

BOARD PROPOSAL FOR PUBLIC COMMENT OCTOBER 3, 1996

TITLE 35: ENVIRONMENTAL PROTECTION

SUBTITLE A: GENERAL PROVISIONS

CHAPTER I: POLLUTION CONTROL BOARD

PART 130

IDENTIFICATION AND PROTECTION OF TRADE SECRETS

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AUTHORITY: Implementing Sections 7 and 7.1 of the Environmental Protection Act (Act) [415 ILCS 5/7 and 7.1] and authorized by Sections 7 and 7.1 of the Act [415 ILCS 5/7 and 7.1].

SOURCE: Subparts A, B, and C originally adopted in R81-30 at 7 Ill. Reg. 16149 , effective November 23, 1983. Subpart D originally adopted in R88-5(A) at 13 Ill. Reg. 12055 effective July 10, 1989. Parts repealed, new Part adopted in R97-8 at __Ill. Reg. __, effective ____.

SUBPART A: TRADE SECRETS AND NON-DISCLOSABLE INFORMATION

Section 130.100 General

In accordance with 2 Ill. Adm. Code 2175.300, all files, records, and data of the Board are open to reasonable public inspection and copying in the Board's Chicago office except for information exempted from inspection by Section 7 of the Environmental Protection Act (Act) [415 ILCS 5/7] and Section 7 of the Freedom of Information Act (FOIA) [5 ILCS 140/7]. The following rules deal specifically with non-disclosable information and trade secret information.

Section 130.102 Purpose

Section 7 of the Act provides that *all files, records and data of the Agency, the Board, and the Department shall be open for reasonable public inspection...except for*, information which constitutes a trade secret, information privileged against introduction in judicial proceedings, internal communications of the several agencies, and information concerning secret manufacturing processes or confidential data submitted by any person under the Act. [415 ILCS 5/7.] Section 7.1 of the Act provides that *the Board shall adopt regulations...which prescribe: (1) procedures for determining whether articles represent a trade secret; and procedures to protect the confidentiality of such articles.* [415 ILCS 5/7.1.]

Section 130.104 Additional Procedures

Each agency may adopt additional procedures which are not inconsistent with this Part for the protection of articles which are claimed or determined to represent a trade secret.

Section 130.106 Definitions

For purposes of this Part the following definitions shall apply:

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- a) *“Article” means any object, material, device, or substance, or whole or partial copy thereof, including any writing, record, document, recording, drawing, sample, specimen, prototype, model, photograph, culture, microorganism, blueprint, or map.*
- b) *“Representing” means describing, depicting, containing, constituting, reflecting or recording.*
- c) *“Copy” means any facsimile, replica, photograph, or other reproduction of an article, and any note drawing or sketch made of or from an article.*
- d) *“Requester” means the party seeking the trade secret determination from the agency.*

[415 ILCS 5/7.1.]

- d) The “agency or agencies” means the Illinois Pollution Control Board (Board), the Illinois Environmental Protection Agency (Agency), and the Department of Natural Resources (Department).

SUBPART B: PROCEDURES FOR IDENTIFYING ARTICLES WHICH REPRESENT TRADE SECRETS

Section 130.200 Initiation of a Claim that an Article Represents a Trade Secret

- a) The owner of an article in the possession of the agency may claim that the article represents a trade secret only by providing the agency with the information listed in subsection (b) below at the time the article is submitted to the agency. After submittal, the article is considered to have become a matter of general public knowledge and can no longer be protected as a trade secret.
- b) Any person wishing to have an article considered as a trade secret must file with the agency holding the article, all other parties to the case, and any hearing officer, the following information:
 - 1) A claim letter which clearly states the name of the article, gives a brief description of the article, and states that the article is claimed to represent a trade secret, as defined in these rules and the Act, and names and briefly describes the article;
 - 2) A copy of the article marked as provided in Section 130.302 of this Part; and
 - 3) A statement of justification for the claim meeting the requirements of Section 130.202 of this Part and a waiver of the statutory deadlines for any agency decision as provided in Section 130.204 of this Part.
- c) If an agency is provided with the information required in this section, it shall consider such article a trade secret and shall protect such article from disclosure pursuant to

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Subpart C of this Part until a final determination is made by the agency and the appeal time has expired.

Section 130.202 Contents of Statement of Justification

A statement of justification shall contain the following:

- a) A detailed description of the procedures used by the owner to safeguard the article from becoming available to persons other than those selected by the owner to have access thereto for limited purposes;
- b) A detailed statement identifying the persons or class of persons to whom the article has been disclosed;
- c) A certification that the owner has no knowledge that the article has ever been published, disseminated or otherwise become a matter of general public knowledge;
- d) A detailed discussion of why the owner believes the article to be of competitive value; and
- e) Any other information which will support the claim.

Section 130.204 Waiver of Statutory Deadlines

At the time an article is filed and a trade secret claim is made, the owner of an article that is claimed to represent a trade secret must submit a written waiver of any statutory deadlines for agency decisions which may be delayed due to a subsequent justification and determination process. Such waiver must at a minimum extend any final agency decision deadline for at least 90 days. This is to allow 45 days for the agency determination and 35 days for an appeal (plus mailing time).

Section 130.206 Response to the Trade Secret Claim

Any party in a contested case before any of the agencies in which a trade secret claim is made shall have seven days in which to file a response to the trade secret claim. All responses shall be filed with the agency holding the article, and served upon all other parties to the case, and the hearing officer if applicable.

Section 130.208 Time Limit for Agency Determination

- a) The agency shall determine whether the article represents a trade secret within 45 days from the date of receipt of a complete statement of justification as prescribed in Section 130.202 of this Part.
- b) The time period for the agency's decision may be extended by the person requesting the determination upon the filing of an additional waiver of the underlying decision deadline as provided for in Section 130.204 of this Part and an extension of time for the agency to make the determination. The additional waiver of any decision deadline

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must be for at least the same amount of time as the extension of time to make the determination plus 40 days (in order to allow time for an appeal).

Section 130.210 Standards for Agency Determination

- a) An article shall be determined to represent a trade secret if:
 - 1) The owner has substantially complied with the procedures for making a claim and justification as prescribed by this Part; and
 - 2) The statement of justification demonstrates that:
 - A) The article has not been published, disseminated or otherwise become a matter of general public knowledge; and
 - B) The article has competitive value.
- b) There shall be a rebuttable presumption that an article has not been published, disseminated or otherwise become a matter of general public knowledge, if:
 - 1) The owner has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes; and
 - 2) The statement of justification contains a certification that the owner has no knowledge that the article has ever been published, disseminated, or otherwise become a matter of general public knowledge.
- c) The agency may determine that any page, part or portion of the article represents a trade secret without finding that the entire article represents a trade secret.

Section 130.212 Agency Actions Following a Negative Determination

- a) If the agency determines that an article, or any page, part or portion thereof, does not meet the standards specified in subsection 130.210(a)(1) or (2), the agency shall deny the claim for trade secret protection for the article or page, part or portion thereof, and shall give written notice of such denial to the owner of the article and the requester pursuant to subsection (b) below.
- b) Written notice of the denial of a claim for trade secret protection shall be given by certified mail, return receipt requested, and shall contain the following information:
 - 1) A statement of the agency's reason for denying the claim;
 - 2) A notification of the availability of review of the agency decision pursuant to the procedures prescribed in Section 130.216 of this Part; and

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- 3) A notification that the agency will cease protecting the article, or the page, part or portion thereof, as a trade secret unless the agency is served with notice of the filing of a petition for review within 35 days from the date of notice to the owner.
- c) If the agency is served with notice of the filing of a petition for review of its determination within 35 days of the notice of denial to the owner, the agency shall notify the requester of such action and shall continue to protect the article, or the page, part or portion thereof, pursuant to Subpart C of this Part until such time as it receives official notification of a final order by a reviewing body with proper jurisdiction which does not reverse the agency determination and which is not subject to further appeal.
- d) If the agency does not receive the notification of a petition for review within 35 days or does receive official notification of a final, non-appealable action which does not reverse the agency determination, the article shall not be protected pursuant to Subpart C of this Part and the agency shall so notify the owner by certified mail.

Section 130.214 Agency Actions Following a Positive Determination

- a) If the agency determines that an article, or any page, part or portion thereof, meets the standards specified in subsection 130.210(a)(1) and (2), the agency shall grant the claim for trade secret protection for the article or page, part, or portion thereof, and shall give written notice of such granting to the owner of the article pursuant to subsection (b) below.
- b) Written notice of the granting of a claim for trade secret protection shall be given by certified mail to all parties, return receipt requested, and shall contain the following information:
 - 1) A statement of the agency's reasons for granting the claim;
 - 2) A notification of the availability of review of the agency's determination pursuant to the procedures prescribed in Section 130.216 of this Part; and
 - 3) A notification that the article, or the page, part or portion thereof, will be protected pursuant to Subpart C of this Part until such time as the agency receives official notification of a final order by a reviewing body which reverses the agency determination and which is not subject to further appeal.
- c) The agency shall continue to protect an article, or the page, part or portion thereof, for which trade secret protection has been granted pursuant to Subpart C of this Part until such time as it receives official notification of a final order by a reviewing body with proper jurisdiction which reverses the agency determination and which is not subject to further appeal.

Section 130.216 Review of Agency Determination

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- a) An owner or requester who is adversely affected by a final determination of either the Agency or the Department pursuant to this Part, may petition the Board for review within 35 days after entry of a final agency determination.
- b) An owner or requester who is adversely affected by a final determination of the Board pursuant to this Part, may obtain judicial review from the appellate court by filing a petition for review pursuant to Section 41 of the Act. [415 ILCS 5/41.]
- c) The failure of an agency to make a final determination within the time limits prescribed in this part may be deemed to be a final determination for purposes of appeal.
 - 1) If an agency fails to make a final determination within the time limits, the agency must continue to protect the article as set out in Subpart C of this Part during the 35 day appeal time.
 - 2) If after 35 days no appeal is taken, the article shall be treated as if it received a negative determination from the agency and the article will no longer be protected pursuant to Subpart C.

Section 130.218 Status of Article Claimed or Determined to Represent a Trade Secret

- a) A claim or determination by one agency that an article represents a trade secret made pursuant to this Part shall apply to that same article when in the possession of either of the other two agencies.
- b) Notwithstanding subsection (a), any person may make a written request that an agency having possession of the article review a determination made pursuant to this Part by any other agency.
- c) The agency shall review a determination made pursuant to this Part if and only if the person making the request for review presents prima facie evidence of a change in factual circumstances which would require the reversal of the agency's Section 130.210 of this Part determination..

Section 130.220 Status of Article which was Determined or Claimed to Represent a Trade Secret Prior to the Effective Date of this Part

- a) Any article which was determined by an agency prior to the effective date of this Part to represent a trade secret in accordance with agency procedures adopted pursuant to the Illinois Administrative Procedure Act (APA) [5 ILCS 100/1-1 *et. seq.*] shall be deemed to have been determined to represent a trade secret for the purposes of this Part.
- b) Any article which was claimed to represent a trade secret prior to the effective date of this Part, but which was not determined by an agency to represent a trade secret in

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accordance with agency procedures adopted pursuant to the APA shall be deemed to have been claimed to represent a trade secret for the purposes of this Part for 90 days after the effective date of this Part.

Section 130.222 Extension of Deadlines for Participation in Proceedings

Upon a finding by the agency that any person will be adversely affected in a proceeding before that agency due to the timing of the determination of the trade secret status of an article, the agency shall extend any deadline for such person's participation in that proceeding until 10 days after the status of the article has been determined by the agency. The burden shall be on the person to demonstrate: the relevancy of the article to the proceeding; and that the person will be adversely affected in the proceeding due to the timing of the trade secret determination.

SUBPART C: PROCEDURES FOR PROTECTING ARTICLES WHICH REPRESENT TRADE SECRETS

Section 130.300 Applicability

Any article which is claimed or determined to represent a trade secret pursuant to Subpart B of this Part shall be protected from unauthorized disclosure pursuant to this Subpart.

Section 130.302 Owner's Responsibility to Mark Article

- a) Where an entire article is claimed to represent a trade secret, the owner shall mark the article with the words "Trade Secret" in red ink on the face or front of the article.
- b) Where less than an entire article is claimed to represent a trade secret, the owner shall:
 - 1) Mark the article with the words "Trade Secret" in red ink on the face or front of the article;
 - 2) Indicate on the face or front of the article which page, part or portion of the article is claimed to represent a trade secret;
 - 3) Mark every page, part or portion of the article which is claimed to represent a trade secret with the words "Trade Secret"; and
 - 4) Furnish the agency with a second copy of the article which is marked pursuant to paragraphs (1) and (2) of this subsection and from which the page, part or portion of the article which is claimed to represent a trade secret is deleted.

Section 130.304 Agency's Responsibility to Mark Article

- a) Where an entire article is determined to represent a trade secret pursuant to Section 130.210 of this Part, the agency shall mark the article with the word

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“DETERMINED” in red ink on the face or front of the article and shall also mark any claim letter submitted for the article.

- b) Where less than an entire article is determined to represent a trade secret pursuant to Section 130.210 of this Part, the agency shall:
 - 1) Mark the article with the word “DETERMINED” in red ink on the face or front of the article;
 - 2) Indicate on the face or front of the article and any claim letter submitted for the article which page, part or portion of the article is determined to represent a trade secret; and
 - 3) Mark every page, part or portion of the article which is determined to represent a trade secret with the word "DETERMINED."

Section 130.306 Transmission of Article Between Agencies

Prior to transmitting any article which is claimed or determined to represent a trade secret to another agency, the agency shall insure that the article is properly marked pursuant to Sections 130.302 and 130.304 of this Part and is clearly distinguished and segregated from other transmitted materials.

Section 130.308 Segregation of Article

Any article, or any page, part or portion thereof, which is claimed or determined to be a trade secret shall be kept segregated from articles which are open to public inspection, and shall be kept secure from unauthorized access.

Section 130.310 Public Access to Information Related to Article

- a) A copy of the claim letter submitted pursuant to Section 130.200(a)(1) shall be open to public inspection.
- b) Where an article was determined to represent a trade secret prior to the effective date of this Part and no claim letter exists, the agency shall prepare a statement which shall be open to public inspection which names and briefly describes the article.
- c) Where a page, part or portion of an article is claimed or determined to represent a trade secret, a copy of the article shall be open to public inspection, with the part or portion deleted which is claimed or determined to represent a trade secret or which would lead to disclosure of the trade secret.

Section 130.312 Access to Claimed or Determined Article

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- a) The agency shall designate the agency employees and/or officers who are authorized to review articles which are claimed to represent trade secrets for the purpose of making a determination pursuant to Section 130.210 of this Part.
- b) Access to an article which is claimed or determined to represent a trade secret shall be limited to:
 - 1) Employees or officers designated pursuant to subsection (a);
 - 2) Other employees, officers, or authorized representatives of the State specifically authorized by the agency to have access to the article for the purpose of carrying out the Act or regulations promulgated thereunder or when relevant to a proceeding under the Act; or
 - 3) Employees, officers, or authorized representatives of the United States who are specifically authorized by the agency to have access to the article for the purpose of carrying out federal environmental statutes or regulations.
- c) The agency shall maintain the following information with regard to an article which is claimed or determined to represent a trade secret:
 - 1) A record of the number of copies held by the agency;
 - 2) A log of the location of all copies; and
 - 3) A log of all persons who review the article or copies thereof.

Section 130.314 Unauthorized Disclosure or Use of Article

- a) The agency shall insure that all persons who are authorized to have access to an article which is claimed or determined to represent a trade secret are given notice of the restrictions on disclosure and use of the article contained in this Subpart, and of the sanctions and liabilities prescribed in subsections (d) and (e) below or unauthorized disclosure or use of the article.
- b) No agency officer, employee, or authorized representative may disclose, except as authorized by this Subpart, or use for private gain or advantage, any article which is claimed or determined to represent a trade secret.
- c) Each agency officer, employee, or authorized representative shall take reasonable measures to safeguard an article which is claimed or determined to represent a trade secret and to protect against disclosure which is inconsistent with these rules.

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- d) Each authorized representative of the agency who is furnished with access to an article which is claimed or determined to represent a trade secret pursuant to this Part shall use or disclose that information only as authorized by the contract or agreement under which such person is authorized to represent the agency. Any contract or agreement between the agency and the authorized representative shall state that the trade secret protection requirements of the contract or agreement are expressly for the benefit of the owner of an article which is claimed or determined to be a trade secret pursuant to this Part and that a breach thereof will permit the owner to sue the authorized representatives directly.

Section 130.316 Limitation on Copying Article

No agency officer, employee, or authorized representative of the State or the United States shall copy an article which is claimed or determined to represent a trade secret pursuant to this Part except where authorized to do so by the agency officer or employee designated to review the article pursuant to subsection 130.312(a) of this Part. All copies shall be recorded and logged in accordance with subsection 130.312(c) of this Part.

Section 130.318 Disposal of Articles

An agency may dispose of an article which is claimed or determined to represent a trade secret only by shredding, burning, or returning it to the owner.

SUBPART D: NON-DISCLOSABLE INFORMATION

Section 130.400 General

This Subpart applies only to submissions before the Board, it does not apply to the Agency or the Department.

Section 130.402 What Constitutes Non-Disclosable Information

Non-disclosable information is, *information which constitutes a trade secret, information privileged against introduction in judicial proceedings, internal communications of the several agencies, information concerning secret manufacturing processes or confidential data submitted by any person under this Act.* [415 ILCS 5/7(a).]

Section 130.404 Who May View Non-Disclosable Information

Any information accorded confidential treatment may be disclosed or transmitted to other officers, employees, including but not limited to Board Members, Board attorneys, environmental scientists of the Board's technical unit, Board hearing officers, the Clerk, Assistant clerk, or authorized representatives of this State or of the United States concerned with or for the purposes of carrying out this act or the federal environmental statutes and regulations: provided however, that such information shall be identified as confidential by the...the Board..., as the case may be. [415 ILCS 5/7(e).]

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Section 130.406 Application for Non-Disclosure

- a) A single copy of the material for non-disclosure shall be filed with the Clerk in addition to the application for non-disclosure.
- b) The material for which the party is seeking protection shall be marked "NON-DISCLOSABLE INFORMATION" in red ink on the face or front of the article and on every page, part, or portion of the material for which protection is sought.
- c) A copy of the notice of application for non-disclosure shall be served upon all parties to the case and the assigned hearing officer. If any agency of this State or the United States is a participant in the proceeding in which the application for non-disclosure is made, the applicant shall serve the agency participants with the notice of the application for non-disclosure.
- d) The application for non-disclosure not pertaining to trade secrets shall contain the following:
 - 1) Identification of the precise material, or parts of material, for which non-disclosure is sought;
 - 2) An indication of the particular non-disclosure category into which the material falls;
 - 3) A concise statement of the reasons for requesting non-disclosure;
 - 4) The application shall be verified by affidavit and contain such data and information as will inform the Board of the nature of the material for which non-disclosure is sought, the reasons why non-disclosure is necessary, and the number and title of all versions familiar with such information, and how long the material has been limited from disclosure; and
 - 5) A waiver of the decision deadline in accordance with Section 130.204 of this Part if applicable.

Section 130.408 Public Inspection

Public inspection of material for which a non-disclosure application is pending shall be barred until the Board rules on the application and the time for appeal has run. After the Board rules on the application, any page, part, or portion of the material deemed to be non-disclosable information shall be protected from public inspection in accordance with Section 130.404 of this Part.

Section 130.410 Board Order

- a) If the Board determines that the material or any page, part, or portion thereof constitutes non-disclosable information, the material shall be marked "DETERMINED" on the face or front and on every page, part, or portion which is

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determined to represent non-disclosable information. The material so determined shall then be segregated in accordance with Subpart C of this Part.

- b) If the Board determines the material, or any page, part, or portion thereof does not constitute non-disclosable information, the Board may enter a conditional non-disclosure order allowing the withdrawal by the applicant of the material covered by such order. If such material is not withdrawn by the deadline given in the Board order, it shall be returned to the normal case file and shall be subject to public inspection.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996 by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board