

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 ENVIRONMENTAL LAW AND POLICY)
 CENTER, on behalf of PRAIRIE RIVERS)
 NETWORK and SIERRA CLUB,)
 ILLINOIS CHAPTER,)
)
 Intervenor,)
)
 vs.)
)
 FREEMAN UNITED COAL MINING)
 COMPANY, LLC, a Delaware limited)
 liability company, and SPRINGFIELD)
 COAL COMPANY, LLC, a Delaware)
 limited liability company,)
)
 Respondents.)

PCB No. 10-61 & 11-2
 (Water - Enforcement)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

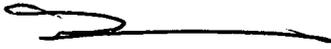
PLEASE TAKE NOTICE that on July 2, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO APPLICATION FOR CONFIDENTIAL AND NON-DISCLOSABLE INFORMATION DESIGNATION, SEAL, AND PROTECTIVE ORDER, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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 Attorney General of the
 State of Illinois

MATTHEW J. DUNN, Chief
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BY: 

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

ENVIRONMENTAL LAW AND)

POLICY CENTER, on behalf of PRAIRIE)

RIVERS NETWORK and SIERRA CLUB,)

ILLINOIS CHAPTER,)

Intervenor,)

v.)

**PCB No. 2010-061 & 11-02
(Water-Enforcement)**

FREEMAN UNITED COAL MINING)

COMPANY, LLC,)

a Delaware limited liability company, and)

SPRINGFIELD COAL COMPANY, LLC,)

a Delaware limited liability company,)

Respondents.)

PEOPLE'S RESPONSE TO APPLICATION FOR CONFIDENTIAL AND NON-DISCLOSABLE INFORMATION DESIGNATION, SEAL, AND PROTECTIVE ORDER

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, objects to the Application filed by Springfield Coal pursuant to Section 7(a) of the Act, and Section 101.616 and the provisions at Part 130, Subpart D, of the Board's procedural rules, and states as follows:

Springfield Coal seeks relief regarding certain business and financial records sought in discovery by the Intervenor, and represents that such documents are "confidential data" subject to extraordinary protection under Section 7(a) of the Act. The specific relief described in the Application consists first of a designation as "non-disclosable information" pursuant to Section 130.402 so that such documents "may not be publicly disclosed or transmitted." Application at ¶

4. Springfield Coal further requests that the use of such financial documents and income statements be restricted to the prosecution of this enforcement proceeding. Application at ¶ 6.

The reason Springfield Coal is seeking relief under Section 101.616(d) is “to protect non-disclosable materials from disclosure consistent with Section 7 and 7.1 of the Act and 35 Ill. Adm. Code 130.” The burden assumed by this Respondent is to demonstrate that the financial documents and income statements are not simply confidential but also qualify for legal protection as “non-disclosable information” as defined at Section 101.202. A protective order issued to allow condition or regulate the production in discovery of confidential materials does not necessarily affect the use and introduction into the record of such materials, if relevant and admissible. Just as the possible inadmissibility of information does not preclude its discovery under Section 101.616(e), the protection of discovery materials from disclosure is a separate issue from evidentiary use. It is well-settled that pretrial discovery presupposes a range of relevance and materiality much broader than that of admissibility of evidence at trial. Moreover, a motion for a protective order with respect to discovery limits the breadth of discovery in certain situations, while a motion *in limine* is a pretrial motion that seeks to either exclude inadmissible evidence or otherwise condition or restrict the use of such evidence. See, e.g., *Payne v. Hall*, 2013 WL 1190288 at ¶ 20 (1st Dist.) (the defendant “improperly combined a discovery limit request under Rule 201(c) with a motion in limine to bar the use of certain evidence during his cross-examination at trial. . . . We find that the question of whether evidence should be excluded at trial is more suited for consideration in a motion in limine, where the trial court can determine the admissibility of such evidence.”).

The Application was filed on June 24, 2013. The Board’s hearing officer conducted a

status conference on June 25, 2013 during which the parties discussed the Application and the hearing officer informed the parties that (upon the Board's approval of the Application) the documents would be handled in the manner that was recently utilized in *People v. Packaging Personified*, PCB 04-016. In this other enforcement proceeding, the Attorney General's Office did not object to income tax returns and other financial records being considered confidential; the Board's control over the usage of such documents at trial was obtained through rulings on a motion *in limine*. See Hearing Report of June 3, 2013, PCB 04-016. The remarks of the hearing officer as to the potential relief that might be afforded through a motion *in limine* were obviously intended to be helpful to the parties in preparing for the hearing.

Springfield Coal must also file a motion *in limine* to preclude the materials it is producing to ELPC under the protective order from being used at the hearing. The Respondent may assert an evidentiary privilege. Alternatively, the grounds for precluding admissibility may focus on the lack of relevance and materiality. The Respondent cannot rely solely upon the "confidential" nature of the records.

The Complainant will address the Application in regards to the authority for protective orders in discovery. As a creature of statute, the Board has no authority beyond what is expressly delegated in the Environmental Protection Act and, regarding the confidentiality of information, this authority is limited to Section 7 of the Act.¹ The statutory provisions in Section 7 pertain solely to the "files, records, and data of the Agency, the Board, and the Department" and mandate the public availability of such files, records, and data "except for the following: (i) information

¹ Since there is no claim regarding any "trade secret" in the Application, Section 7.1 of the Act is not applicable to this discussion. Section 7.1(b) authorizes the Board to adopt substantive regulations regarding procedures for the designation of trade secret articles and the protection of the confidentiality of such articles.

which constitutes a trade secret; (ii) information privileged against introduction in judicial proceedings; (iii) internal communications of the several agencies; (iv) information concerning secret manufacturing processes or confidential data submitted by any person under this Act.” 415 ILCS 5/7(a). Subsections (b) through (g) provide exceptions to the applicability of Section 7(a). The three-page Application of Springfield Coal provides no discussion or legal citations regarding the purported applicability of Section 7(a) of the Act to its income statements and financial information. However, even though the subject documents are discovery materials, the Respondent represents that it “seeks to transmit to the Board for the Board’s consideration . . . business and financial records and documents that constitute confidential proprietary information. . . .” Application at ¶ 5. It is unclear from the motion itself whether Springfield Coal intends to use at trial the discovery materials being made available for consideration of a protective order. In any event, without this transmittal to the Board, Section 7(a) would be inapplicable. The application of this statutory provision to the subject documents means that the Board is authorized to protect the documents from public disclosure (in accordance with its rules) only if such documents are determined to fall within one of the categories set forth in Section 7(a): “(i) information which constitutes a trade secret; (ii) information privileged against introduction in judicial proceedings; (iii) internal communications of the several agencies; (iv) information concerning secret manufacturing processes or confidential data submitted by any person under this Act.”

Section 101.616(d) governs protective orders for discovery materials: “The hearing officer may . . . issue protective orders that deny, limit, condition or regulate discovery to prevent unreasonable expense, or harassment, to expedite resolution of the proceeding, or to protect

non-disclosable materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 130.” The provisions of Part 130 involving non-disclosable information other than trade secrets are in Subpart D and are expressly limited “to Board determinations of whether articles are non-disclosable information other than trade secrets.” 35 Ill. Adm. Code 130.400. However, none of the Board’s procedural rules and substantive regulations regarding confidential information allows for redacted testimony and the exclusion of the public from a public hearing during testimony regarding “confidential” information.

The Attorney General certainly does not object to a protective order in the event that the Board’s determination pursuant to Section 130.408 that the Respondent has met its burden to establish the documents contain non-disclosable information. The prospective relief that may be afforded must, however, be consistent with the limits and scope of the Board’s statutory authority. In other words, the Board cannot close its proceedings without explicit statutory authorization. *Packaging Personified* does not establish any precedent for the relief afforded therein and the Attorney General does not waive objection in this matter because of our participation in that other proceeding.

Section 32 of the Act provides as follows:

All hearings under this Title shall be held before a qualified hearing officer, who may be attended by at least one member of the Board, designated by the Chairman. *All such hearings shall be open to the public*, and any person may submit written statements to the Board in connection with the subject thereof. In addition, the Board may permit any person to offer oral testimony.

Any party to a hearing under this subsection may be represented by counsel, may make oral or written argument, offer testimony, cross-examine witnesses, or take any combination of such actions. All testimony taken before the Board shall be recorded stenographically. The transcript so recorded, and any additional matter accepted for the record, shall be open to public inspection, and copies thereof shall be made available to any person upon payment of the actual cost of reproducing the original.

415 ILCS 5/32; emphasis added. No other provision of the Environmental Protection Act governs the conduct of a public hearing in an enforcement proceeding. Section 32 provides no exceptions to the public hearing mandate.

In conclusion, it is premature without a motion *in limine* to indicate that documents produced in discovery under a protective order are subject to any limitations at trial. The *ad hoc* procedures employed in *Packaging Personified* to preclude the public from attending any portion of a hearing cannot be used in this matter. Moreover, if Springfield Coal were to affirmatively admit otherwise confidential information into the record, the Respondent might waive any claim of confidentiality. In contrast, a protective order under Section 101.616(d) would presumably necessitate limitations on the use by the Intervenors of the discovery materials produced by Springfield Coal under the protections afforded by Section 130.406(c), which is all this Respondent seeks as relief. See Application at ¶ 8. The scope of any protective order is limited by this request as well as the *specific legal authorization* provided first by statute and next by the applicable rules and regulations.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, respectfully objects to the Application for Confidential and Non-Disclosable Information Designation, Seal, and Protective Order.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

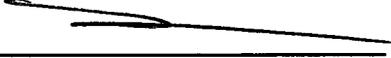
BY: 

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Dated: July 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that I did on July 2, 2013, cause to be served by United States Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and PEOPLE'S RESPONSE TO APPLICATION FOR CONFIDENTIAL AND NON-DISCLOSABLE INFORMATION DESIGNATION, SEAL, AND PROTECTIVE ORDER upon the Respondents listed on the Service List.



Thomas Davis, Chief
Assistant Attorney General

This filing is submitted on recycled paper.