

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)	
)	
REVISIONS OF THE BOARD)	
PROCEDURAL RULES: 35 ILL. ADM.)	R00-20
CODE 101-130)	(RULEMAKING-PROCEDURAL)

**TESTIMONY OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ON
PROPOSED 35 ILL. ADM. CODE 130**

Now comes the Illinois Environmental Protection Agency ("IEPA") and provides the following testimony with respect to the proposed Part 130.

The Agency appreciates the opportunity to comment on the Board's proposed procedural rules concerning trade secret claims. The Agency has carefully deliberated on these proposed regulations in order to provide comments that further a complex goal. This goal is to provide maximum availability of a document to the public, and to develop a system that is efficient, timely and able to be implemented with the resources available to each bureau and division of the Agency. This goal has been difficult to achieve in that each bureau or division is different in the number of trade secret claims it relieves; the resources allocated for personnel to process trade secret claims; the number of Freedom of Information Act (FOIA) requests received; the complexity, time frame and number of permits issued; the number of permit denial appeals filed; and the statutory and regulatory deadlines to take action in the numerous state and federal programs administered by the Agency. Therefore, please take these comments into consideration in light of the "environment" described above. FLEXIBILITY for the Agency is the solution. In crafting this solution, it is our intent to provide adequate notice and information to owners of the Agency's FOIA actions, and safeguards to the Board and the public that the documents needed will be provided in a timely fashion for FOIA requests, administrative record filings, and enforcement proceedings.

My testimony today includes the points of flexibility the Agency believes are necessary to manage the quantity and complexity of claims it receives. This testimony excludes comments on whether or under what circumstances documents containing emission data can be determined to be trade secrets. Comments for this subject were submitted separately.

Preliminary to the other points I will present is the fact that the Agency must become aware of a trade secret claim when the document is submitted. This is essential for the Agency's effective protection and management of the document. Also, it is essential for the owner's claim. Documents not marked or claimed will be presumed to be available to the public. If the

document is not claimed when submitted, a FOIA request for the document may be received and processed by the Agency. Once the document has been submitted to the Agency unclaimed or if the Agency has released the document to the public, it will be extremely difficult for the owner to provide adequate justification meeting the requirements of the Board's proposed Section 130.202.

Flexibility Point #1: The Availability of a Waiver on Lieu of Providing Justification (Agency's Proposed Sections 130.200(b)(3) and 130.201)

In certain instances it is not necessary for the Agency to immediately process a trade secret claim. Also, it may not be in an owner's interest to provide justification and obtain a final decision. Absent an intervening event such as a FOIA request, a permit denial appeal or issuance of a permit subject to public notice requirements, there is no harm to the public, a judicial body or the owner if a waiver is provided and the document is held as if it were determined to be a trade secret. This allows the Agency the necessary flexibility to use its resources to process documents of immediate concern.

Flexibility Point #2: The Agency's Ability to Request Justification (Agency's Proposed Section 130.205)

There are instances that demand immediate action by the Agency in determining trade secret claims. Some examples are the following: the processing of FOIA requests (with a statutory deadline of 7 days with a 7-day extension), permit denial administrative records (with a regulatory deadline of 14 days), judicial orders (with various deadlines), and permit notices and hearing requirements (with various deadlines). In addition to the above, the Agency needs the flexibility to manage documents so that a large backlog does not occur, or a large backlog can be rectified, such that timely and technically sound determinations are possible. In the long run, the ability to request a justification will lessen the hardship to the Agency, the Board, the owner and the public. Without this flexibility to manage its workload, the Agency will never have effective document control.

Flexibility Point #3: The Deletion of the Automatic Denial

An automatic denial creates numerous problems for the Agency, the Board, and especially the owner. Because it is not possible for the Agency to process all trade secret claims within the 45 days proposed by the Board, there will be numerous appeals filed. This creates large expenditures of resources in litigation (including tracking of all actions and inactions) for all parties. The Agency will not have the resources to defend the large number of appeals that an automatic denial will create. Also owners may find that their appeal rights have expired without receiving notice of a denial from the Agency. The practical solution to this situation is for the Agency to protect a document claimed to be a trade secret until a determination can be made.

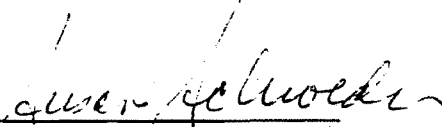
Flexibility Point #4: The Management of Documents Claimed with No Agency Final Action

The status of documents claimed to be a trade secret where no Agency action has taken place

varies with each bureau and division in the Agency. A deadline to manage these documents will create a hardship on the Agency, the Board, and the owner. In many instances, the owner does not know which documents submitted to the Agency have been claimed a trade secret. A deadline will generate a large number of FOIA requests by the owners in an effort to identify which documents have been claimed trade secrets. Once documents have been identified, there will be a large number of justifications for the Agency to process. A great amount of resources will be needed to manage this increased workload, with accompanying litigation and tracking. The Agency requests the flexibility to manage these documents without a regulatory deadline for final action.

This concludes my testimony. Once again, thank you for the opportunity to comment on your proposed procedural rules.

Respectfully submitted,

By 
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