

ILLINOIS POLLUTION CONTROL BOARD
November 3, 1983

IN THE MATTER OF:)
)
PROCEDURES FOR IDENTIFYING) R81-30
AND PROTECTING TRADE SECRETS)

Adopted Rule. Final Order.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

I. Statutory Authority and Procedures

Section 7 of the Illinois Environmental Protection Act (Act) establishes a general policy and procedural framework for access to information acquired pursuant to the Act. As a general policy, "all files, records and data of the Illinois Environmental Protection Agency (IEPA), the Pollution Control Board (Board), and the Department of Energy and Natural Resources (Department) are to be open to reasonable public inspection and may be copied upon payment of reasonable fees." Section 7 also establishes four exceptions to this general policy, including an exception for "information which constitutes a trade secret." Sections 7(b), (c) and (d) specify certain types of information which may not be treated as confidential, irrespective of their trade secret status, or otherwise privileged or confidential character. In addition, Section 7.1 establishes a general policy of non-disclosure with regard to trade secrets and mandates that the Board adopt regulations which prescribe procedures for identifying and protecting trade secrets.

These regulations are designed to meet the mandate for rulemaking in Section 7.1(b). A proposal for a procedural rulemaking was presented to the Board on December 16, 1981 by the IEPA and docketed as R81-30. Hearings were held on the IEPA proposal on February 10th and 23rd, 1982. In addition, several lengthy public comments and redrafts of the proposal were considered by the Board prior to publication of a Board proposed rule in the

The Board acknowledges with appreciation the contribution of the late Vice-Chairman of the Pollution Control Board, Irvin G. Goodman, to the development and legal analysis of these regulations.

The Board also appreciates the efforts of Board Assistant Patricia F. Sharkey who acted as hearing officer in this proceeding and assisted greatly in the drafting of the Opinion and Order.

Illinois Register on February 25, 1983. Four additional comments were received during the First Notice period. Those additional comments were the basis of a number of refinements in the rule as proposed for Second Notice. The rule has also been amended, as noted, in response to comments made by the Joint Committee on Administrative Rules (JCAR) during the Second Notice period.

II. General Issues

Scope

These regulations prescribe uniform procedures to be applied to "all articles representing a trade secret reported to or otherwise obtained by the Agency, the Board or the Department in connection with any examination, inspection or proceeding under this Act." The scope of these rules follows from this statutory language and several limitations in this scope should be noted. First, these regulations apply to all three agencies subject to the Environmental Protection Act. However, they apply only to articles which are obtained pursuant to Environmental Protection Act authority. Thus, these procedures are applicable to most information handled by the Board and the IEPA, but are not necessarily applicable to all articles obtained by the Department, which operates largely pursuant to other statutory authority. Second, these rules cover only "trade secrets." (The term "trade secret" is defined in Section 3 of the Act.) Although the Board agrees with some commenters (P.C. #6 and #9) and participants in the hearings who suggested that it would be advisable for the agencies involved to adopt similar uniform procedures for identifying and protecting other privileged or confidential information, Section 7.1(b) authorizes the Board to adopt procedural rules governing the internal operations of the Agency and the Department only with regard to the limited subject of "trade secrets."

Several commenters expressed concern about the relationship of these rules to the other requirements for disclosure and non-disclosure under Section 7 of the Act. (P.C. #6, #8 and #9) Obviously, these rules do not supersede other statutory requirements for disclosure or non-disclosure unless the statutory language so indicates. Therefore, the fact that an article is not a trade secret does not necessarily mean that it is disclosable since that same article may fall within one of the other statutorily protected categories listed in Section 7(a)(2), (3) or (4) of the Act. Likewise, the fact that an article is a trade secret will not supersede a statutory disclosure requirement contained in Sections 7(b)(1), (c) and (d) of the Act.

Balance of Interests

These regulations attempt to balance the interests of the information requester, the information submitter, and the agencies handling the information. There is an obvious public interest in

informed citizen oversight of administrative actions affecting public health and the environment. Often this requires timely access to information. Unreasonable delays can effectively eliminate public comment in actions moving through administrative processes such as rulemaking or permitting. For example, the Act requires that IEPA decisions on certain permits must be made within 90 days from the date an application is submitted. Public access to information must be geared to the public participation process.

A second obvious interest is the property interest of the owner of the information. In the field of pollution control, this person is generally a regulated industry or individual. The information involved is generally technical in nature and may have an economic value to the owner. The avid interest of competitors and consultants in environmental files is evidence of the fact that a regulated party may have a legitimate concern about submitting valuable information to the three government agencies covered by these rules.

A third interest is that of government itself. The government has several concerns in regard to the handling of information. First, there is an interest in encouraging rather than inhibiting the flow of technical information to a government agency charged with overseeing regulated activities. Second, there is an interest in handling the massive amount of information submitted to and obtained by government in the most efficient and inexpensive way possible. Third, there is a government interest in operating under rules which minimize the possibility of unintentional mishandling of information.

Proposed Claim/Waiver/Justification System

The proposed regulations establish a procedure for identifying trade secrets which is intended to accommodate the balance of interests delineated above. Appendix A to this Part provides a "flow chart" depicting the steps involved in the "claim/waiver/justification" system. Briefly, this system works as follows. Upon submitting an article, the owner of the article has the option of claiming that it represents a trade secret. (Although the most common situation involves an article submitted to an agency, provision is also made for articles already in the possession of an agency or independently obtained by the agency.) The owner must accompany such a claim with either a "Statement of Justification", as defined in Section 120.202, or a limited "waiver" of certain statutory deadlines as defined Section 120.203. If the "justification" route is taken, the owner must include specified information to enable the agency to determine whether the article qualifies as a "trade secret" under the statutory definition. The article is then temporarily protected and the agency has 10 working days to make a final determination. If the

"waiver" route is chosen, the article will be conditionally protected by the agency without the owner or the agency doing anything more until a request for access to the information is received. In this latter case, a brief description of the article is placed in the open access file. A request for access to the conditionally protected information triggers the formal agency determination process during which the owner is required to provide information justifying its claim.

There are advantages and disadvantages in providing an option under which articles may be claimed and protected before they are determined to represent "trade secrets". The advantages accrue to the owner of the article and the agency which are spared the expense and burden involved in justifying and determining the legal status of articles which may never be the subject of a request for access. The vast majority of information submitted to the agencies involved is never the subject of inquiry, thus many "front-end" determinations would be unnecessary. (Notably, USEPA reached this same conclusion in promulgating regulations governing confidentiality of information submitted pursuant to the Resource Conservation and Recovery Act and the consolidated permit program.) (See 47 FR 15305 and 40 CFR Part 2.)

On the other hand, the availability of trade secret protection without a justification may encourage owners to make unfounded claims. This may also result in increased information handling costs to the agencies. Another drawback to this approach is the delay in the requester's access to information which has been claimed "but not determined" to be a trade secret. Under these rules, upon receiving a request the agency must notify the owner and allow the owner 10 days in which to submit a justification. (Sections 120.210 and 120.220.) Then, the agency itself may take another 10 days to make a determination. (Section 120.225.) (In addition, both of these time periods may be extended by 10 days.) Finally, under these rules the article may not be released until the owner has been given 35 days in which to appeal the agency determination. (Section 120.240.) In total, the delay involved can be as long as 80 days (including mailing time) where the agency decision is not appealed. Obviously, this lengthy delay may jeopardize the public's ability to participate in permitting and variance proceedings before the agency where agency decisions are limited by statutory time constraints. The "waiver", which must be submitted in this situation, is designed to alleviate this jeopardy. As described in Section 120.203, it would extend any statutory decision deadline for a period equal to the period by which the decision is delayed plus 10 working days.

Appeal from Agency Determination

Section 120.250 establishes the route of appeal which may be taken by either an owner or a requestor from an agency determination of trade secret status. Both IEPA and Department

determinations are directly appealable to the Board. Board determinations, whether initial determinations of trade secret status by the Board itself or Board review of the other agencies' determinations, are directly appealable to the Appellate Court pursuant to Section 41 of the Act. This route of appeal differs from that proposed by the IEPA which would have had IEPA and Department determinations made appealable to the Circuit Courts rather than the Board.

There are several advantages in making these decisions appealable to the Board. Appeals to a single body will result in a consistent, statewide interpretation of the law on the subject of trade secrets as defined under the Act. The delay caused by the case backlog in many circuit courts will be avoided. Furthermore, the technical qualifications of the Board in this specialized field provide it with a better understanding of the technical material involved. Recognition of the need for technical expertise in this area is the fundamental concept behind the structure established in the Act for the appeal of permit decisions and the enforcement of the Act's provisions before the Board.

Level of Detail in this Proposed Rule

These proposed rules provide greater detail than those proposed by the IEPA. In particular, the IEPA's proposal did not provide uniform procedures for the protection of trade secrets. Rather the IEPA proposal would have left those practices up to the individual agencies involved. In light of information presented in the record on inconsistent practices within some of the agencies involved, as well as the explicit statutory mandate to adopt procedures for the "protection" of trade secrets, the Board believes explicit, uniform procedures for both the identification and protection of trade secrets are necessary. The possibility that articles may be transferred from one agency to another underscores the necessity that policies with regard to "marking" articles and restrictions on access to articles be clearly stated and uniformly applied. The Board believes this includes specificity in details such as how and where an article is to be marked, how trade secret articles are to be maintained in the agency files, and who may have access to them.

Notably this level of specificity is a protection to the clerical employees who handle the great mass of materials submitted to and maintained by the agencies. In addition, these specific requirements will have the positive result of formalizing many practices which are currently informal and unenforceable.

III. Section by Section Review

The following is a discussion of substantive changes which have been made to the rule as proposed on February 10, 1983. Changes made in response to JCAR comments are also noted.

Section 120.103 Definitions

The definition of "authorized representative" has been amended to include those persons who act on behalf of an agency under a formal agreement that may not be considered a "contract" under contract law. This might, for example, include a local government or another state agency.

The definition of "owner" has been clarified by use of the term "agent" rather than "authorized representative" in reference to a person who is acting on behalf of an owner under these rules.

The definition of "proceeding" has been amended to include a "variance proceeding." As pointed out by one commentor, a variance proceeding is not solely a rulemaking or an adjudication, but is a hybrid, and thus would not fall within the other named categories of proceedings.

A definition of the term "Act" as used in this Part has been added in response to JCAR comments. This is necessary because Section 101.102 of the general procedural rules does not reference this new Part 120.

Section 120.201 Claim That Article Represents a Trade Secret

Subsection (a) has been reworded in the active voice for improved readability. Former subsections (b), (d) and (e) have either been moved elsewhere in the rules or deleted as unnecessary.

Former subsection (c) has been retained (as subsection (b)) despite comments that a submitter should not be allowed to claim that an article submitted to the agency is a trade secret subsequent to submitting it. The Board agrees that an owner who takes no precautions to insure that an article will not become "available to persons other than those selected by the owner to have access thereto for limited purposes" is not entitled to the presumption of trade secret status prescribed in the statutory definition of "trade secret." However, the fact that an article has been submitted to an agency does not necessarily mean that it has been "published or disseminated or otherwise become a matter of general public knowledge." Absent this finding (and a finding of "competitive value") an agency cannot presume an article is not a trade secret. The owner, of course, bears the burden of proving that the article meets the statutory trade secret requirements despite the fact that it was submitted to be held in an open file.

As a policy matter, it is also undesirable to slow down or impede the flow of information to the agencies by imposing a sanction against submitters who unwittingly submit an article without making a claim. Such a sanction is likely to make submitters, such as permit applicants, wary of submitting articles without prior review by their attorneys, or may lead their attorneys to advise that all articles submitted to the agency should be claimed as a trade secret as a precaution.

With regard to subsection (a)(3), one commentor argued that the Board lacks the statutory authority to require an owner to "waive" applicable statutory deadlines where the owner chooses to delay filing a statement of justification (P.C. #9). This is simply incorrect. The Board has the authority to require that "up-front" justifications accompany all submittals. The delayed "justification" approach is provided as an option for the convenience of the owner. Absent the "waiver" provision, the option of delaying justification could disrupt administrative action and curtail public participation.

Another commentor argued that owners should be required to justify all claims at the time of submittal, and that if the "claim/waiver" system is allowed, the agencies should be required to extend discretionary as well as statutory deadlines. As stated earlier, the advantages of the "claim/waiver" system, in terms of the flow of information to the agencies and reducing numerous "unnecessary" determinations, outweigh the disadvantages. However, the Board agrees that any adverse affect on public participation resulting from this approach should be minimized. This is the reason the "waiver" is required where there is a delayed justification. To remedy other situations involving discretionary deadlines, a new Section 120.270 has been added to the rules. (See discussion under that heading.)

Section 120.202 Contents of Statement of Justification

This section, was formerly Section 120.204(c).

With regard to subsection (c), one commentor argues that the Board lacks the statutory authority to require that an owner certify that it has no knowledge "that an article has ever been published, disseminated or otherwise become a matter of general public knowledge." (P.C. #9) On the contrary, this language is taken directly from the statutory definition of "trade secret" which establishes the two basic standards for trade secret status. The owner's certification as to this fact is highly pertinent to the broad and difficult question of whether something like publication or dissemination of the article has ever occurred. This certification is limited to the owner's "knowledge," and thus should not present an impossible burden to the owner. Furthermore, if publication, dissemination, etc. has occurred, why or how it occurred is irrelevant to the articles trade secret status.

Section 120.210 Public Request for Disclosure of an Article Which is Claimed to Represent a Trade Secret

Formerly Section 120.202, this Section has been clarified to outline how a public request for disclosure triggers either disclosure or the owner justification/agency determination process.

Since, in some instances, a requestor may not know the name or description of the article as contained in the claim letter or there may not be a claim letter on file, the rule has been amended to state that the requestor need only make a written request to trigger this process. (P.C. #9, #10.)

Section 120.215 Agency Request for Justification of Claim

This Section was formerly Section 120.203.

One commentor argues that the agencies lack statutory authority to impose the burden of justifying a trade secret on owners simply to facilitate public participation. (P.C. #9). The Board disagrees. Under a system which allows for a delay in justifying and determining the trade secret status of an article, an agency must have the flexibility to request a justification when it can foresee that public requests are likely to be made which may delay the final determination in a proceeding.

The same commentor argues that subsection (c) is "subjective, arbitrary and outside the scope of the Act," and that owners are "entitled to claim that all information submitted to or otherwise obtained by the agencies (subject to statutory requirements on disclosure) is trade secret or confidential." Again, the Board disagrees. The statute does not provide owners with a "right" to protection of an article based only upon a "claim" of trade secrecy. It is only within the context of these rules, which attempt to balance the competing interests involved, that protection is given based on an unsubstantiated "claim" of trade secrecy. The indiscriminate use of unsubstantiated claims of trade secrecy under this system will place administrative burdens on the agencies and unnecessarily delay public access to information. This is an abuse of the system which the agencies must have an ability to prevent. However, the Board agrees that this subsection should only be used by an agency when there is "reasonable doubt" that the article in question actually represents a trade secret. This condition has been added to subsection (c).

The Board notes that this Section is designed to be used by the agency which is in possession of the article. When an agency is standing in the position of a participant in a proceeding, it may request access to an article pursuant to Section 120.210 without being required to state a circumstance warranting the request.

In response to JCAR comments "or officer" has been added to the first sentence of this Section to make it parallel the language used in Section 120.330(a).

Section 120.220 and 120.225 Time Limit for Delayed Submission
of Justification and Time Limit for
Agency Determination

These time limits were contained in Section 120. of the proposed rules. They have been "broken out" for clarity. In addition, in response to JCAR comments a demonstration of the necessity for an extension of the time limits is required. This should clarify the intent that extensions are not to be automatically or arbitrarily granted or denied.

Section 120.240 Agency Actions Following A Negative Determination

(This Section was formerly Section 120.206.)

This section has been slightly modified to clarify the fact that a negative finding on trade secret status does not necessarily mean that an article may be disclosed, rather, it simply means that an agency must "cease protecting the article... as a trade secret." As stated earlier in this Opinion, other statutory requirements may nonetheless prohibit agency disclosure of such information.

Also, the 30 day notice of an appeal has been changed to 35 days to make it consistent with the 35 days for appeal provided in Section 120.250 of these rules and Section 41 of the Act. (See P.C. #7, #10.)

Other changes to improve clarity in this section and Section 120.245 have been made in response to JCAR comments.

Section 120.250 Review of Agency Determination

(This Section was formerly Section 120.208).

This Section has not been substantively modified. Several commentors supported the Board proposal that IEPA and Department determinations be appealable first to the Board and then directly to the Appellate Court in the manner prescribed in the Act for permit appeals. (P.C. #7, #9). One commentor objected to Section 120.208(c) on the grounds that the Board lacks statutory authority to issue the equivalent of a mandamus order to either the IEPA or Department. (P.C. #10). Without addressing the question of whether the Board may issue the equivalent of a mandamus order (see Sections 33(d), 43, and 45(b) of the Act), the posture of this "determination" on review is like that of a permit appeal, and a Board order in this situation would be equally enforceable.

In response to JCAR comments, subsection (c) has been reworded to clarify the intent that an agency's inaction may be deemed appealable at any time after the prescribed time limits.

Section 120.265 Status of Article Which Was Determined or Claimed to Represent a Trade Secret Prior to the Effective Date of This Part

(Subsection (a) of this new section replaces former Section 120.205(e). Subsection (b) replaces former Sections 120.201(d) and (e).)

Subsection (a) provides that determinations of trade secret status made prior to the effective date of these rules will be treated as determinations made pursuant to this part and such articles will be accorded the same protection. However, only determinations made by an agency in accordance with procedures adopted pursuant to Administrative Procedure Act are to be so respected. The recognition of informal determinations or determinations made without conformance with properly adopted standards could undermine the statutory intent of Section. 7.

Subsection (b) was modified in response to public comment received during First Notice. (See P.C. 10, pp. 1-3.) It now provides that where a claim was made that an article represents a trade secret prior to the effective date of these rules, but no agency determination was made, it shall be protected as a claimed trade secret under these rules for 60 days after the effective date of these rules. During this 60 day period, owners of such information should review such articles. If they wish to retain the claimed status for such articles, these owners must provide the agency with the information required in Section 120.201(a), i.e. a claim letter; a copy of the article marked as provided in Section 120.302; and either a statement of justification or a limited waiver of statutory deadlines. The 30-day "grace period" for all articles, including those that were never claimed as trade secrets, has been eliminated in response to comment that it was both unreasonably burdensome and unnecessarily solicitous of owners who themselves had failed to protect their articles. The Board also notes that these owners have been on notice of these new procedures for several months and have had a de facto" grace period in which to submit a claim.

Section 120.270 Extension of Deadlines for Participation in Proceedings

This new Section has been added in response to a comment that the waiver of statutory deadlines does not go far enough in protecting public participation in proceedings involving discretionary or agency imposed deadlines. (P.C. #7). Absent an extension of deadlines for public comment in a rulemaking, for example, members of the public could be effectively prohibited from commenting on articles which form a part of the record due to the length of time it may take the owner to justify the claim and the agency to make its determination.

This section places a burden of proof on the person who claims to be adversely affected by the delayed justification and determination procedure. It also limits the time by which a proceeding may be delayed.

Section 120.305 Owner's Responsibility to Mark Article

(This Section was formerly Section 120.302(a).)

This Section has been somewhat reworded to clarify the owner's responsibility to clearly mark articles. Where less than an entire article is claimed, the owner must also provide a second copy of the article with the claimed material deleted. Section 120.310, formerly Section 120.302(b), outlines the parallel responsibilities of the agency in marking "determined" articles.

Section 120.310 Agency's Responsibility to Mark Article

In response to JCAR comments, this Section now requires the agencies to mark claim letters as well as the articles themselves. This requirement was inadvertently deleted in the Second Notice version of the rule.

Section 120.315 Transmission of Article Between Agencies

(This Section was formerly Section 120.302(e).)

The Board has added the new requirement that the agency transmitting an article to another agency clearly distinguish and segregate the claimed or determined article from other transmitted materials. This is an additional protection designed to alert the receiving agency that it is receiving a claimed or determined article.

Section 120.325 Public Access to Information Related to Article

(This Section was formerly Section 120.304.)

In response to comments received from JCAR, the situations in which the agency must prepare a statement naming and describing the article have been limited to those where a determination was made prior to the effective date of these rules and no claim letter exists.

Section 120.330 Access to Claimed or Determined Article

(This Section was formerly Section 120.305.)

As redrafted, this Section now requires that the agency maintain a record of the number of copies held by the agency and a log of the location of those copies at all times, as well as a log of the persons who have reviewed the article or copies. One commentor expressed concern that maintaining a log of agency personnel who have reviewed an article is too burdensome. (P.C. #10) While this may pose a slight additional burden on the agency, a record of copies and log of this nature is essential to track and control access to these articles. This Section envisions a "library-style" sign-in sheet for review of these articles.

Section 120.340 Unauthorized Disclosure or Use of Article

(This Section was formerly Section 120.306.)

In response to comments made by JCAR, the Board has eliminated any reference to personnel sanctions in this Section. Since the authority to impose these sanctions emanates from other statutes and regulations it is unnecessary to reference them here. In addition, subsection (c) has been reworded to eliminate vague terms such as "appropriate" and "properly" in response to JCAR comments.

Section 120.350 Limitation on Copying Article

(This Section was formerly Section 120.307.)

The proposed "prohibition" on copying of claimed or determined articles has been changed to a "limitation" on copying. Copies may be made only pursuant to specific authorization. Such copies must be recorded and logged pursuant to Section 120.330(c).

Section 120.360 Disposal of Articles

In response to JCAR comments this Section has been modified to clarify its focus on the appropriate means of disposal of claimed or determined trade secrets. The purpose of this Section is to prevent the possibility of trade secrets being left "open" to the casual, or not so casual, "garbologist" upon disposal.

ORDER

The Board hereby orders that the text of the rules in this proceeding be adopted for Second Notice as follows:

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. Statutory requirements for disclosure and non-disclosure contained in Section 7 of the Act also supersede any conflicting requirements in this Part and should be referenced prior to undertaking any of the procedures contained 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:

"Act" means the Environmental Protection Act (Sections 1-52 and all amendments thereto (Ill. Rev. Stat. ch. 111½, pars. 1001-1052 as amended)).

"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.

"Authorized Representative" means any person who is authorized to act on behalf of an agency by formal agreement or contract.

"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 agent of such person.

"Proceeding" means any rulemaking, adjudication, variance proceeding, 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) An agency shall consider any article submitted to or otherwise obtained by the agency as claimed to represent a trade secret and shall protect such article from disclosure pursuant to Subpart C of this Part, only if the agency is provided with the following:
 - 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 120.305; and
 - 3) Either a Statement of Justification for the claim meeting the requirements of Section 120.202 or a limited waiver of the statutory deadlines for any agency decision as provided in Section 120.203.
- b) The owner of an article in the possession of the agency may claim that the article represents a trade secret by providing the agency with the information listed in subsection (a) at any time.

Section 120.202 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; and
- b) A detailed statement identifying the persons or class of persons to whom the article has been disclosed; and
- 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; and
- d) A detailed discussion of why the owner believes the article to be of competitive value; and
- e) Any other pertinent information which will support the claim.

Section 102.203 Optional Limited Waiver of Statutory Deadlines

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 due to the subsequent justification and determination process plus 10 working days.

Section 120.210 Public Request for Disclosure of An Article
Which Is Claimed to Represent a Trade Secret

- a) Any person may make a request for the disclosure of information which has been claimed to represent a trade secret pursuant to Section 120.201 by submitting to the agency a written request.
- b) Upon receipt of a written request for the disclosure of an article which is claimed to represent a trade secret, but for which a statement of justification has not been submitted, 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 to Section 120.201(a)(1). At a minimum, this notification shall contain the following:
 - 1) A copy or description 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 limit prescribed by Section 120.220 for the return of a complete statement of justification to the agency, including notice of the availability of an extension of that time period.

Section 120.215 Agency Request for Justification of Claim

An employee or officer of the agency who is authorized to make determinations pursuant to Section 120.330(a) may request that the owner of an article claimed to represent a trade secret submit a justification meeting the requirements of Section 120.202. 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) There is reasonable doubt that the article represents a trade secret and there has been a practice, on the part of the owner of the 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 120.220 Time Limit For Delayed Submission of Justification

Within 10 working days from the date of receipt of the notification required by Section 120.210(b) or a written request made pursuant to Section 120.215, the owner shall submit a statement of justification as prescribed in Section 120.202 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 demonstrates that the extension is necessary to complete the statement of justification and submits a request for an extension.

Section 120.225 Time Limit For Agency Determination

The agency shall determine whether the article represents a trade secret within 10 working days from the date of receipt of a complete statement of justification as prescribed in Section 120.202 (whether such justification is submitted as a result of a request by the agency, a request by the public, or on the owner's initiative.) This time period may be extended for a second period of 10 working days, if within the first 10 day period, the agency demonstrates that the extension is necessary to make the determination pursuant to Section 120.230 and notifies the owner and requester of the extension.

Section 120.230 Standards For Agency Determination

- a) 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.
- 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 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.
- c) The agency may determine that any page, part or portion of the article represents a trade secret which meets the requirements of subsection (b).

Section 120.240 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 Section 120.230(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) of this section.
- 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 120.250; and
 - 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 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 and the agency shall so notify both the owner and the requester.

Section 120.245 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 Section 120.230(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 and the requester pursuant to subsection (b) of this section.
- 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 120.250; and
 - 3) A notification that the article, or the page, part or portion thereof, will be protected pursuant to Subpart C 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 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 120.250 Review of Agency Determination

- a) Except as provided in (b), an owner or requester who is adversely affected by a final determination of either the Environmental Protection Agency or the Department of Energy and Natural Resources 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 by filing a petition for review pursuant to Section 41 of the Environmental Protection Act (Ill. Rev. Stat. ch. 111½, par. 1041.)
- 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.

Section 120.260 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 120.230 determination. The review of a prior determination shall utilize the same procedures utilized in making the prior determination.

Section 120.265 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 Administrative Procedure Act (Ill. Rev. Stat. ch. 127, Par. 1001, 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 accordance with agency procedures adopted pursuant to the Administrative Procedure Act (Ill. Rev. Stat. ch. 127, Par. 1001, et seq.) shall be deemed to have been claimed to represent a trade secret for the purposes of this Part for 60 days after the effective date of this Part.

Section 120.270 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; that the person will be adversely affected in the proceeding due to the timing of the trade secret determination, and that the person could not have avoided the resulting delay by making an earlier request.

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.

Section 120.305 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 120.310 Agency's Responsibility to Mark Article

- a) Where an entire article is determined to represent a trade secret pursuant to Section 120.230, the agency shall mark the article with the word "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 120.230, 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 120.315 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 120.305 and 120.310 and is clearly distinguished and segregated from other transmitted materials.

Section 120.320 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 120.325 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) 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 120.330 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 120.215 and 120.230.
- 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 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 120.340 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, 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 any disclosure which is inconsistent with these rules.
- 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 120.350 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 Section 120.330(a). All copies shall be recorded and logged in accordance with Section 120.330(c).

Section 120.360 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: 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.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 3RD day of November, 1983 by a vote of 5-0.


 Christan L. Moffett, Clerk
 Illinois Pollution Control Board

APPENDIX A
FLOW CHART FOR IDENTIFICATION OF TRADE SECRETS

