

ILLINOIS POLLUTION CONTROL BOARD
February 10, 1983

IN THE MATTER OF:)
)
IDENTIFICATION AND PROTECTION) R81-30
OF TRADE SECRETS)


Proposed Rule. First Notice.

ORDER OF THE BOARD (I. G. Goodman):

It is the Order of the Board that the attached regulatory proposal be adopted for First Notice publication in the Illinois Register.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10th day of February, 1983 by a vote of 8-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board

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TEXT OF PROPOSED RULES

TITLE 35: ENVIRONMENTAL PROTECTION

SUBTITLE A: GENERAL PROVISIONS

CHAPTER I: POLLUTION CONTROL BOARD

PART 120: IDENTIFICATION AND PROTECTION OF TRADE SECRETS

SUBPART A: GENERAL PROVISIONS

Section 120.101 Purpose

This Part establishes uniform procedures for the identification and protection of articles which represent trade secrets and which are reported to or otherwise obtained by the Illinois Environmental Protection Agency, the Illinois Pollution Control Board (Board), or the Illinois Department of Energy and Natural Resources (Department).

Section 120.102 Superseding Requirements

Regulations adopted by the Board for particular programs or orders of the Board in particular proceedings shall supersede any conflicting requirements in this Part.

Section 120.103 Definitions

- a) Except as otherwise defined in subsection (b), definitions of terms used in this Part shall be those used in the Environmental Protection Act (Ill. Rev. Stat. 1981, ch. 111½, par. 1001 et seq.) and in 35 Ill. Adm. Code 101.
- b) The following definitions shall apply to this Part only:

"Agency" means any of the following:

The Illinois Pollution Control Board; or

The Illinois Environmental Protection Agency; or

The Illinois Department of Energy and Natural Resources.

"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.

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"Authorized Representative" means any person who is authorized to represent an agency on a contractual basis.

"Copy" means any facsimile, replica, photograph, or other reproduction of an article, and any note, drawing or sketch made of or from an article.

"Owner" means any person who owns an article reported to or obtained by an agency or any authorized representative of such person.

"Proceeding" means any rulemaking, adjudication, certification, or permitting conducted by an agency under the Act or regulations promulgated thereunder.

"Representing" means describing, depicting, containing, constituting, reflecting or recording.

"Requester" means any person who makes a request to an agency to review an article.

"Trade Secret" means the whole or any portion or phase of any scientific or technical information, design, process (including a manufacturing process), procedure, formula or improvement, or business plan which is secret in that it has not been published or disseminated or otherwise become a matter of general public knowledge, and which has competitive value. A trade secret is presumed to be secret when the owner thereof takes reasonable measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

SUBPART B: PROCEDURES FOR IDENTIFYING ARTICLES
WHICH REPRESENT TRADE SECRETS

Section 120.201 Claim That Article Represents A Trade Secret

- a) Any article submitted to or otherwise obtained by an agency shall be considered to be claimed to represent a trade secret and shall be protected from disclosure by the agency pursuant to Subpart C of this Part, if and only if the agency is provided with the following:

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- 1) A claim letter which clearly 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; and
 - 2) A copy of the article marked as provided in Section 120.302; and
 - 3) Either a Statement of Justification for the claim meeting the requirements of Section 120.204(c); or a limited waiver of the statutory deadlines for any agency decision as provided in subsection (b) of this section.
- b) In lieu of submitting a Statement of Justification at the time a claim is made, the owner of an article claimed to represent a trade secret may 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 shall extend the deadline for decision for a period equal to the period by which the decision is delayed plus 10 working days.
- c) At any time, the owner of any article in the possession of the agency may claim that the article represents a trade secret pursuant to the procedures in subsection (a).
- d) Any article submitted to or otherwise obtained by the agency, but not determined to represent a trade secret, prior to the effective date of this Part, shall be deemed to be claimed to represent a trade secret for 30 working days after the effective date of this Part.
- e) This Section shall not apply to any article submitted to or otherwise obtained by the agency which was determined by the agency to represent a trade secret prior to the effective date of these rules.

Section 120.202 Request for Disclosure of An Article Which
Is Claimed to Represent A Trade Secret

Any person may make a request for the disclosure of information which has been claimed to represent a trade secret pursuant to

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Section 120.201 by submitting to the agency a written request which names or describes the article as it is named or described in the claim letter submitted by the owner.

Section 120.203 Agency Request for Justification of Claim

Any employee of the agency who is authorized to make determinations pursuant to Section 120.305(a) may request that the owner of an article claimed to represent a trade secret submit a justification meeting the requirements of Section 120.204. Such request may be made when the article is submitted or obtained, or at any time thereafter. The request shall be in written form, shall be signed by the authorized employee, and shall state the circumstances warranting the request. Circumstances in which such a request may be warranted include, but are not limited to, the following:

- a) Reasonable anticipation of requests from the public for disclosure of the article; or
- b) Facilitation of public participation in proceedings before the agency where notice and/or comment periods are short relative to the time required for a final determination in accordance with the requirements of this Part; or
- c) A practice, on the part of an owner of an article, of indiscriminately claiming that articles submitted to the agency represent trade secrets; or
- d) The requirement in a specific regulation that a determination of whether the article represents a trade secret be made at the time that it is submitted to or obtained by the agency.

Section 120.204 Justification of Claim That An Article Represents A Trade Secret

- a) Upon receipt of a written request for the disclosure or justification of an article pursuant to Sections 120.202 or 120.203, the agency shall send written notification of the request, return receipt requested, to the owner of the article as identified in the claim letter submitted pursuant

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to Section 120.201(a)(1). As a minimum, this notification shall contain the following:

- 1) A copy of the written request; and
 - 2) A list of the standards to be used in the Agency's determination and the information required to be supplied in a statement of justification; and
 - 3) A notice of the time period prescribed by subsection (c) for the return of a complete statement of justification to the agency, including notice of the availability of an extension of that time period.
- b) The owner shall have 10 working days from the date of receipt of the notification required by subsection (a) of this section to submit the statement of justification to the agency. This time period may be extended by the agency for a second period of 10 working days if, within the first 10 day period, the owner submits a request for an extension.
- c) A statement of justification shall contain the following:
- 1) 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; and
 - 2) A detailed statement identifying the persons or class of persons to whom the article has been disclosed; and
 - 3) 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; and
 - 4) A detailed discussion of why the owner believes the article to be of competitive value; and
 - 5) Any other pertinent information which will support the claim.

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Section 120.205 Agency Determination of Trade Secret Status
of An Article

- a) Within 10 working days from the date of receipt of a complete statement of justification as prescribed in Section 120.204, the agency shall determine whether the article represents a trade secret. This time period may be extended for a second period of 10 working days, if within the first 10 day period, the agency notifies the owner and requester of the extension.
- b) An article shall be determined to represent a trade secret if and only 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.
- c) 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 thereto 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.
- d) The agency may determine that any part or portion of the article represents a trade secret which meets the requirements of subsection (b).
- e) Notwithstanding the requirements of subsections (a)-(d), any article which was determined by the agency to represent

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a trade secret consistent with agency rules or procedures in effect prior to the effective date of these rules shall be deemed to have been determined to represent a trade secret for the purposes of this Part.

Section 120.206 Agency Actions Following A Negative Determination

- a) If the agency determines that an article, or any part or portion thereof, does not meet the standards specified in Section 120.205(b)(1) or (2), the agency shall deny the claim for trade secret protection for the article or part or portion thereof, and shall give written notice of such denial to the owner of the article pursuant to subsection (b).
- 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; and
 - 2) A notification of the availability of review of the agency decision pursuant to the procedures prescribed in Section 120.208; and
 - 3) A notification that the article, or the part or portion thereof, will be subject to disclosure unless, within 30 days from the date of notice to the owner, the agency is served with notice of the filing of a petition for review.
- c) If the agency is served with notice of the filing of a petition for review of its determination within 30 days of the notice to the submitter, the agency shall notify the requester of such action and shall continue to protect the article, or the part or portion thereof, pursuant to Subpart C until such time as it receives official notification of a final, non-appealable order by an appropriate reviewing body which does not reverse the agency determination.
- d) If the agency does not receive the notification of a petition for review 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 and the agency shall notify both the owner and the requester that the article, or the part or portion thereof, may be disclosed.

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Section 120.207 Agency Actions Following A Positive Determination

- a) If the agency determines that an article, or any part or portion thereof, meets the standards specified in Section 120.205(b)(1) and (2), the agency shall grant the claim for trade secret protection and shall give written notice of such granting to the owner of the article and the requestor pursuant to subsection (b).
- b) Written notice of the granting 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 reasons for granting the claim; and
 - 2) A notification of the availability of review of the agency's determination pursuant to the procedures prescribed in Section 120.208; and
 - 3) A notification that the article, or the part or portion thereof, will not be subject to disclosure until such time as the agency receives official notification of a final, non-appealable order by a reviewing body which reverses the agency determination.
- c) The agency shall continue to protect an article, or the part or portion thereof, for which trade secret protection has been granted pursuant to Subpart C until such time as it receives official notification of a final, non-appealable order by an appropriate reviewing body which reverses the agency determination.

Section 120.208 Review of Agency Determination

- a) Except as provided in (b), an owner or requester who is adversely affected by a final agency determination 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 Board determination pursuant to this Part, may obtain judicial review by filing a petition for review pursuant to Section 41 of the Environmental Protection Act.

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- c) For the purpose of this section, failure of an agency to act as expeditiously as possible in conformance with the procedures in this Part, may be deemed to be a reviewable final agency determination.

Section 120.209 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.
- 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 205(b) determination. The review of a prior determination shall utilize the same procedures utilized in making the prior determination, i.e., Sections 120.204 through 120.208.

Section 120.210 Intergovernmental Disclosure

Notwithstanding this Subpart, any article which has been claimed or determined to represent a trade secret pursuant to this Part may be disclosed to officers, employees or authorized representatives of the State or the United States who are designated or authorized to have access to the article pursuant to Section 120.305.

SUBPART C: PROCEDURES FOR PROTECTING ARTICLES
WHICH REPRESENT TRADE SECRETS

Section 120.301 Applicability

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

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Section 120.302 Marking of Article

- a) The owner of an article which is claimed to represent a trade secret shall mark the article with the words "TRADE SECRET" in red ink on the face or front of the article. If only a part or portion of an article is claimed to represent a trade secret, the owner of the article shall also mark the part or portion in the above manner.
- b) Upon determining that an article represents a trade secret pursuant to Section 120.205, the agency shall mark the article with the word "DETERMINED" in red ink on the face or front of the article. If only a part or portion of the article is determined to represent a trade secret, that part or portion shall also be marked in the above manner.
- c) 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 subsections (a) and/or (b).

Section 120.303 Segregation of Article

Any article or any 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 120.304 Public Access to Information Related to Article

- a) A copy of the claim letter submitted pursuant to Section 120.201(a)(1) shall be open to public inspection.
- b) Upon a final determination pursuant to Subpart B that an article represents a trade secret, the agency shall mark in red ink the claim letter with the word "DETERMINED."
- c) Upon a final determination that only a part or portion of an article represents a trade secret, the agency shall mark the claim letter pursuant to subsection (b). A copy of the article, with the part or portion which is determined to represent a trade secret, or which would lead to disclosure of the trade secret, deleted shall be open to public inspection.

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Section 120.305 Access to Claimed or Determined Article

- 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 requests and determinations pursuant to Sections 120.203 and 120.205.
- 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); or
 - 2) Other employees, officers, or agency representatives specifically authorized by the designated employee or officer 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 designated agency employee or officer to have access to the article for the purpose of carrying out federal environmental statutes or regulations.
- c) The agency shall maintain a log of all persons who review an article which is claimed or determined to represent a trade secret.

Section 120.306 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) for unauthorized disclosure or use of the article.
- b) No agency officer, employee, or authorized representative may disclose, or use for his or her private gain or advantage, any article which is claimed or determined to represent a trade secret except as authorized by this Subpart.

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- c) Each agency officer, employee, or authorized representative shall take appropriate measures to properly safeguard an article which is claimed or determined to represent a trade secret and to protect against its improper disclosure.
- d) Violations of subsections (b) or (c) of this section shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action. Violation of subsection (b) may also result in civil liability or criminal prosecution pursuant to state and/or federal statutes.
- e) 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 under which such person is authorized to represent the agency. Any contract between the agency and the authorized representative shall state that the trade secret protection requirements of the contract 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. In addition, any violation of subsections (b), (c) or (e) shall constitute grounds for suspension of the contract.

Section 120.307 Prohibition on Copying Article

No agency officer, employee, or authorized representative shall copy an article which is claimed or determined to represent a trade secret pursuant to this Part.

Section 120.308 Destruction of Articles No Longer Required For Record

When it is determined that an article which is claimed or determined to represent a trade secret is no longer required to be maintained as an agency record, the agency shall destroy the article by shredding or burning.

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SUBPART D: INTERNAL AGENCY PROCEDURES

Section 120.401

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.