

ILLINOIS POLLUTION CONTROL BOARD
September 5, 2013

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 10-61, 11-02
) (Consolidated - Water - Enforcement)
FREEMAN UNITED COAL MINING CO.,)
LLC, and SPRINGFIELD COAL CO., LLC)
)
Respondents.)

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ENVIRONMENTAL LAW AND POLICY)
CENTER, on behalf of PRAIRIE RIVERS)
NETWORK and SIERRA CLUB, ILLINOIS)
CHAPTER,)
)
Complainant,)
)
v.)
)
FREEMAN UNITED COAL MINING CO.,)
and SPRINGFIELD COAL CO., LLC,)
)
Respondents.)

ORDER OF THE BOARD¹ (by D. Glosser):

On June 24, 2013, Springfield Coal LLC (Springfield Coal) filed a request asking that the Board determine that certain documents are confidential and non-disclosable. Responses were filed and on July 15, 2013, the hearing officer directed Springfield Coal to file a supplement to

¹ Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board's drafting or deliberation of any order or issue in this matter.

the request. For the reasons discussed below the Board grants Springfield Coal's request and the material will be protected as confidential as described in the following order.

PROCEDURAL BACKGROUND

On June 24, 2013, Springfield filed its request and on July 29, 2013 a supplement to the request for confidential (Pet.) and non-disclosable designation was filed (SuppPet.). On July 1, 2013, Environmental Law and Policy Center (ELPC), on behalf of Sierra Club and Prairie Rivers Network, filed a response to the motion and on August 5, 2013 a response to the supplemental request was filed (Resp.). On July 2, 2013, the People of the State of Illinois (People) filed a response to the original request but did not file a response to the supplemental request.

STATUTORY AND REGULATORY BACKGROUND

Section 7(a) of the Environmental Protection Act (Act) (415 ILCS 5/7(a) (2012)) provides:

- a) All files, records, and data of the Agency, the Board, and the Department shall be open to reasonable public inspection and may be copied upon payment of reasonable fees to be established where appropriate by the Agency, the Board, or the Department, except for the following:
 - (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. 415 ILCS 5/7(a) (2012).

Section 101.616 of the Board's rules establishes the rules for conducting discovery in a proceeding before the Board. 35 Ill. Adm. Code 616. Section 101.616(d) provides that:

The hearing officer may, on his or her own motion or on the motion of any party or witness, 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. 35 Ill. Adm. Code 101.616(d).

Section 130.404 of the Board's rules sets forth the steps for applying for non-disclosure. 35 Ill. Adm. 130.404. Section 130.404(e) delineates what must be included in the application for non-disclosure and provides:

- e) The application for non-disclosure must contain the following:

- 1) Identification of the particular non-disclosure category into which the material that is sought to be protected from disclosure falls (see 35 Ill. Adm. Code 101.202 for the definition of “non-disclosable information”);
- 2) A concise statement of the reasons for requesting non-disclosure;
- 3) Data and information on the nature of the material that is sought to be protected from disclosure, identification of the number and title of all persons familiar with the data and information, and a statement of how long the material has been protected from disclosure;
- 4) An affidavit verifying the facts set forth in the application for non-disclosure that are not of record in the proceeding; and
- 5) A waiver of any decision deadline in accordance with Section 130.204 of this Part. 35 Ill. Adm. Code 130.404.

PETITION

Springfield Coal asks that the Board keep confidential materials filed on June 24, 2013, and that the hearing officer enter a protective order to protect those materials. Specifically, Springfield Coal seeks to keep certain financial documents and income statements confidential. SuppPet. at 3. Springfield Coal asserts the documents constitute confidential data and contain proprietary information such as profits and losses, operating statements as well as other highly sensitive business information. The persons who are familiar with the documents are limited to Springfield Coal’s officers, directors, and accounting personnel. *Id.* Springfield Coal has protected the articles from disclosure since the items were created and its business and proprietary interest will be damaged if the documents are publically disclosed. *Id.*

Springfield Coal argues that the Board has entered protective orders under similar circumstances to protect a company’s business and proprietary interests. SuppPet. at 4, citing *e.g.*, Horsehead Resource and Development Co., Inc., AS 00-2 (Sept. 9, 1999); and Proposed Site-Specific Rule Change for Reilly Tar and Chemical Corp., Granite City Facility, R88-9 (Oct. 20, 1988). Springfield Coal states it:

is willing to provide the Articles to the other parties in this matter, [however] Springfield Coal’s proprietary interests require protection against use of the articles for any other purpose than this litigation, including but not limited to disclosure to third parties. SuppPet. at 4.

RESPONSES

The Environmental Groups' initial response opposed the request by Springfield Coal due to the inadequacy of the request and the concern that the hearings be open to the public. Resp. at 1. In response to the supplemental petition, the Environmental Groups note that the request has been supplemented and ask that if the Board agrees to treat the documents as confidential, that any protective order accommodate reasonable preparation for hearing. Resp. at 1-2.

The People did not respond to the supplemental request. In the response to the initial petition, the People note that Section 7(a) of the Act (415 ILCS 5/7(a) (2012)) allows for three categories of materials to be protected from public disclosure. People Resp. at 4. However, the People argue that the initial application provides no discussion or legal citations regarding the applicability of Section 7(a) of the Act (415 ILCS 5/7(a) (2012)). The People go on to state:

The Attorney General certainly does not object to a protective order in the event that the Board's determination pursuant to Section 130.408 [35 Ill. Adm. Code 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. People Resp. at 5.

DISCUSSION

Springfield Coal in its initial application and supplemental application claim the documents "constitute confidential data" because the documents contain proprietary information. SuppPet. at 3. This assertion is supported by an affidavit. In addition, the supplemental application provides citations to cases where the Board has found that similar types of information were held to be non-disclosable. For example, in Horsehead, AS 00-2, the Board agreed to keep confidential financial data that included prices charged by Horsehead to its customers. See Horsehead, AS 00-2, slip op. at 2-3 (Sept. 9, 1999). Likewise, in Reilly Tar, R88-9, the Board protected business information, not at issue in the proceeding, as confidential. See Reilly Tar, R88-9, slip op. at 1 (Oct. 20, 1988).

Based on the Environmental Groups response to the supplemental application and the People's nonresponse to the supplemental application, it appears that the objections to treating the documents as confidential have been removed. The Environmental Groups specifically state that they may not agree with Springfield Coal's legal reasoning but agree that the supplemental application addresses concerns regarding the sufficiency of the initial application.

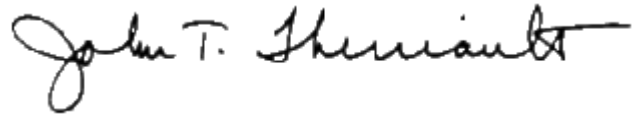
The Board finds that at this time, pursuant to Section 130.404(e), Springfield Coal has provided sufficient explanation that the materials should be protected from disclosure. The Board therefore grants Springfield Coal's request to treat the documents as confidential. The Board believes that this decision is consistent with Horsehead, AS00-2 as well as the ongoing enforcement action People v. Packaging Personified, PCB 4-16, for the reasons laid out by the People in its response. The Board's decision in no way limits the parties' ability to bring motions to the hearing officer or the Board regarding the specific use of the materials at hearing

or during discovery; rather the Board's decision will protect the materials from disclosure to persons not a party to this proceeding.

IT IS SO ORDERED.

Board Member J. A. Burke abstains.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above opinion and order on September 5, 2013, by a vote of 3-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Clerk
Illinois Pollution Control Board