

ILLINOIS POLLUTION CONTROL BOARD

July 7, 2020

SIERRA CLUB, ENVIRONMENTAL LAW)
AND POLICY CENTER, PRAIRIE RIVERS)
NETWORK, and CITIZENS AGAINST)
RUINING THE ENVIRONMENT,)
)
Complainants,)
)
v.) PCB 13-15
) (Citizen's Enforcement - Water)
MIDWEST GENERATION, LLC,)
)
Respondent.)

HEARING OFFICER ORDER

On June 20, 2019, the Board, after finding liability, held that the record lacks sufficient information to determine the appropriate remedy in this matter and directed the hearing officer to hold additional hearings to determine the appropriate relief. *See* Board Interim Order, slip at 93 (June 20, 2019). On April 1, 2020, complainants filed a motion for leave to designate substitute expert witnesses with supporting memorandum (Mot.). Complainants wish to substitute their expert witnesses for the Board ordered remedy hearing in this matter. Mot. at 1-3. Complainants identified two expert witnesses for the initial hearing in this matter but only Dr. Kunkel was deposed and later testified at hearing. Mot. at 2. As to Dr. Kunkel, complainants state that “a new expert would be better placed than Dr. Kunkel to address the issues that remain to be resolved in the remedy phase of the litigation.” *Id.*

On May 22, 2020, I issued an order directing the complainants file on or before June 1, 2020, a memorandum “elaborating why Dr. Kunkel needs to be replaced and why a substitute expert would be better placed than Dr. Kunkel.” Hearing Officer Order at 2 (May 22, 2020). Respondent was directed to file its response on or before June 9, 2020. *Id.*

On May 29, 2020, complainants timely filed a memorandum (Memo) as directed. Addressing my question of why Dr. Kunkel needs to be replaced and why a substitute expert would be better placed than Dr. Kunkel, complainants argue that providing an answer “requires divulging privileged attorney work product consisting of attorney mental impressions.” Memo at 1.

On May 29, 2020, complainants, pursuant to 35 Ill. Adm. Code 130.400 *et seq.*, also filed an Application for Non-Disclosure (Application) of an Article consisting of an Affidavit. The Affidavit is titled “Confidential Affidavit of Faith E. Bugal Regarding Expert Witness”.¹

¹ Faith E. Bugal is an attorney for Sierra Club. The Application is not open to Public Inspection while the Application is pending before the Board. 35 Ill. Adm. Code 130.406.

Complainants argue that the affidavit constitutes non-disclosable information pursuant to 35 Ill. Adm. Code §101.202 because it contains “information privileged against introduction in judicial proceedings.” Application at 2-3. Complainants contend that the affidavit includes the mental impressions of Faith E. Bugel and that those mental impressions are protected from introduction in judicial proceedings by work product privilege. *Id.* at 3.

On June 15, 2020, respondent filed an objection (Obj.) to complainants’ Application. In its objection, respondent argues, *inter alia*, that 415 ILCS 5/7 authorizes the Board to designate information as non-disclosable with respect to the public, not with respect to opposing parties. Obj. at 3-8.

On June 26, 2020, complainants filed a motion for leave to reply to respondent’s objection to complainants’ Application. Complainant’s motion for leave to reply is denied as I find no material prejudice will result in denial. 35 Ill. Adm. Code 101.500 (e).

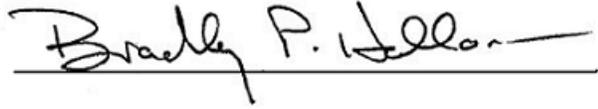
DISCUSSION AND ORDER

35 Ill. Adm. Code §130.100 identifies the purpose and applicability of the protection of non-disclosable information as follows: “Section 7(a) of the Act provides that all files, records, and data of the Agency, the Board, and DNR shall be open for reasonable public inspection except for information which constitutes a trade secret; information privileged against introduction in judicial proceedings; internal communications of the several agencies; and information concerning secret manufacturing processes or confidential data submitted by any person under the Act.” 415 ILCS 5/7(a) (emphasis added). Previous Board decisions designating information as non-disclosable underscore that the protection exists with respect to the public at large, not to opposing parties. *See, e.g., People v. Freeman United Coal Mining, LLC*, PCB 10-61, 11-02 2013 Ill. ENV LEXIS 281; *In the Matter of: Petition of Greif Packaging, PCB AS11-01 LLC*, 2012 Ill. ENV LEXIS 144.

Complainants’ contention that 35 Ill. Adm. Code §130.400 *et seq.* authorizes the Board to designate information as non-disclosable with respect to an opposing party is therefore at odds with the Board’s procedural rules and Board case law. Complainants are directed to disclose the affidavit to respondent. Respondent is barred from disclosing the Affidavit or its contents, and the Affidavit is not to be injected into judicial proceedings.

The parties are directed to participate in a telephonic conference call with the hearing officer on July 22, 2020, at 11:30 a.m. The complaints are directed to provide a call-in number prior to the conference call.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

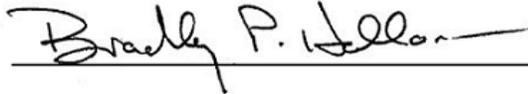
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on July 7, 2020, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on July 7, 2020:

Don Brown
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James R. Thompson Center
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A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath.

Bradley P. Halloran
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