ILLINOIS POLLUTION CONTROL BOARD
March 10, 1983

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

Proposed Opinion. First Notice.

PROPOSED OPINION OF THE BOARD (by I. G. Goodman):

Section 7 of the Illinois Environmental Protection Act (Act) establishes a general policy and procedural framework regarding 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 a trade secret, or otherwise privileged or confidential status. 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.

This Proposed Opinion supports the proposed regulations contained in the Board's First Notice Order of February 10, 1983. These regulations are designed to meet the mandate for rulemaking in Section 7.1(b). A proposal for rulemaking was presented to the Board on December 16, 1981 by the IEPA and docketed as R81-30. Hearings meeting Section 28 requirements were held on the IEPA proposal on February 10th and 23rd, 1982. In addition, several lengthy public comments and redrafts of the proposal were received. The Board proposal retains the basic procedural framework proposed by the IEPA. However, as will be discussed later, it provides greater specificity than the IEPA proposal, and, in particular, specifies administrative procedures for the protection of trade secrets.

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." Two comments on the scope of these rules 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 participants in the hearings who suggested 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) appears to authorize uniform Board rules for "trade secrets" only. Arguably, since the Board is authorized under Section 26 to adopt "such procedural rules as may be necessary to accomplish the purposes of this Act," a broader authority to promulgate procedural regulations applicable to all three agencies may exist. The Board particularly solicits comment on the advisability and legal authority for expanding this proposal to include "information concerning secret manufacturing processes or confidential data." This is a category of information which is specified as an exception to the general disclosure policy in Section 7 and which is likely to involve the same type of decision-making process as the "trade secret" category.

Balance of Interests

These regulations attempt to balance the interests of the information requestor, 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 permits generally 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, unit of government, 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. A third government concern is insuring against liability for either inappropriate or unintentional disclosure or non-disclosure of information. It should be recognized, however, that none of these concerns justify a general agency policy of non-disclosure, nor delays and unnecessary expense based on inefficient filing procedures.

Proposed Claim/Waiver/Justification System

The proposed regulations establish a procedure which is intended to accomodate the interests delineated above. Briefly, the "claim/waiver/justification" 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 120.204(c), or a limited "waiver" of certain statutory deadlines as defined Section 120.201(b). 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 "protected" by the agency and neither the owner nor the agency need do anything more until a request for access to the information is received. In this case, the request for access to the 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.

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 requestor'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. (Section 120.204(a) and (b).) Then, the agency itself may take another 10 days to make a determination. (Section 120.205(a).) (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 30 days in which to appeal the agency determination. (Section 120.206.) 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 120.201(b) it would extend any statutory decision deadline for a period equal to the period by which the decision is delayed plus 10 working days.

This system as drafted attempts to strike a balance between the competing interests described. However, the Board recognizes that this system is not ideal from the perspective of any of these interests. For example, requestors will still be at jeopardy in situations where agency actions do not involve statutory time constraints or proceed before deadlines. Also, under this proposed system the agencies are compelled to undertake additional responsibilities with regard to "claims" and "waivers". The Board specifically solicits comments on both the general approach taken here and specific aspects of the rules as drafted, such as time frames and notice procedures.

Appeal from Agency Determination

Section 120.208 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 other agency 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. Having stated the basis of this proposed provision, the Board nonetheless welcomes additional comment on this provision.

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 articles which are claimed or determined to represent 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 vague and inconsistent practices within 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 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 restriction 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 about which people submitting and requesting information are neither informed nor have an opportunity to enforce. The Board, again, solicits comments on the general level of detail in these rules, and the appropriateness of specific details, or lack thereof.

Conclusion

In conclusion, these rules establish a process to be used by the three agencies in identifying trade secrets, and specific formalities for the protection of trade secrets held by the agencies. Many of the fine points of the proposed rules have not been discussed in this preliminary opinion, but nonetheless may have significance in the daily operation of the agencies and the flow of information to and from them, e.g. the prohibition on copying of trade secrets (Section 120.307). The Board encourages a detailed review of this proposal by the agencies and all members of the public who may be affected by their actions. Additional hearings on this matter are not anticipated, however, the comment period will remain open until Monday, May 2, 1983.

IT IS SO ORDERED.

Mr. Nega abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion was adopted on the 7th day of March, 1983 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board