. Thus, IERG is assured that this provision will not restrict public access to emissions information. Therefore, IERG urges the Board to include IERG's proposed Section 130.112. IERG notes that revisions to other rules, such as 35 Ill. Admin. Code 201.302, may also be necessary.

IERG is also concerned with timing issues concerning trade secret claims and determinations. IERG believes that the Board should continue the current practice of allowing a facility to submit a waiver of decision deadlines, in lieu of a trade secret justification, at the time that a trade secret claim is filed. However, if submittal of the justification is necessary to streamline Agency or Board actions regarding trade secret protection, the regulated community can accept such an arrangement so long as IERG's proposed revisions to Part 130, to improve the trade secret claim determination process, are adopted concurrently. These revisions include specific delineation of the circumstances under which the IEPA may review a trade secret claim, as set forth in IERG's proposed Section 130.201.

Once one of the circumstances in proposed Section 130.201 is triggered, IERG has suggested a sequence of events that must occur during review of a trade secret claim.

IERG's proposed revisions to proposed Section 130.208 foster the current practice of the IEPA and the facility working together to resolve any issues regarding a trade secret claim. The IEPA then must issue a decision on the trade secret claim in writing. This would eliminate the need for duplicative and confusing waivers of decision deadlines. Further, such a provision would prevent the countless appeals that could occur as a result of "automatic" denials of trade secret claims, arising from the 45-day IEPA review deadline provisions at Sections 130.208 and 130.216. IERG has proposed revisions to these sections in its comment to address these concerns.

Finally, IERG is greatly concerned with the Board's proposed Section 130.218. As discussed in IERG's comments, the requirement to refile all pending trade secret claims would create an untenable situation for both the IEPA and regulated industry. Rather, trade secret claims that are pending on the effective date of the proposed Part 130 should remain pending, as if filed under Part 130, with an unlimited waiver of deadlines.

The trade secret protection issue is one of great concern to IERG's members. I believe we have proposed very effective changes to the trade secret process that would make it work better for everyone, including the IEPA and the Board. IERG urges the Board to carefully consider IERG's proposed revisions to the Board's proposed Part 130.

I would be happy to answer any questions regarding IERG's position in this matter at this time.

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IERG reserves the right to supplement this pre-filed testimony.

Respectfully submitted,

By: LaDonna Driver
N. LaDonna Driver

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Katherine D. Hodge
N. LaDonna Driver
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

Karen Bernoteit
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-5512

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