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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

Proceedings held on July 10, 2000, at 10:00 a.m., at the
Illinois Pollution Control Board, 600 South Second Street, Suite
403, Springfield, Illinois, before the Honorable Carol Sudman,
Hearing Officer.

Reported by: Darlene M. Niemeyer, CSR, RPR
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A P P E A R A N C E S

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Members of the Board:

Claire Manning, Chairman

G. Tanner Girard

Elena Kezelis

Marili McFawn

Staff Members of the Procedural Rules Committee:

Kathleen Crowley

Amy Jackson

Richard McGill

Marie Tipsord

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E X H I B I T S

EXHIBIT	MARKED	ENTERED
Hearing Exhibit Number 1	66	66

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1 P R O C E E D I N G S

2 (July 10, 2000; 10:00 a.m.)

3 HEARING OFFICER SUDMAN: Good morning. My name is Carol
4 Sudman. I am the Hearing Officer for R00-20 regarding the
5 Board's Procedural Rules. The purpose of this hearing is to hear
6 comments on Part 130, but we will take other comments at the end
7 if there are any. Witnesses, as last time, will not be sworn in
8 or subject to cross-questioning. However, the Board Members may
9 ask questions to ensure their full understanding. No decisions
10 will be made right now, but the Board will respond to your
11 comments during the first notice period.

12 I would like to take this opportunity to present the Board
13 members with us today. Seated on my right is Chairman Claire
14 Manning.

15 CHAIRMAN MANNING: Good morning.

16 HEARING OFFICER SUDMAN: Also present are Board Members
17 Tanner Girard.

18 BOARD MEMBER GIRARD: Good morning.

19 HEARING OFFICER SUDMAN: Elena Kezelis.

20 BOARD MEMBER KEZELIS: Hello.

21 HEARING OFFICER SUDMAN: And Marili McFawn.

22 BOARD MEMBER McFAWN: Hello.

23 HEARING OFFICER SUDMAN: Chairman, do you have any comments
24 at this time?

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1 CHAIRMAN MANNING: Not at this time. We look forward to
2 hearing you on Part 130 and on any other concerns you have at
3 this, hopefully, our last hearing of the public Board's
4 Procedural Rules. But if we need more hearings, we will do that,
5 too. Go right ahead.

6 HEARING OFFICER SUDMAN: Thank you, Chairman. Any other
7 Board Members have any comments at this time?

8 Okay. We will proceed now with the comments from IERG and
9 the Agency, as they were the only two parties who filed prefiled
10 testimony. It is not necessary to read your prefiled testimony,
11 but we will discuss your comments.

12 If Deirdre Hirner or any representative with her would like
13 to come up. Please identify yourselves for our court reporter.

14 MS. HIRNER: Thank you. Hello. I am Deirdre Hirner. I am
15 the Executive Director for the Illinois Environmental Regulatory
16 Group, IERG, and with me today are Karen Bernoteit, who serves as
17 General Counsel for IERG, and Ladonna Driver, who is also counsel
18 to IERG on this matter.

19 I know when we filed our prefiled testimony we said that we
20 would like to reserve some time to supplement that information.
21 I have just a couple of comments that I would like to offer at
22 this time if it is okay with the Members of the Board.

23 HEARING OFFICER SUDMAN: Sure.

24 CHAIRMAN MANNING: Go right ahead.

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1 THE DEPONENT: We, IERG, and I think speaking for the
2 regulated community, we do believe, I think as we have stated
3 somewhat, that the U.S. EPA has clearly provided the opportunity
4 for states to afford trade secret protection to information that
5 companies determine needs to be confidential because they
6 determine that it has competitive value.

7 And as noted in both our comments and in our prefiled
8 testimony, we have proposed a new Section 130.112, and that
9 section, I am sure as you have had the opportunity to review and
10 note, first defines emissions data. And in our definition of
11 emission data we have used the U.S. EPA's regulatory definition
12 absent production information. We have excluded production
13 information from that particular regulatory definition.

14 And, second, and I think most importantly from our
15 perspective is that our definition is premised on the notion that
16 data used to calculate emissions data, and that is production
17 information, which we consider process rates, raw material usage,
18 and things of that nature, will be protected as a trade secret
19 unless, and until, the Agency finds that it must be expressly
20 stated as a limitation in the permit document itself so that the
21 permit can be enforced. So, again, we start from the premise
22 that the information is to be protected unless and until it has
23 to be expressly stated.

24 Now, once the information is placed in the permit, the

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1 regulated community agrees that the information then becomes
2 emissions data and it may be released to the public. From our
3 perspective, and we would contend that it can be released to the
4 public exactly as it is stated in the permit, in the permit
5 document itself.

6 We believe that in all other contexts, such as the
7 information is included in the permit application or in the
8 annual emissions report, the information should continue to be
9 afforded trade secret protection. So once it is stated in the
10 permit document itself as a limitation it may be released. But
11 as used in the application materials or as used in the AER to
12 better define how those emissions were arrived at, we believe
13 that the information should be used -- should be afforded trade
14 secret protection.

15 I have a couple of examples that I would like to use that
16 may illustrate this. I am going to use throughput capacity as
17 the information that I, as a company, desire to protect as trade
18 secret. Okay. And that throughput capacity, and I am going to
19 use an example of a thousand gallons of paint per hour. Let's
20 say I am making a product called super paint A. I could do the
21 same thing if I were going to make bone meal and bones was what I
22 was trying to protect. Okay. But the throughput information, I
23 am going to say throughput capacity of my plant is a thousand

24 gallons of paint per hour. That's the information I want to

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1 protect.

2 Now, as a member of the regulated community, I am going to
3 get a permit for my plant. And that permit will have a
4 limitation in it which is an emission rate. And the emission
5 rate will be pounds of pollutant per hour. Okay. That's the
6 emission rate that is going to be stated in the permit. Now, we
7 believe and agree with the Agency that the pounds of pollutant
8 per hour, the public is entitled to that information. They are
9 entitled to that emission number. But to get at the emission
10 rate I made a calculation. And the calculation that I made was
11 throughput units per hour so that would be a thousand gallons of
12 paint per hour times an emission factor, and the emission factor
13 would be stated as pounds of pollutant per unit.

14 So in this example let's say I would use .0013 pounds of
15 VOCs per gallon of paint as that emission factor. And then I
16 would take that times some control device efficiency. So if my
17 plant were 99.9 percent efficient, I would use .001 in that
18 calculation. So my calculation would be throughput units per
19 hour, times an emission factor, times control device efficiency.
20 Now, that emission factor is public information already. The
21 U.S. EPA publishes those emission factors so that is a piece of
22 public information. And then the ultimate emission rate that is

23 going to be placed in the permit, pounds of pollutant per hour,
24 will be public information.

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1 From our perspective, our interest is that everything left
2 of the equation, of the equal sign, with the exception of that
3 emission factor, which is already public information, be
4 protected as trade secret. Because, for example, if you have
5 three factors, A times B times C times something else, and you
6 know the result, if you know more than one thing, which is that
7 public emission factor to the left of the equal sign, you can
8 back calculate to the throughput unit per hour which is what we
9 are trying to protect. So that, in essence, is our concern, is
10 that what was used to come up with the final emission factor can
11 be, if so requested by the company, protected as trade secret
12 information.

13 Now, let's make a little change to that example. Say that
14 instead of an emission rate, that the enforceable permit
15 limitation is stated in the permit as a maximum annual throughput
16 cap. So, again, let's go back to the paint plant. I have a
17 paint plant that if I am running it 365 days a year with one
18 shift, I can produce 2.7 million gallons of paint. But I may
19 want to increase that production in the future and add more
20 shifts. So, say, I go in for a permit and the annual maximum
21 throughput cap is 8.7 million gallons of paint per year
22 throughput. Okay. If that is stated in the permit as the

23 limitation we agree with the Agency that that should be public
24 information. That is what is placed in the permit.

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1 Now, in order to get at 8.7 million gallons per year, you
2 had to use that throughput factor of 1,000 gallons of paint per
3 hour. And 1,000 gallons of paint per hour is what the trade
4 secret is. Under IERG's proposal the thousand gallons of paint
5 per hour, the throughput number, would be protected in the permit
6 application and it would be protected in the AER report if it
7 were used to show how the final emissions or the final maximum
8 throughput number, what that number was. The 10,000 gallons of
9 paint per hour would be protected as trade secret in those two
10 documents.

11 Now, we have had the opportunity to review IEPA's proposal
12 and to review their testimony. And what we are uncertain of, is
13 that because 1,000 gallons per hour is a throughput number, even
14 though you have stated the throughput number in terms of maximum
15 annual, which is 8.7 million gallons per year, if you would be
16 able to continue to protect the 10,000 gallons per hour because
17 they are both throughput numbers. Okay. Again, as it is stated
18 in the permit, 8.7 million gallons, fine, the public should have
19 a right to have that information. Our members are interested in
20 protecting the 10,000 gallons per hour.

21 One other example that will demonstrate what our members

22 are interested in protecting goes to the process weight rate rule
23 in the permit. The Agency now states in some instances the
24 process weight rule in the permit. The rule has two components.

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1 The components are process throughput and corresponding tons of
2 allowable emissions. We believe and agree that the tons of
3 allowable emissions assigned to the company under the rule is
4 rightly public information. We believe, however, that the
5 process throughput is entitled to be afforded trade secret
6 protection. So it is that ultimate number that should be
7 published. We think that is particularly important if other
8 restrictions are placed in the permit, where you don't really
9 need to site the process weight rule in order to have a
10 limitation.

11 Those are my examples. I thank you for the additional time
12 to talk about this stuff today. I thank you for having this
13 additional hearing. And we will be pleased to answer any
14 questions that you all might have at this point.

15 CHAIRMAN MANNING: Thank you.

16 HEARING OFFICER SUDMAN: Thank you. Do the Board Members
17 have any questions at this time?

18 CHAIRMAN MANNING: I do, I think. Just so that I have a
19 clear understanding. The proposed definition of emissions data
20 and how it relates to the definition of trade secret, do I
21 understand you correctly that you would determine -- that your

22 position, that is, that the throughput number, the "A" part of
23 the equation that you want protected, is automatically a trade
24 secret by function of the definition of emissions data or a

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1 company would have to identify that number as a trade secret?

2 MS. HIRNER: Yes, they still --

3 CHAIRMAN MANNING: Okay.

4 MS. HIRNER: They have to identify the number. They have
5 to claim the trade secret.

6 CHAIRMAN MANNING: Okay.

7 MS. HIRNER: The way it goes to the heart of the definition
8 is that if you look at some of the past practices, it has been
9 based -- there have been arguments on what was necessary to
10 determine the emission rate. And so if the throughput number
11 were necessary to determine the emission rate, then the belief
12 was it had to be released as public information. And all we are
13 saying is the company still has to claim it a trade secret. The
14 emission is still available to the public.

15 The Agency has 100 percent access to that information to
16 verify the calculations, to determine if it needs to put those
17 in the permit limitation itself. None of that has changed. We
18 are just asking that once the Agency has made the determination
19 and that it needs to be placed in a permit, if the company has
20 requested that things that were used to calculate that number be

21 trade secret, that information be trade secret, but the claim
22 still has to be made.

23 CHAIRMAN MANNING: Okay.

24 BOARD MEMBER KEZELIS: I do have another question. How

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1 different is this from the U.S. EPA's practice, the provision
2 that you are proposing?

3 MS. HIRNER: What we have -- if you look at the regulatory
4 definition, the U.S. EPA's regulatory definition, it talks about
5 information that is necessary to determine.

6 BOARD MEMBER KEZELIS: Right.

7 MS. HIRNER: And that can include production rates and so
8 on. That was the definition. But in at least three separate
9 instances afterwards, the U.S. EPA has kind of defined or
10 described what it meant by that definition. And it said that in
11 instances -- that there is discretion regarding production
12 information, because they listed what exactly is emissions data,
13 and absent from that was the production information.

14 And they have also said that they recognize that there is
15 sensitive information that must be -- you know, that industry is
16 interested in protecting and they have allowed the states some
17 discretion in identifying that as sensitive information. But
18 what the U.S. EPA has affirmatively said has to be emissions
19 data, we believe that this does not conflict with that in any
20 way, shape or form.

21 BOARD MEMBER KEZELIS: Okay.

22 MS. CROWLEY: If I could just follow-up on that with just
23 one question. You have just said, and it says on page two of
24 your prefiled testimony, that there are apparently three

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1 particular pieces of U.S. EPA guidance that you would like to
2 have us look at. Have you identified those or provided them to
3 us specifically?

4 MS. DRIVER: They are in the comment.

5 MS. HIRNER: The cites are in the comment.

6 MS. CROWLEY: Okay.

7 MS. HIRNER: Now, we have not, you know, copied those and
8 handed them to you. If you would like us to, we would be more
9 than happy to do that.

10 MS. CROWLEY: I just wanted to make sure that we did have
11 them in the --

12 MS. HIRNER: We do have the three cites in the comments.

13 MS. CROWLEY: Fine. Thank you.

14 MS. HIRNER: It is a NOx SIP Call, a NESHAPs, and there is
15 one other that I can't exactly remember because the name is about
16 this long.

17 MS. DRIVER: They are all Federal Register documents.

18 MS. CROWLEY: Great. Thank you.

19 HEARING OFFICER SUDMAN: Does anybody else have any

20 questions at this time?

21 BOARD MEMBER McFAWN: I have just a couple of questions. I
22 was not really tracking the equations. Could you just help me
23 out with them?

24 MS. HIRNER: Sure.

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1 BOARD MEMBER McFAWN: On your second example, where your
2 permit limitation is the maximum annual throughput, what would be
3 on the left side of the equation, then? I take it that it would
4 be the throughput times --

5 MS. HIRNER: Times a number of different things to come up
6 with -- there would be -- on that I would have to get a better
7 example for you.

8 BOARD MEMBER McFAWN: Okay.

9 MS. HIRNER: I don't have that.

10 BOARD MEMBER McFAWN: Okay. I thought maybe I just missed
11 that.

12 MS. HIRNER: No. You would have throughput like ten -- you
13 would have like a thousand gallons of paint per hour. That would
14 be the starting point and then there would be many other factors,
15 the types of equipment and things that were used. I know some of
16 the things that I have seen --

17 MS. DRIVER: One of the things you would have to factor in
18 is how many shifts you could possibly have.

19 Ms. HIRNER: Yes, shifts.

20 MS. DRIVER: The control efficiency of the equipment and
21 then the pounds of VOM per gallon of paint. That's how you would
22 get up to that maximum theoretical throughput limit.

23 BOARD MEMBER McFAWN: Okay. Thanks. Then I had a similar
24 question about your example concerning process weight rate. But

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1 maybe a better question to ask now is you were questioning the
2 Agency's stance on that or --

3 MS. HIRNER: Well, not on the process weight rate. Well,
4 let's take two examples. If in the one when I look at the
5 language of the Agency and, again, we agree in concept. We have
6 had these discussions with the Agency and we very much agree in
7 concept. We just have some very subtle differences in that Part
8 C language. If in a permit it is stated as millions of gallons
9 of paint per year, because that is throughput -- that is a
10 throughput number, if in the application the throughput number is
11 10,000 or 1,000 gallons per hour, does throughput in the permit
12 translate to automatically releasing throughput in the
13 application, even though they are derivatives, the big number is
14 a derivative of a small number. That we don't know. And maybe
15 when the Agency talks about that they could shed some light on
16 it.

17 In the process weight rule, it is a table that is in the --
18 there is a table in the rule. And on one column of the table is

19 throughput capacity. Then on another -- and then, you know,
20 across the table are amounts of emissions that are associated
21 with certain categories of throughputs. And so the Agency,
22 instead of stating the full rule in the permit, we would ask
23 that -- that included both the throughput rate and the
24 corresponding emissions, we would ask that they just state the

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1 emissions and then could afford, if requested, trade secret
2 protection to the throughput rate where they went across to make
3 that calculation.

4 BOARD MEMBER McFAWN: Okay. I think I understand.

5 MS. HIRNER: It is a down and then across.

6 BOARD MEMBER McFAWN: Okay. Wouldn't someone be able to
7 back calculate that since it is stated in the rule anyhow?

8 MS. HIRNER: I think that -- I think and, now, I am not
9 sure. I might have to get back to you on this. My
10 understanding, when I asked someone to explain it to me, is that
11 there are ranges stated and, again, the Agency may shed more
12 light. This is as it was explained to me. There are ranges of
13 throughput and ranges of emissions. And so there is a difference
14 in knowing your range and your exact number.

15 BOARD MEMBER McFAWN: Okay. Thank you.

16 CHAIRMAN MANNING: I have one more question, too, though
17 not necessarily related to the testimony you are giving today on
18 the emissions data question. But generally you made a comment in

19 our process, in I think maybe your first public comment, about
20 the Agency's Title 2 rules, the Freedom of Information Act rules
21 and how they relate to the trade secret rules. Do you want to
22 talk about that for just a second? Or do you still have concerns
23 about that that you raised in the original public comment?

24 MS. HIRNER: Well, the way that we understand it, and we

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1 have identified some issues even in this comment more
2 specifically in that regard, is that the Agency says that they
3 have not promulgated specific rules for trade secret protection.
4 In fact, they repealed Part 1827 and so trade secret is no longer
5 an Agency rule. The Agency says what the guiding factor is is
6 whatever the Board has decided. And so in that instance it was
7 Part 120. I mean, currently it is Part 120, is the rule that is
8 used to deal with trade secrets by the Agency.

9 And so a couple of the questions that we had raised in our
10 comments went to the definition of Agency and so that Part 100
11 just says the IEPA. But this is the Board's rules and so does
12 130 apply -- if I look at the definition, yes, it does just apply
13 to the IEPA and it does not apply to the Board or anybody else.
14 And so that some of those definitions as to whom these things
15 apply I think need to be clarified in this particular proceeding.
16 And if they are, then that will clear up the issues with the
17 Agency.

18 CHAIRMAN MANNING: But it is your understanding that if a
19 company wants to claim a trade secret they do it under our Part
20 130 and they don't do it under the Agency's Freedom of
21 Information Act rules; am I correct about that?

22 MS. HIRNER: Right. What would happen is, and one of the
23 things that we have asked is that a trigger be placed on when the
24 Agency does do a trade secret determination. We think that if

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1 somebody claims something a trade secret you should protect it as
2 a trade secret until there is a question about it. And that
3 there would be three questions that would trigger the need for a
4 determination by the Agency whether something is or is not a
5 trade secret.

6 And the first trigger would be if there is a Freedom of
7 Information request. And if I submit a Freedom of Information
8 request, the Agency will need to determine if they can release
9 that information or whether it really is a trade secret or
10 whether they deem it not a trade secret. And our concern from
11 that really goes to the heart of business practices, and that's
12 that we have found that it is not the public that is asking for
13 this information. It is business' competitors. So if they
14 would -- so they can get access to that trade secret information
15 and access to competitive information.

16 The second was if there would be a Board proceeding. If
17 you all needed that information and then that would be a time to

18 determine whether the information is or is not a trade secret.

19 And then the third was if the Agency determined that they
20 were going to have to state something as a permit limitation in
21 order for it to be enforceable. And industry believes that
22 absent some kind of a trigger, absent the need to make a
23 determination whether something is a trade secret, we should
24 presume that it is a trade secret until the question is called.

19

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1 CHAIRMAN MANNING: Would industry identify it as a trade
2 secret before it gives the information to the Agency?

3 MS. HIRNER: Right. We always have to --

4 CHAIRMAN MANNING: So it is always identified?

5 MS. HIRNER: Yes, it is always identified. Even in your
6 rules now and our comments, we need to claim, you know. The way
7 that the proposed rule states, we must claim at the time it is
8 submitted that it is a trade secret.

9 CHAIRMAN MANNING: Okay.

10 MS. HIRNER: Under 120 we have more leeway and many of our
11 members would prefer more leeway so that, like, a month or two
12 afterwards they could say, oops, I forgot to define something.
13 We understand that can present a problem. But if we never
14 claimed that it is a trade secret, then the Agency is not under
15 an obligation to protect it as such, or the Board or anyone else.
16 We have to claim it.

17 CHAIRMAN MANNING: Okay. Thank you.

18 BOARD MEMBER McFAWN: Along that line, according to your
19 submittal, you would like the word substantially retained in
20 Section 130.210. Then the Agency, if I recall correctly, would
21 like it -- they were glad that it was deleted. Could you tell us
22 a little bit about did you have any discussion with the Agency
23 about this difference of opinion and where you went to --

24 MS. HIRNER: We did not because we did not see that part of

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1 their comment until after it had been filed. Before the filing
2 we had many discussions on this emissions data, but we had not
3 seen any of the other comments until they were filed with you all
4 and then we got them from your web site. So we did not have
5 questions about that. Or we did not have discussions with the
6 Agency about that. And I have a little trouble recalling what
7 the substantially question was. I might ask if you would mind if
8 Ladonna would answer that for me.

9 MS. DRIVER: 120 currently says that the article will be
10 determined to represent a trade secret if the owner substantially
11 complied with the procedure to claim it, such that if there was a
12 minor -- our understanding was if there was a very minor
13 technical glitch it was not going to forever bar you from
14 claiming trade secret protection for that article. We felt that
15 was an important thing to retain because if not a major part of
16 the claim was left out, there is really no service to denying a

17 person to have trade secret protection for that article. We
18 wanted to see that concept retained so that if they met the
19 majority of the requirements for claiming and maybe got one minor
20 thing wrong, it was not going to forever void a trade secret
21 protection for that article.

22 BOARD MEMBER KEZELIS: Would not marking a particular page
23 be substantial or not?

24 MS. DRIVER: I know that you get into some hard questions

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1 there, that is true.

2 BOARD MEMBER KEZELIS: It is difficult for the Agency in
3 that situation to get into the mind-set of the producer of that
4 document and know what was and what was not.

5 MS. DRIVER: We have really felt from our members
6 perspective and in practice that the Agency is very good about
7 working with the claimer to say, you know -- and this was why
8 IERG really presented kind of a process for that in its
9 suggestion was to allow that to continue. The Agency will look
10 at something and say, you know, can you provide a little bit more
11 justification on this one issue or something and there is some
12 give and take and some back and forth to perfect the claim.

13 We would like to see that practice continue because we feel
14 like that benefits everybody. It benefits the Agency and it
15 benefits the industry to get it right. And so we felt like it

16 was important to retain those concepts like substantially so that
17 if there was just something minor wrong the Agency could call the
18 facility and say what did you mean to do here and can we get this
19 fixed so that we can move forward. That's why we wanted to
20 incorporate those concepts.

21 BOARD MEMBER KEZELIS: Thank you. I want to go back to
22 FOIA for a minute. If a document is submitted to the Agency as a
23 trade secret and it is marked and it has been substantially and
24 completely complied with the procedural requirements and the

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1 determination is not made by the Agency, what is your position
2 with respect to -- what is your preference with respect to
3 situations where a FOIA request has been made for that document?
4 Walk me through the process.

5 Because FOIA is a seven day time frame. It moves very
6 quickly. And if a FOIA request is made, the Agency, obviously,
7 needs more time than FOIA normally would permit for that trade
8 secret determination. The Agency can run into problems if it
9 does not respond to a FOIA request promptly. At the same time,
10 the private entity that has submitted this information runs a
11 substantial risk if a trade secret is released when perhaps it
12 should not have been. So, what, in an ideal world do you
13 envision with a trade secret paper that is now subject to a FOIA
14 request for which a determination has not yet been made by the
15 agency.

16 MS. HIRNER: I will start and then if I miss something I
17 will ask Ladonna to back me up. When a FOIA request is
18 submitted, the industry that is the subject of the request is
19 notified that there is a request for this information. Now --

20 BOARD MEMBER KEZELIS: Not industry, the private -- the
21 company?

22 MS. HIRNER: Yes, right.

23 BOARD MEMBER KEZELIS: Okay.

24 MS. HIRNER: The company.

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1 BOARD MEMBER KEZELIS: The company that submitted the
2 material. Okay.

3 MS. HIRNER: Yes, is notified that there has been a request
4 for that information.

5 BOARD MEMBER KEZELIS: Okay.

6 MS. HIRNER: Then the Agency will already have the
7 document, the claim. They will have the document marked as trade
8 secret and they will have a claim letter that tells why and some
9 of the information pertinent to the claim. They either will have
10 a justification statement, a full-blown justification statement,
11 which they can use, or they will have to request that from the
12 company to get the full-blown justification. So once they have
13 asked the company, the company has to turn it around in the
14 prescribed time. Now, what I am not certain of, and what I will

15 ask Ladonna is whether the turn around is trumped by the FOIA
16 deadline or by the Board's procedural rules.

17 BOARD MEMBER KEZELIS: I can give you a partial answer to
18 that. There is, at least in terms of the time frames of FOIA,
19 within seven days you must respond. If the state Agency needs an
20 additional seven days they can indicate that because it has not
21 been able to collect this material it provides that it needs
22 seven additional days. So the maximum window in responding to a
23 FOIA is 14 days by the state Agency. I still am not sure that is
24 enough time for the state Agency to make a trade secret

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1 determination.

2 MS. DRIVER: And it is not now. I mean, the situation now
3 is -- I mean, you send a request in and they will send you a
4 letter back saying they need at least 45 days, if not longer, to
5 respond. That is what is happening right now.

6 BOARD MEMBER McFAWN: Is that because of the trade secret
7 or is that just in general, the 45 days?

8 MS. DRIVER: I think in some cases it is triggered by the
9 trade secret issue but in other cases it is just because of
10 backlog. And I am sure the Agency could speak to that. But that
11 has been my experience with that. And I will let Deirdre
12 continue but, I mean, just from that perspective the only other
13 alternative to get around that is that every claim be reviewed
14 and determined in seven days when it comes in the door. And

15 there is no way the Agency can do that. And I think they feel
16 that way as well.

17 BOARD MEMBER KEZELIS: Okay. So it is not a problem caused
18 by our procedural rules, it is really a problem caused by FOIA?

19 MS. DRIVER: Right.

20 BOARD MEMBER KEZELIS: Okay.

21 MS. HIRNER: And so if the request came in, then the
22 company would have to respond. Then the Agency would have to
23 review its justification and determine whether or not that
24 particular piece of information was a trade secret. If it were

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1 deemed a trade secret based on the justification by the Agency
2 then under FOIA the Agency would notify the requester that
3 particular piece of information has been deemed a trade secret
4 and is not available. There would be other information that went
5 along with it that would be available, but that particular piece
6 would not be available under the Freedom of Information Act,
7 because it was a trade secret.

8 I mean, that's how I see those two things working together.
9 So it does -- it does -- it can hold them back in terms of this
10 give and take. I think even under FOIA once they have asked for
11 some information then the responder can request a time -- an
12 extension of time as well. I think, like, the Agency can ask for
13 an additional seven days and then it goes to the responder who

14 can ask for an additional seven days or --

15 MS. DRIVER: No.

16 MS. HIRNER: It doesn't? Okay. Never mind. Take that
17 back.

18 BOARD MEMBER KEZELIS: All right. That's helpful. Thank
19 you.

20 BOARD MEMBER McFAWN: I have one more question. You
21 mentioned that the production data is usually requested by
22 business competitors. I read that at page eight in your public
23 comment. I just wondered how you determined that.

24 MS. HIRNER: We asked the Agency. I mean, in the

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1 discussions we asked the Agency has the public, the public, ever
2 asked for any of this information that we have claimed as trade
3 secret and they said, no, it is competitors.

4 BOARD MEMBER McFAWN: So this is based on representations
5 from the IEPA?

6 MS. HIRNER: From the IEPA. And then in a separate
7 negotiation that is going on now in regard to the ERMS rule in
8 Chicago, we are working with an ERMS dialogue group that includes
9 members of the environmental community. Because the trade secret
10 comes up in the context of the annual emissions report, and this
11 ERMS rule is taking place in the context of the annual emissions
12 report, we have discussed with the environmental community
13 whether they are interested in those calculations or whether they

14 are interested in the actual emissions number.

15 And they have told us that they are interested in the
16 emissions number. They are not interested in getting into
17 confidential business information. And as we have stated to them
18 and to the Agency, we agree that once it is an emissions number,
19 once it is an emission, the public has every right to know that
20 information.

21 BOARD MEMBER McFAWN: Thank you.

22 HEARING OFFICER SUDMAN: Anything else? Okay. Thank you
23 very much.

24 MS. HIRNER: Thank you.

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1 MS. DRIVER: Thank you.

2 HEARING OFFICER SUDMAN: At this time would Susan Schroeder
3 or anyone from the IEPA like to come forward?

4 Would you please identify yourselves for the court
5 reporter.

6 MS. MORENO: Yes, Madam Hearing Officer, Madam Chairman, I
7 am Lisa Moreno with the Illinois Environmental Protection Agency.
8 Sitting next to me is Ms. Susan Schroeder who is Associate
9 Counsel in the bureau of land. Her comments, as I am sure you
10 have seen, address essentially procedural aspects and document
11 handling type of aspects of the proposed rule.

12 Over at the other table we have Mr. Don Sutton, who is the

13 permit manager for the bureau of air. Next to him is Ms. Deborah
14 Williams, who is an attorney in the bureau of air. And they, as
15 you saw in Mr. Sutton's comments, are -- their expertise is more
16 focused on the emissions aspects and a lot of the things that
17 have been discussed by IERG already this morning. I am sure that
18 they have a lot of information available to be able to elucidate
19 any of the points from the Agency's perspective.

20 MS. SCHROEDER: I don't have anything new to add to my
21 testimony, so I will pass it on to the emissions data people.

22 MR. SUTTON: I don't have anything new to add. I would be
23 available to respond to some of the questions that were raised
24 earlier to IERG, if you want to restate them, I guess.

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1 MS. WILLIAMS: I think I could just say a couple of little
2 introductory things anyway. You will notice from the proposal
3 that the language that was submitted by the parties is very
4 similar. But I think if you will review the testimony you will
5 see there are definitely some gaps in the interpretation of the
6 language. I think both parties would be glad to see in the final
7 order some take from the Board on how they interpret whatever
8 language they do come up with.

9 I also would like to comment on one aspect of IERG's
10 testimony, which is that -- which is where the U.S. EPA stands on
11 this whole concept. We have had a lot of litigation over the
12 last few years on the definition of emissions data. The proposal

13 submitted incorporate a great deal of the definition that the
14 U.S. EPA relies upon, but it does change it significantly, and
15 that is in that the U.S. EPA relied on the term information
16 necessary to determine emissions. Most Board opinions in the
17 past have interpreted that aspect of the definition, information
18 necessary to determine.

19 I would like to encourage the Board to take a look at some
20 of the documents cited by IERG. I don't think they misspoke in
21 the sense that their rule does not prohibit any of what we
22 have -- or their interpretations do not prohibit any of what we
23 have submitted. But I don't feel in any way has the U.S. EPA
24 provided any guidance to deal with this problem. I think it has

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1 been as difficult a problem for them to resolve as it has been
2 for us.

3 They have provided guidance on what is always going to be
4 emissions data. But when it comes down to a case-by-case
5 determination of what may be emissions data and what may not be
6 emissions data, I think they have given us really nothing to work
7 with on how to figure that out on. It is a case-by-case
8 determination which generally has to be made by Don and his
9 engineers.

10 The other main issue of disagreement, I guess, has been on
11 the aspect of when the same information is determined to be

12 needed in a permit, will that information always be releasable to
13 the public when it is also contained in the permit application
14 or an annual emissions report. The Agency's position has been
15 that, yes, that information, the emissions data is always going
16 to be emissions data. Now, again, in a practical situation a
17 case-by-case basis that is going to become maybe more complicated
18 decision about is the number really the same number what these
19 different figures represent. I think that comes from two aspects
20 of the language. One, being that if something is determined to
21 be emissions data how can you say now that it is not. The other
22 would then go back to the interplay between what is a trade
23 secret and what is emissions data.

24 I think that the Agency feels that once the information has

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1 been released to the public as emissions data, it can no longer
2 be said to have met the definition of a trade secret. When it
3 has been released to the public it no longer has been protected
4 and probably -- most likely in most situations you are not going
5 to have to meet the definition because it will no longer have
6 been properly protected from release to the public. So if you
7 have any other questions --

8 MR. SUTTON: By way of introduction, I have a dual role.
9 One, I am responsible for all of the analysts that issue the
10 permits and I am also responsible for the bureau' FOIA
11 activities. So I am stuck in the middle of both of those

12 activities.

13 MS. WILLIAMS: Don has a lot of practical experience on how
14 this works. I think if you want to review some of the examples
15 that IERG went through with you, I think he can give you a lot of
16 insight to the practical matter on how these decisions are made.

17 BOARD MEMBER KEZELIS: Okay. Let's go ahead. Can you walk
18 me through what your preferred process would be when material
19 submitted to the Agency, substantially or completely in
20 compliance with trade secret markings, so completely in
21 compliance for your purposes -- well, actually, let's assume
22 substantially in compliance for your purposes. And shortly after
23 receipt of the material by the Agency a FOIA request is made, but
24 for trade secret that material would be disclosable under FOIA.

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1 The question is trade secret.

2 MR. SUTTON: Well, the problem that we historically have
3 had and to some extent the problem we will have in the future, is
4 the definition of what can be a trade secret depends on its
5 outcome in the permit. The Board's decisions to date have
6 somewhat supported that is necessary to determine. And so we are
7 not, as a permit analyst, or as the permitting side of that, able
8 to do that determination until such point as I am at a position
9 to issue the permit.

10 BOARD MEMBER KEZELIS: Okay.

11 MR. SUTTON: In a construction permit, that particular time
12 frame would be within 90 days. I usually have to reach a
13 decision with that even if I am going to notice so I can get it
14 from that. Under Title 5, unfortunately, I have a considerable
15 backlog that I have had for in some cases close to four years
16 now. I only have a third of those issued. So I have a stack of
17 700-some Title 5 applications that have confidential information
18 in them that is just sitting there unperfected. I will not be
19 able to perfect that until such time as I am ready to issue that
20 Title 5 permit.

21 So to answer your question, what we do today is when we get
22 a claim we write back within a seven day period that there is an
23 unperfected claim of trade secret in this document. We will
24 issue the public document but until we are able to determine the

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1 trade secret status of that, we are not able to release it. So
2 it basically puts it in a black hole until the permitting
3 activity catches up with the process of that permit. What we do
4 release is the public information copy that is also provided.

5 Now, to get a little bit off the subject, under
6 substantial, we agree that there can be mistakes made in filing,
7 but if somebody claims as a mistake that they failed to stamp a
8 page as trade secret and gave it to me as a public document, that
9 is out the door. That is one thing that I cannot read their mind
10 and determine, well, they should have, could have, or would have,

11 but they didn't. So if they give me a public copy, that public
12 copy is out the door. I cannot be in a position where I can --
13 if I can't release that to the public, then they are not getting
14 anything.

15 MS. SCHROEDER: I have to preface that Don is speaking for
16 the bureau of air. There is a lot more to the Agency than the
17 bureau of air.

18 MR. SUTTON: That is true.

19 MS. SCHROEDER: And other parts of the Agency do it
20 differently. The bureau of land, for instance, because we get --
21 the bureau of land gets a lot of documents in and a lot of FOIA
22 requests. We have in excess of 1,000 FOIA requests a month. It
23 is not possible for us to delay determinations and be anywhere
24 near what FOIA demands. Unfortunately, FOIA does not say, oh,

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1 you don't have to meet the seven and seven if you have other
2 procedural rules that say otherwise.

3 So what we do in the bureau of land, resources allowable,
4 is when the document comes in and it is marked in any way,
5 whether trade secret or confidential or, you know, any of those
6 buzz words, we will send out a request for a justification. So
7 that we need to process those documents further up front or we
8 can't meet certain deadlines, FOIA being one, administrative
9 records being two, and there are a number of other situations

10 where the Agency needs to produce documents. If we can't produce
11 those documents, then the Agency is penalized in some way for not
12 being able to do that.

13 So Don is dealing with one problem that we have had with
14 these rules and really even with our FOIA regulations, is that
15 there are different bureaus and divisions of the Agency and they
16 have different requirements as to what they need and don't need
17 and can and cannot do with these documents. That is why we tried
18 to put as much flexibility as we could into these rules so that
19 Don can meet his programmatic needs, but the bureau of land may
20 have other programmatic needs, so that we need to have the
21 flexibility to meet those needs as well.

22 So that's what they are doing in the bureau of land whether
23 it was a permit application or a clean up site, is they would try
24 to push that determination up front as much as possible. If the

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1 justification was not there, if a waiver came in, for instance,
2 then we would send out a letter asking for their justification
3 and then we try to process that as soon as resources would allow.

4 BOARD MEMBER KEZELIS: Okay. Thank you.

5 MR. SUTTON: So there is clearly a difference in the
6 process between the bureaus. Mine is somewhat compounded in that
7 historically and even in the future until it is determined what
8 that permit will look like, I cannot, in exact confidence, say
9 what is or is not a trade secret. The industry, and I would

10 support that position on their side, that we will always error on
11 the conservative side, so they will tend to claim as much as they
12 think is reasonably possible to do that.

13 There is information on the application that we ask for
14 that addresses a process that we don't ultimately use in the
15 permit. We ask what their maximum rates of production are, what
16 their typical rates are, and what they would like to be limited
17 to. So we have more information in the document than ultimately
18 we show in the permit. So we and IERG are in agreement that are
19 things submitted to us that goes beyond what is necessarily
20 ultimately to write that permit. So we have agreed that what
21 actually shows up in the permit itself should then, obviously,
22 become public information. We may have a slight difference of
23 opinion on the level that goes in that permit and we will
24 probably always have that.

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1 I don't necessarily agree with the example that they
2 provided. In fact, when you have four parts in the equation and
3 you release three of them, the fourth is obvious, so there is no
4 sense to protect it in the first place. But that is just one
5 part of the application. If the 1,000 gallons per hour is what
6 they want to be limited to, they may have the capacity to do
7 2,000 gallons an hour and may typically only use 500 gallons an
8 hour, both of those would have a competitive advantage to their

9 competitors and would not be released under our scenario, but the
10 1,000 gallons would, because that is necessary to determine what
11 is enforceable as a practical matter condition. So I think we
12 are very close in that concept.

13 Again, we are little concerned on the process after we make
14 this determination what needs to be in the permit and we have
15 that understanding with the company that the permit is
16 appropriate, then we feel we maybe need to go back and release
17 that portion of the trade secret claim to match the permit. I am
18 not sure that is exactly what IERG has in mind. But we don't see
19 how once we put out in the public domain a number, if it exists
20 wherever it exists, it has to be public information. It has now
21 been released. So it would not meet one of the claims or one of
22 the -- I guess the concept of trade secret is that it is not
23 known information. So once we release it, then it becomes known
24 information and then we don't understand how the company can then

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1 say it has not been released otherwise.

2 CHAIRMAN MANNING: But you would agree that you can't
3 release it as known information if the trade secret determination
4 is requested and it has not been made, then the Agency would
5 first have to make a determination of the trade secret before it
6 would put the number out there.

7 MR. SUTTON: Right. See, that is what makes the whole
8 processing very complicated because basically when we reach the

9 appointed time of agreement on a draft permit with that
10 information in it, then we also have to reach an agreement that
11 it is no longer a trade secret. So both have to be done
12 simultaneously.

13 BOARD MEMBER KEZELIS: Mr. Sutton, can you estimate the way
14 Ms. Schroeder did, how many FOIA requests your bureau receives?

15 MR. SUTTON: We receive approximately 200 FOIA requests a
16 month and we allow multiple requests per -- multiple sources per
17 request. So we typically keep track of how many FOIA requests we
18 get and how many sources that impacts. The number of sources it
19 impacts a month is roughly 275.

20 MS. SCHROEDER: The number of sources for the bureau of
21 land would be considerably less than 1,000. The 1,000 number
22 that I received from the bureau of land was the number of -- they
23 are counting each individual request, but each request from Mr.
24 Brown could have four sites that he wants to see.

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1 BOARD MEMBER KEZELIS: I understand.

2 MS. SCHROEDER: So we could multiply between 1,000 and
3 4,000 actual sites, but the number of paper requests coming in
4 are 1,000.

5 CHAIRMAN MANNING: Has it been your experience at the
6 Agency in both your bureaus, as suggested and understood by IERG,
7 that the requestors are more often from competition than they are

8 from the general public?

9 MR. SUTTON: We provided that information to IERG, and we
10 basically did three types of -- the predominant requests we get
11 are from competitors, litigants in lawsuits and what we call
12 vendors. So those are where the predominant requests are, with
13 the vendor being the guy that sells boilers and would like to
14 know who uses boilers within the state, so give us the list of
15 boilers greater than 10 million BTUs in the state. So those are
16 the ones that we normally get along this line.

17 When the public asks for information they are usually very
18 satisfied to get a copy of the permit and what the annual
19 emissions are and they do not necessarily ask for the application
20 itself. So they just rely on the permit and quit there.

21 CHAIRMAN MANNING: When you say public, you mean the
22 environmental organizations, the Sierra Club or whoever?

23 MR. SUTTON: Right. They are predominantly happy once they
24 get the permit. And they ask us for annual emission reporting

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1 information and we give back the summary of that on what is the
2 annual emission. So they like to know what the permit allows and
3 what they have been doing, and that is how it historically has
4 been done and they have been satisfied with that.

5 MS. SCHROEDER: Don seems to satisfy them a lot. In the
6 bureau of land we are dealing with clean up sites and we have a
7 lot of citizen interest, a lot of Sierra Club and environmental

8 group interests. We have interests from everywhere and they want
9 all kinds of information on the landfill or the clean up. We
10 have the U.S. EPA wanting information. We get requests from
11 everywhere. I think that Don's top three would probably be our
12 three, but a very close fourth would be this other group. And
13 they are very interested in specifics, and they will come in and
14 they will sit there and will review a file for a week. They
15 won't just take a permit and go home.

16 BOARD MEMBER KEZELIS: These are neighbors or residents?

17 MS. SCHROEDER: Right, or people who have had cancer and
18 are trying to figure out what the source is, and groups through
19 siting, you know, they want to see what the company has done in
20 another location if they are planning on siting in their
21 neighborhood or whatever. There is a wide range of people that
22 come in to the bureau of land.

23 MS. WILLIAMS: I would like to point out really quickly,
24 too, that even though we are definitely in agreement with IERG

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1 that at this point in time citizens do not have a lot of interest
2 in this type of information, the Clean Air Act envisions that
3 public citizens will have the ability to enforce the Clean Air
4 Act in the same way that the Clean Water Act permits have been
5 enforced. The issue that has been a problem with, you know,
6 getting these permits through the U.S. EPA is that you can't

7 necessarily just look at a number on the permit and look at the
8 actual number and get back to what it takes to enforce a permit.

9 In the same way that in a water permit effluent data is
10 also releasable. But effluent data is just the number of what
11 comes out of this pipe. But in the air context we are talking
12 about calculations, and you have to go through -- it is not an
13 actual number very often, what is actually coming out of the
14 stack. It is a number that is calculated and a lot of things are
15 gone through that at this point in time most citizens in Illinois
16 probably would not even know how to begin to do that, actually do
17 it as a practical matter. But in terms of the statute and what
18 the U.S. EPA expects our permitting decisions to incorporate,
19 that should be a practical possibility.

20 HEARING OFFICER SUDMAN: Yes, Kathleen?

21 MS. CROWLEY: There are a couple of questions that this
22 sequence raises for me. We have got some good data from the
23 division of air and land. Is it that trade secret protection is
24 not an issue in the division of -- excuse me -- the bureau of

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1 water or public water?

2 MS. SCHROEDER: No, I think it is an issue throughout the
3 Agency, but you have your top hitters here. Air and land get
4 probably the most requests of anything. The other divisions are
5 lesser, not unimportant, but lesser in volume.

6 MS. CROWLEY: Okay.

7 MR. SUTTON: Along that lines, having what has been the --
8 from the section manager of public water supply, they deal
9 predominately with municipalities and they do not get a lot of
10 trade secret type of information sent to them in the first place.
11 So that is not a big issue with them, nor do they even get a lot
12 of confidential business information because it is municipality
13 owned, more or less. The waste water side, they would have some
14 trade secret claims under pretreatment type ordinances, some
15 information like that but, again, they don't have the volume of
16 FOIA requests that we do, and we don't have the volume they have.

17 MS. MORENO: Speaking for water, just briefly, most of
18 the -- that I am aware of in, you know, the last few years, we
19 also have the -- not so much the competitors, a lot of vendors,
20 but we also now are having more and more FOIAs from the
21 environmental groups because there are a number of issues that
22 are being raised and a lot of this is in terms of, you know, in
23 connection with NPDES permits and send us everything you possibly
24 have on every facility that could possibly be like this. So a

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1 lot of it -- you know, there is a certain amount of bulk there.

2 But in terms of trade secrets, the truth is water treatment
3 has been standardized for a long time and so that there really
4 isn't anything out there in terms of business competition that
5 would be of particular interest. I mean, that's my

6 understanding, is that it is a very, very understood process.
7 You do it one of four ways. Nobody is using any new bugs these
8 days, that I know of. So it is just -- right now the focus is
9 much more public and environmental groups and looking at specific
10 pollutants and specific situations. I think a lot of that has
11 come up because of the recent changes that allow for the third
12 party appeals. So we get a lot of hunting around to see if
13 somebody, you know -- if there is something that somebody wants
14 to appeal. Frankly, that's the bulk of our FOIAs right now.

15 HEARING OFFICER SUDMAN: Yes, Kathleen?

16 MS. CROWLEY: I would like to, again, touch briefly on the
17 guidance or lack of guidance from the U.S. EPA on the whole
18 emissions data definition issue, which IERG addressed in what has
19 been marked Public Comment Number 15 and is roughly pages three
20 to seven. Is there any additional guidance you think that the --
21 that the Agency thinks that the Board should be looking at in
22 addition to what IERG has cited to us? I mean, I realize you
23 don't agree with their characterizations.

24 MS. WILLIAMS: Oh, and I wouldn't even say completely

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1 disagree with their characterization. But there is one guidance
2 document that I think -- I don't know that we cited also, but it
3 is the 1991 Federal Register that deals specifically with what
4 fields and their sort of computer codes are always going to be
5 emissions data. It has been helpful to us in our own computer

6 codes and our own permitting lines, you know, telling us what is
7 always emissions data. And in my reading of the other documents
8 that were cited, they were not documents that I looked at when I
9 was researching this issue because it is not the main focus of
10 the NOx SIP Call and that sort of thing. I didn't see much that
11 was helpful at all in there. It is not that I disagreed. It
12 talked about it, but it really was not helpful to me. And I have
13 not found anything else that has been helpful at all. There have
14 been a lot of articles that suggests that the U.S. EPA is also
15 going to look at this issue in the future and come up with
16 something, but I don't think there is a lot out there. If you
17 find anything, I would love to see it.

18 CHAIRMAN MANNING: So you basically agree that what was
19 cited by IERG is pretty much the place to look?

20 MS. WILLIAMS: Yes.

21 CHAIRMAN MANNING: Okay. Thank you.

22 HEARING OFFICER SUDMAN: Anybody else?

23 BOARD MEMBER KEZELIS: Yes. Have you had an opportunity to
24 review the approach that IERG suggests with respect to trade

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1 secret claims pending as of the effective date of the new rules,
2 that material for which a trade secret claim has been made, the
3 process has not yet been completed, and I am sure there are many,
4 many, many documents in that situation.

5 MS. SCHROEDER: I think there, at least from the bureau of
6 land's standpoint, we are in agreement with IERG.

7 BOARD MEMBER KEZELIS: As to unlimited waivers?

8 MS. SCHROEDER: Yes, that would be fine. I think an
9 important area of agreement that we have is that until we make a
10 determination we will keep the article as if it were determined
11 trade secret. That would be across the board.

12 BOARD MEMBER KEZELIS: Okay.

13 MS. SCHROEDER: The bureau of land is going to try to and
14 it has made substantial efforts in going back and cleaning up, if
15 you will, the documents that have been submitted prior to you
16 acting on this part.

17 BOARD MEMBER KEZELIS: Material in the pipeline, as it
18 were.

19 MS. SCHROEDER: Pardon me?

20 BOARD MEMBER KEZELIS: Material in the pipeline, as it
21 were?

22 MS. SCHROEDER: Right, exactly. I think the bureau of air
23 has a unique permitting situation there which is going to create
24 some complications. I think the whole Agency as a whole is

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1 trying very hard to deal with these documents right up front
2 before complications arise. I have been involved in a number of
3 them where years have gone by. The company doesn't even know
4 what it has that is a trade secret, which if you were trying to

5 get a date certain we would have probably thousands, hundreds of
6 thousands of FOIA requests from companies themselves because they
7 don't realize what they have with the Agency that they have
8 marked or not marked. Then we run into problems with the
9 companies because the people that made the initial decision are
10 no longer with the company, and then they are trying to recreate
11 why it was even determined a trade secret in the first place.
12 And it just -- it creates a situation where we have a document
13 nightmare at the Agency. So we are trying to -- at least at
14 various parts of the Agency where we can, we are trying to deal
15 with those documents as soon as possible.

16 MR. SUTTON: I brought some pictures, which I will leave
17 with you. This is the Staley's Decatur facility. This is their
18 historic operating and construction permit stack of files. There
19 is three different shots. And this is I think probably the nine
20 volume set of their Title 5 applications. So along those lines,
21 this is basically from 1972 to current, and that is operating and
22 construction permits of which some have been perfected and some
23 have not. And the other -- when the company would ask for a
24 construction permit oftentimes it would ask to be incorporated

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1 into the existing operating permit. The operating permit ran
2 every five years. Staley's actually had at one time 263 separate
3 operating permits. They did things a little different than most

4 people. They got a construction permit and then an operating
5 permit.

6 But they would always claim whatever material I presented
7 previously is trade secret and I want to incorporate it in this
8 way, so they would tie them all together. So every -- you know,
9 they don't go back and tell us what it was. They would say if I
10 claimed something previously, please keep it that way. So if
11 they were forced within 180 days, or we were, to come in and
12 clean up that file, I would say we would have to have reserved
13 parking for all of the attorneys to come go through all of the
14 files, because that's what they would have to do. They have no
15 idea what they have claimed. So we agree that we would like to
16 keep that as trade secret until there is a point in time where
17 there is a FOIA request and then have them clean it up and
18 release it that way.

19 MS. SCHROEDER: We do also have a problem with the
20 substantially, which was touched on once before. It is very hard
21 for the Agency, when you are trying to push that kind of paper,
22 to determine what is substantial compliance. If our decision is
23 appealed then you have further delays in producing that document
24 either to the public, a judicial body or to an administrative

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1 body. There are a number of instances that I can think of where
2 they might not have a claim letter, they might have a document
3 marked but it is not marked on the front. It is only marked as

4 you get into the documents, each individual page.

5 As you are going through files like you have seen in the
6 pictures and you have a seven or a fourteen day deadline, we
7 can't examine each piece of paper. The rules, both the FOIA regs
8 and these regs are designed so that when we look at a document it
9 is clear on the face of it what the intent of the party is. I
10 have counseled many times that we cannot second guess the intent
11 of a party. So we really need to have it marked properly. I
12 don't feel the rules are onerous. It is a letter simply
13 identifying what the document is that you are claiming, the
14 document itself properly marked and then generally we get
15 waivers. We do not get justifications. I don't think it is that
16 onerous. If, in fact, the material which I believe is very
17 sensitive, competitor sensitive, then I would think that the
18 companies would go that small amount, in my opinion, to have it
19 protected, at least identify it properly so that we know what to
20 do with it. I believe that the word substantial is going to
21 create a lot of appeals and it is going to be a long time before
22 that word substantial is really flushed out for all parties. I
23 see that as a problem for the Agency in resources. I see that as
24 a problem for industry in that they will not have certainty as to

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1 what is substantial and what isn't in the information that they
2 obviously feel is worth a lot of money to them.

3 It is going to create a lot of work for the Board, because
4 sooner or later that word will need be flushed out. And then
5 hopefully it is flushed out in enough detail that we can pass
6 that along to all of the people that are working in all of these
7 different bureaus and divisions so that we are all doing it the
8 same way with these fine lines. So I would just encourage as
9 bright a line as possible on that one. I think it will save a
10 lot of work for everyone in the long run.

11 MR. SUTTON: Another thing that -- I don't know if -- I
12 think land probably runs into this, too, but the bureau of air,
13 the application itself is more or less a starting point in the
14 journey. It is not the end point. The company has a strong
15 desire to build something, they know that. They know what the
16 current emissions are. They want to build that in the most
17 expeditious way that keeps them in compliance. So oftentimes we
18 have to come back to them and say, well, the 1,000 gallons an
19 hour you proposed will not make it because you will trigger PSD
20 or you will start a new source review. So they say, well, can we
21 cut it back. So we start beginning the negotiations and we end
22 up with a number, and the number may end up being 870 gallons an
23 hour, and that's a number that equates to less than a 25 ton
24 increase and it keeps them out of new source review. So that's

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1 the process. So the application is growing. Similarly, in our
2 Title 5 applications now that are four years old, once we start

3 reviewing them, oftentimes the first thing that the company says
4 is will you please send that one back and we will give you a new
5 one.

6 So what we have -- we cannot do that currently, but we say,
7 well, just send us another one and we will keep both sets. So we
8 have complete redoing of those nine volumes because, again, the
9 company's outlook on things has changed and the personnel has
10 changed and oftentimes those are submitted by consultants because
11 of time crunch and then they say, well, if we had time to look at
12 it differently we would not have presented it in that fashion.
13 So we are getting complete rewrites of those Title 5 applications
14 and they are actually getting better. So we not complaining
15 about that. Again, we have this large stack of information with
16 a lot of claimed trade secret in there because most of the
17 information we ask for is related to their production, use of raw
18 materials and capacities, and so they have the desire, and
19 rightly so, to claim a lot of that as trade secret. So we are
20 getting trade secret piled on to trade secret and piled on to
21 trade secret. And we are not in a position to then decide truly
22 what is necessary to the public until we have that permit
23 drafted.

24 MS. WILLIAMS: On that point, really quickly, I think that

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1 though it was not covered in the comments that I know of, the

2 Agency agrees with IERG that it is desirable to have this give
3 and take back on forth on the trade secrets because like Don
4 said, that is how the permitting works anyway. But I don't agree
5 that the scheme presented in terms of the deadlines or when we
6 have a FOIA request and there is a claim pending, where they ask
7 to have 45 days to respond and all of that, I think that those
8 narrow dates that were presented -- the broad dates, I guess, the
9 specific time lines and the length of those are a little bit too
10 far in countervailing the needs of FOIA and the need to try to do
11 it as quickly as possible to come to some resolution that will
12 lead to a response under FOIA. I don't know that we presented a
13 better counter, either, but it is definitely a balance that needs
14 to be struck.

15 HEARING OFFICER SUDMAN: Does anybody have anymore
16 questions for the Agency?

17 BOARD MEMBER McFAWN: Oh, I did. I was thinking about what
18 she just said, so give me a moment.

19 Mr. Sutton, I think it was in your comments that you filed,
20 you, at page four, said that the Agency and industry groups are
21 in agreement that information that must be contained within a
22 permit will constitute emission data and, therefore, be
23 releasable to the public. Then you go on to say, it seems clear
24 to the Agency that once a permit has been issued this information

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1 is also releasable when it appears in a permit application or an

2 annual emission report.

3 When I read the language that Ms. Williams presented in her
4 comments, I was under the impression that the supporting
5 information that was used to determine the emission rate, for
6 example, must be contained in the permit before you release it.
7 But based on your comment, it sounds to me like you are going to
8 release the permit application and the annual emissions report
9 and the information contained in there if it was used to develop
10 the number in the permit. So I am wondering which route do you
11 want us to go or does the Agency advocate?

12 MR. SUTTON: Well, I guess my logic is -- and, again, we
13 can argue with the company and/or IERG on what level we need in
14 our permit. But we clearly think that the permit has to have
15 limitations that are enforceable as a practical matter. And
16 because of what Debbie says, you don't have direct measurement of
17 what the emissions are, we have to have the compliance
18 determination method in the permit.

19 BOARD MEMBER McFAWN: So you would put that in the permit?

20 MR. SUTTON: Right. But, again, keep in mind we have a lot
21 more information than that presented to us. So like I say, the
22 company tells us what the maximum production rate is, what the
23 typical production rate is, its average and also what is called
24 its potential to emit, which is basically the hourly rate times

1 the numbers of the hours in a year, which is 8,760. So we have a
2 whole range of numbers to choose from which may not always be
3 relevant. We figure all of that stuff can stay a trade secret,
4 but where is a number that we have to put in to assure
5 compliance.

6 So once that number is determined and then we have to have
7 a method to show that compliance. So for whatever reason you get
8 there, you have to have that in the permit. So it cannot just be
9 you are limited to ten tons a year. You are limited to ten tons
10 a year because you are going to do this and this and this to
11 assure that you are less than ten tons. Once those items are
12 identified, we feel the permit itself is a public document. So
13 all of that information is available. So you will have the ten
14 ton limit and you will have how you got there. And if how you
15 got there says you are going to take a 1,000 gallon an hour limit
16 on your usage, that then becomes public information, because it
17 is a key part of that equation. If that same 1,000 gallons per
18 hour is contained over here in the permit application, once it is
19 public information or we agree it should be public information,
20 we feel they need to release it from its trade secret claim,
21 because how can it be a trade secret over here and released over
22 here. That's what we are dealing with.

23 BOARD MEMBER McFAWN: Okay. So you would put the equation
24 in --

1 MR. SUTTON: In the permit.

2 BOARD MEMBER McFAWN: -- the permit? Okay. Thank you for
3 explaining all of that, because I wondered how you were going to
4 handle it. Then maybe you could address this from the legal
5 standpoint. Would this be an appeal as a permit or would it be a
6 trade secret appeal or both?

7 MS. WILLIAMS: Well --

8 BOARD MEMBER McFAWN: And we might also ask IERG to also
9 address --

10 MS. WILLIAMS: It has to be resolved in terms of how we
11 will process them once the rule comes out, I guess. I don't
12 think we have decided.

13 BOARD MEMBER McFAWN: Okay.

14 MS. WILLIAMS: Because we have the option of saying you
15 have claimed information on your permit that is trade secret that
16 is not sufficient for us to write a permit that is releasable to
17 the public. Therefore, we would have to deny your permit
18 application. There is no -- I mean, we could do that. That is
19 not the way we do things now. Typically we work it through. We
20 also could instead, then, issue a trade secret denial saying this
21 information is not trade secret because it is emission data and
22 it must be contained in the permit. I think that's the way the
23 legal department envisions it working. And then the time period
24 to appeal would run. Then after the appeal period on the trade

1 secret determination had run, you would go forward with issuing
2 the draft permit to public notice and you would know what was
3 protected now and what wasn't. Does that make sense?

4 BOARD MEMBER McFAWN: Yes, it does. Thank you.

5 MR. SUTTON: One point of clarification. We have roughly
6 8,500 sources in the State of Illinois that have an air permit.
7 Very few of them have trade secret claims in them. We have 760
8 sources which are Title 5 sources, which are the largest
9 industries in the state. And probably in air only 400 or so have
10 actually claimed trade secret. The other 300 have not. But it
11 is the very largest sources and the most articulate and legally
12 represented sources that have that. And the people we have most
13 of our permits with are those large sources. Again, it is not a
14 universal problem throughout all of those sources because most of
15 them don't understand or don't care that those limits are there.
16 But it is very critical to the larger sources in the state that
17 this information be claimed, and they are very protective of
18 that. So, I mean, the appeals we have had today on trade secret
19 have not been on how we have dealt with the trade secret and the
20 permit -- I mean, the application, but how we have dealt with it
21 in the permits.

22 BOARD MEMBER McFAWN: I have kind of a similar question.
23 You mentioned the public information copy is often provided as
24 part of the permit application; is that right? Is that what you

1 were saying?

2 MR. SUTTON: Well, when somebody submits to us a trade
3 secret application, they also have to provide a public
4 application at the same time. So basically what they do is
5 submit an application with all the stuff we wanted marked trade
6 secret and circled and indicate what they want claimed as a
7 trade secret and then they give us a public copy where those
8 things are left blank, and the cover page basically says blank
9 information has been claimed trade secret.

10 BOARD MEMBER McFAWN: All right.

11 MR. SUTTON: And we provide that to the public. So we get
12 dual copies.

13 BOARD MEMBER McFAWN: Does the bureau of land get that type
14 of package?

15 MS. SCHROEDER: I can't say that every single thing that
16 comes in. They are all different. But, yes, a lot of times we
17 will have a document claimed trade secret with the trade secret
18 information in it, and then we will have what we call the
19 sanitized version where the trade secret information has been
20 lifted, but there is still some information there that we can
21 provide to the public. If we go ahead and ask for the
22 justification and we agree with the company then that is real
23 handy for us, because if we have a FOIA request we get the
24 sanitized version. And if it does not work out that way then

1 other documents have to be created. But, yes, I have seen that a
2 lot of times, and I have also not seen that a lot of times.

3 BOARD MEMBER McFAWN: Okay. Thank you.

4 MS. WILLIAMS: And that's you what envision, correct, I
5 think, in your proposal, that they submit a second copy?

6 MS. SCHROEDER: Right. Yes, that really helps.

7 BOARD MEMBER McFAWN: And it is being done in practice?

8 MS. SCHROEDER: Yes.

9 BOARD MEMBER McFAWN: Okay. Thank you.

10 HEARING OFFICER SUDMAN: Anything else?

11 CHAIRMAN MANNING: Yes, I do. So going back to Ms.
12 Hirner's equation, "A" plus "B" plus "C" equals the emissions
13 data, Ms. Hirner has set us up, I think, with a very nice example
14 that was easy to understand that there may be two parts of that
15 equation that would be missing because they would be claimed
16 trade secret. I think the throughput was one example and the
17 control factor was the other example. Do I hear you saying,
18 then, Mr. Sutton, that you could never see a scenario where two
19 of those parts of the equation would be claimed trade secrets? I
20 mean, it would seem to me that you could still enforce the number
21 without having all parts of the equation in the permit.

22 MR. SUTTON: Well, our practice has been and will continue
23 that we have to have the enforceable limitation in there and then
24 a compliance determination. So we, in fact, would submit in the

1 permit the equation. So the equation will always be there and
2 the listing of the component parts will always be there. That is
3 the method of the determination, because they do not have direct
4 measurement, because they don't have continuous emission
5 monitoring of that particular unit they have to have some means
6 of determination. Most of our rules are written around some
7 level of an equation and we list what the component parts are.
8 My argument is, and even the same one, is if you clearly know
9 what the emission is and you clearly know that the factors that
10 you are using is based on a U.S. EPA known factor, that is public
11 information, you have to list what the control device is.

12 Now, whether you list the actual efficiency of that, there
13 is an assumed ratio of that, and it won't take a rocket scientist
14 to figure out what the unknown component is. You know a bag
15 house is going to be 90 to 95 percent efficient. We know a
16 control device or a control flare is going to be in a 98 or 99
17 percent level. So you can quickly determine a range of that
18 throughput within ten percent, if you will. So there is no
19 particular reason to try to hide that. Again, we have not run
20 into too many sources who have said if I need that particular
21 limitation they would be unwilling to let us release that. So we
22 have not run into that particular problem to any great degree.
23 Once they want that permit, because they need to have that
24 limitation be enforceable as a practical matter to get it past

1 the U.S. EPA and to avoid enforcement.

2 So I don't think that we are particularly going to hide
3 anything in that particular shell game. But I do agree that we
4 don't necessarily have to tell them what the maximum potential to
5 emit or averages because they won't be equal to that number.
6 That number will be somewhere below the maximum, probably
7 hopefully above the average in typical but at some comfort level
8 number that they can live with.

9 BOARD MEMBER KEZELIS: Mr. Sutton, what do you point to
10 that necessitates your including all of the elements of your
11 equation in your permit?

12 MR. SUTTON: Well --

13 BOARD MEMBER KEZELIS: What drives your decision that you
14 need to have that in there?

15 MS. WILLIAMS: I think if you want a detailed explanation
16 we should maybe respond to that in writing. There are a complex
17 sort of number of guidances from the U.S. EPA that are put
18 together and it is not one clear requirement that tells us what
19 needs to go.

20 BOARD MEMBER KEZELIS: Okay.

21 MR. SUTTON: Well, yes, I agree. I mean, there are a
22 number of guidance documents under PSD and new source review
23 which say what conditions must look like to assure that and we
24 rely on those. We rely heavily on federally enforceable state

1 operating permits to put in conditions that people avoid Title 5.
2 In that particular case those limitations were sought voluntarily
3 so companies voluntarily ask for those permits with those
4 limitations in them. We issue roughly 1,800 of those and had no
5 problem claiming trade secret on any of those. Because the
6 company's desire was to avoid Title 5, they were more than
7 willing to say limit my throughput to this number to assure that.

8 In Title 5 or in the Clean Air Act permits, the cap permits
9 we call them, that we do for Title 5, again, we have to, under
10 39.5, again, put in a limitation to ensure how you are going to
11 get there. So we would also cite 39.5 of the act as giving us
12 the ability to put those conditions necessary to assure
13 compliance. But we can give you a further breakdown of that if
14 you want.

15 BOARD MEMBER KEZELIS: Okay. I think that would be
16 helpful. I think some further discussion with respect to this
17 issue that appears to be pretty central to both sets of
18 participants today would be helpful.

19 HEARING OFFICER SUDMAN: Yes, Richard?

20 MR. MCGILL: This is really a question for IERG, if I
21 could.

22 CHAIRMAN MANNING: Would you mind identifying yourself for
23 the record, Richard? I think we forgot to do that with Kathleen,
24 too.

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1 MR. MCGILL: Richard McGill.

2 CHAIRMAN MANNING: Thank you. Go ahead.

3 MR. MCGILL: The question is it sounds like there may be
4 disagreements between IERG and the Agency on what should go into
5 a permit on a given case. But once the conditions of the permit
6 are established, would IERG agree that what goes into a permit
7 should be publically available? You would not be suggesting
8 maintaining trade secret protection of those component
9 calculations once they are in a permit?

10 MS. HIRNER: No, we are not. We think there can be some
11 negotiations about what you have to go through, which the Agency
12 and the company can do, to come up with what has to be stated in
13 the permit so the permit may be enforceable. There are other
14 states -- my understanding is that there are some other states,
15 for example, that if you had "A" times "B" times "C" equaled "D"
16 in the permit, that the permit would be issued with "A" blanked
17 out and "C" blanked out. Okay. We are not contending that at
18 all. We are not saying that once a factor is placed in the
19 permit, that it should be blanked out in any way or it could be
20 claimed as a trade secret anymore.

21 What we are saying is that there are instances that numbers
22 were used to determine what those calculations should look like.
23 And, again, I have a little trouble with this because I admit
24 that I am not an engineer. I have talked with engineers who are

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1 IERG members. But, for example, let's say that in the permit
2 document itself the throughput was 850 gallons of paint. That
3 was the number that they ended up using in the permit, the
4 throughput, and the times something, times something. But that
5 in the permit application document and, again, am I sure that
6 this will ever happen? I don't know, but I understand that there
7 are instances where it could happen. That in the permit
8 application or in the application materials that went in, at some
9 point that 1,000 gallon per hour throughput number was stated in
10 the application materials.

11 That actual honest to goodness capacity that the plant has
12 is the information that is the trade secret, coupled with some
13 other things. Because I think they can do many things with the
14 calculations to make them work. I think that is probably true.
15 But whatever in the permit application and material was that
16 states what the actual throughput number is that the company
17 wants to have protected as trade secret, even though you have 870
18 gallons in a permit and that is throughput per unit, our
19 contention is that whatever throughput per unit was the number
20 used in the application to get there, that is important to be
21 protected. Or when you report the emissions in the AER report,
22 again, we are saying report those emissions but whatever
23 throughput number that was used to verify that calculation in AER
24 report that we think is important to keep as a trade secret they

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1 should be allowed to keep it as a trade secret.

2 If, for example, in the permit it came up with 870 gallons
3 per unit and the actual trade secret was 870 gallons per unit,
4 but the company agreed that it had to be put into their permit,
5 at that point it could no longer be protected as trade secret.
6 It is public information. I think that, you know, if we are
7 looking at you have 8,000, or 8,500 permits and you have 750 big
8 emitters and you have 400 where this is an issue, and Don has
9 said when they negotiate with the company if it has to be stated
10 in the permit it has to be stated in the permit and we agree that
11 is it. But if the number is any way, shape or form different in
12 that application then it is true trade secret. The way it is in
13 that application or the way it is in the AER report need not be
14 released. It can be protected as trade secret. The number that
15 is released to the public is the number they are using in the
16 application. Does that make sense?

17 MR. MCGILL: Yes. Thank you.

18 MS. CROWLEY: And then just to play this through
19 administratively, let's assume that the permit -- at the end of
20 the permit application process the permit is denied for whatever
21 reason. Is it your position, then, that any information in the
22 application that has been claimed as a trade secret remains as a
23 trade secret?

24 MS. HIRNER: Yes. It has been denied. So, obviously, that

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1 information has never been released.

2 MS. WILLIAMS: Can I follow-up, please?

3 MR. SUTTON: Let me just add one quick comment to that. We
4 could have a situation where we and the company agreed to take a
5 permit to public notice, and once it is in public notice then it
6 is public information. For whatever reason information can come
7 forward through the hearing process would force denial of the
8 permit and we would have already release the information. That
9 is rare but, I mean, that would be one caveat to that scenario.

10 MS. WILLIAMS: I am not sure I understand as an
11 administrative matter how you envision enforcement cases with the
12 Attorney General before the Board working, and how would you like
13 to see the Agency treat the information in the AER that you feel
14 would be -- is still protectable. Do you still feel we have the
15 right to give that information to the Attorney General as part of
16 an enforcement case? Because they don't have these rules. I
17 don't know that these rules would apply to them.

18 MS. HIRNER: I tell you what, I will have to get -- I am
19 not an attorney. I don't understand. So, I mean, I can't even
20 follow the question. I am sorry. So I don't know what you are
21 asking.

22 MS. DRIVER: I know there is some provision in the Board's
23 proposed rule for agency to agency transfer of information. I

24 agree with you that I don't think the Attorney General is at this

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1 point included in that. Maybe that is something that can be
2 looked at.

3 MS. WILLIAMS: I don't know the answer either.

4 MS. DRIVER: Yes, I think we maybe have to think about that
5 and get back to you on it.

6 CHAIRMAN MANNING: We will look at that as well. That's a
7 pretty good issue for something for us to look at. It would seem
8 to me that if through the process it has been declared to be a
9 trade secret, that trade secret determination needs to be a
10 determination that is protected by all government entities, no
11 matter who they are. I mean, I have some concerns with the whole
12 State Records Act and Freedom of Information Act. It seems to me
13 if the Agency has declared something to be a trade secret and it
14 goes off to the Secretary of State's office in six years it
15 should still be a trade secret. The State Records Act shouldn't
16 trump and all of the sudden it becomes public information.
17 That's a concern I had even before we walked into the hearing
18 here today. So we will look at that issue as well to see that
19 interplay between the Agency and the Attorney General's office.
20 But it would seem to me that if it is a trade secret under the
21 law, it is trade secret under the law, and that ought to trump
22 any other sort of informational gathering under other laws.

23 MS. SCHROEDER: We have -- the bureau of land has a form,

24 an intergovernmental form where if a government agency comes in

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1 with a FOIA request that they sign that whatever claims that we
2 have just -- whatever claims we have accepted, that they will
3 also treat those the exact same way. But it would be nice to see
4 it in a rule.

5 MS. MORENO: I would -- something just occurred to me.
6 There is an old case involving banking where a -- it was an
7 administrative type of situation and the bank withheld certain
8 information as confidential, and did not -- it was not made part
9 of the, quote, public record. The appellate court overturned --
10 just something to think about and find that case -- the appellate
11 court overturned the determination because the appellate court
12 said in an administrative matter everything has to be on the
13 record. Since there was stuff that was withheld from the record
14 because of -- this is an old case, remember. Because of the bank
15 statutes or whatever the appellate court threw it out. So there
16 is lurking in the weeds that issue. Obviously, there are all
17 sorts of things that have been developed by the Board over the
18 years for in camera consideration, etcetera, etcetera. But I
19 would warn you that there is a case out there that has been
20 followed that sometimes people have to make a choice, and it --
21 this was a question where the bank was trying to do something and
22 it didn't get to do what it wanted to do because it was unwilling

23 to release particular information that was key -- that was
24 critical to it being allowed to do whatever it wanted to do. So

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1 that is not necessarily the situation which would apply very
2 often in what we have been discussing today, but it is one of
3 those sleepers out there.

4 CHAIRMAN MANNING: Thank you. We will look for that and I
5 am sure we will find it.

6 BOARD MEMBER McFAWN: Could you look for it as well?

7 CHAIRMAN MANNING: But we are being guided most definitely
8 by the fact that the Environmental Protection Act does allow for
9 trade secret protection.

10 MS. MORENO: Sure. I understand that. It is just that in
11 terms of straight administrative law and how -- I think I -- I
12 don't think I have ever -- I know the case, but I don't think
13 anybody has ever used it before the Board, but it is out in the
14 weeds there.

15 CHAIRMAN MANNING: Okay. Thank you.

16 BOARD MEMBER McFAWN: If you happen to find it please let
17 us know.

18 MS. MORENO: Sure.

19 MS. SCHROEDER: For the record, 2 Illinois Administrative
20 Code 1828 does not apply to trade secrets.

21 CHAIRMAN MANNING: Thank you. That helped. I have it
22 sitting right here. Good. Thank you.

23 HEARING OFFICER SUDMAN: Does anybody else have any
24 comments for the Agency, questions? I will mark your photographs

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1 as Exhibit 1 and include them in our file.

2 (Whereupon said photographs were duly marked for purposes of
3 identification and entered into evidence as Hearing Exhibit
4 1 as of this date.)

5 HEARING OFFICER SUDMAN: I would also like to clarify for
6 the record that my references to Kathleen is Kathleen Crowley
7 from the Pollution Control Board and Richard McGill, also from
8 the Pollution Control Board.

9 If there are no other questions for the Agency, thank you
10 very much. I would like to ask if anybody else has any comments
11 or questions, anything that has not yet been addressed?

12 MS. MORENO: Can we go off the record just a minute?

13 HEARING OFFICER SUDMAN: Sure.

14 (Discussion off the record.)

15 HEARING OFFICER SUDMAN: Okay. We are back on the record
16 now.

17 We will entertain one more comment regarding tax
18 certifications by the Agency.

19 Would you please identify yourself again for the record.

20 MS. MORENO: Thank you. My name is Lisa Moreno. I am an
21 attorney with the bureau of water, and I am the attorney who

22 reviews tax certifications for the bureau of water.

23 As a preface, I would like to say that tax certifications,
24 as the Board knows, are a create of the Property Tax Code.

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1 However, there are two more taxing statutes which are relevant,
2 the retail occupational tax and also the use tax. Both of those
3 have identical language in terms of pollution control equipment
4 and the courts have construed them together. So that there is a
5 body of law out there which is not Property Tax Code law. In
6 fact, there are only two or three cases that have ever been
7 decided by the appellate courts dealing with the property tax
8 aspect of the pollution control equipment and the primary purpose
9 test. Most of the action has been in the use tax and also in the
10 sales tax, because the language is identical.

11 Now, having said that, it is important that the Board
12 understand that the tax certification process, whether done by
13 the Agency or the Board, is the first step in property assessment
14 and not an end to itself. And the process that the Board has
15 chosen, the petition process essentially, which is quite similar
16 to the adjusted standards and other shall we say deviations from
17 statutory or regulatory matters are an end process. And while I
18 am not suggesting that the petition mode is inappropriate, I
19 would like to suggest to the Board that the Board also include a
20 form which is -- and that will be made available to the Board.
21 We use an application form. This application form was developed

22 in connection with the Department of Revenue, because besides
23 these environmental related things that we are looking at to make
24 sure that this qualifies, there are such technical things as tax

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1 identification numbers and legal descriptions, and also because
2 this is the sort of beginning process of a tax assessment and the
3 whole purpose of this is to be able to be assessed at 33 and a
4 third percent of the value of the property, there is also
5 specific financial information that is in our form that the
6 Department of Revenue asked us to ask for.

7 Basically we -- what we do is we get the application, we
8 look at it, we get -- I have looked at past statistics and we get
9 a lot more applications than you might think given the fact that
10 we have only had one permit appeal in recent history -- well, one
11 permit appeal involving three permits. But, in fact, we can get
12 up to 100 applications per year per bureau of water or bureau of
13 air. The bureau of land, I don't believe has anything or I am
14 not aware of any tax certifications from the bureau of land.
15 And, in fact, when this process was first delegated by the first
16 Board to the Agency, the review was delegated to specific people,
17 to Tom McSwiggin, who is still there, and to Otto Kline in air,
18 who isn't, but Don Sutton, who is here, is sort of his successor.

19 Essentially, these applications come in with the
20 information with a portion there for a justification description

21 and whatever, and they are reviewed generally by the permit
22 analysts who are responsible for that particular type of industry
23 or maybe even the specific, depending on the company, maybe even
24 that specific company, say, if it is a large company.

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1 Now, one of the things that the Board rule seems to
2 indicate is that you anticipate that this process would apply to
3 new facilities. In fact, there isn't anything in the statutes,
4 in the taxing code, that say new versus old. And what happens is
5 there are some companies, for example, who have chosen not to
6 apply for tax relief for community relations or other reasons.
7 There are some companies who have chosen not to -- it is not that
8 they have chosen not to, it is just that they don't know about
9 it. We anticipate that with the electric deregulation and all of
10 the sales that have gone on there is a company and I am not sure
11 which one, but there is one of the utilities which, as a matter
12 of public policy, did not seek tax certifications. Now, a lot of
13 their facilities have been sold. And it may well be that what
14 happens is that a new company comes in and they start to do a
15 review of their assets and send it down to the tax department and
16 the tax department says, wait a minute. You have all of this
17 stuff that you have not applied for.

18 So it is possible that you will get applications for
19 preexisting equipment, the people just didn't realize was
20 possible or where they hadn't chose. Most of the tax

21 certifications are routine. They are equipment that we see all
22 of the time in air, bag houses, things like that. In water there
23 is a certain amount of industrial types of equipment, but also
24 where we have -- where we have had a big growth recently in the

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1 last few years has been hog lots, those types of things, where
2 the lagoons are treated as pollution control equipment and things
3 like that. Then the farm chemical operations, where the Board
4 recently found that the housings around the places, the FS feed
5 places where farmers go in and get fuel to use in their tractors,
6 where those are covered.

7 Every once in awhile we do get things that don't fall into
8 neat categories. In that case what we do is what I can only
9 refer to as is it bigger than a bread box test. The courts
10 have -- there is a wide spectrum, basically, of decisions in
11 terms of individual situations. As you know, researching the
12 individual situations is more difficult than a principle of law.
13 But the courts have said basically things that -- for example,
14 things that are pertinent to a recognized piece of pollution
15 control equipment. One of the early cases was you had the input
16 and the output. The output piece was certified. The question
17 was, was the input piece certifiable. The court said, look, you
18 don't have output without input, so it is a pertinent. Those
19 types of things. So there is a wide range of factual situations

20 out there. As I said, most of them are pretty routine.

21 The Department of Revenue operates seasonally, which is not
22 surprising. So they basically take the position, and this is
23 another reason why we need have some sort of -- the Board needs
24 to identify date certain upon which the application, the thing is

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1 applied for, because the Department of Revenue, the certification
2 relates back to the date of application. And with our
3 application forms that has been a fairly easy way to, you know,
4 get a date stamp someplace. I would strongly encourage the Board
5 to develop a form or whatever where you have a date certain that
6 you can look at. Because this goes to the Department of Revenue
7 and then to the local assessors, and so that -- this is one of
8 those areas where I think it would be useful to have to be able
9 to have an always recognizable date because, again, this is our
10 experience with the Department of Revenue, is that, while the
11 Agency processes these things as quickly as we can, the
12 Department of Revenue does not want to necessarily see them until
13 about a month before April 15th, and this is a seasonal load type
14 of thing. So that sometimes we will submit a certification that
15 will sit over at the Department of Revenue for, you know, up to
16 ten months. But that is not something that guides us, and I am
17 not suggesting that it guide the Board, but I am pointing out
18 that this is part of a kind of an interesting process.

19 Revenue, once the certification is done and off to revenue,

20 then revenue pretty much takes over. And revenue will track,
21 through annual reports, whether or not the company is still --
22 still qualifies for the tax certification. So that there is
23 no -- so that once it is done, it is over with as far as the
24 environmental aspect of it. And there are reviews to make sure

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1 that somebody is not claiming -- continuing to claim for a piece
2 of equipment that is gone or whatever. But that -- what I am
3 trying to say is that there is no enforcement aspect of this type
4 of thing whatsoever. It is just purely an up front determination
5 for the Department of Revenue, does this qualify or not. And it
6 is a little different because, again, since it is the beginning
7 part of a process over which we have no control or we have no
8 interest, but we are giving information to the Department of
9 Revenue that it needs since we are the beginning point.

10 Now, I will, obviously, submit all of this in writing with
11 the examples of our forms and I will also give you some -- a
12 breakdown of the types of things that we have seen before, and so
13 that you can get a good handle on this. I mean, this process
14 was, you know, statutorily delegated to the Board and the Board,
15 I think, for manpower and other types of reasons, delegated it to
16 the Agency. And because we had for many years the same two
17 people running the process and, you know, people who had
18 experience in determining, you know, whether things were

19 certifiable or not that, you know, we probably -- I dare say we
20 probably should have -- I mean, it would have been useful to have
21 some procedures that we didn't have. On the other hand, we never
22 really needed any because a lot of this is subject to
23 negotiations. I have been involved in circumstances where
24 somebody will come in and say, okay, we want to certify

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1 everything. And we have said to them, look, we don't think that
2 this is certifiable and they will say, okay, generally. We have
3 also gotten telephone calls from irate -- one of our people who
4 signed up on a tax certification got a call from an irate school
5 board member who said, well, now that you have given these guys
6 the tax certification, there go my football uniforms. The point
7 being that at the local level these things can make a lot of
8 difference, and people can get kind of involved. Now, that does
9 not happen too often. But, again, it is not an environmental
10 process, it is a taxing process. I would be glad to answer any
11 questions that you have. I just hope the Board knows what it is
12 getting itself in for.

13 CHAIRMAN MANNING: Well, you are letting us know.

14 MS. MORENO: I am not suggesting anything (laughing).

15 CHAIRMAN MANNING: I think the rules, as we crafted them,
16 though, still had Agency input, did it not?

17 MS. MORENO: Oh, they do.

18 CHAIRMAN MANNING: We are still seeking a recommendation, I

19 think, from the Agency on these.

20 MS. MORENO: Sure, sure. I mean, the thing is, you know,
21 what I have prepared is recommendations in terms of -- that you
22 should have some kind of a form and those types of mechanical
23 things. In terms of whether or not the Board should involve
24 itself in this in the first place, I mean, the Agency, you know,

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1 as far as we are concerned, you know, we have been doing this on
2 a delegation from the Board, which is certainly the Board's -- if
3 the Board is interested in doing this itself for awhile, we have
4 no problem with that. We can't.

5 It is just that it is a -- I mean, I am not trying to
6 suggest that you not do this, okay. I am just trying to give you
7 a realistic view, because this is one of those things that the
8 Agency has been doing over the years that has not really come to
9 the attention of the Board and not having come to the attention
10 of the Board I want to make sure that the Board understands that
11 that does not mean that nothing goes on. It is just that it goes
12 on in a completely different context. Certainly, the Agency is
13 there, you know, and will be there continuing to review because
14 we have the information. We have the -- and we have the
15 background.

16 Now, whether or not the Board wants to make this -- let me
17 put it this way. The level of formality that the Board wants to

18 assign to this in terms of the type of administrative process
19 that the Board thinks is important, you know, is sufficient, that
20 is, obviously, up to the Board. The other thing that I didn't
21 see in the rules is that at the end there has to be a certificate
22 that has to go to the Department of Revenue. And the rules kind
23 of end with the petition is granted or denied. Actually, what it
24 needs to end with is the certificate goes out or it doesn't. And

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1 because, again, it has been the Agency's responsibility, and not
2 the applicant's responsibility, to send the certification on over
3 to the Department of Revenue on whose behalf we are actually
4 doing this. So I hope I have given you some things to think
5 about.

6 CHAIRMAN MANNING: Yes, this was very good.

7 MS. MORENO: In terms of how to craft this process. We are
8 perfectly happy to hand it over to you, believe me.

9 CHAIRMAN MANNING: I think our concern was more in terms of
10 what the statute says in terms of obligation as opposed to --

11 MS. MORENO: Sure. I understand that. We will do
12 everything we can to assist the Board. Giving the Board the
13 benefit of our experience, given the fact that most of these
14 things are routine and given that there is a larger number of
15 them than perhaps you had in mind, in terms of documents, purely
16 in terms of docket control and other types of circumstances, I
17 mean, we can all imagine different scenarios where the Board

18 would be making the decision and, you know, with more or less
19 formal input from the Agency.

20 I think we also have to, even though very few people have
21 taken advantage of the fact that they could appeal to the Board,
22 in making the Board -- the decision being the first line of
23 decision, we are changing -- I mean, the Board was the first -- I
24 mean, legally the Board was the first line of decision and

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1 administratively the Agency was the first line of decision. Are
2 we cutting -- you know, are we giving -- are we taking away a
3 level of decision making? Do we care? And the other thing is
4 the Board has to keep in mind the appeals of these things,
5 because basically what will happen is if your decision is
6 appealed it goes through the administrative review law and off it
7 goes to Circuit Court. Because this is not -- again, this is not
8 an environmental thing from the legal perspective. However the
9 tax code works is however -- you know, the next step of decision
10 making.

11 CHAIRMAN MANNING: Except that, Lisa, all decisions of the
12 Board pursuant to the -- all decisions of the Board are under the
13 Environmental Protection Act. I mean, all decisions that we make
14 through the vehicle that is created for us are subject to review
15 in appellate court. And even though this review is pursuant to
16 the property tax appeal -- and we will decide this, obviously, in

17 a decision, you know, if we have to reach this question.

18 MS. MORENO: Sure.

19 CHAIRMAN MANNING: But it seems to me that we are fairly
20 safe that these decisions would go to appellate court and not
21 circuit court. That is an issue we need to look at but I guess I
22 am not sure that you are correct that the decision of the Board
23 on this question would go to the circuit court.

24 MS. MORENO: I honestly don't know, because there are

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1 certain decisions of the Board that -- there are -- let me put it
2 this way. There are certain aspects of what we do that are not
3 necessarily -- not necessarily everything that the Agency and the
4 Board do is appealable under the Environmental Protection Act.

5 BOARD MEMBER McFAWN: But in any case, wouldn't you agree
6 that that does not change whether the Board is the first decision
7 maker on this or the Agency through a delegation. It would still
8 take the same appeal route, either the circuit or the appellate
9 court.

10 MS. MORENO: It would take whatever appeal route. The only
11 appeal that I can think of were the school board things where
12 they were Reed Custer several years ago.

13 CHAIRMAN MANNING: That went straight to the appellate
14 court, did it not?

15 MS. MORENO: Yes. They were trying to vacate something.
16 It was a third party appeal. Again, I raised this because, to be

17 honest with you, I am not sure. Inasmuch as there is nothing in
18 the Environmental Protection Act, there is not a word in the
19 Environmental Protection Act that refers to tax certification,
20 that the Board's authority is entirely under the property code,
21 entirely under the property code, and since we don't have
22 amendments by reference, you know, statutory amendments by
23 reference, to be honest with you, I don't know. It hasn't really
24 come up. And I am not suggesting that you will have -- that, you

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1 know, when the Board takes this over that people will be
2 appealing your decisions any more than they appealed ours. We
3 just have no way of knowing that.

4 CHAIRMAN MANNING: We appreciate the update. It has been
5 very helpful.

6 MS. MORENO: Sure.

7 BOARD MEMBER McFAWN: Maybe you could provide a copy of a
8 certificate as well as your application.

9 MS. MORENO: Yes, yes, and I am going to give you an entire
10 package.

11 BOARD MEMBER McFAWN: Thank you.

12 CHAIRMAN MANNING: Thank you.

13 HEARING OFFICER SUDMAN: Anybody else? Thank you very
14 much.

15 MS. MORENO: Thank you.

16 HEARING OFFICER SUDMAN: There is no more comments from
17 anybody?

18 All right. Then I would just like to mention that we will
19 still accept public comments for a period of 21 days after this
20 hearing. Also copies of our expedited transcript will be
21 available from the clerk's office or you can download it from the
22 Board's web site in three or four days.

23 Do any of the Board Members have anything else that they
24 would like to say? Okay. Thank you very much.

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1 MS. DRIVER: Excuse me.

2 HEARING OFFICER SUDMAN: I am sorry. Yes.

3 MS. DRIVER: The 21 day comment period, is that for Part
4 130 alone or for 101 through 130?

5 HEARING OFFICER SUDMAN: No, that is for anything.

6 MS. DRIVER: Okay. Thank you very much.

7 HEARING OFFICER SUDMAN: Thank you.

8 MS. TIPSORD: Just a point of clarification. Do you mean
9 21 days from today or 21 days from the date the transcript is
10 available?

11 CHAIRMAN MANNING: Traditionally we do it from the date the
12 transcript is available, isn't it?

13 HEARING OFFICER SUDMAN: Okay. It is 21 days from the date
14 that the transcript is available.

15 Okay. Thank you very much for coming. The hearing is

16 adjourned.

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2) SS

3 COUNTY OF MONTGOMERY)

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C E R T I F I C A T E

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I, DARLENE M. NIEMEYER, a Notary Public in and for the

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County of Montgomery, State of Illinois, DO HEREBY CERTIFY that

9

the foregoing 80 pages comprise a true, complete and correct

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transcript of the proceedings held on the 10th of July A.D.,

11

2000, at 600 South Second Street, Suite 403, Springfield,

12

Illinois, In the Matter of: Revision of the Board's Procedural

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Rules, 35 Ill. Adm. Code 101-130, in proceedings held before the

14

Honorable Carol Sudman, Hearing Officer, and recorded in machine

15 shorthand by me.

16 IN WITNESS WHEREOF I have hereunto set my hand and affixed
17 my Notarial Seal this 12th day of July A.D., 2000.

18

19

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Notary Public and
Certified Shorthand Reporter and
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