

ILLINOIS POLLUTION CONTROL BOARD
August 18, 2005

MIDWEST GENERATION EME, LLC,)
)
Petitioner,)
)
v.) PCB 04-216
) (Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent,)

ORDER OF THE BOARD (by A.S. Moore):

This trade secret appeal was filed by Midwest Generation EME, LLC (Midwest), which has asked the Board to review a trade secret determination of the Illinois Environmental Protection Agency (IEPA). In this order, the Board rules on Sierra Club's motion to intervene in this proceeding.

For the reasons below, the Board denies Sierra Club's motion to intervene. Sierra Club may, however, participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing. This ruling is consistent with the Board's decisions denying Sierra Club requests to intervene in two other pending trade secret appeals, Midwest Generation EME, LLC v. IEPA, PCB 04-185 (Nov. 4, 2004) and Commonwealth Edison Co. v. IEPA, PCB 04-215 (Aug. 18, 2005).

In this order, the Board will address procedural matters before discussing trade secret protection under the Environmental Protection Act (Act) (415 ILCS 5 (2004)) and Sierra Club's motion to intervene.

PROCEDURAL MATTERS

Accept for Hearing

In an April 23, 2004 letter, IEPA partially denied Midwest's request for trade secret protection from public disclosure for information about six coal-fired generating stations. The stations, all of which are in Illinois, are formerly owned by Commonwealth Edison Company (ComEd) and currently owned by Midwest: the Crawford, Fisk, Joliet, Powerton, Will County, and Waukegan power stations. The information claimed to be trade secret was submitted to IEPA by ComEd.

On June 3, 2004, Midwest filed its appeal of IEPA's April 23, 2004 trade secret determination.¹ In a June 17, 2004 order, the Board accepted for hearing Midwest's petition for review. The Board also directed that, as Midwest requested, any hearings would be held *in camera* to avoid disclosing to the public the information claimed to be trade secret.

On July 13, 2004, IEPA filed the administrative record of its trade secret determination in PCB 04-216, which consists of over 1,600 pages, in two volumes: Volume I contains information that can be made available to the public; Volume II contains the information claimed to be trade secret. There is also a redacted version of Volume II so as not to improperly disclose claimed trade secret information.

Sierra Club states that it is a not-for-profit environmental group with 26,000 members in Illinois. By its motion to intervene in PCB 04-216, Sierra Club seeks to become a party to this proceeding. Under the Freedom of Information Act (FOIA) (5 ILCS 140 (2004)), Sierra Club asked IEPA to disclose the information ComEd submitted to IEPA.

On June 9, 2005, Midwest waived to March 29, 2006, the Board's deadline for deciding this appeal. A hearing has not yet been scheduled. By hearing officer order of July 26, 2005, Midwest and IEPA are presently proposing discovery schedules. A status conference with the hearing officer is scheduled for September 22, 2005.

Motions to Intervene and Responses as Filed in Dockets PCB 04-216 and PCB 04-215

The Board's June 17, 2004 order also directed the parties to address whether this proceeding, PCB 04-216, should be consolidated with another pending trade secret appeal brought by ComEd, Commonwealth Edison, PCB 04-215. The information claimed to be trade secret in each appeal was submitted to IEPA by ComEd and some of the same information is at issue in each appeal. As noted, the Board docketed ComEd's appeal as PCB 04-215 and Midwest's appeal as PCB 04-216. After reviewing the responsive pleadings of the parties, the Board issued an order declining to consolidate the two trade secret appeals on July 7, 2005. In a separate order, the Board today is also denying a Sierra Club motion to intervene in the other trade secret appeal, PCB 04-215. *See* Commonwealth Edison, PCB 04-215 (Aug. 18, 2005).

Several filings received by the Clerk of the Board have been unclear on whether they were intended for the docket in PCB 04-215 or the docket in PCB 04-216. Indeed, in its order declining to consolidate the two appeals, the Board granted ComEd's motion to strike from the PCB 04-215 docket those pleadings related only to PCB 04-216. Perhaps some of the participants in these two trade secret appeals believed the Board had consolidated the appeals when the Board had actually only requested that the parties address the propriety of consolidating the proceedings.

For example, on June 21, 2004, Sierra Club filed a motion to intervene only in PCB 04-215. The filing, however, included the captions of both trade secret appeals. On June 23, 2004,

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

IEPA filed a response, supporting intervention subject to several conditions. This filing included the appearance by IEPA's attorney. Yet six days later, on June 29, 2004, IEPA filed an identical but separately dated response to Sierra Club's requested intervention, which also included the appearance by the same attorney. Each of these IEPA responses refers at times to ComEd as petitioner and at other times to Midwest as petitioner.

On July 20, 2004, Sierra Club filed a motion for leave to reply to ComEd on intervention. Sierra Club's motion for leave was docketed not only in PCB 04-215, but also in PCB 04-216, as the pleading's caption indicated. On July 23, 2004, Midwest filed a response opposing Sierra Club's motion for leave, noting that Sierra Club had not yet filed a motion to intervene *in PCB 04-216*. In fact, it was not until August 3, 2004, that Sierra Club filed a motion to intervene in this trade secret appeal, PCB 04-216.

It is apparent from IEPA's filings of June 23 and 29, 2004, that IEPA believed Sierra Club had moved to intervene in both proceedings, yet the Board at that time had received a motion to intervene only in PCB 04-215. To remedy any confusion, the Board will treat IEPA's June 23, 2004 filing as IEPA's response to Sierra Club's motion to intervene in PCB 04-215, and treat IEPA's substantively identical June 29, 2004 filing as IEPA's response to Sierra Club's virtually verbatim motion to intervene in PCB 04-216. The Board finds that this will further the interest of fully hearing from all of the participants on the issue of intervention. The Board accordingly directs the Clerk to ensure that the filings of the respective records and docket sheets of these two appeals reflect this ruling.

Sierra Club's Motion for Leave to File Reply

Midwest filed a response opposing Sierra Club's motion to intervene on August 17, 2004. On August 26, 2004, Sierra Club filed a reply to Midwest's response, with a motion for leave to file the reply. In its motion for leave, Sierra Club states that the reply is needed to avoid materially prejudicing Sierra Club because the organization needs "to provide a more complete argument to respond to Midwest Generation's detailed objections." Sierra Club Motion for Leave at 2.

On September 9, 2004, Midwest filed a response to Sierra Club's motion for leave, opposing the motion. In its response to the motion for leave, Midwest argues that Sierra Club failed to establish material prejudice absent an opportunity to reply (citing 35 Ill. Adm. Code 101.500(e)). Midwest maintains that the arguments in Sierra Club's offered reply either are mere elaborations that should have been stated in Sierra Club's motion to intervene, or are not directly responsive to Midwest's response on intervention. Midwest Response to Motion for Leave at 4-8. Midwest asks for an opportunity to respond to Sierra Club's reply if the Board grants Sierra Club leave. *Id.* at 9-10.

The Board does not disagree with all of Midwest's claims on whether Sierra Club has demonstrated material prejudice. The Board notes, however, that as a practical matter, the legal arguments in the offered reply have already been made by Sierra Club and considered by the Board in the pending trade secret appeal Midwest Generation, PCB 04-185 (Nov. 4, 2004). There, Midwest neither opposed Sierra Club's motion for leave to file a similar reply nor sought

to file a surreply. Furthermore, Sierra Club's arguments were likewise considered today by the Board in the pending trade secret appeal Commonwealth Edison, PCB 04-215. In those other two trade secret appeals, PCB 04-185 and PCB 04-215, the very arguments made in the reply now offered here were ultimately found unpersuasive on the issue of intervention. Under these circumstances, the Board grants Sierra Club's motion for leave to file the reply and denies Midwest any surreply.²

IERG's Motion for Leave to File *Amicus Curiae* Brief Regarding Intervention

On August 6, 2004, the Illinois Environmental Regulatory Group (IERG) filed an *amicus curiae* brief opposing Sierra Club's motion to intervene, along with an unopposed motion for leave to file the brief. In the motion for leave to file, IERG states that it is an affiliate of the Illinois State Chamber of Commerce and a not-for-profit Illinois corporation. IERG is comprised of 66 member companies "engaged in industry, commerce, manufacturing, agriculture, trade, transportation, and other related activities." IERG Motion for Leave at 1-2. IERG explains that it "was organized to promote and advance the interests of its members before governmental agencies . . . and before judicial bodies." *Id.* at 2.

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

DISCUSSION

The Board discusses trade secret protection under the Act and Midwest's petition for review before turning Sierra Club's motion to intervene.

Background on Trade Secret Protection

Under Section 7 of the Act (415 ILCS 5/7 (2004)), all files, records, and data of the Board, IEPA, and the Illinois Department of Natural Resources are open to reasonable public inspection and copying. However, the Act provides that certain materials may represent "trade

² The Board cites Sierra Club's motion to intervene as "SC Mot. at _"; Midwest's response to the motion to intervene as "MG Interv. Resp. at _"; IEPA's response to the motion to intervene as "IEPA Resp. at _"; and Sierra Club's reply as "SC Reply at _."

³ The Board cites IERG's *amicus curiae* brief as "IERG Br. at _."

secrets,” “privileged” information, “internal communications of the several agencies,” or “secret manufacturing processes or confidential data” and, accordingly, be protected from public disclosure. *See* 415 ILCS 5/7(a) (2004); 415 ILCS 5/7.1 (2004) (trade secrets).

Even so, the Act denies protection from public disclosure for: effluent data under the National Pollutant Discharge Elimination System (NPDES) permit program; emission data to the extent required by the federal Clean Air Act; and the quantity, identity, and generator of substances being placed or to be placed in landfills or hazardous waste treatment, storage, or disposal facilities. *See* 415 ILCS 5/7(b)-(d) (2004).

In Midwest’s appeal, trade secret status is at issue. The Act defines “trade secret” as follows:

[T]he whole or any portion or phase of any scientific or technical information, design, process (including a manufacturing process), procedure, formula or improvement, or business plan which is secret in that it has not been published or disseminated or otherwise become a matter of general public knowledge, and which has competitive value. A trade secret is presumed to be secret when the owner thereof takes reasonable measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. 415 ILCS 5/3.48 (2004).

The Board has established procedures for identifying and protecting articles that constitute trade secrets or other non-disclosable information. *See* 35 Ill. Adm. Code 130.⁴ The owner of an article seeking trade secret protection for the article must claim that the article represents a trade secret when the owner submits the article to the State agency. *See* 35 Ill. Adm. Code 130.200(a). The State agency must consider the claimed information as a trade secret and protect it from disclosure in accordance with Part 130 procedures unless and until the State agency makes a final determination denying the trade secret request and all appeal times have expired without that final determination being overturned. *See* 35 Ill. Adm. Code 130.200(d), 130.210.

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

⁴ “Article” means “any object, material, device or substance, or whole or partial copy thereof, including any writing, record, document, recording, drawing, sample, specimen, prototype, model, photograph, culture, microorganism, blueprint or map.” 415 ILCS 5/7.1 (2004).

Midwest's Petition for Review

In its petition, Midwest states that in January 2004, ComEd submitted information in response to a request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414) from the United States Environmental Protection Agency and submitted a “courtesy copy” of the information to IEPA. Pet. at 1. Midwest notes that the information ComEd submitted included “excerpts from a continuing property record (‘CPR’) relating to six coal-fired generating stations formerly owned by ComEd and currently owned by Midwest.” *Id.* at 1-2, Attachment 1.

The petition further states that Midwest purchased the six stations in December 1999 and received a copy of the CPR pursuant to an asset sale agreement between ComEd and Edison Mission Energy, Midwest’s parent company. Pet. at 2. Midwest’s petition asserts that the excerpts from the CPR are “compiled listings of confidential detailed financial information related to expenditures at the six generating stations.” *Id.* Midwest states that ComEd marked the information as confidential. *Id.*

Midwest maintains that after it was informed of IEPA’s request that ComEd provide a statement justifying the trade secret claims, Midwest submitted an independent statement of justification to IEPA concerning the CPR. Pet. at 2, Attachments 2-4. IEPA issued a final determination on April 23, 2004, responding to Midwest’s statement of justification and denying trade secret protection for the information submitted by ComEd. IEPA granted trade secret status only to work order numbers in the CPR. *Id.* at 2, Attachment 4.

Midwest argues that IEPA erred in determining the company failed to demonstrate that the information claimed to be trade secret had not become a matter of general public knowledge, had competitive value, and did not constitute emission data exempt from protection. Pet. at 2-5, Attachment 1. Midwest claims that disclosure of the information will harm the company’s competitive position. *Id.* at 3-4.

Sierra Club's Motion to Intervene

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

Procedural Rule on Intervention

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

- a) The Board may permit any person to intervene in any adjudicatory proceeding. *** The motion must set forth the grounds for intervention.

- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.
- ***
- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if: ***
- 2) The person may be materially prejudiced absent intervention; or
 - 3) The person is so situated that the person may be adversely affected by a final Board order. 35 Ill. Adm. Code 101.402.

Motion to Intervene

In its motion to intervene in this trade secret appeal, Sierra Club states that in February 2004, it submitted an electronic FOIA request to IEPA “seeking all documents submitted to IEPA by [ComEd] in response to an information request under Section 114 of the Clean Air Act.” SC Mot. at 1. Sierra Club asserts that the records it requested “relate to IEPA oversight of coal-fired plants and ComEd’s compliance with requirements that originate in the Clean Air Act and the Illinois Environmental Protection Act.” *Id.*

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

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

Sierra Club states that the goal of the Act to increase public participation in protecting the environment is facilitated by giving access to IEPA’s records. SC Mot. at 4. According to Sierra

Club, while the parties are focused on whether the information constitutes trade secret, its “focus in this hearing is altogether different and involves creating a record of the public’s interests in having access to information consistent with Illinois and federal law.” *Id.* at 4-5.

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

IEPA’s Response Supporting the Motion to Intervene

IEPA supports intervention by Sierra Club in this trade secret appeal, subject to conditions. IEPA Resp. at 1. Specifically, IEPA’s response sets forth six proposed conditions limiting Sierra Club’s participation in the proceeding should Sierra Club be allowed to intervene. *Id.* Those conditions provide that Sierra Club must:

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

Midwest’s Response Opposing the Motion to Intervene

In its response opposing Sierra Club’s motion to intervene, Midwest argues first that Sierra Club failed to establish that it may be “materially prejudiced absent intervention” under Section 101.402(d)(2) of the Board’s procedural rules. MG Interv. Resp. at 2. According to Midwest, Sierra Club has no interest in the issue before the Board, which is the “narrow question of whether IEPA correctly determined whether information submitted to IEPA constitutes trade secret information.” *Id.* at 3. The Board’s determination on that issue, continues Midwest, requires analyzing the nature of the information and how Midwest treated that information, but it “does not involve an analysis of Sierra Club’s or the general public’s interest, if any, in the information” or their interest in having access to the claimed information. *Id.* at 3-4.

Midwest asserts that the public’s interest in the claimed trade secret information is neither relevant nor admissible. MG Interv. Resp. at 4. Midwest further argues that because the Board need not and properly should not consider the public’s interest in or interest in having access to the claimed information, Sierra Club will not be materially prejudiced if it cannot make a record of that interest. *Id.* at 4-5.

Midwest also argues that Sierra Club failed to explain how intervening could assist it in gaining a better understanding of how IEPA enforces laws and regulations. MG Interv. Resp. at

4-5. Midwest states that Sierra Club would presumably gain this understanding by learning what type of information is afforded trade secret protection and gaining access to information related to air pollution. *Id.* at 5. But, according to Midwest, Sierra Club admits that intervention would not allow it to gain access to the disputed documents during this proceeding. *Id.* Nor will intervention, Midwest maintains, “enable Sierra Club to learn more about the type of information IEPA affords trade secret protection.” *Id.* Midwest similarly argues with respect to Sierra Club’s claimed interest in learning about Midwest’s compliance status. *Id.* Midwest concludes that Sierra Club will not be prejudiced absent intervention. *Id.*

In addition, Midwest argues that Sierra Club’s statement that it has a pending FOIA request for the claimed trade secret information does not explain how Sierra Club will be adversely affected by a final Board order. MG Interv. Resp. at 5-6. According to Midwest, “Sierra Club has no legal right to these documents to the extent they contain [Midwest’s] trade secret information.” *Id.* at 6. Midwest states that if the Board finds that the contested documents contain trade secret information, then Sierra Club has “no legal interest in this information and cannot be adversely affected by not receiving the documents.” *Id.*

Midwest asserts that even if Sierra Club has established grounds for intervention, the Board should not exercise its discretion to allow intervention here—because intervention would unduly delay, materially prejudice, and otherwise interfere with an orderly and efficient proceeding. MG Interv. Resp. at 6 (citing 35 Ill. Adm. Code 101.402(b)). Midwest notes that Sierra Club “admits that it has no interest in the issue that is before the Board.” *Id.* Midwest argues that Sierra Club’s interest is “irrelevant to the issue before the Board” and that Sierra Club “overlooks that the parties are focused on [the trade secret] issue because it is the *only* issue before the Board.” *Id.* at 7 (emphasis in original).

Stating that trade secrets “do not cease being trade secrets merely because someone contends the public has an interest in seeing them,” Midwest maintains that Sierra Club’s intervention would not assist the Board in determining whether the claimed information is trade secret. MG Interv. Resp. at 7. Sierra Club’s proposed intervention, continues Midwest, is an attempt to “bring irrelevant issues and politics into this proceeding in a manner that is completely unrelated to the only issue the Board is called upon to decide.” *Id.* at 7-8.

Sierra Club’s Reply to Midwest’s Response

Sierra Club replies to Midwest’s arguments by stating that its interest in this appeal “involves establishing a record of the public’s interest in having access to information consistent with Illinois and federal law,” citing to the Illinois FOIA (5 ILCS 140/1 (2004)) and the federal Clean Air Act (42 U.S.C. §§ 7414(a), (c)). SC Reply at 3-4. Sierra Club argues that it needs to intervene to make an “adequate record” of this interest should it decide to appeal the Board’s final decision in this trade secret appeal. *Id.* at 5. Moreover, Sierra Club continues, it accepts the conditions of intervention as proposed by IEPA. *Id.* at 7.

Sierra Club further maintains that under 35 Ill. Adm. Code 130.214(b), as a FOIA requester, it may appeal any adverse final Board decision regarding release of the requested records, even if Sierra Club is not a party to the Board proceeding: “it is inconsistent that the

Sierra Club is entitled the right to appeal but *not* the right to intervene in order to create an adequate record of its interests in the hearing before the Board.” SC Reply at 5 (emphasis in original).

IERG’s *Amicus Curiae* Brief Opposing Intervention

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

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

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

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

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

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

Board's Ruling on Motion to Intervene

The Board may allow a person to intervene in an adjudicatory proceeding if the person seeking to intervene establishes that he may be “materially prejudiced absent intervention” or that he is so situated that he may be “adversely affected by a final Board order.” *See* 35 Ill. Adm. Code 101.402(d)(2), (3). For the reasons below, the Board denies Sierra Club’s motion to intervene.

The Board finds that Sierra Club has not established that it may be materially prejudiced absent intervention. Sierra Club has not articulated how its interests will not be adequately represented in this proceeding by IEPA. Under the Act, IEPA is required to have all files, records, and data open for reasonable public inspection, unless the material is trade secret—and even then, emission data must be publicly available to the extent required by the federal Clean Air Act. *See* 415 ILCS 5/7(a), (c) (2004). Here, the decision being appealed, and being defended by IEPA, is that the claimed information should be available to the public.

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

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

Accordingly, under this provision, if IEPA *grants* trade secret protection, and a FOIA request would therefore be *denied*, only then does the FOIA requester have the right to appeal the trade secret determination to the Board. However, when IEPA has denied trade secret status, as is the case here, there is no right of appeal for a FOIA requester—only the article owner may appeal. This case does not present an instance of a third party seeking to intervene to assert its own property interest in contested information by arguing against its claimed trade secret being disclosed. Here, IEPA determined that the contested information is not trade secret. Mindful of IEPA’s decision in this case and IEPA’s statutory obligations to make information publicly available, the Board can find no justification in Sierra Club’s pleadings to expand through intervention the permissible parties in this appeal. *Cf. Lowe Transfer, Inc. v. County Board of McHenry County*, PCB 03-221 (July 10, 2003) (denying intervention in appeal of local government’s decision to *deny* siting for a pollution control facility; Act allows third party to appeal local government’s siting decision only when siting is *granted*).

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

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

An owner or requester who is adversely affected by a final determination of the Board pursuant to this Subpart may obtain judicial review from the appellate court by filing a petition for review pursuant to Section 41 of the Act [415 ILCS 5/41]. 35 Ill. Adm. Code 130.214(b).

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

[A]ny *party* adversely affected by a final order or determination of the Board . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the *party* affected by the order or other final Board action complained of, under the provisions of the Administrative Review Law, . . . except that review shall be afforded directly in the Appellate Court 415 ILCS 5/41(a) (2004) (emphasis added).

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

The Administrative Review Law likewise refers only to a "party" seeking direct administrative review of an agency final decision in the appellate court. *See* 735 ILCS 5/3-113 (2004). This is an axiom of administrative law and to hold otherwise would lead to a flood of appeals never contemplated by the General Assembly or the courts. And if simply wanting to be able to appeal the Board's final order was in itself a sufficient ground to intervene in a Board proceeding, intervention may never be denied.

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

The Board also finds that Sierra Club has not demonstrated that it may be adversely affected by a final Board order in this case. Again, Sierra Club does not seek to intervene to try to introduce evidence that the disputed documents are not trade secrets. To the extent that the Board reverses IEPA and finds that some of the disputed information constitutes trade secret and

not emission data, then that information would be protected from disclosure under the Act. Sierra Club would have no legal right to the protected information. Sierra Club has not shown how it would be adversely affected when it would simply not be allowed to receive information that it had no legal right to receive.

In addition, even when discretionary intervention is permissible, the Board must consider “whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.” 35 Ill. Adm. Code 101.402(b). The Board finds that intervention here would raise all of these concerns. Sierra Club seeks to make a record that is unrelated to the lone issue of this appeal, and the Board is not convinced that the limiting conditions on intervention proposed by IEPA would necessarily protect the claimed trade secret information from improper disclosure. Accordingly, the Board denies Sierra Club’s motion to intervene.

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

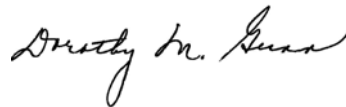
As noted above, today’s ruling is consistent with the Board’s decisions denying Sierra Club requests to intervene in two other pending trade secret appeals, Midwest Generation, PCB 04-185 (Nov. 4, 2004) and Commonwealth Edison, PCB 04-215 (Aug. 18, 2005).

CONCLUSION

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

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 18, 2005, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board