

1           BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5 IN THE MATTER OF:

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7 REVISION OF THE BOARD'S           R00-20

8 PROCEDURAL RULES: 35 ILL. ADM.   (Rulemaking - Procedural)

9 CODE 101-130

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13       Proceedings held on April 11, 2000, at 1:40 p.m., at the

14 Illinois Pollution Control Board, 600 South Second Street, Suite

15 402, Springfield, Illinois, before the Honorable Carol Sudman,

16 Hearing Officer.

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21       Reported by: Darlene M. Niemeyer, CSR, RPR

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1                    A P P E A R A N C E S

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Members of the Board:

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4 Claire Manning, Chairman

5 G. Tanner Girard

6 Elena Kezelis

7 Samuel T. Lawton, Jr.

8 Marili McFawn

9 Nicholas J. Melas

10

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Staff Members of the Procedural Rules Committee:

12

13 Kathleen Crowley

14 Amy Jackson

15 Richard McGill

16 Marie Tipsord

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1 INDEX

2 WITNESS PAGE NUMBER

3

4 DEIRDRE K. HIRNER 9

5 LISA MORENO 16

6 SUSAN SCHROEDER 19

7 JAMES T. HARRINGTON 22

8 THOMAS DAVIS 25

9 DIANNA JAGIELLA 38

10

11

12 EXHIBITS

13 NUMBER MARKED FOR I.D. ENTERED

14 (No exhibits were marked.)

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1 PROCEEDINGS

2 (April 11, 2000; 1:40 p.m.)

3 HEARING OFFICER SUDMAN: Good afternoon, everyone. Thank

4 you for coming here today. My name is Carol Sudman. I am the

5 Hearing Officer in this proceeding, entitled, In the Matter of:

6 Revision of the Board's Procedural Rules, 35 Ill. Adm. Code

7 101-130, which the Board references as Docket Number R00-20.

8 Please indicate Docket Number R00-20 if you submit any

9 information regarding this proceeding.

10 Because the opinion and order are rather lengthy in this

11 rulemaking, we have set out a couple of copies over there. If

12 you don't have one already, please feel free to pick one up.

13 This is all on our web site or if you would like a paper copy,

14 please feel free to contact me.

15 We have also put out additional sign-up sheets for the

16 notice and service lists. If you -- we are not using the notice

17 and service lists for the 1996 proceeding, so if you want to

18 receive information for this rulemaking, please sign up, if you

19 have not already done so.

20 The Board has set June 1st as the cutoff date for filing  
21 written comment. We hope to file the rules for second notice by  
22 July 1st, and we are willing to extend these dates if there is  
23 any interest in doing so.

24 Today is the first of two hearings that we will be holding

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1 on this matter. The second hearing will be in Chicago on  
2 Thursday, May 4th, at 1:30 p.m., in room 940 of the James  
3 Thompson Center. The purpose of today's hearing is to provide  
4 you with an opportunity to ask questions about the proposed rules  
5 or to offer any comments.

6 Witnesses will not be sworn in or subject to cross  
7 questioning, but the Board Members may ask questions to further  
8 understand your question or comment. Any suggestions that you  
9 may offer today to change the language of the proposed rules will  
10 not be decided at this hearing, but the Board will consider them  
11 and respond to them during the first notice period.

12 I would like to present the Board Members with us here  
13 today. Seated on my right is Chairman Claire Manning.

14 CHAIRMAN MANNING: Good afternoon. Hello.

15 HEARING OFFICER SUDMAN: Also present are Board Members  
16 Tanner Girard, Elena Kezelis, Marili McFawn.

17 BOARD MEMBER McFAWN: Good afternoon.  
18 HEARING OFFICER SUDMAN: Board Members Nick Melas and  
19 Samuel Lawton.  
20 Chairman Manning, do you have any comments at this time?  
21 CHAIRMAN MANNING: I do. Thank you, Hearing Officer  
22 Sudman.  
23 I just want to welcome everyone to this proceeding and to  
24 this, the first of two hearings, as Carol said, which would be

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1 held during our first notice procedure.  
2 These proposed rules, as you might know, are the result of  
3 many, many hours of staff time and Board Member hours that we put  
4 into coming to the first notice provisions and proposal that we  
5 have before you today. Since we originally proposed these new  
6 Procedural Rules in what now used to be Docket Number R97-08 for  
7 public comment, we have spent much time in discussions and  
8 deliberations regarding the very many good comments we have  
9 received from the regulated community, from various law firms who  
10 practice before us, from the government entities charged with the  
11 implementation and enforcement of the Act, particularly the  
12 Environmental Protection Agency and the Attorney General's  
13 office. We also received comments from the Illinois State Bar  
14 Association and the Chicago Bar Association.

15 We thank all of you and all of those entities for all those  
16 good comments that we received. Those comments have really  
17 allowed us to present the public and you with a product which we  
18 hope would increase our efficiency and the order in which we  
19 process cases before the Board.

20 I also would like to at this point take time to thank and  
21 recognize the members of our staff who have basically served as  
22 the Board's internal Procedural Rules Committee, if you will. To  
23 my left, the Hearing Officer, Carol Sudman, who is my Attorney  
24 Assistant in the Springfield office, was on that committee, as

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1 were the four staff people you see before you. Kathleen Crowley,  
2 our Senior Attorney in our Chicago office. Richard McGill, now  
3 our Senior Attorney for Research and Writing. Marie Tipsord, who  
4 is Board Member Girard's Attorney Assistant. And Amy Jackson,  
5 who is Board Member Kezelis' Attorney Assistant.

6 In addition to their fine efforts, the Board Members also  
7 have had significant input in the first notice proposal before  
8 you today. Specifically Member Kezelis and Member Girard are  
9 sort of on the Board drafting team, the three of us, in terms of  
10 presenting this to the rest of the Board.

11 The newest member of our Board I am happy to present,  
12 Samuel Lawton, who just joined us a couple of weeks ago. So

13 while he is new to these proceedings, obviously, those of you who  
14 know Sam Lawton knows that he was one of the first members of the  
15 first original Illinois Pollution Control Board. So he  
16 participated in the drafting of one of the original -- some of  
17 the original rules of the Pollution Control Board, and we are  
18 very happy to have him with us to deliberate over all of your  
19 comments that we will be receiving between first and second  
20 notice.

21 You can be assured, just as we have had significant Board  
22 input on all of the rules in the first notice proposal that we  
23 have before you today, that we will be welcoming any suggestions  
24 and any comments you have for us regarding the first notice

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1 proposal, and we will have a full Board input on whatever changes  
2 we might make between first and second notice.

3 With those comments, I actually would just suggest to Carol  
4 that we could go ahead and begin, unless any of the other Board  
5 Members have any comments that they would like to make at this  
6 time.

7 HEARING OFFICER SUDMAN: Okay. Before I call on the  
8 Illinois Environmental Regulatory Group, who contacted me in  
9 advance, is there anyone else present who knows that they would  
10 like to speak here today? Nobody? Okay. Well -- oh, I am



11 sorry.

12 MS. MORENO: I am Lisa Moreno with the Illinois EPA. I

13 would just like to make a very brief statement.

14 HEARING OFFICER SUDMAN: Okay. Great.

15 MS. SCHROEDER: I have a question. I am Susan Schroeder

16 with the EPA. I have just a question, not a statement.

17 HEARING OFFICER SUDMAN: Okay. If anyone else changes

18 their mind, I will open the floor at the end of the meeting for

19 any other questions or comments people may have.

20 We will now proceed with your questions and comments. Will

21 the representative from the Illinois Environmental Regulatory

22 Group please come forward.

23 Would you please state your name and spell it for the court

24 reporter.

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1 MS. HIRNER: My name is Deirdre, D-E-I-R-D-R-E, Hirner,

2 H-I-R-N-E-R.

3 MS. DRIVER: I am Ladonna Driver, L-A-D-O-N-N-A,

4 D-R-I-V-E-R, Counsel for the Illinois Environmental Regulatory

5 Group.

6 Deirdre Hirner is going to be reading some testimony, and I

7 thought it might be helpful if we would just give you this

8 written testimony first.

9 HEARING OFFICER SUDMAN: Thank you.

10 MS. HIRNER: I would like to first thank you for the  
11 opportunity to be here today. I am Deirdre Hirner, and I do  
12 serve as the Executive Director of the Environmental Regulatory  
13 Group, which we refer to as IERG, of course. I am here today to  
14 inform the Board of IERG's intent to file specific and  
15 substantive comments on the proposed revision to the Board's  
16 Procedural Rules. And we will do so at its subsequent hearing to  
17 be held on May the 4th.

18 I would also like to inform you of those matters which we  
19 have so far identified that may be of concern to the regulated  
20 community. I would like to thank you also for acknowledging  
21 IERG's participation in the 1997 proceeding regarding the  
22 revision of the Board's procedural rules.

23 And having briefly compared the October proposal to that of  
24 the March 16th proposal, which we have before us, we were very

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1 pleased to note that there were changes made that addressed  
2 issues that were raised by IERG during the course of the  
3 proceedings. And as an example, I would like to point out  
4 matters regarding such things as a record on appeal and  
5 declaratory rulings. I would also like to point out that IERG  
6 intends to evaluate any unresolved matters from the 1997

7 proceedings for our future consideration and to further  
8 scrutinize the proposal before us so that we can bring our  
9 concerns to the Board's attention.

10 I would note one particular area of interest to the  
11 regulated community, which was not the subject of the 1997  
12 comments, and that is Part 130, the Identification and Protection  
13 of Trade Secrets and Other Nondisclosable Information. Our  
14 concerns include the lack of clarity of definitions, procedures  
15 and timing regarding such matters as how trade secret  
16 determinations are to be made and who will make those  
17 determinations.

18 Further, we believe, from reading the proposed revisions,  
19 that it is somewhat difficult to ascertain the scope of the  
20 impact of the implementation of the proposed Part 130 on the  
21 regulated community, on regulators and on the public's access to  
22 records. I also believe I would be somewhat remiss if I didn't  
23 point out that of primary importance is that any of the  
24 procedures which the Board may choose to adopt are devised so

1 that they assure the responsible and realistic treatment of  
2 sensitive information.

3 The proposed Part 130 provides that information will be  
4 determined trade secret if a claimant complies with the

5 procedures, proves that it has competitive value, and certifies  
6 that it has not become a matter of public knowledge. Yet,  
7 members of the regulated community have followed this protocol  
8 and have still been denied trade secret protection, which I am  
9 sure you may well realize is extremely important to our members  
10 as well as to other members of the regulated community.

11 The proposed Part 130 states that information claimed or  
12 determined to be nondisclosable is to be secure from unauthorized  
13 access. But to reach the threshold of security the information  
14 must first be defined as nondisclosable. And one of our specific  
15 concerns arises from action that is seemingly based on judgment  
16 rather than on definition. More specifically, the lack of the  
17 definition of emission data. IERG's recent discussions with IEPA  
18 in this regard demonstrates a clear need, from our perspective,  
19 for guidance from the Board.

20 We do understand that the Clean Air Act allows for the  
21 protection of trade secret information with the exception of  
22 emission data, which we also recognize has not been defined in  
23 the Clean Air Act. Now, a plain interpretation of this term  
24 would suggest that emission data are only the actual levels or

1 rates of emissions that are reported. The U.S. EPA has defined  
2 the term to include, among other things, information necessary to

3 determine the amount or other characteristics of emissions,  
4 which, under an applicable standard or limitation, the source was  
5 authorized to emit. This includes, to the extent necessary for  
6 such purposes, a description of the manner or rate of operation  
7 of the source.

8 However, U.S. EPA has subsequently clarified this  
9 definition, and its impact on the public release of information.  
10 U.S. EPA has done so in the following context as a guidance on  
11 the public release of emission data, the collection of data for a  
12 rulemaking, and the review of information used in the NO<sub>x</sub> SIP  
13 Call. We will, of course, provide the specific sites to these  
14 studies when we provide you our written comments.

15 Now, our contention, from the statements appearing in those  
16 documents, is that U.S. EPA has clearly provided the opportunity  
17 for this state or any other to afford trade secret protection to  
18 confidential business information, such as process rates. And we  
19 have been working with the Illinois EPA to develop a way to grant  
20 such protection while not violating the public's right to  
21 information regarding air emissions. We believe that the Board's  
22 proceeding to revise its procedural rules provides an excellent  
23 opportunity to resolve this problem. And to that end, we will be  
24 proposing language to add to the proposed Part 130, to address

1 our trade secret concerns, particularly with respect to emission  
2 data.

3 On first review of the proposed rules, we note a few  
4 specific changes from the existing Part 120 that raise concern  
5 based on industry's recent experiences in its effort to protect  
6 information claimed as trade secret.

7 Section 130.220 (b) requires the re-filing of pending trade  
8 secret claims within 180 days of the effective date of the new  
9 Part 130. Failure to file results in the automatic loss of  
10 protection. This has the potential to impose an enormous burden  
11 both on the Illinois EPA and on the regulated community. When we  
12 look at it in terms of the Illinois EPA, it is quite possible  
13 that there are pending trade secret claims that date back to  
14 1983. And we believe, further, that it is unreasonable to expect  
15 that all of regulated industry could be informed of the need to  
16 refile claims within the 180 day period.

17 An additional matter includes the burden of proof to delay  
18 public proceedings to allow a trade secret determination under  
19 Section 130.222. Further, IERG is concerned about the loss of  
20 the remedy for unauthorized use of trade secret articles under  
21 Section 130.312 (d). We think these have the potential to  
22 whittle away currently available protection.

23 The issues raised on IERG's behalf are intended as a point  
24 of departure for future input and dialogue. We do not believe

1 sufficient time was available between when the information was  
2 made available and today to do a very diligent and complete  
3 section-by-section review. We are, however, committed to  
4 providing detailed comments on these and any other issues that  
5 may arise during our further review. We do assure you that not  
6 only will we raise concerns about the matters and discuss the  
7 matters at hand, but we also will provide detailed  
8 recommendations for their resolve.

9 I would like to thank you for the opportunity to express  
10 our concerns to you today. I would like to say that to help us  
11 in the endeavor to review the proposed revisions and the existing  
12 information, if there is a strikethrough underlined copy  
13 available we would appreciate receiving a copy of that  
14 strikethrough underline.

15 We look forward to working with you in the future. If you  
16 have any questions, I would be pleased to take them at this time.

17 CHAIRMAN MANNING: Thank you.

18 HEARING OFFICER SUDMAN: Do any of the Members have any  
19 questions or comments?

20 CHAIRMAN MANNING: I just appreciate IERG coming forward  
21 with the questions of the trade secrets. Trade secret was not  
22 one of the provisions that we dealt with significantly in our  
23 original proposal in the R97-08 proposal, so we appreciate the  
24 concerns and understand that the EPA may raise theirs, as well.

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1 Is it my understanding, then, that IERG plans to actually  
2 file a formal proposal prior to our May 4th hearing or at our May  
3 4th hearing? Do you have a timing kind of in mind in terms of  
4 when you might get suggested revisions to us?

5 MS. HIRNER: We plan to have those at the May 4th hearing  
6 for sure.

7 CHAIRMAN MANNING: Okay.

8 MS. HIRNER: And if possible, we would prefile them if you  
9 plan to have prefilings. We have been focusing on this whole  
10 trade secret issue for quite some time, and we have some ideas,  
11 but we continue to work on those ideas among our members and  
12 dialogue with the Agency.

13 CHAIRMAN MANNING: Good. And it is not really, I think,  
14 the Board's intention to rush this proceeding. We just sort of  
15 wanted to make sure that everyone knew that we do plan to go to  
16 second notice. It has been quite a bit of time between our  
17 public comment proposal and our first notice provision. And the  
18 June 1st deadline is there for the public comment, but I think  
19 Hearing Officer Sudman said at the very beginning that we are  
20 willing to extend whatever time we need for discussions on  
21 certain particular items.

22 We appreciate IERG's participation in this entire process  
23 and look forward to continued comment and looking at all of the



24 issues you present for us.

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1 MS. HIRNER: Thank you.

2 HEARING OFFICER SUDMAN: Thank you.

3 CHAIRMAN MANNING: Anybody else?

4 HEARING OFFICER SUDMAN: Oh, I am sorry.

5 CHAIRMAN MANNING: Thank you.

6 HEARING OFFICER SUDMAN: Thank you very much.

7 MS. HIRNER: Thank you.

8 MS. DRIVER: Thank you.

9 HEARING OFFICER SUDMAN: Would our representatives from the  
10 Agency come up and please state your name and spell it for the  
11 court reporter.

12 MS. SCHROEDER: I am Susan Schroeder, S-C-H-R-O-E-D-E-R.

13 MS. MORENO: Lisa Moreno, M-O-R-E-N-O. Madam Chairman,  
14 Members of the Board, I am speaking here off the cuff, basically.  
15 I have been appointed, I suppose, the chairperson for the Agency  
16 to make sure that everyone gets copies of everything and that we  
17 present to the Board a comprehensive set of comments.

18 I would like to thank the Board very much on behalf of the  
19 Agency for the endeavors it has made both in the last go-round of  
20 this and the present go-round. I have been with the Agency for  
21 quite awhile and have seen a lot of changes and that have

22 necessitated changes in the Board's procedures, and sometimes we  
23 have sort of been forced to do them on an ad hoc basis as the  
24 next crisis arises. I think that this is very good opportunity

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1 for us to take a comprehensive look after a long time and to see  
2 what changes need to be made and what things that are good that  
3 need to be kept.

4 Having said that, what the Agency is doing is the various  
5 parts have been distributed to certain people, such as Ms.  
6 Schroeder and others, to do comments themselves and in turn  
7 distribute to their attorneys. We are trying to make this as  
8 organized a process as one can do with 50 attorneys. And if  
9 we -- I would like for us to be able to present something on May  
10 4th. However, I will be honest with you, the internal deadline  
11 for comments that we have set ourselves is a little bit later.

12 On the other hand, I have expressed to Joe Sabato (spelled  
13 phonetically) and he agrees with me, that if in our review there  
14 are specific things that come up which we feel should be  
15 addressed directly or questions that we have directly, that we  
16 will do so on May the 4th. But I will say that as much as I  
17 would like to, I don't -- unlike IERG, I don't believe that we  
18 will be able to give you quite the finished product at that time,  
19 although we will try our best.

20 I would like to make a brief comment. Part 125, the tax  
21 certification, and this is not a substantive comment at all. As  
22 the Board appreciates, this represents a radical change from what  
23 the procedures have been in the past. And the concern that I  
24 have, and I will be honest with you, this is a personal concern

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1 also, because I have, over the last few years, been the person  
2 called upon when they needed an attorney in the Water Division to  
3 look at tax certification. And as you know, I just lost a couple  
4 of tax certifications in front of you. This is the concern that  
5 I have. At the moment, we have an application process. The  
6 people who file those applications with us are hardly ever  
7 attorneys, and they are hardly ever environmental people. They  
8 are often the tax lawyers, if lawyers they be, or certainly the  
9 tax departments of the major corporations.

10 My concern is that I want to make sure that the word gets  
11 out as widely as possible so that the people affected will have  
12 an opportunity to know that this is in work and, in fact, know  
13 that the changes are being made. Because I think that we would  
14 all agree it would be unfortunate, indeed, in a couple of years  
15 if someone comes in with a tax certification and we say, gee, we  
16 are very sorry, but you have to hire a lawyer and then file a  
17 petition. So I have mentioned this to the attorneys that I know

18 in the environmental practice, and I will confess that most of  
19 them, say, oh, well, I know we do those, but I have never done  
20 them myself. I will send a memo to people.  
21 I don't know what to suggest to you as to how to get this  
22 more widely distributed. I am sure the Board will consider this  
23 and come up with a mechanism. But, again, it is just a question  
24 of information, because we are dealing with a group of people who

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1 have, you know -- until these recent cases, have never really  
2 been involved with Board procedures. And so we need to --  
3 because this does make a radical change, and it would require  
4 different people being involved in the process, different types  
5 of information to be presented, and so I would appreciate it very  
6 much if the Board could think of that and use whatever good  
7 offices that you have to make sure that this aspect of the new  
8 procedural rules is widely known. Thank you very much.

9 HEARING OFFICER SUDMAN: Thank you.

10 MS. SCHROEDER: Now I have a specific question for the  
11 drafters on Part 130. Section 130.200 states that the owner of  
12 an article may claim it as trade secret only by providing the  
13 information that you have set out here at the time the owner  
14 submits the article to the Agency. Then if you turn a couple of  
15 pages, Section 130.208 (a) says this is the time frame for the

16 agencies to act. It says that the Agency must determine whether  
17 an article is trade secret within 45 days after the date of the  
18 receipt of the complete statement of justification.

19 I have had a number of people ask me what that really  
20 meant, if they are supposed to have all of the elements when the  
21 paper comes through the door or it is not a trade secret, and it  
22 is immediately available for the public to view. Then we are  
23 confused with a complete statement of justification and whether  
24 or not there is an obligation on the Agency to do a completeness

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1 review, send out an incomplete letter, allow so many business  
2 days to have the party respond. When does our time start, when  
3 the paper immediately enters the door, after it has been deemed  
4 complete. It opens up that whole area of inquiry. I don't know  
5 whether you can answer this question now or, you know, whether we  
6 will leave it for the next hearing. But it was something that  
7 was very confusing to the people that do this work at the Agency.

8 HEARING OFFICER SUDMAN: Madam Chairman, would you like to  
9 field that now, or would you like to hold that for Board  
10 deliberation?

11 CHAIRMAN MANNING: I think what I would like to say is that  
12 with any of the questions we appreciate being asked the question.  
13 We will regroup on the issue, the Procedural Rules Committee. I

14 don't think there is anything we want to say particularly today,  
15 but we all understand her concern, I think, as she has raised it,  
16 don't we?

17 MS. CROWLEY: I have just one question.

18 CHAIRMAN MANNING: Go ahead, Kathleen.

19 MS. CROWLEY: Would I be correct in assuming -- this is  
20 Kathleen Crowley. Would I be correct in assuming that the Agency  
21 would prefer not to have to make a completeness review?

22 MS. SCHROEDER: I can't speak for that at the moment.

23 MS. CROWLEY: Okay.

24 MS. SCHROEDER: As you know, we are divided by the

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1 different bureaus and divisions, and at some points they do not  
2 agree. So basically it was to get a clarification.

3 MS. CROWLEY: Okay. I just couldn't tell from the way you  
4 asked the question whether you would prefer not to or -- thank  
5 you.

6 MS. SCHROEDER: It was stated just that way.

7 CHAIRMAN MANNING: We appreciate that. Actually, I debated  
8 whether to put our people in the position that you are always in  
9 in a regulatory hearing, huddling and having to come up with an  
10 answer really quickly, and decided that we would punt in most  
11 cases and get back to you on the record in terms of what our

12 answer is.

13 MS. SCHROEDER: Sure. That is fine.

14 BOARD MEMBER KEZELIS: I have another question of Ms.

15 Schroeder.

16 CHAIRMAN MANNING: Yes, go ahead, Board Member Kezelis.

17 BOARD MEMBER KEZELIS: With respect to the concern you have

18 raised, would the Agency be opposed to maintaining

19 confidentiality of the material while a completeness review were

20 being undertaken, if it would be undertaken?

21 MS. SCHROEDER: I don't think we would object to that.

22 BOARD MEMBER KEZELIS: All right. Thank you.

23 MS. SCHROEDER: Of more concern is what are our obligations

24 when it comes in incomplete, because you have another section in

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1 the beginning that says then it is open to the public. So that

2 would have to be resolved somewhere.

3 BOARD MEMBER KEZELIS: My question was only hypothetical --

4 MS. SCHROEDER: Yes, right.

5 BOARD MEMBER KEZELIS: -- (continuing) assuming that there

6 would or would not be a completeness review.

7 MS. SCHROEDER: Right.

8 BOARD MEMBER KEZELIS: Thank you.

9 HEARING OFFICER SUDMAN: Do any other Board Members have

10 any questions regarding this question? Okay. Thank you very  
11 much.

12 MS. SCHROEDER: Thank you.

13 MS. MORENO: Thank you.

14 HEARING OFFICER SUDMAN: Would anybody else like to speak  
15 at this time?

16 Yes, sir, Mr. Harrington, please come forward.

17 MR. HARRINGTON: I will be very brief.

18 HEARING OFFICER SUDMAN: Would you please spell your name  
19 for the court reporter.

20 MR. HARRINGTON: James T. Harrington, H-A-R-R-I-N-G-T-O-N,  
21 with the law firm of Ross & Hardies and here for Ross & Hardies  
22 and for the Illinois Steel Group. And really I have a question  
23 at this point, and will tend probably to follow it up with  
24 comments at the next hearing before the close of the comment

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1 period. Unlike others, we are still going through it and  
2 discussing with clients and other interested parties.

3 But my question goes to Section 102.210, Proposed Contents  
4 for Site Specific Regulations, particularly 102.210 (b), which  
5 requires that a petition for a site specific rulemaking establish  
6 why the general rule is not technically feasible or economically  
7 reasonable for the person or site. I am unaware of any



8 requirement statute for such a showing for a site specific rule,  
9 and I am wondering if the Board has any citations or references  
10 where this requirement has been established by Board procedure in  
11 the past.

12 One thing I would point out, is this would seem to preclude  
13 citizens from bringing a site specific rulemaking to impose more  
14 stringent standards on someone. I know citizen comment in the  
15 past suggested they wanted that right. For industry it might  
16 prevent them from bringing a proposal for an alternative or  
17 different control strategy which might actually be more  
18 beneficial to industry and the environment even if they could  
19 comply with the Board's regulation. So I think it is problematic  
20 in both its legal basis and environmental impact, but I have not  
21 investigated it that thoroughly at this point or the precedent  
22 for it.

23 We will be looking at some other issues that are closely  
24 related in terms of requirements that may come out of these rules

1 which would appear to have substantive impact and procedural  
2 impact. This is one example. But before I close, and I don't  
3 testify again, I do want to thank the Board because, obviously,  
4 it is an incredible amount of work, and careful attention has  
5 gone into the rules, and I think it is a major step forward for

6 anyone who appears before the Board to have this kind of guidance  
7 in front of them. Thank you.

8 CHAIRMAN MANNING: Thank you.

9 HEARING OFFICER SUDMAN: Thank you. Anybody else?

10 BOARD MEMBER McFAWN: Mr. Harrington, before you leave, I  
11 wondered, the Agency raised this question concerning the tax  
12 certifications, and I wondered if your firm or any of your  
13 clients have ever been involved in those, and what you might  
14 think about the Agency's comments about reaching out to the  
15 regulated community on that issue?

16 MR. HARRINGTON: I think it is important, because the  
17 regulated community on that issue is not the regulated community  
18 I typically represent. I am not saying it is not the same  
19 companies. They may well be. But this goes through the tax  
20 lawyers and through the tax departments. They almost -- I think  
21 in practicing environmental law since 1969 and since the Board  
22 was established I have been consulted twice by tax firms about  
23 these issues. But they jealously guard their role as being tax  
24 lawyers to their clients and experts in Illinois tax law. And

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1 they really don't think in terms of Pollution Control Board or  
2 agency proceedings, in my experience.

3 If there is anyone in our office who has handled it, I

4 don't know. I think we have a couple of estate tax lawyers who  
5 probably would never think of even talking to the environmental  
6 lawyers group when one of these issues came up. Thank you.

7 HEARING OFFICER SUDMAN: Do any other Board Members have  
8 any questions for Mr. Harrington? Yes, Kathleen.

9 MS. CROWLEY: If we could make one follow-up to what Member  
10 McFawn raised. I am sure that the Board would be very grateful  
11 for anything that -- for any outreach efforts that IERG could  
12 make to its member communities in their newsletters and that sort  
13 of thing to help us spread the word that way in addition to the  
14 legal community. Thank you.

15 HEARING OFFICER SUDMAN: Thank you.

16 CHAIRMAN MANNING: Thank you.

17 MR. DAVIS: May it please the Hearing Officer.

18 HEARING OFFICER SUDMAN: Hi.

19 MR. DAVIS: Hi. My name is Thomas Davis.

20 HEARING OFFICER SUDMAN: Okay. I think that the court  
21 reporter --

22 MR. DAVIS: It is D-A-V-I-S.

23 HEARING OFFICER SUDMAN: -- (continuing) can probably spell  
24 that.

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1 MR. DAVIS: I am with the Attorney General's Office. I am

2 Chief of the Environmental Bureau. I applaud the Board's efforts  
3 to revise and revitalize its procedural rules.

4 As an environmental prosecutor, I deal a lot with  
5 enforcement hearings, and so most of my comments will be from  
6 that perspective. But I think a good beginning point is just to  
7 realize that this is a comprehensive effort that the Board is  
8 undertaking, and that there is the opportunity to vastly improve  
9 what is, in essence, are the road maps that practitioners have to  
10 do the hearings before the Board.

11 So even though my comments may focus on enforcement cases,  
12 I suggest that the overall approach is one -- or at least I would  
13 recommend to the Board that the overall approach that you take is  
14 one to make it easier for practitioners to facilitate the making  
15 of a record before a hearing officer in any given case, no matter  
16 whether it is a variance proceeding, a permit appeal or an  
17 enforcement case.

18 Now, I am here on behalf of the Attorney General's Office,  
19 but I would comment initially that due to the fact that the first  
20 notice came out just three and a half weeks ago, that our comment  
21 process, if you will, is still in the very early stages. We do  
22 expect to be filing written comments by the June 1st deadline.  
23 Hopefully those comments -- or, rather, my remarks today won't  
24 deviate too much from those comments or vice versa, for that

1 matter. But I do have a few things that I would like to focus  
2 on, and hopefully none of those will be viewed as too nit-picky.  
3 Okay.

4 Once again, where I am coming from, my perspective is as a  
5 prosecutor. I have done a lot of hearings and I have seen a lot  
6 of hearings. And sometimes it is easy, and sometimes it is not.  
7 Sometimes it is a situation where the participants, including the  
8 hearing officer, unfortunately, loses site of the overall  
9 objective, that is, making a good record so that the Board  
10 Members can read that record and make a decision based upon the  
11 transcript and all of the exhibits and all of the pleadings.

12 In the way that I would suggest looking at this is you  
13 don't want to win the battle and lose the war. You want to have  
14 a comprehensive and comprehensible record made. One of the  
15 things that I have seen in my preliminary review of the first  
16 notice is an effort at various parts, at various provisions for  
17 the Board to assert sanctionability. I think this is one of those  
18 situations where it might be a good idea, but it is really going  
19 to depend on how it is implemented. First and foremost, you  
20 don't want to exceed your statutory authority. There are cases  
21 of a recent vintage where the Appellate Court has, in essence,  
22 said the Board lacks authority to sanction in certain respects.  
23 So you want to be very mindful of what authority you do have, and  
24 then you want to be very mindful about, you know, administering

1 sanctions.

2 You can have strong hearing officers, weak hearing  
3 officers, complacent hearing officers, incompetent hearing  
4 officers. So a lot of what the Board is trying to do,  
5 apparently, in giving itself rules to issue sanctions will be  
6 dealt with -- or rather, the situations will arise and the  
7 problems will be created by the hearing officers. Or, on the  
8 other hand, on the positive side, those problems will be dealt  
9 with appropriately and avoided by the hearing officer.

10 Now, one of the good examples of focusing on winning the  
11 battle and losing the war is discovery. Discovery can be a real  
12 pain. It can be counter-productive. You can waste time and  
13 resources to accomplish something that is essentially  
14 meaningless. If it is a situation where documents are being  
15 improperly withheld, privilege is unreasonably asserted, then I  
16 do believe that the Board should have some authority to sanction  
17 that behavior. That is not tolerable. That is against the  
18 spirit of the Supreme Court rules. It is against the Code of  
19 Professional Conduct and etcetera, etcetera. And it does not --  
20 there again, be mindful of the objective. It does not allow a  
21 good record to be made for you folks in any proceeding. It  
22 muddies the water. Discovery battles can get out of hand. There  
23 again, hearing officers can prevent those problems or,  
24 unfortunately, exacerbate those problems. So the first comment I

1 would make on sanctions is be mindful of what authority you do  
2 have.

3 I don't intend to really try to make much of a record, if  
4 you will, about legal citations. But there is one case in  
5 particular on this issue. It is ESG Watts versus PCB. And I am  
6 sure the Board is well aware of the citation. It is 286 Illinois  
7 Appellate 3rd, 325. It is not a very old case. It is just from  
8 1997. I don't think anything has changed since then. I would  
9 comment directly to you unequivocally that my reading of that  
10 case does not allow the Board to either impose attorney's fees or  
11 reasonable expenses. I realize that lawyers may disagree,  
12 especially about the legal interpretation of cases and statutes.  
13 But there, again, my objective here is just to raise this issue;  
14 be mindful of the extent of your authority.

15 Now, the other big issue that I would like to attempt to  
16 raise concern is hearsay. I would, without bragging, simply  
17 state that the last time the Board did this I was involved as a  
18 participant at the hearing back in I think it was 1987, maybe.  
19 Okay. This being testifying before the Board about the issue of  
20 evidence and especially hearsay. It was my recollection that the  
21 Board did address a revision to its procedural rules back in the  
22 mid 1980s when I was a lawyer for the Illinois EPA. It seems to

23 me from this vantage a previous lifetime. So maybe I am mistaken  
24 about the extent of what the Board did.

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1 But what the Board is trying to do now is I think  
2 problematic. And let me say something without intending to  
3 offend, but acknowledging that it could have that result. We  
4 don't want Board hearings to be like traffic court where  
5 everything gets in, it is too informal, it is a situation where,  
6 like I mentioned a few minutes ago, the hearing officer  
7 unfortunately may not be exercising appropriate control. Hearsay  
8 is inherently unreliable. There is the business record  
9 exception, which is most often utilized in Board proceedings as  
10 well as Circuit Court. The business record exception is a valid  
11 exception. It may still be hearsay, but it is admissible as a  
12 business record.

13 Most of the documents that we admit before the Board in  
14 enforcement cases are business records. They are inspection  
15 reports, permits, discharge monitoring reports, etcetera,  
16 etcetera. Those documents that are kept out as inadmissible  
17 hearsay could be admitted on the proposed provision that the  
18 Board has in its first notice. And I would think that would be a  
19 real shame, because it is not going to facilitate the ultimate  
20 objective of clear, comprehensive, comprehensible record. You



21 are going to have information that a court of law would not be  
22 considering, and what you are doing is you are giving a task to  
23 your hearing officers that may be much more difficult than one  
24 of, as it is now, one of interpreting whether a document falls

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1 under an exception to the hearsay rule.

2 This task is the language that you have put into Section  
3 101.626 (a). You are saying that the hearsay, in order to be  
4 admissible, must be, quote, material, relevant, and would be  
5 relied upon by prudent persons in the conduct of serious affairs,  
6 unquote. Now, I acknowledge that this phrase is one that you  
7 will often see in case law. However, it is not a standard  
8 capable of consistent usage. The Board has a great deal of  
9 turn-over in its hearing officers, unfortunately. I have seen  
10 hearing officers that would not make good trial attorneys. And I  
11 don't believe that you want to put a more difficult task on the  
12 making of a record than your hearing officers already have.

13 Now, hearsay's intrinsic weakness deals with its inability  
14 or incompetency to satisfy the mind as to the existence of a  
15 fact. Now, this is right out of Hornbook law, if you will. It  
16 is a basic fundamental concept that hearsay is unreliable.

17 I suppose that I could stop at this point in my harangue  
18 and ask if anyone would want to comment on the reasoning behind

19 proposing a wide open approach on hearsay. I really don't know  
20 what you folks have in mind with the proposal to make any hearsay  
21 admissable.

22 HEARING OFFICER SUDMAN: Madam Chairman, would you like to  
23 respond to this further after deliberations with the Board?

24 CHAIRMAN MANNING: We will certainly respond to your

31  
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1 comments in writing in between the first and second notice  
2 period. But my immediate reaction is that in addition to  
3 enforcement actions, as you know, that are state enforcement  
4 actions that are brought before the Board, the Board is also the  
5 adjudicator of citizens enforcement actions. So we often have  
6 citizens appearing before the Board in an enforcement context as  
7 well. And in citizens enforcement actions oftentimes the  
8 citizens are not represented by counsel, and don't need to be  
9 represented by counsel when they represent themselves. That is  
10 not to suggest that is the Board's changing of our hearsay rule.  
11 I am not actually quite familiar with -- the Procedural Rules  
12 Committee, what is our current hearsay rule?

13 MS. TIPSORD: This is our current rule.

14 CHAIRMAN MANNING: That's what I thought. There is not a  
15 lot of deviation between what we are proposing as the first  
16 notice provision, is my understanding, and what we currently have

17 in our current procedural rules. I didn't have them here at my  
18 disposal, but I thought that that was the case. We are really  
19 not changing a lot. In fact, it is my understanding that this is  
20 a rather -- not a unique hearsay provision in the administrative  
21 law context, but rather common, in that the administrative law  
22 context is different than a Circuit Court in that kind of  
23 context.

24 But those are just my immediate reactions, and I turn to

32  
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1 any of the other Board Members if they have anything that they  
2 wanted to say or the Procedural Rules Committee at this point in  
3 time. But, certainly, Mr. Davis, we will take your concerns and  
4 we will review those concerns.

5 MR. DAVIS: So the Board is not attempting to broaden the  
6 introduction of evidence by any relaxing or relaxation of the  
7 hearsay prohibition?

8 MS. TIPSORD: Currently at 103.204 (a) this is the  
9 language.

10 MR. DAVIS: Lastly, and hopefully to end on a positive  
11 note, as I stated in my very initial remarks, this is an  
12 opportunity for the Board to make some progress. And as I also  
13 held out as an example, where problems arise, discovery.  
14 Discovery is a very broad endeavor subject to, unfortunately,

15 personality contests and disputes between the practitioners.  
16 Your hearing officers want to minimize that. The hearing  
17 officers want to give you a comprehensive and comprehensible  
18 record.  
19 One suggestion that I would make is instead of saying, in  
20 essence, that the Supreme Court rules and the Code of Civil  
21 Procedure provisions do not apply except where the Board feels  
22 that it needs guidance, it might be a good idea, especially on  
23 discovery, to say that they specifically and explicitly do apply.  
24 That the Supreme Court Rules 201 through 220 something, 218,

33  
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1 whatever, that they do explicitly apply to Board proceedings.  
2 The Board does this piecemeal, and I would only throw out one  
3 example under 101.2 -- I am sorry -- 101.622, Subsection G, there  
4 is a -- according to my notes, at least, there is an effort to  
5 make Supreme Court Rule 206 (d), which is the three hour  
6 limitation on depositions, to make that applicable to Board  
7 proceedings. If that is what you intended, then I think that's a  
8 very good idea.  
9 Another specific suggestion would be Supreme Court Rule  
10 213, which deals with interrogatories, has a 30 interrogatory  
11 limit, and I think that might be another good step to make, if  
12 you want to do it piecemeal. But another way to do it and

13 another way to make administrative practice before the Board more  
14 conducive to the ultimate objective and more compatible with  
15 Circuit Court procedures is just to simply make the Supreme Court  
16 rules on discovery applicable to Board proceedings. So, you  
17 know, that's just a suggestion.

18 We will have written comments that I hope will facilitate  
19 your efforts, but I do want to stop where I started, and say that  
20 the Attorney General's Office appreciates this attempt to revise  
21 the procedural rules. These are the rules that we follow, Parts  
22 101 and 103 in particular, when we bring cases before the Board.  
23 We will have other comments, perhaps nit-picky and so forth.  
24 But, there again, the spirit in which we are putting this to you

34

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1 is one that, you know, should be viewed as positive. We may be  
2 critical of this or that, but the ultimate outcome, I think, is  
3 an improved set of procedural rules so that when we or anyone  
4 else does hearings before the Board, it gives you a better record  
5 so that you can, I guess, make better decisions.

6 HEARING OFFICER SUDMAN: Any there any questions or  
7 comments for Mr. Davis?

8 CHAIRMAN MANNING: Thank you, Mr. Davis.

9 BOARD MEMBER McFAWN: Oh, I had one comment.

10 MR. DAVIS: Yes, ma'am.

11 BOARD MEMBER McFAWN: I think your comments are  
12 well-intended and well-taken by the Board. I don't think you  
13 should worry so much about them being nit-picky. You do  
14 represent the office that prosecutes the enforcement cases before  
15 the Board, and even your most minute comments would be welcomed  
16 by the Board.

17 MR. DAVIS: So if I said that I don't like 12 pitch font,  
18 and I prefer 11 pitch font --

19 BOARD MEMBER McFAWN: We would read it and take it for what  
20 it was worth. I think that the prosecutor is probably not too  
21 concerned with font, but more concerned with the actual true  
22 length of a document.

23 MR. DAVIS: Well, I may have a comment on that, too.

24 BOARD MEMBER McFAWN: Wonderful.

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1 MR. DAVIS: Thank you very much.

2 HEARING OFFICER SUDMAN: Hang on, Mr. Davis. Mr.  
3 Harrington, did you have a question?

4 MR. HARRINGTON: Yes, and not that I expect you to answer  
5 it now. But I think one question that is going to come up is, as  
6 I pointed out in my comments, there are some things here that  
7 might appear to have substantive impact as well as procedural.  
8 Is the Board -- will the Attorney General's office and also the

9 Board take the position that any challenge to these rules must be  
10 brought on review of the rules, or that any challenge to the  
11 substantive impact be brought during the subsequent proceeding?

12 MR. DAVIS: I would say the latter, Jim.

13 MR. HARRINGTON: I think, for the record, and for the  
14 Board's drafting, that really we should all come to some  
15 agreement and clarification on that. We don't want to end up in  
16 front of the courts arguing about the minutiae of the rules,  
17 which might seem to them to be irrelevant, but at some subsequent  
18 proceeding very important. And on the other hand, no one wants  
19 to waive their rights if one of the these proceedings is going to  
20 have a major impact. If we can all on the record sort of agree  
21 what we mean, I think we will come out of this a lot better off.  
22 The Attorney General, obviously, perhaps your opinion will be the  
23 most important as well as together with the Board's. Thank you.

24 HEARING OFFICER SUDMAN: All right. Thank you, Mr.

1 Harrington.

2 Yes, Kathleen?

3 MS. CROWLEY: If I could just ask you, Mr. Harrington, are  
4 you asking us to agree on the interpretation of Section 29?

5 MR. HARRINGTON: In a sense, yes, and I think that this is  
6 an area where a court would give great deference to the Board in

7 saying are these substantive requirements to require that type of  
8 limitation on review or are they procedural purely and,  
9 therefore, any substantive issues will be raised at a subsequent  
10 proceeding. It is a difficult reading, I think. Traditionally  
11 the Board's procedural rules were treated as not being directly  
12 reviewable, is my recollection from the past history, but I could  
13 be wrong. But that was before the preclusion of subsequent  
14 challenges was added to the Environmental Protection Act. That  
15 is in the act now, and I am just concerned about the implication.  
16 Quite frankly, I think if I took the appeal I would be thrown out  
17 of court, but I might have to do it just to make sure that  
18 subsequently I could raise the issues.

19 HEARING OFFICER SUDMAN: Thank you.

20 CHAIRMAN MANNING: We appreciate that concern and raising  
21 it. Thank you.

22 HEARING OFFICER SUDMAN: Okay. Would anybody else care to  
23 speak today?

24 Yes. Please come forward. Please state your name and who

37

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1 you represent, and could you spell your name for the court  
2 reporter, please.

3 MS. JAGIELLA: Good afternoon, Ladies and Gentlemen and the  
4 Board. My name is Dianna, and my last name is spelled



5 J-A-G-I-E-L-L-A, Jagiella. I am here today on behalf of the  
6 Environmental Section Counsel of the Illinois State Bar  
7 Association. And I don't have any substantive comments, but we  
8 wanted to let you know first and foremost we appreciate being  
9 invited to comment, and second to tell you that we will be  
10 commenting by June 1st, and that we will have members at each  
11 hearing. And that is all I had to say. Thank you very much.

12 HEARING OFFICER SUDMAN: Thank you.

13 CHAIRMAN MANNING: Thank you.

14 HEARING OFFICER SUDMAN: Would anybody else care to speak  
15 today?

16 Okay. Well, thank you. We certainly very much appreciate  
17 everybody coming here today and offering your comments and  
18 questions. They are very important to our process, and we will  
19 certainly give them due consideration during the first notice  
20 period. And we will be giving responses to everything that was  
21 raised here today. I just want to remind you that there is  
22 another hearing on May 4th, in Chicago, at 1:30 p.m., in room 940  
23 of the James R. Thompson Center.

24 Does anyone here right now know if they will be speaking at

38  
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1 that meeting other than IERG and the Environmental Section  
2 Counsel? Does the Agency --

3 MS. MORENO: Yes, I expect that someone from the Agency  
4 will be there.

5 HEARING OFFICER SUDMAN: Okay. If anybody else decides  
6 that they would like to speak, if you know in advance please give  
7 me a call. You don't have to do so, but I will call on people  
8 that have given me advance notice first. Also, the June 1st  
9 public comment deadline, this is certainly not meant to be  
10 chilling. If you need more time to review the rules, please let  
11 me know. We can see what we can work out. We don't want them  
12 lingering in first notice period forever.

13 We have requested an expedited transcript for this hearing  
14 today, so we should have it within three business days. If  
15 anyone would like a copy, it is available on our web site for  
16 free or for 75 cents a page. You can contact me or Dorothy Gunn  
17 in the Clerk's office in Chicago.

18 Before we adjourn, do any of our Board Members have any  
19 final comments?

20 CHAIRMAN MANNING: Thank you all for coming and for your  
21 participation.

22 HEARING OFFICER SUDMAN: Thank you very much. We will  
23 adjourn.

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2 ) SS  
3 COUNTY OF MONTGOMERY)

4  
5 CERTIFICATE

6 I, DARLENE M. NIEMEYER, a Notary Public in and for the  
7 County of Montgomery, State of Illinois, DO HEREBY CERTIFY that  
8 the foregoing 39 pages comprise a true, complete and correct  
9 transcript of the proceedings held on the 11th of April A.D.,  
10 2000, at 600 South Second Street, Suite 402, Springfield,  
11 Illinois, In the Matter of: Revision of the Board's Procedural  
12 Rules, 35 Ill. Adm. Code 101-130, in proceedings held before the  
13 Honorable Carol Sudman, Hearing Officer, and recorded in machine  
14 shorthand by me.

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

17

18

19 Notary Public and  
20 Certified Shorthand Reporter and  
21 Registered Professional Reporter

22 CSR License No. 084-003677  
23 My Commission Expires: 03-02-2003

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