ILLINOIS POLLUTION CONTROL BOARD
November 4, 2004

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| 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):

This trade secret appeal was filed by Midwest Generation EME, LLC (Midwest), which has asked the Board to review a trade secret determination of the Illinois Environmental Protection Agency (IEPA). In this order, the Board rules on two motions: a motion to intervene in the proceeding; and a motion to partially reconsider the Board's order accepting the appeal for hearing. The Board today also orders a limited remand to IEPA for IEPA to specify its reasoning for denying trade secret protection.

By way of background, in a March 10, 2004 letter, IEPA partially denied Midwest's request for trade secret protection of information the company submitted to IEPA. The information relates to Midwest's six coal-fired power stations, all of which are in Illinois. On May 6, 2004, the Board accepted for hearing Midwest's appeal. Since then, the Board has received a motion to intervene filed by Sierra Club and a motion to partially reconsider filed by Midwest.

By the motion to intervene, Sierra Club seeks to become a party to this proceeding. Under the Freedom of Information Act (FOIA), Sierra Club sought, from IEPA, disclosure of the information Midwest submitted to IEPA. For the reasons in this order, the Board denies Sierra Club's motion to intervene. Sierra Club may, however, participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing.

By the motion to partially reconsider the Board's May 6, 2004 order, Midwest asks the Board to review IEPA's trade secret decision *de novo*, *i.e.*, to consider new evidence and not just the evidence in the record before IEPA at the time of IEPA's trade secret determination. As discussed below, the Board denies Midwest's motion for partial reconsideration, but notes that, consistent with long-standing Board precedent, Midwest may introduce new evidence at the Board hearing if it was unavailable when IEPA denied trade secret protection.

Finally, though the Board will retain jurisdiction of this appeal, the Board remands this matter to IEPA for the limited purpose of having IEPA state the reasoning for its March 10, 2004

denial of trade secret protection. Midwest will have an opportunity to respond to this supplemental decision of IEPA.

In this order, the Board first provides the procedural history of this case and rules on several procedural motions. The Board then discusses trade secret protection generally and the pleadings before ruling on the motions to intervene and to partially reconsider.

## PROCEDURAL MATTERS

### Petition for Review, Accept for Hearing, Administrative Record

On April 19, 2004, Midwest filed its appeal of IEPA's March 10, 2004 trade secret determination.[1] In a May 6, 2004 order, the Board accepted for hearing Midwest's petition for review. The Board also directed that, as Midwest requested, any hearings would be held *in camera* to avoid disclosing to the public the information claimed to be trade secret. 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.[2] On May 27, 2004, Midwest waived to April 19, 2005, the Board's deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for April 7, 2005.

### Motion to Intervene and Responses

On May 27, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. Midwest filed a response opposing Sierra Club's motion on June 14, 2004. IEPA filed a response opposing Sierra Club's motion on June 17, 2004. On June 18, 2004, Sierra Club filed a reply to Midwest's response, followed by a motion for leave to file the reply on June 24, 2004, which the Board grants. On June 23, 2004, IEPA and Sierra Club jointly filed a stipulation, which withdrew IEPA's objection to intervention by Sierra Club.[3]

On July 12, 2004, the Illinois Environmental Regulatory Group (IERG) filed an *amicus curiae* brief opposing Sierra Club's motion to intervene, along with a motion for leave to file the brief. In the motion for leave to file, IERG states that it is an affiliate of the Illinois State Chamber of Commerce and a not-for-profit Illinois corporation. IERG is comprised of 66 member companies "engaged in industry, commerce, manufacturing, agriculture, trade,

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[1] The Board cites Midwest's petition for review as "Pet. at _."

[2] In this order, the Board cites only to the redacted IEPA record, which is Volume I, and does so as "AR, Vol. I at _."

[3] The Board cites Sierra Club's motion to intervene as "SC Mot. at _"; Midwest's response as "MG Interv. Resp. at _"; Sierra Club's reply as "SC Reply at _"; and the joint stipulation of IEPA and the Sierra Club as "Stip. at _."

transportation, and other related activities." IERG Motion for Leave at 1. IERG explains that it "was organized to promote and advance the interests of its members before governmental agencies . . . and before judicial bodies." *Id*. at 1-2.

In the motion for leave to file, IERG states that "[t]his matter presents an issue that is of significant concern to the member companies of IERG and to industry throughout the State." IERG Motion for Leave at 1. According to IERG, "most of IERG's member companies submit information to the Illinois EPA which includes material claimed as trade secret; thus, IERG's members have an interest in the procedure by which appeals of such trade secret determinations take place." *Id*. at 3. IERG notes that the Board and Illinois courts have previously allowed IERG to participate as an *amicus* and that doing so here will "assist the Board in considering this matter by presenting the viewpoint of Illinois industrial concerns on issues that are important to the regulated community." *Id*. The Board grants IERG's motion for leave to file the *amicus curiae* brief.[4]

## Motion to Partially Reconsider and Responses

On July 1, 2004, Midwest filed a motion for the Board to partially reconsider its May 6, 2004 order. Specifically, Midwest asks the Board to review IEPA's trade secret denial *de novo* rather than limiting the Board's review to the record before IEPA at the time of IEPA's denial. IEPA filed a response on August 13, 2004, opposing Midwest's motion. Midwest filed a reply on August 27, 2004.[5] The motion and subsequent related filings were timely pursuant to the schedule set forth in a May 27, 2004 hearing officer order.

## DISCUSSION

The Board provides background on trade secret protection and Midwest's petition for review before discussing Sierra Club's motion to intervene and Midwest's motion to partially reconsider.

## Background on Trade Secret Protection

Under Section 7 of the Environmental Protection Act (Act) (415 ILCS 5/7 (2002)), all files, records, and data of the Board, IEPA, and the Illinois Department of Natural Resources are open to reasonable public inspection and copying. However, the Act provides that certain materials may represent "trade secrets," "privileged" information, "internal communications of the several agencies," or "secret manufacturing processes or confidential data" and, accordingly, be protected from public disclosure. *See* 415 ILCS 5/7(a) (2002); 415 ILCS 5/7.1 (2002) (trade secrets).

[4] The Board cites IERG's *amicus curiae* brief as "IERG Br. at _."

[5] The Board cites Midwest's motion for partial reconsideration as "MG Mot. Recon. at _"; IEPA's response as "IEPA Recon. Resp. at _"; and Midwest's reply as "MG Recon. Reply at _."

Even so, the Act denies protection from public disclosure for: effluent data under the National Pollutant Discharge Elimination System (NPDES) permit program; emission data to the extent required by the federal Clean Air Act; and the quantity, identity, and generator of substances being placed or to be placed in landfills or hazardous waste treatment, storage, or disposal facilities. *See* 415 ILCS 5/7(b)-(d) (2002).

In Midwest's appeal, trade secret status is at issue. 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. A trade secret is presumed to be secret when the owner thereof takes reasonable measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. 415 ILCS 5/3.48 (2002).

The Board has established procedures for identifying and protecting articles that constitute trade secrets or other non-disclosable information. *See* 35 Ill. Adm. Code 130.[6] The owner of an article seeking trade secret protection for the article must claim that the article represents a trade secret when the owner submits the article to the State agency. *See* 35 Ill. Adm. Code 130.200(a). The State agency must consider the claimed information as a trade secret and protect it from disclosure in accordance with Part 130 procedures unless and until the State agency makes a final determination denying the trade secret request and all appeal times have expired without that final determination being overturned. *See* 35 Ill. Adm. Code 130.200(d), 130.210.

The owner of the article may submit a "Statement of Justification" for trade secret protection (*see* 35 Ill. Adm. Code 130.203) to the State agency at the time the owner submits the article, or at a later time, but in no event later than the time limit of Section 130.202. *See* 35 Ill. Adm. Code 130.200(c). Section 130.202 requires the owner to submit the Statement of Justification within ten working days of the State agency's request (*see* 35 Ill. Adm. Code 130.202(a)), which request may be triggered by a FOIA request for the claimed information (*see* 35 Ill. Adm. Code 130.201(b)). The State agency may extend the time period an additional ten working days if timely requested by the owner. *See* 35 Ill. Adm. Code 130.202(b). The State agency must determine whether the article represents a trade secret within 45 days after receiving a complete Statement of Justification, but the owner may waive out this decision deadline. *See* 35 Ill. Adm. Code 130.206.

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[6] "Article" means "any object, material, device or substance, or whole or partial copy thereof, including any writing, record, document, recording, drawing, sample, specimen, prototype, model, photograph, culture, microorganism, blueprint or map." 415 ILCS 5/7.1 (2002).

Part 130 includes procedures for appealing trade secret determinations of State agencies. For example, an owner of an article submitted to IEPA (or a person, known as a "requester," seeking an article from IEPA) who is adversely affected by a final trade secret determination of IEPA, may appeal that determination to the Board. *See* 35 Ill. Adm. Code 130.214(a). Trade secret appeals before the Board are governed by the procedural rules for permit appeals set forth in Subparts A and B of Part 105 of Title 35 of the Illinois Administrative Code. *Id*.

## Midwest's Petition for Review

In its April 19, 2004 petition for review, Midwest states that it submitted information to IEPA on November 6, 2003, claiming trade secret protection for the information. 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*.

IEPA denied trade secret protection for what Midwest describes as two types of information: (1) "information Midwest [] compiled concerning capital projects at each of its coal-fired electric generating units"; 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." Pet. at 2. Midwest argues that IEPA erred in determining the company failed to demonstrate that the information claimed to be trade secret had not become a matter of general public knowledge, had competitive value, and did not constitute emission data exempt from protection. *Id*. at 2-5, Attachment 1.

## Sierra Club's Motion to Intervene

Sierra Club filed a motion to intervene in this trade secret appeal, seeking to become a party to the proceeding. Sierra Club made a FOIA request to obtain from IEPA the information claimed by Midwest to constitute trade secret. Below the Board sets forth its procedural rule on intervention, describes the motion to intervene and responsive pleadings, and rules on the motion.

## Procedural Rule on Intervention

Section 101.402 of the Board's procedural rules (35 Ill. Adm. Code 101.402) addresses intervention in adjudicatory proceedings. That Section provides in relevant part:

> a) The Board may permit any person to intervene in any adjudicatory proceeding. *** The motion must set forth the grounds for intervention.
>
> b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.
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> ***

> d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if: ***
>
> 2) The person may be materially prejudiced absent intervention; or
>
> 3) The person is so situated that the person may be adversely affected by a final Board order. 35 Ill. Adm. Code 101.402.

**Sierra Club's Motion**

In its motion to intervene in this trade secret appeal, Sierra Club states that it is a not-for-profit environmental group with 26,000 members in Illinois. According to Sierra Club, in February 2004, it submitted an electronic FOIA request to IEPA "seeking all documents submitted to IEPA by [Midwest] in response to an information request under Section 114 of the Clean Air Act." SC Mot. at 1. Sierra Club asserts that the records it requested "relate to IEPA oversight of coal-fired plants and [Midwest's] compliance with requirements that originate in the Clean Air Act and the Illinois Environmental Protection Act." *Id*.

Sierra Club maintains that its motion to intervene is timely because IEPA has not filed any responsive pleading to Midwest's petition and the Board has not set a hearing date. SC Mot. at 2. Sierra Club seeks to intervene on the basis that the Board's final order "may adversely affect and materially prejudice [Sierra Club's] interests." *Id*. at 2-3. Citing Section 101.402(d)(3) of the Board procedural rules, Sierra Club argues that because it has a pending FOIA request for the information that is the subject of Midwest's trade secret appeal, Sierra Club will be adversely affected if the Board's final decision "prohibits releasing some or all of the information to [Sierra Club]." *Id*. at 3.

Citing Section 101.402(d)(2) of the Board procedural rules, Sierra Club also argues that it may be materially prejudiced absent intervention because: (1) Sierra Club may be prevented from "making an adequate record of its interests in the hearing before the Board" should Sierra Club decide to appeal any adverse final Board decision to the appellate court; (2) Sierra Club may be prevented from "adequately representing the interests of its members and the public at large in having access to information compiled by the IEPA;" (3) Sierra Club and the public at large may be prevented from "gaining a better understanding of how the IEPA enforces laws and regulations related to air and water pollution in keeping with the public's right to educate itself on the environmental protection process;" and (4) Sierra Club and the public at large may be prevented from "gaining a well-grounded understanding of the compliance status of [Midwest] and, in turn, evaluating opportunities for members of the public to participate in efforts to remedy any non-compliance." SC Mot. at 3-4.

Sierra Club states that the goal of the Act to increase public participation in protecting the environment is facilitated by giving access to IEPA's records. SC Mot. at 4. According to Sierra Club, while the parties are focused on whether the information constitutes trade secret, its "focus in this hearing is altogether different and involves creating a record of the public's interests in having access to information consistent with Illinois and federal law." *Id*.

Sierra Club emphasizes that by its motion to intervene, it is not seeking access to the claimed trade secret information before the Board's final decision on the trade secret denial. SC Mot. at 4-5. Further, Sierra Club maintains that allowing it to intervene will not unduly delay the proceeding or materially prejudice Midwest or IEPA "in light of the timeliness of this motion and the disparate interests of the Sierra Club and the original parties to the appeal." *Id*. at 5.

**Midwest's Response to Motion to Intervene**

In its response opposing Sierra Club's motion to intervene, Midwest argues first that Sierra Club failed to establish that it may be "materially prejudiced absent intervention" under Section 101.402(d)(2) of the Board's procedural rules. MG Interv. Resp. at 2. According to Midwest, Sierra Club has no interest in the issue before the Board, which is the "narrow question of whether IEPA correctly determined whether information submitted to IEPA constitutes trade secret information." *Id*. The Board's determination on that issue, continues Midwest, requires analyzing the nature of the information and how Midwest treated that information, but it "does not involve an analysis of Sierra Club's or the general public's interest in the information" or their interest in having access to the claimed information. *Id*. at 2-3

Midwest asserts that the public's interest in the claimed trade secret information is neither relevant nor admissible. MG Interv. Resp. at 4. Midwest further argues that because the Board need not and properly should not consider the public's interest in or interest in having access to the claimed information, Sierra Club will not be materially prejudiced if it cannot make a record of that interest. *Id*. at 2-3.

Midwest also argues that Sierra Club failed to explain how intervening could assist it in gaining a better understanding of how IEPA enforces laws and regulations. MG Interv. Resp. at 3. Midwest states that Sierra Club would presumably gain this understanding by learning what type of information is afforded trade secret protection and gaining access to information related to air pollution. *Id*. But, according to Midwest, Sierra Club admits that intervention would not allow it to gain access to the disputed documents during this proceeding. *Id*. Nor will intervention, Midwest maintains, "enable Sierra Club to learn more about the type of information IEPA affords trade secret protection." *Id*. at 3-4. Midwest similarly argues with respect to Sierra Club's claimed interest in learning about Midwest's compliance status. *Id*. at 4. Midwest concludes that Sierra Club will not be prejudiced absent intervention. *Id*.

In addition, Midwest argues that Sierra Club's statement that it has a pending FOIA request for the claimed trade secret information does not explain how Sierra Club will be adversely affected by a final Board order. MG Interv. Resp. at 4. According to Midwest, "Sierra Club has no legal right to these documents to the extent they contain [Midwest's] trade secret information." *Id*. at 4-5. Midwest states that if the Board finds that the contested documents contain trade secret information, then Sierra Club has "no legal interest in this information and cannot be adversely affected by not receiving the documents." *Id*. at 5.

Midwest asserts that even if Sierra Club has established grounds for intervention, the Board should not exercise its discretion to allow intervention here—because intervention would unduly delay, materially prejudice, and otherwise interfere with an orderly and efficient

proceeding. MG Interv. Resp. at 5 (citing 35 Ill. Adm. Code 101.402(b)). Midwest notes that Sierra Club "admits that it has no interest in the issue that is before the Board." *Id.* Midwest argues that Sierra Club's interest is "irrelevant to the issue before the Board" and that Sierra Club "overlooks that the parties are focused on [the trade secret] issue because it is the *only* issue before the Board." *Id*. at 6 (emphasis in original).

Stating that trade secrets "do not cease being trade secrets merely because someone contends the public has an interest in seeing them," Midwest maintains that Sierra Club's intervention would not assist the Board in determining whether the claimed information is trade secret. MG Interv. Resp. at 5. Sierra Club's proposed intervention, continues Midwest, is an attempt to "bring irrelevant issues and politics into this proceeding in a manner that is completely unrelated to the only issue the Board is called upon to decide." *Id.*

**Sierra Club's Reply to Midwest's Response**

Sierra Club replies to Midwest's arguments by stating that its interest in this appeal "involves establishing a record of the public's interest in having access to information consistent with Illinois and federal law," citing to the Illinois FOIA (5 ILCS 140/1 (2002)) and the federal Clean Air Act (42 U.S.C. §§ 7414(a), (c)). SC Reply at 3-4. Sierra Club argues that it needs to intervene to make an "adequate record" of this interest should it decide to appeal the Board's final decision in this trade secret appeal. *Id*. at 4. Sierra Club maintains that under 35 Ill. Adm. Code 130.214(b), it, as a FOIA requester, may appeal any adverse final Board decision regarding release of the requested records, even if Sierra Club is not a party to the Board proceeding: "it is inconsistent that the Sierra Club is entitled the right to appeal but *not* the right to intervene in order to create an adequate record of its interests in the hearing before the Board." *Id*. at 4-5 (emphasis in original).

**Joint Stipulation of Sierra Club and IEPA**

In the joint stipulation filed by Sierra Club and IEPA regarding intervention, IEPA withdraws its response opposing Sierra Club's motion to intervene. Stip. at 1. Further, in light of the conditions in the stipulation, IEPA states that it now supports intervention by Sierra Club in this trade secret appeal. *Id*. The stipulation sets forth six proposed conditions limiting Sierra Club's participation in the proceeding should Sierra Club be allowed to intervene, citing 35 Ill. Adm. Code 101.402(e). *Id*. Those conditions provide that Sierra Club must:

> (1) not be allowed to control any decision deadline; (2) be barred from serving discovery, interrogatories, and requests to admit; (3) be barred from conducting any depositions; (4) be bound by all Board and hearing officer orders issued to date; (5) not be allowed to raise any issues that were raised and decided, or might have been raised, earlier in this proceeding; and (6) not be provided, in connection with this proceeding, with the subject documents for which trade secret protection is claimed, until and unless those claims are finally resolved against Midwest. *Id*.

**IERG's *Amicus Curiae* Brief Opposing Intervention**

IERG states that it is concerned about the "ability of a third party to intervene in a trade secret appeal, where the resolution of that matter will clearly involve argument, depositions, and details of those very documents." IERG Br. at 1-2. IERG maintains that allowing intervention would circumvent the Act's protections for trade secrets. *Id*. at 2.

According to IERG, Illinois case law is not instructive on this issue, but federal case law "suggests that third party intervention is permissible where the intervenor shows a property interest in the disputed information." IERG Br. at 2-3. Here, maintains IERG, "Sierra Club possesses no such interest." *Id*. at 3. IERG claims instead that Sierra Club's interest is "to see that the documents are disclosed, which the Illinois EPA has already determined to do." *Id*.

IERG states that it "cannot believe that the only way for a party to make a record of its interests is to intervene in each and every instance before the Board where such an interest arises." IERG Br. at 3. According to IERG, that would necessitate "dozens, or even hundreds, of precautionary 'interventions' to ensure that a record of one's interests are made in the event that a Board decision would warrant appeal." *Id*. Rather, IERG maintains that an "adequate record could be made through oral or written statements at hearing, public comment, or, as IERG does here, the filing of an *amicus curiae* brief." *Id*. at 3-4.

IERG also argues that Sierra Club's interest in determining the compliance status of Midwest "has nothing to do with the underlying cause of action." IERG Br. at 4. IERG continues that Midwest's compliance status is not part of the test of whether material is a trade secret. *Id*.

IERG questions what would be conferred to Sierra Club under the intervention conditions proposed in the joint stipulation that would not otherwise accrue to Sierra Club as an *amicus*. IERG Br. at 5. IERG argues that under the proposed conditions, it is unclear whether Sierra Club would be barred from *reviewing* discovery, *attending* depositions, or *discussing* the claimed information. *Id*. at 5-6. IERG asserts that the proposed conditions "are simply not sufficient to ensure that the safeguards provided within the Act for trade secret claimants are met." *Id*. at 6.

Lastly, according to IERG, the risks of intervention outweigh any potential benefit given the "minimal contribution to the proceeding that Sierra Club will have due to the [stipulated] limitations" and "the potential for disclosing the information at the heart of this very matter." IERG Br. at 6. IERG states that it "cannot fathom how intervention could be in any way useful or productive unless the information at issue was disclosed to the intervenor." *Id*. In conclusion, IERG likens Sierra Club's proposed participation to "seeking to intervene in the penalty phase of a trial while agreeing to not having any knowledge of the offense committed." *Id*.

**Board's Ruling on Motion to Intervene**

The Board may allow a person to intervene in an adjudicatory proceeding if the person seeking to intervene establishes that he may be "materially prejudiced absent intervention" or that he is so situated that he may be "adversely affected by a final Board order." *See* 35 Ill.

Adm. Code 101.402(d)(2), (3). For the reasons below, the Board denies Sierra Club's motion to intervene.

The Board finds that Sierra Club has not established that it may be materially prejudiced absent intervention. Sierra Club has not articulated how its interests will not be adequately represented in this proceeding by IEPA. Under the Act, IEPA is required to have all files, records, and data open for reasonable public inspection, unless the material is trade secret—and even then, emission data must be publicly available to the extent required by the federal Clean Air Act. *See* 415 ILCS 5/7(a), (c) (2002). Here, the decision being appealed, and being defended by IEPA, is that the claimed information should be available to the public.

Section 130.214(a) of the Board's procedural rules provides in pertinent part:

> An owner or *requester who is adversely affected by a final determination of the Illinois Environmental Protection Agency* or DNR pursuant to this Subpart may petition the Board to review the final determination within 35 days after service of the determination. 35 Ill. Adm. Code 130.214(a) (emphasis added).

Accordingly, under this provision, if IEPA *grants* trade secret protection, and a FOIA request would therefore be *denied*, only then does the FOIA requester have the right to appeal the trade secret determination to the Board. However, when IEPA has denied trade secret status, as is the case here, there is no right of appeal for a FOIA requester—only the article owner may appeal. This case does not present an instance of a third party seeking to intervene to assert its own property interest in contested information by arguing against its claimed trade secret being disclosed. Here, IEPA determined that the contested information is not trade secret. Mindful of IEPA's decision in this case and IEPA's statutory obligations to make information publicly available, the Board can find no justification in Sierra Club's pleadings to expand through intervention the permissible parties in this appeal.

Sierra Club's argument that it is not "focused' on whether the claimed information is a trade secret only underscores that Sierra Club need not be a party. Sierra Club's rationales for seeking intervention do not concern the sole issue in this appeal. Sierra Club's described interest in building a "record of the public's interest in having access to information" (1) is not relevant to the Board's ultimate decision—whether the contested information is trade secret—and (2) is beyond the evidentiary scope of the Board's hearing. That hearing, as discussed more fully below in ruling on Midwest's motion, is generally limited to the record before IEPA at the time of trade secret denial. Under these circumstances, Sierra Club has not shown how it may be materially prejudiced by not becoming an intervenor in this trade secret appeal.

Sierra Club also misconstrues Section 130.214(b) of the Board's procedural rules. Sierra Club argues that it should be allowed to intervene because under that provision, it can appeal to the appellate court any reversal here by the Board regarding release of the claimed trade secret information, even if Sierra Club is not made an intervenor. Section 130.214(b) reads:

> An owner or requester who is adversely affected by a final determination of the Board pursuant to this Subpart may obtain judicial review from the appellate court

> by filing a petition for review pursuant to Section 41 of the Act [415 ILCS 5/41]. 35 Ill. Adm. Code 130.214(b).

In turn, Section 41 of the Act states in relevant part:

> [A]ny *party* adversely affected by a final order or determination of the Board . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the *party* affected by the order or other final Board action complained of, under the provisions of the Administrative Review Law, . . . except that review shall be afforded directly in the Appellate Court . . . . 415 ILCS 5/41(a) (2002) (emphasis added).

Under this language, only an "adversely affected" *party* to a Board proceeding may appeal the Board's final decision to the appellate court. For purposes of Sierra Club's motion, Section 130.214(b) simply provides that if a party appealing IEPA's trade secret determination pursuant to Section 130.214(a) (*i.e.*, "an owner or requester who is adversely affected by a final determination" of IEPA) loses before the Board, that party to the Board proceeding may appeal the Board's final decision to the appellate court under Section 41 of the Act. Contrary to Sierra Club's suggestion, Section 130.214(b) does not confer upon any non-party requester the right to appeal to the appellate court a final Board decision on the merits of a trade secret appeal.

The Administrative Review Law likewise refers only to a "party" seeking direct administrative review of an agency final decision in the appellate court. *See* 735 ILCS 5/3-113 (2002). This is an axiom of administrative law and to hold otherwise would lead to a flood of appeals never contemplated by the General Assembly or the courts. And if simply wanting to be able to appeal the Board's final order was in itself a sufficient ground to intervene in a Board proceeding, intervention may never be denied.

Sierra Club was not seeking, and could not have, access to the claimed information during the course of this proceeding. The Board finds that Sierra Club has not shown how its purposes cannot be fulfilled by means of participating other than as a party to this appeal, such as by making statements at hearing and filing *amicus curiae* briefs or public comments.

The Board also finds that Sierra Club has not demonstrated that it may be adversely affected by a final Board order in this case. Again, Sierra Club does not seek to intervene to try to introduce evidence that the disputed documents are not trade secrets. To the extent that the Board reverses IEPA and finds that some of the disputed information constitutes trade secret and not emission data, then that information would be protected from disclosure under the Act. Sierra Club would have no legal right to the protected information. Sierra Club has not shown how it would be adversely affected when it would simply not be allowed to receive information that it had no legal right to receive.

In addition, even when discretionary intervention is permissible, the Board must consider "whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Adm. Code 101.402(b). The Board

finds that intervention here would raise all of these concerns. Sierra Club seeks to make a record that is unrelated to the lone issue of this appeal, and the Board is not convinced that the conditions of the joint stipulation would necessarily protect the claimed trade secret information from improper disclosure.

Accordingly, the Board denies Sierra Club's motion to intervene. Sierra Club may, however, participate in this proceeding by making oral or written statements at hearing and by filing *amicus curiae* briefs or public comments. *See* 35 Ill. Adm. Code 101.110, 101.628. In denying intervention here, the Board is in no way ruling on Sierra Club's or the public's rights to information under the FOIA, which is not the subject of this appeal.

## Midwest's Motion to Partially Reconsider

Midwest filed a motion for the Board to partially reconsider its May 6, 2004 order. In doing so, Midwest asks the Board to conduct a *de novo* hearing on IEPA's trade secret decision, allowing all relevant evidence to be admitted without regard to whether the evidence was part of the record before IEPA at the time of the trade secret determination. Below the Board describes the motion to partially reconsider and the responsive pleadings before ruling on the motion.

### Midwest's Motion

Midwest submitted to IEPA a copy of its response to the USEPA Section 114 information request, claiming trade secret. Later, in response to an IEPA request, Midwest submitted a Statement of Justification for its trade secret claims. MG Mot. Recon. at 1. Midwest maintains that its Statement of Justification identified two charts that contained trade secret information, a "Project Chart" and a "Generation Chart." *Id*. According to Midwest, its Statement of Justification explained that the information in the charts was not publicly available and was compiled solely to respond to USEPA's Section 114 request, and further provided "specific reasons why the release of the information would cause the company competitive harm." *Id*. Midwest adds that the Statement of Justification was supported by the affidavit of a Midwest official. *Id*.

Midwest states that IEPA "summarily" denied most of the company's trade secret claims, doing so without clearly identifying the applicable grounds for denial and without adequately explaining the basis for the denial grounds. MG Mot. Recon. at 2. Regarding information on the Project Chart, Midwest asserts that IEPA's denial letter simply concludes that Midwest failed to demonstrate that the information is not a matter of general public knowledge "and/or" failed to demonstrate that the information has competitive value. *Id*. (quoting IEPA denial letter). Midwest maintains that besides IEPA's decision not specifying which denial ground applies (*i.e.*, whether the denial is based on the information being either publicly available or lacking competitive value, or both), the denial letter fails to articulate the factual or other basis for any denial ground. *Id*.

Regarding information on the Generation Chart, according to Midwest, the IEPA denial grounds are identical with the "curious addition" of Midwest allegedly failing to demonstrate

that the information is not emission data. *Id*. Midwest "cannot conceive of why the generation information on this chart would be considered emissions data." MG Mot. Recon. at 2.

Midwest states that before issuing the denial of trade secret protection, IEPA held no formal or informal hearing on the matter and never discussed with Midwest its trade secret claims. MG Mot. Recon. at 2. Before the final determination, Midwest continues, Midwest "was given no opportunity to refute IEPA's conclusory determinations by submitting additional evidence." *Id*. Midwest argues that under these circumstances, the Board's May 6, 2004 order, which Midwest asserts limits the Board hearing to the record before IEPA at the time of decision, violates the due process requirements under the Fourteenth Amendment of the United States Constitution and Article 1, Section 2 of the Illinois Constitution. *Id*. at 3.

Midwest asserts that under Constitutional due process requirements, administrative agencies performing adjudicatory functions must give the parties before them the opportunity to be heard at a meaningful time and in a meaningful way. MG Mot. Recon. at 3. Midwest quotes the Illinois Supreme Court's decision in Lyon v. Dept. of Children and Family Services, 807 N.E.2d 423 (2004), for the factors that should be considered when evaluating procedural due process claims:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. MG Mot. Recon. at 3 (quoting Lyon, 807 N.E.2d at 423, citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)).

Applying these factors, Midwest states that its claim involves protecting a property interest and that disclosing the trade secrets will cause it financial harm. MG Mot. Recon. at 3-4. The risk of depriving Midwest of this property interest is great, according to Midwest, if Midwest is prevented from "knowing IEPA's reasons for denial and from submitting evidence to refute these reasons." *Id*. at 4. Midwest argues that the government has no interest in releasing trade secret information because trade secrets are protected from disclosure under Section 7(a) of the Act. *Id*. Lastly, allowing Midwest to submit additional evidence at the Board hearing, Midwest argues, would not cause a "significant administrative burden" as it will "only slightly lengthen the required hearing." *Id*.

Midwest concedes that the "due process clause is flexible," but argues that due process "requires that all parties have an opportunity to offer evidence in rebuttal." MG Mot. Recon. at 4. Midwest maintains that if a party is denied an "effective opportunity" to submit information to IEPA, "this denial of due process will not be corrected at the Board level if, in the proceedings before the Board, the party cannot submit additional information." *Id*. Midwest relies on the Illinois Appellate Court decisions in Village of Sauget and Wells for the proposition that the Board hearing, if limited to the IEPA record, cannot cure this due process infirmity. *Id*. at 4-6.

Midwest states that in Village of Sauget v. PCB, 207 Ill. App. 3d 974, 982-83, 566 N.E.2d 724 (5th Dist. 1990), the court found that Monsanto was denied due process because it was not given an effective opportunity by IEPA to introduce evidence into the record to respond to USEPA comments on Monsanto's permit application. MG Mot. Recon. at 4. Midwest quotes the Village of Sauget court:

> If, as occurred here, the parties are precluded from supplementing the record before the IEPA on such issues, this failure cannot be cured through the Board hearing because the scope of a Board hearing in a permit appeal is limited to the record developed before the IEPA. *** We find that the procedural safeguards to which Monsanto was due at the agency level were not afforded, and the proceedings before the Board did not cure this deficiency. *Id*. at 4-5 (quoting Village of Sauget, 207 Ill. App. 3d at 983).

Midwest continues that in Wells Manufacturing Co. v. IEPA, 195 Ill. App. 3d 593, 596, 552 N.E.2d 1074 (1st Dist. 1990), IEPA denied Wells' application to renew its air permit, concluding that operation of the Wells facility would cause a violation of the Act. MG Mot. Recon. at 5. According to Midwest, before Wells' renewal application was denied, Wells did not have the opportunity to present evidence that it would not violate the Act. Midwest quotes Wells:

> There are several problems with this procedure. The Board's decision was based on the record compiled by the Agency. *** However, Wells never had an opportunity to proffer evidence that it would not pollute. *** [I]t is obvious that the manner in which the Agency compiled information denied Wells a fair chance to protect its interest. The Agency asserts that the Board gave Wells an opportunity to challenge the information relied on by the Agency in its permit denial. This is by no means the same as being allowed to submit evidence, some time during the application process, in order to show that it is not polluting the air. *Id*. (quoting Wells, 195 Ill. App. 3d at 597-98).

Midwest argues that, like Monsanto and Wells, it was not given an "effective opportunity to protect its interest" by responding to IEPA before the denial, in which IEPA "conclusorily rejected" Midwest's Statement of Justification "on a factual basis unknown to Midwest." MG Mot. Recon. at 5. According to Midwest:

> This denial of due process will not be cured by a Board hearing on the record before IEPA because Midwest [] will not have the opportunity to submit evidence responding to IEPA's sweeping, unsubstantiated conclusions that the trade secret is not in the public domain and that its release will not cause competitive harm. *Id*. at 5-6.

In addition to its due process arguments, Midwest argues that the Board's procedural rule at Section 105.214(a) explicitly allows for the submittal of additional evidence at hearing. MG Mot. Recon. at 6. Midwest quotes the following sentence from Section 105.214(a), a section of the Board's procedural rules cited in the Board's May 6, 2004 order:

> If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact. *Id*., quoting 35 Ill. Adm. Code 105.214(a).

Midwest asserts that the Board's May 6, 2004 order "would seem to negate the protection afforded in the regulation." MG Mot. Recon. at 6.

Midwest argues that the trade secret provisions of the Act (415 ILCS 5/7.1 (2002)) do not explicitly require the Board to base its decision exclusively on the IEPA record, in contrast with the permitting provisions of the Act (415 ILCS 5/40(d) (2002)), which do explicitly require the Board to base its permit appeal decisions exclusively on the record before IEPA. MG Mot. Recon. at 6. Midwest maintains that even if compliance with the Board's procedural rules requires the Board's review to be limited to the record, "compliance or noncompliance with state procedural requirements is not determinative of whether minimum due process standards have been met." *Id*.

Finally, Midwest takes issue with the Board's citation to case law in the Board's May 6, 2004 order. Specifically, Midwest argues that the following decisions, cited in the Board's order, do not stand for the proposition that Board review in permit appeals is typically limited to the record, but the Board hearing affords petitioner the opportunity to challenge IEPA's reasons for denial: Community Landfill Co. v. PCB, 331 Ill. App. 3d 1056, 1063, 772 N.E.2d 231 (2d Dist. 2002); and Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275, 279 (5th Dist. 1987). MG Mot. Recon. at 7. Midwest states that the Community Landfill court merely found that the record on appeal was inadequate for the court to decide if IEPA had certain documents in its possession at the time of permit denial. *Id*. In Alton, according to Midwest, the court "only mentioned the procedural due process issues in *dicta*" and merely observed that another decision did not change the law on the requirements for permit appeal hearings before the Board. *Id*.

**IEPA's Response to Midwest's Motion to Partially Reconsider**

IEPA opposes Midwest's motion for partial reconsideration. IEPA Recon. Resp. at 1. IEPA argues that Midwest's request for a *de novo* hearing:

> [C]ontravenes not only the Board's regulations but more than three decades of consistent precedent requiring that hearings be held on the agency record, to preserve IEPA's proper decisionmaking role and prevent forum shopping. *Id*.

IEPA asserts that the process it afforded Midwest gave Midwest "ample opportunity to protect its rights and submit pertinent information." IEPA Recon. Resp. at 1. IEPA notes that Midwest fails to "even provide a clue as to what particular extra-record information it would like to now introduce, and why such information could not have been provided to IEPA in the first place." *Id*. at 1-2.

IEPA maintains that Midwest's argument regarding Section 105.214(a), relying on the third sentence of the Section, would "cancel out" the second sentence of the Section. IEPA Recon. Resp. at 2-3. IEPA quotes the second and third sentences of Section 105.214(a):

> The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact. *Id*. at 2, quoting 35 Ill. Adm. Code 105.214(a).

IEPA notes this Midwest argument was rejected by the Board in Community Landfill Co. v. IEPA, PCB 01-170 (Dec. 6, 2001), where the Board affirmed the hearing officer's ruling that the record could not be supplemented under Section 105.214(a) because the third sentence of that rule modified only the clause in the second sentence regarding Section 40(d) of the Act, not the entire second sentence. *Id*. at 3. IEPA states that Section 40(d) does not apply here. *Id*.

IEPA asserts that the Board's former procedural rules (repealed 35 Ill. Adm. Code 105.103(b)(8)) expressly allowed *de novo* hearings under certain circumstances in appeals of NPDES permit decisions. IEPA Recon. Resp. at 4. Based on this, IEPA states: "Clearly, the Board is cognizant of how to craft regulations calling for *de novo* proceedings when it so chooses, and it chose not to do so here." *Id*. IEPA emphasizes that even when this *de novo* provision was in effect, the Board construed it narrowly "in order not to distort the respective roles of the board and the agency as defined in the statute." *Id*., n. 2. On this point, IEPA quotes the Board's decision in Dean Foods v. IEPA, PCB 81-151 (Aug. 22, 1984), quoting Olin Corp. v. IEPA, PCB 80-126 (Feb. 17, 1982):

> The hearing *de novo* provisions must be construed narrowly; otherwise permit applicants will be tempted to withhold facts at the Agency level in hopes of a more friendly reception before the Board. This would encourage appeals and place the Board in a position of being the first agency to evaluate the factual submissions. This would distort the separation of functions in the Act. IEPA Recon. Resp. at 4, n. 2.

According to IEPA, Midwest "entirely missed the point of Community Landfill by citing only to the Appellate court affirmance and not the referenced Board decision." IEPA Recon. Resp. at 4. IEPA further states that the purported "*dicta*" in Alton Packaging refers to a "long and consistent line of court and Board decisions, dating back to 1972, expressly holding that hearings must be conducted solely on the agency record." *Id*. at 5-6.

IEPA concedes that procedural rules are not dispositive of due process requirements. However, IEPA notes that "such rules 'are a useful reference because they represent standards that the General Assembly and the Department concluded were sufficient.'" IEPA Recon. Resp. at 5, quoting Lyon, 209 Ill.2d at 274. IEPA maintains that Midwest had "ample opportunity to make its views known to IEPA, and did so." *Id*. at 5-6.

IEPA states that the "limited basis for a trade secret claim is unambiguously laid out in the statute and regulations." IEPA Recon. Resp. at 6. IEPA notes that under the statute and regulations, the trade secret claimant must prove that the article has not become public and has competitive value. "Emission data," as defined in these requirements, is exempt from trade secret protection. *Id*. IEPA further notes that the trade secret claimant may present its Statement of Justification (*i.e.*, "the basis for its claim") either at the outset when it makes its claim or in response to an agency request. *Id*.

Here, IEPA explains, Midwest submitted information in its Statement of Justification pertinent to both prongs of the trade secret definition: public availability and competitive value. IEPA Recon. Resp. at 6. IEPA argues that Midwest:

> [N]owhere states either what specific additional information regarding these prongs it would have submitted upon learning of IEPA's unsurprising reliance upon them, nor why it could not have submitted that information before receiving the denial. *Id*.

IEPA states that it denied trade secret protection additionally on the ground of claimed documents being "emission data." IEPA Recon. Resp. at 6. IEPA maintains that this should come as no surprise to Midwest because the USEPA Section 114 information requests here "were all directed specifically toward determining whether [Midwest's] facilities were emitting pollutants in violation of the Clean Air Act New Source Review standards." *Id*. at 7. IEPA argues that the State and federal definitions of "emission data" are "substantially the same," and include "documents containing information necessary to determine how much a particular facility was 'authorized to emit' – *i.e.*, that would determine whether the facility's emissions constitute a violation of the Clean Air Act." *Id*. at 6-7.

IEPA states that if Midwest was somehow "unclear on this point," it should have submitted "whatever information it had to the agency regarding the status of information as emission data" or sought "clarification prior to a decision being made," but instead Midwest is "complaining after the fact that it did not understand a basic point of law well enough to submit appropriate information." *Id*. IEPA adds, however, that the issue of whether information is "emission data" is "essentially a legal one," therefore "it is unlikely that Midwest [] would have had any pertinent factual information to submit." *Id*.

IEPA quotes the Illinois Supreme Court in Lyon for the proposition that "what due process entails is a flexible concept in that not all situations calling for procedural safeguards call for the same kind of procedure." IEPA Recon. Resp. at 8, quoting Lyon, 209 Ill.2d at 272. IEPA asserts that there are situations, such as criminal proceedings and license deprivations, that require every available procedural protection, such as the right to cross-examine and rebut unfavorable testimony. But in trade secret matters, IEPA argues, the Board has properly determined that "the Statement of Justification process outlined in the [Part 130 rules] is sufficient to protect the interest of trade secret claimants." *Id*.

**Midwest's Reply**

Midwest maintains that a hearing based exclusively on the record before IEPA precludes Midwest from "introducing evidence rebutting the facts and reasoning upon which IEPA based its denial." MG Recon. Reply at 1. Midwest reiterates that it had no opportunity "to respond to the IEPA's determination" and the Board's proceedings "will not cure this denial of due process." *Id*.

Midwest states that it submitted the requisite Statement of Justification and notes that Section 130.208(b) creates a rebuttable presumption that the article has not become a matter of general public knowledge. MG Recon. Reply at 1-2. Yet IEPA, according to Midwest, "summarily denied the claim without identifying any deficiency in Midwest['s] Statement of Justification or providing a statement of its reasoning." *Id*. at 2. Midwest notes that Section 130.210(b)(1) requires IEPA to give the claimant a "statement of the State agency's reasoning for denying the claim." *Id*., quoting 35 Ill. Adm. Code 130.210(b)(1). Here, according to Midwest, it is "not on notice of the reasons for the IEPA denial and has had no opportunity at the IEPA level to rebut the facts and reasoning supporting IEPA's denial, whatever they may be." *Id*.

Midwest argues that "IEPA articulates no reason nor cites any authority for its position that the right to offer evidence in rebuttal is not a minimum right guaranteed by the due process clause." MG Recon. Reply at 3. Midwest further argues that given the company does not know the reasoning behind the denial of trade secret protection, it is in no position to identify what additional evidence it might submit. *Id*. at 3-4.

Midwest asserts that it was not on notice that "IEPA would come up with a nonsensical interpretation of the term 'emission data'; accordingly, Midwest [] could not have dealt with this argument pre-emptorily in its Statement of Justification." MG Recon. Reply at 4. According to Midwest, unless the Board reverses its ruling, Midwest "will be prevented from showing that it is impossible to calculate emissions data from the Project Chart." *Id*.

Midwest argues that the only authority cited by IEPA relates to permit appeals, and that they are distinguishable because permit applicants are "afforded due process at the IEPA level." MG Recon. Reply at 6. Moreover, asserts Midwest, even in permit appeals, the Board allows petitioners to introduce new evidence at the Board hearing "if petitioners had been denied that opportunity at the agency level." *Id*. Midwest cites to the Board's allowance of evidence regarding estoppel in Community Landfill, PCB 01-170, even though that information was not in the IEPA record, because, according to Midwest, petitioner there did not know it would have to make an estoppel argument until after it was denied the permit. *Id*.

Midwest similarly relies on Environmental Site Developers v. IEPA, PCB 80-15 (June 12, 1980). Midwest states that during the hearing in that case, IEPA testified that it denied the permit because of the water pollution potential of certain sludge, although this basis was not specified in the permit denial letter. MG Recon. Reply at 6-7. According to Midwest, the Board in Environmental Site Developers allowed petitioners to introduce additional evidence, not included in the permit application, providing that the material was inert. *Id*. at 7. Midwest

quotes the Board's decision: "This case could have been handled more easily had the Agency fully complied with the requirements of Section 39(a) of the Act in issuing a denial letter [requiring detailed statements as to why the permit application was denied] and had ESD responded with a supplemental application." *Id*., quoting Environmental Site Developers, PCB 80-15. Midwest concludes that the Board in Community Landfill and Environmental Site Developers "allowed permittees to supplement the record as fairness requires." *Id*.

**Board Ruling on Midwest's Motion to Partially Reconsider**

For the following reasons, the Board denies Midwest's motion for partial reconsideration. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 5 (Feb. 19, 2004). As explained below, the Board finds that Midwest has not met any of these criteria for reconsideration.

**Scope of the Board Hearing Under Part 130.** The passage of the Board's May 6, 2004 order that Midwest asks the Board to reconsider reads as follows: "Hearings will be based exclusively on the record before IEPA at the time it issued its trade secret determination. *See* 35 Ill. Adm. Code 105.214(a)." The Board's Part 130 procedural rules on trade secrets provide that trade secret appeals before the Board are governed by the Board's Part 105 procedural rules for permit appeals. Specifically, Section 130.214(a) provides:

> An owner or requester who is adversely affected by a final determination of the Illinois Environmental Protection Agency or DNR pursuant to this Subpart may petition the Board to review the final determination within 35 days after service of the determination. *Appeals to the Board will be pursuant to 35 Ill. Adm. Code 105.Subparts A and B.* 35 Ill. Adm. Code 130.214(a) (emphasis added).

Accordingly, the Board cited Part 105, specifically 35 Ill. Adm. Code 105.214(a), which provides that the "hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." In its entirety, Section 105.214(a) reads:

> Except as provided in subsections (b), (c) and (d) of this Section, the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact. 35 Ill. Adm. Code 105.214(a).

Midwest relies on the third and final sentence of Section 105.214(a) to argue that it may now introduce new evidence at a "separate hearing." Midwest has misconstrued the provision. The Board's order of May 6, 2004, does not "negate" this sentence as Midwest argues. Instead, the provision simply does not apply here. Importantly, the final sentence of Section 105.214(a) is preceded by the following:

> The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record *pursuant to Section 40(d) of the Act*. 35 Ill. Adm. Code 105.214(a) (emphasis added).

The Board has held that the "separate hearing" provision being relied upon by Midwest is limited to instances where the parties agree to supplement the record "pursuant to Section 40(d) of the Act." *See* Community Landfill, PCB 01-170, slip op. at 9 ("the third sentence in Section 105.214(a) pertains to the previous sentence regarding Section 40(d)"), citing Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112, slip op. at 10 (Aug. 9, 2001) ("Section 40(d) of the Act provides for supplementation of the record in appeals involving permits issued pursuant to . . . permitting programs under the Clean Air Act.").

Section 40(d) in turn refers to Board review of IEPA permit denials or permit conditions involving rules for Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER) under the federal Clean Air Act. EPA argues that Section 40(d) does not apply here, and Midwest does not dispute this. *See* 415 ILCS 5/40(d) (2002). Were new evidence *always* admissible in permit appeals if "any party desires," as Midwest suggests, this exception to the Board's review being limited to the record could swallow the rule.

Midwest argues that the Act does not expressly require the Board's review to be limited to the IEPA record. That is true. Section 7.1(b) of the Act does, however, require the Board to adopt regulations that prescribe "procedures for determining whether articles represent a trade secret." 415 ILCS 5/7.1(b)(i) (2002). The Board has done so. The Board's Part 130 rules provide that trade secret appeals will proceed like permit appeals. That Section 7.1 did not expressly provide that the trade secret appeal hearing be limited to the IEPA record does not mean that the regulation is void or even unwise. Section 7.1 likewise does not state the trade secret appeal hearing must be *de novo*. In other words, the General Assembly left it to the Board's discretion to craft procedural rules. Those rules could have, but have not, been challenged in appellate court, nor can Midwest attack them collaterally now. *See* 415 ILCS 5/29 (2002). Nor did the Board receive any comments during the rulemaking process that trade secret appeal hearings should be *de novo*. *See* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20.

Midwest also maintains that the two decisions (Community Landfill and Alton Packaging) cited by the Board in its May 6, 2004 order for the basic proposition —that Board review is limited to the record, with some exceptions, and that the hearing nevertheless affords an opportunity to challenge IEPA's reasons for denial—are not on point. But they are. First, Midwest complains that the appellate court decision in Community Landfill does not stand for

this proposition. The Board agrees. However, the Board cited its own decision in Community Landfill, not the appellate court's. The Board in Community Landfill stated the general principles and in one instance allowed new evidence to be admitted. The Board stated:

> It is well-settled that the Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. [citation omitted] However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit if granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would "test the validity of the information (relied upon by the Agency)." [citation omitted]
>
> Typically, evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board. [citation omitted] Community Landfill, PCB 01-170, slip op. at 4.

The court in Alton Packaging held:

> While both the appellate and the supreme court opinions discussed the opportunity afforded the permit applicant, during the Board hearing, to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the receipt of testimony "to test the validity of the information [relied upon by the Agency]" [citation omitted], the courts' language should not be construed to allow the supplementing of the record with new matter not considered in the Agency's denial of the permit application. Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280.

Therefore, contrary to Midwest's arguments, Community Landfill and Alton Packaging directly support the proposition for which the Board cited them in its May 6, 2004 order.

The Board's statement in the May 6, 2004 order that its review is limited to the record, however, must not be interpreted out of context. Midwest's motion to reconsider reads the contested sentence of the Board's order in isolation, effectively ignoring the very next sentence, which states: "Therefore, though the Board hearing affords petitioner the opportunity to challenge IEPA's reasons for denial, information developed after IEPA's decision *typically* is not admitted at hearing or considered by the Board." (emphasis added).

The Board's order therefore contemplated not only that Midwest could use the Board hearing to challenge IEPA's reasoning, but also that there may be situations where new evidence could be admitted, *i.e.*, evidence that was not before IEPA at the time of its trade secret determination. Indeed, the Board has long held that new evidence may be considered in trade secret appeals under particular circumstances:

> The parties in this trade secret appeal are the owner of the article (petitioner, General Mills), and the agency whose determination is the subject of appeal (respondent, Illinois Environmental Protection Agency). The burden of proof in these appeals rests with petitioner. Further, *although the Board is standing in review posture, new evidence will be accepted upon a demonstration that: (1) it was unavailable to the party and the Agency at the time that the Agency made its determination; or (2) the party was not given an opportunity under Part 120 to present it to the Agency*. General Mills Operations, Inc. v. IEPA, PCB 99-74, slip op. at 2 (Dec. 17, 1998) (emphasis added); *see also* Monsanto Co. v. IEPA, PCB 85-19, slip op. at 2-3 (Feb. 20, 1985).

Part 120 in this quoted passage refers to the Board's former procedural rules on trade secrets. The Part 120 rules, which were at 35 Ill. Adm. Code 120, are now repealed and replaced by Part 130, but the Part 120 rules also provided for the process of submitting a Statement of Justification for a trade secret claim.

In adopting the new Part 130 procedural rules, the Board codified long-standing practice, and in no way signaled a paradigm shift in how the Board would hear trade secret appeals. There remain circumstances when the Board considers a trade secret matter *de novo*. That occurs, however, when the trade secret claim is *initially* made with the Board, such as when the purported trade secret document is filed with the Board in a variance or adjusted standard proceeding. *See, e.g.*, Burlington Environmental, Inc. v. IEPA, PCB 94-177, slip op. at 3 (July 21, 1994) (Board granted trade secret protection in variance proceeding). In that instance, the Board is not reviewing a trade secret determination of another State agency, but instead is the first State agency to consider the owner's trade secret claim.

Therefore, under Part 130 and in accordance with well-settled precedent, if a trade secret claimant *appealing* to the Board demonstrates that relevant and otherwise admissible new evidence was unavailable at the time of IEPA's determination or that the claimant was not given the opportunity to present the information to IEPA, then the claimant could introduce the new evidence at the Board hearing. Accordingly, though Midwest is denied reconsideration, the Board hearing is not necessarily limited to the record before IEPA at the time of the trade secret determination.

**Constitutional Due Process.** It is Midwest's position that it was denied an effective opportunity to submit evidence to IEPA and that this deprivation constitutes a denial of its federal and State Constitutional due process rights, necessitating a *de novo* hearing before the Board.

The Fourteenth Amendment of the Constitution of the United States provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., 14th Amend., § 1. The Illinois Constitution likewise states: "No person shall be deprived of life, liberty or property without due process of law." Const. of the State of Illinois, Art. 1, § 2.

Due process principles apply to administrative proceedings. *See* Abrahamson v. Illinois Dept. of Professional Regulation, 153 Ill. 2d 76, 92, 606 N.E.2d 1111 (1992). Procedural due process claims "question the constitutionality of the procedures used to deny a person's life, liberty, or property." Lyon, 209 Ill. 2d at 272, 807 N.E.2d at 431. The Illinois Supreme Court explained in Coldwell Banker:

> It is a well-established constitutional principle that every citizen has the right to pursue a trade, occupation, business or profession. This inalienable right constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the due process clauses of the Illinois and Federal constitutions. Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton, 105 Ill. 2d 389, 397, 475 N.E.2d 536 (1985).

In Lyon, the Illinois Supreme Court stated:

> The due process clause protects fundamental justice and fairness. [citation omitted] However, what due process entails is a flexible concept in that "not all situations calling for procedural safeguards call for the same kind of procedure." [citing Morrissey v. Brewer, 408 U.S. 471, 481, 494, 92 S. Ct. 2593, 2600 (1972)]. Consequently, what procedures are required by due process in a particular situation depend upon "'the precise nature of the government function involved as well as the private interest that has been affected by governmental action.'" [citing Morrissey, 408 U.S. at 481, 92 S. Ct. at 2600, quoting Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748-49 (1961)].
>
> ***
>
> The due process clause requires that the opportunity to be heard occur "'at a meaningful time and in a meaningful manner.'" [citing Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187, 1191 (1965)]. Lyon, 209 Ill. 2d at 272, 277, 807 N.E.2d at 430-31, 433.

The Board recognizes that providing due process is not necessarily synonymous with compliance with state regulations:

> The United States Supreme Court has made clear that due process is a matter of federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due process standards have been met. Lyon, 209 Ill. 2d at 274, 807 N.E.2d at 432, citing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1492 (1985).

Nevertheless, state requirements "are a useful reference because they represent standards that the General Assembly and the [agency] concluded were sufficient." Lyon, 209 Ill. 2d at 274, 807 N.E.2d at 432. "Generally, the State must act reasonably before depriving a person of

an interest protected by the due process clause." Rosewell v. Chicago Title & Trust Co., 99 Ill. 2d 407, 412, 459 N.E.2d 966 (1984).

Three factors are used to consider procedural due process claims under the federal Constitution:

> (1) the private interest implicated by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value of the proposed additional or substitute safeguards; and (3) the government's interest, including the function involved and the administrative or fiscal burdens that would result from the proposed additional or substitute safeguards. People v. Botruff, 2004 Ill. LEXIS 1019, 17-19 (filed Sept. 23, 2004), citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).

The same factors are used in determining what procedures are required by the Illinois Constitution's due process clause. Botruff, 2004 Ill. LEXIS at 18.

Regarding the first factor, IEPA does not dispute Midwest's statement that a trade secret is a property interest, and that the property interest is entitled to due process. The Board recognizes that trade secrets, by definition, have been subject to their owners' efforts to maintain confidentiality and have competitive value. As discussed, the General Assembly has taken steps to ensure that trade secrets be protected appropriately. *See* 415 ILCS 5/7, 7.1 (2002).

As for the second factor, the Board finds that the Part 130 Statement of Justification process, with the right of appeal to the Board, presents little, if any, risk of erroneous deprivation of the trade secret property interest. The trade secret claimant under Part 130 has the opportunity to present evidence to IEPA in the form of a Statement of Justification before IEPA can make the information publicly available. *See* 35 Ill. Adm. Code 130.200(c), 130.201, 130.202. Under Section 130.203, a Statement of Justification must contain the following:

a) A detailed description of the procedures used by the owner to safeguard the article from becoming available to persons other than those selected by the owner to have access thereto for limited purposes;

b) A detailed statement identifying the persons or class of persons to whom the article has been disclosed;

c) A certification that the owner has no knowledge that the article has ever been published or disseminated or has otherwise become a matter of general public knowledge;

d) A detailed discussion of why the owner believes the article to be of competitive value; and

e) Any other information that will support the claim. 35 Ill. Adm. Code 130.203.

Coloring Midwest's complaints is its argument that the IEPA denial letter fails to articulate IEPA's reasons for denial. Even if IEPA's denial letter is insufficiently detailed, however, that does not mean that Midwest did not have a meaningful opportunity to submit evidence to IEPA. Midwest had that opportunity through the Statement of Justification. Indeed, IEPA's January 5, 2004 request to Midwest for a Statement of Justification specifically referred to and paraphrased the Board's procedural rule on the required contents of that submittal, Section 130.203. AR, Vol. I at 174-75. Midwest responded by submitting a 27-page long Statement of Justification to IEPA on January 26, 2004. AR, Vol. I at 177-204.

Nor is the Board convinced by Midwest's suggestion that the IEPA's denial based on "emission data" was unfair surprise. Midwest's claimed information was submitted in response to a Section 114 Clean Air Act information request. The trade secret requirements of the Act and the Board's rules specifically address the emission data exemption from trade secret protection. The Board's rules define the term "emission data." *See* 415 ILCS 5/7(c) (2002); 35 Ill. Adm. Code 130.110. Moreover, Section 130.203 calls not only for information relevant to the public availability and competitive value of the claimed trade secret, but also "[a]ny other information that will support the claim" (35 Ill. Adm. Code 130.203(e)), which here clearly could have included a demonstration that the claimed information is not emission data.

A trade secret denial letter must state the reasons for denial. *See* 35 Ill. Adm. Code 130.210(b)(1). At that point, nothing in Part 130 precludes the trade secret claimant from submitting to IEPA an amended Statement of Justification in an attempt to respond to the deficiencies identified in the denial letter. The claimant also may appeal the denial to the Board. *See* 35 Ill. Adm. Code 130.214(a). During the entirety of the appellate process, the claimed information must be kept confidential by the State agencies. *See* 35 Ill. Adm. Code 130.210(c).

Unless the case is dismissed on a dispositive motion, an appeal before the Board will include a hearing. *See* 35 Ill. Adm. Code 130.214(a) (proceeding under Part 105 process). That hearing affords the trade secret claimant the opportunity to challenge IEPA's reasons for denial. The Board hearing is generally limited to the record before IEPA at the time of denial. As discussed above, however, the claimant may introduce new evidence if it can demonstrate that the evidence was unavailable to the party and IEPA at the time that IEPA made its determination or that the claimant was not given the required opportunity to present a Statement of Justification to IEPA. With these safeguards in place, the Board finds that any value of a mandatory *de novo* hearing before the Board in every trade secret appeal is slight.

The court decisions relied on by Midwest do not help its position. This case is distinguishable from Wells. In Wells, the court found IEPA's process for considering an operating permit renewal application to be improper. Wells had a five-year operating permit. Before the five years expired, IEPA sent the company a two-page permit renewal form, in which Wells was required to either certify that its equipment remained unchanged or, if changed, to explain those changes. Wells executed the form by certifying that no changes were made, and then submitted the form to IEPA. Wells, 195 Ill. App. 3d at 595-96, 552 N.E.2d at 1075-76. IEPA issued a letter denying Wells renewal of its permit because Wells might be violating the Act's prohibition on causing air pollution, though no formal enforcement action had been filed.

At the time of denial, IEPA had numerous citizen complaints regarding odor from Wells' operations. Wells, 195 Ill. App. 3d at 595, 597, 552 N.E.2d at 1076-77.

The Wells court noted that in the context of a permit application, the Act places:

> [T]he burden of proof on Wells to show that it would not violate the Act or . . . rules and regulations. However, Wells never had an opportunity to proffer evidence that it would not pollute. *** [T]he Agency denied the renewal permit without bringing an enforcement action . . . . In effect, it denied Wells the right to operate its business because it may be violating the Act, but never gave it an opportunity to submit information which would disprove the allegation. Wells, 195 Ill. App. 3d at 597, 552 N.E.2d at 1077.

In Wells, the court specifically refused to hold that a "predenial hearing" was required, but did find it "obvious that the manner in which the Agency compiled information denied Wells a fair chance to protect its interest." Wells, 195 Ill. App. 3d at 598, 552 N.E.2d at 1078. The court held that merely giving Wells the opportunity, at the Board hearing, to challenge the information relied upon by IEPA for denial is not the same as being "allowed to submit evidence, sometime during the application process, in order to show that it was not polluting the air." Wells, 195 Ill. App. 3d at 598, 552 N.E.2d at 1078.

Before the IEPA denial in Wells, the company had no opportunity to submit evidence to prove that it would not violate the air pollution law—the basis of the denial. Wells was only allowed to submit the two-page certification form to verify that its equipment had not changed. In contrast, Midwest was specifically requested to, and did, submit the Statement of Justification to IEPA before IEPA's final determination. The Statement of Justification was Midwest's opportunity to submit evidence supporting its claim for trade secret status.

Another case relied on by Midwest is Village of Sauget. Despite Midwest's suggestions to the contrary, Village of Sauget does not stand for the broad proposition that before any administrative denial there must be an opportunity for rebuttal by the applicant. Rather, the court in Village of Sauget interpreted the very specific regulatory procedures of NPDES permitting. Village of Sauget, 207 Ill. App. 3d at 979-83, 566 N.E.2d at 727-30. NPDES permits allow for the discharge of pollutants in particular amounts to surface waters of the State. The NPDES permitting regulations accordingly provide many opportunities for input from the public as well as the permit applicant, through issuance of draft permits followed by comment periods and potential hearings, all before a final permit issues. Village of Sauget, 207 Ill. App. 3d at 979-83, 566 N.E.2d at 727-30.

In Village of Sauget, USEPA's comments on a draft permit were submitted after the time period provided by the NPDES regulations. Village of Sauget, 207 Ill. App. 3d at 979-80, 566 N.E.2d at 727-28. In addition, the regulations required that USEPA's comments be served on the permit applicant. That also happened late, merely 11 days before the final permit issued. That final permit contained conditions proposed by USEPA in its comments. Village of Sauget, 207 Ill. App. 3d at 980-81, 566 N.E.2d at 728-29. Moreover, contrary to the regulations, IEPA's draft permit did not include a brief description of USEPA's proposed substantive conditions or

the bases for them. Under these circumstances, the court found that the permit applicant had no notice of the proposed conditions and was not apprised of their bases until after the close of the comment period. The court therefore held that the permit applicant was "denied the right to submit comments on the proposed conditions and otherwise participate in the permit process." Village of Sauget, 207 Ill. App. 3d at 981-82, 566 N.E.2d at 729.

Unlike Village of Sauget, here Midwest cannot point to any regulation requiring the opportunity for *additional* input before IEPA's final determination. It was only in the context of the noncompliance with the applicable regulations *requiring* the opportunity for additional input at the IEPA level that the Village of Sauget court held that this deficiency could not be cured at the Board level. There the Board hearing could not remedy the regulatory noncompliance, *i.e.*, could not "remedy [the permit applicant's] inability to submit information during the public comment period or request a hearing concerning the additional permit conditions suggested by the U.S. EPA." Village of Sauget, 207 Ill. App. 3d at 982, 566 N.E.2d at 730. Midwest does not argue that IEPA failed to allow Midwest to submit a Statement of Justification in compliance with Part 130.

Midwest's reliance on several other court decisions for the position that due process requires the opportunity to offer evidence in rebuttal is also misplaced. *See* Novosad v. Mitchell, 251 Ill. App. 3d 166, 621 N.E.2d 960, 966 (1993); Anderson v. Human Rights Commission, 314 Ill. App. 3d 35, 731 N.E. 2d 371, 376 (2000). The full statement of law in those cases is that administrative agencies must base their decisions upon facts, data, and testimony *in the hearing record*, because due process requires an opportunity to cross-examine witnesses and offer evidence in rebuttal. The courts stated these general principles of law in the context of examining whether administrative agencies improperly relied upon extra-record information, instead of the limiting their review to the evidence in the hearing record. *See* Novosad, 251 Ill. App. 3d at 174, 621 N.E.2d at 966; Anderson, 314 Ill. App. 3d at 41, 731 N.E.2d at 376.

In that context, the due process concern was that the parties at hearing would not have the opportunity to subject the extra-record evidence to cross-examination or rebuttal evidence, as had been the evidence in the hearing record. For example, the Novosad court stated:

> [F]indings must be based on evidence introduced in the case, and nothing can be treated as evidence which is not introduced as such because due process of law requires that all parties have an opportunity to cross-examine witnesses and to offer evidence in rebuttal. [citation omitted] Therefore, a decision pursuant to an administrative hearing must be based upon testimony and other evidence received at the hearing, and a conclusion influenced by extraneous considerations must be seta aside. Novosad, 251 Ill. App. 3d at 174, 621 N.E.2d at 966.

The Board takes no issue with this general statement of law, but finds it inapplicable here. IEPA held no hearing on Midwest's trade secret request and Midwest does not argue that it was entitled to one before IEPA. The large record in this case was filed over a month before Midwest filed its reconsideration motion and nowhere does Midwest argue that IEPA improperly relied on extra-record evidence in making the final trade secret determination.

Midwest cites Community Landfill for circumstances when the Board has allowed new evidence in a permit appeal. The new evidence in that case, however, related to a *laches* and estoppel arguments against IEPA, evidence of which was neither part of nor called for by the permit application. *See* Community Landfill, PCB 01-170, slip op. at 5-6. The rationale behind that ruling in Community Landfill is akin to the rationale for the scope of the Board's review of local government decisions on pollution control facility siting. *See* 415 ILCS 5/39.2, 40.1 (2002). In those appeals, the Board's review is generally limited to the record developed by the local government. But, under certain circumstances, the Board will allow the introduction of new evidence, such as when there is an allegation that the local government's proceeding was fundamentally unfair—evidence of which would not necessarily be in the local record. *See* Land & Lakes v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3d Dist. 2000). Midwest does not seek to introduce any such evidence here, but rather seeks to introduce evidence that goes to the core of its trade secret claim—that the claimed information is not public, that it has competitive value, and that it is not emission data. Midwest had the opportunity to submit that information to IEPA through the Statement of Justification.

Environmental Site Developers, another case cited by Midwest, cannot be read as allowing a permit applicant to introduce any new evidence as long as the new evidence supports a claim made in the permit application. Such a reading would gut the long-held principle stated by the Board in that very case:

> The Board has long held that the issue on appeal of a permit denial is whether the Agency erred and not whether new material which was not before the Agency persuades the Board that a permit should be granted. [citation omitted] "The Agency errs in denying a permit only when the material, as submitted to the Agency by the applicant, proves to the Board that no violation of the Act or regulations will occur if the permit is granted." [citation omitted] Environmental Site Developers, PCB 80-15, slip op. at 4.

On the third factor for considering a constitutional due process claim, always requiring a *de novo* hearing would impose both an additional administrative and monetary burden on the State. This burden cannot be dismissed where a trade secret claimant has already had the opportunity to make its case to IEPA in a Statement of Justification. With a *de novo* hearing, the scope of the Board hearing may be greatly expanded beyond IEPA's record. The need for these types of proceedings to be efficient and timely is heightened because they are often triggered by a citizen's or citizen group's FOIA request, as appears to be the case here. The citizens' right to know environmental information is significant, particularly where emission data is involved, as the General Assembly has recognized. *See* 415 ILCS 5/7(c) (2002).

Considering the three factors in total, the Board finds that the Part 130 Statement of Justification process, with the right of appeal to the Board and the scope of the Board hearing as described above, strikes the proper balance between the private interest in trade secret protection, the government's interest in administrative efficiency, and the public's right to know. The Statement of Justification to be submitted to IEPA is a meaningful opportunity to present evidence. If IEPA had not allowed for a Statement of Justification, or not given the requisite

time to submit one, neither of which is alleged here, then new evidence could be admitted during the Board hearing, curing that defect at the IEPA level.

This process provides adequate safeguards against any erroneous loss of trade secret status. At the same time, it avoids wasting State resources through duplication and helps ensure timely availability of information pursuant to citizen FOIA requests. The Board finds that a *de novo* hearing on appeal would promote forum shopping, undermining the separate roles of IEPA as the initial decision-maker and the Board as the reviewing tribunal.

**IEPA's Denial Letter.** The Board does find merit, however, in Midwest's claims that IEPA's trade secret denial letter is insufficiently specific. IEPA's denial letter reads in relevant part as follows:

> 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 174-75.[7]

In trade secret appeals as with permit appeals, the denial letter frames the issue in the appeal before the Board:

> [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).

[7] In its March 10, 2004 decision, IEPA also granted protection from disclosure for some of the claimed information ("only columns 2 and 4 constitute confidential business or trade secret information") and noted that Midwest withdrew the company's "confidentiality claim" with respect to other information. AR, Vol. 1 at 174.

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. And yet IEPA submitted an administrative record, on which the denial is purportedly based, that is some 2,700 pages long.

Part 130 requires IEPA to provide its reasoning in the denial letter. Section 130.210 states:

> b) Written notice that the State agency denied a claim for trade secret protection must be given by certified mail, return receipt requested, and must contain the following information:
>
> 1) A statement of the State agency's reasoning for denying the claim. 35 Ill. Adm. Code 130.210(b)(1).

Had IEPA provided its reasoning, as required by Part 130, Midwest could have submitted an amended or supplemental Statement of Justification in an attempt to address the identified shortcomings. It is also unclear from the IEPA denial letter whether Midwest failed to establish the rebuttable presumption provided in Section 130.208(b), or how that presumption was rebutted. Section 130.208(b) provides:

> b) There will be a rebuttable presumption that an article has not been published, disseminated, or otherwise become a matter of general public knowledge, if:
>
> 1) The owner has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes; and
>
> 2) The statement of justification contains a certification that the owner has no knowledge that the article has ever been published, disseminated, or otherwise become a matter of general public knowledge. 35 Ill. Adm. Code 130.208(b).

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. If IEPA's specification of its reasoning may require the articulation of information claimed by Midwest to be a trade secret, then IEPA must subject that part of the supplemental decision itself to all Part 130 procedures for maintaining the confidentiality of claimed trade secrets.

A supplemental decision pursuant to this order will promote a much more efficient Board hearing and cure any potential due process deficiencies that could result from Midwest not having a meaningful opportunity to submit an amended or supplemental Statement of Justification to respond to identified deficiencies. 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 timely filed this appeal, conferring jurisdiction on the Board, and the Board has already accepted for hearing Midwest's petition for review. The Board is duty-bound to consider this appeal and, consistent with administrative economy, will not direct the parties to simply start the process all over again. The Board will therefore retain jurisdiction of this appeal while IEPA issues its supplemental decision.

Mindful of the Board's decision deadline in this appeal, the Board directs IEPA to file the supplemental decision by November 30, 2004, with service on Midwest. In turn, Midwest will have until December 31, 2004, to file a document with the Board that either amends Midwest's grounds for appeal based on the supplemental decision or states the company chooses not to amend its April 19, 2004 petition for review.

In ordering this limited remand for IEPA to articulate its denial reasons, the Board emphasizes that it is departing from its past practice in permit appeals and permit appeal-type cases (such as underground storage tank appeals) in recognition of the unique nature of trade secret appeals. Midwest's appeal is the first of its kind since the Board adopted new procedural rules, which became effective January 1, 2001, and which, as discussed above, provide that trade secret appeals are to proceed like permit appeals. *See* 35 Ill. Adm. Code 130.214(a). The Board finds that the distinctions between trade secret appeals and permit appeals can justify remand for articulation of denial reasons in the former, but not in the latter.

In crafting the permitting and permit appeal systems of Sections 39 and 40 of the Act (415 ILCS 5/39, 40 (2002)), the General Assembly was concerned that pollution be prevented from new or continuing business, municipal, and private activities. Consequently, permitting is required before initiation of potentially polluting activities, or continuation of such activities after a permit has expired. The legislature required the Board to hold a public hearing before reaching any permit appeal decision.

The General Assembly was also cognizant, however, of a competing interest: that failure of IEPA or the Board to make timely decisions could be unduly burdensome to the permittee

seeking approval to conduct a lawful business or activity. Except in situations involving certain federal programs, the General Assembly therefore provided that, if IEPA or the Board failed to meet their respective 90-day and 120-day decision deadlines, the applicant "may deem the permit issued" in the form requested. The public's right to environmental protection was therefore conditioned on timely State action, subject to decision deadline waiver by the permittee. Under these circumstances, remanding to IEPA to further articulate the reasoning behind the denial runs counter to the legislative preference for a timely decision. Any Board failure to timely notice and hold a hearing, and issue a written decision would result in an automatic "win" for the permittee, and a potential loss to environmental protection.

By contrast, in trade secret cases there are other interests at play. As discussed above, the Act generally provides that "[a]ll files, records, and data of the Agency, the Board and the Department [of Natural Resources] shall be open to reasonable public inspection" and copying. 415 ILCS 5/7(a) (2002). However, recognizing legitimate business interests, the Act carves out limited exceptions, requiring the agencies to keep confidential, among other things, trade secret information. *See* 415 ILCS 5/7(a)(i)-(iv) (2002). Even then, the General Assembly determined that the public's right to information concerning the environment trumped business interests, so that even the trade secret exception to disclosure has an exception, requiring disclosure of, for example, emission data to the extent required under the federal Clean Air Act. *See* 415 ILCS 5/7(b)-(d) (2002).

Notably, the General Assembly did not require that hearings be held in every trade secret case, or impose time deadlines for the making of trade secret determinations. The only time constraints have been those adopted by the Board during the rulemaking process, after hearing and public comment, to balance the interests of free access to information, protection of trade secrets, and the agencies' needs for efficient operation. As a matter of practice and good government then, in determining that trade secret appeals would be processed under the permit appeal procedures of Section 40, the Board incorporated the 120-day decision deadline, subject to waiver by the owner of the article claimed to be a trade secret.

The limited remand ordered here will not jeopardize the interests of Midwest or the public. During an appeal of a trade secret denial, the claimed information is kept confidential, so the appeal does not preclude the trade secret claimant from carrying out its business. In contrast, as earlier stated, during an appeal of a permit denial, the permit applicant cannot lawfully proceed to construct or operate at its business as sought in the application. In addition, the limited remand ordered here does not affect this case's decision deadline, which only Midwest controls.

As to the right of the public to information, the interest in timeliness is to some extent already protected by the decision deadline. Further, articulation of IEPA's specific denial reasons before any hearing will keep members of the public at least minimally informed as to the nature of the dispute. This may be of particular importance in a case where, for instance, IEPA believes that the claimed information is emission data, rather than one where the claimant has failed to properly protect non-emission data from public disclosure. In addition, since all or part of a hearing in a trade secret case may need to be closed to the public to keep the claimed

information confidential, the denial letter may be the public's only source of information about the claimed secret.

This limited remand is further designed to advance the interests of both the Board and IEPA in operating efficiently. IEPA's articulation of the specific denial reasons will focus the issues in any appeal hearing by, for example, eliminating questions as to whether claimed information is emission data where the actual denial reason is premised on the claimant's failure to show competitive value. Alternatively, as discussed, articulation of specific denial reasons might prompt Midwest to submit a supplemental or amended Statement of Justification, potentially obviating any need for this appeal.

Finally, the Board stresses that today it is retaining jurisdiction of this appeal and issuing an *interim* order for clarification of the denial grounds. Accordingly, the Board is in no way abdicating its obligation to "adjudicate the controversy before it." Illinois Power Co. v. PCB, 100 Ill. App. 3d 528, 531-32, 426 N.E.2d 1258, 1261-62 (3d Dist. 1981) (reversing final Board decision that remanded contested permit requirements to IEPA for resolution as IEPA "saw fit").

## CONCLUSION

For the reasons above, the Board denies Sierra Club's motion to intervene, but notes that Sierra Club may participate in this proceeding as a non-party by hearing statement, public comment, and *amicus curiae* briefing. Additionally, the Board denies Midwest's motion to partially reconsider the Board's May 6, 2004 order. However, the Board's review of IEPA's trade secret denial is not necessarily limited to the record before IEPA at the time of the trade secret determination. As described in this order, Midwest may present new evidence at the Board hearing *if* it makes the requisite demonstration that the information was unavailable to Midwest and IEPA when IEPA denied trade secret protection.

Additionally, the Board remands this matter to IEPA for the limited purpose of having IEPA state in a supplemental decision its reasoning for the March 10, 2004 denial of Midwest's request for trade secret protection, in compliance with 35 Ill. Adm. Code 130.210(b)(1). IEPA must specify which grounds apply and why, and must file this supplemental decision by November 30, 2004. By December 31, 2004, Midwest must file a pleading with the Board. That Midwest pleading, based on IEPA's supplemental decision, must either (1) add grounds for appeal, withdraw grounds for appeal, or otherwise amend Midwest's petition for review, or (2) state that the company stands by its petition for review unaltered. The Board accordingly retains jurisdiction of this appeal.

## ORDER

1. The Board denies Sierra Club's motion to intervene in this trade secret appeal. In accordance with the Board's procedural rules (35 Ill. Adm. Code 101.110, 101.628), Sierra Club may participate in this proceeding by making oral or written statements at hearing and by filing *amicus curiae* briefs or public comments.

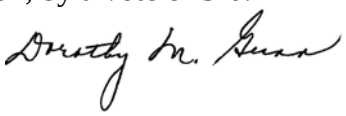
2. The Board denies Midwest's motion to partially reconsider the Board order of May 6, 2004.

3. By November 30, 2004, IEPA must file a supplemental decision, in accordance with this order, that states the reasoning behind IEPA's March 10, 2004 denial of trade secret protection, with service on Midwest. If IEPA's supplemental decision describes any information claimed by Midwest to be a trade secret, then IEPA must subject that portion of the supplemental decision to all procedures of 35 Ill. Adm. Code 130 for protecting claimed information from disclosure.

4. By December 31, 2004, Midwest must file a pleading with the Board, in accordance with this order, responsive to IEPA's supplemental decision described in paragraph 3 of this 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 November 4, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board