BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB 2010-061 and 2011-002
ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	(Consolidated – Water – Enforcement)
	)	
Intervenor,	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING CO., L.L.C., and SPRINGFIELD COAL COMPANY, L.L.C.,	)	
	)	
Respondents.	)	

SPRINGFIELD COAL COMPANY, LLC'S RESPONSE IN OPPOSITION TO INTERVENORS' MOTION TO COMPEL

COMES NOW, Springfield Coal Company, LLC ("Springfield Coal"), and pursuant to 35 Ill. Admin. Code § 101.614, files its Response in Opposition to Intervenors' Motion to Compel. Springfield Coal respectfully requests that the Hearing Officer deny the Motion to Compel, because the requests will unduly harass, burden, and prejudice Springfield Coal and are not relevant to the Illinois Pollution Control Board's (the "Board") assessment of penalties against Springfield Coal in this action. The Hearing Officer should not entertain Intervenors' unfettered requests.

ARGUMENT

As provided in the Board rules, "[t]he hearing officer will deny, limit or condition the production of information when necessary to prevent undue delay, undue expense, or harassment, or to protect materials from disclosure consistent with Section 7 and 7.1 of the Act

and 35 Ill. Adm. Code § 130." 35 Ill. Admin. Code § 101.614. For the reasons discussed below, the Hearing Officer should deny Intervenors' discovery requests, because it is necessary to prevent undue delay, expense, and harassment to Springfield Coal and to third-party individuals and entities.

Intervenors' Motion to Compel seeks to compel the following types of information: (i) admissions that nine other mines in Illinois "are under the same ownership and control as the Industry Mine" (SC Request to Admit No. 12); (ii) identification of "all coal mines owned or controlled by Michael Caldwell, Brian Veldhuizen, and/or Thomas Austin" (PRN Interrog. No. 7); (iii) identification of "all previously adjudicated or pending cases where Springfield Coal **or companies owned or controlled by any of its principals** were accused of violations of any environmental regulation, including any cases that have settled." (PRN Interrog. No. 8) (emphasis added); and (iv) production of "all violation notices issued to Springfield Coal or **other companies owned or controlled by any of its principals for any violation of any environmental regulation**." (PRN RFP No. 10) (emphasis added).[1/] (Motion to Compel at 3-4.)

Intervenors' discovery requests impermissibly conflate requests directed at Springfield Coal with requests directed at information relating to persons and entities not parties to the case: Michael Caldwell, Brian Veldhuizen, Thomas Austin, Springfield Coal's principals, and any companies the principals own. There is no question that these requests are not relevant to the enforcement action at hand and that these requests are designed to harass and cause undue expense not only to Springfield Coal, but to each of its principals and to any third-party persons or entities who may be implicated in such requests. As to requests directed at Springfield Coal, Intervenors offer no precedent or compelling reason why pending cases, settled cases, or

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1/ Springfield Coal does not waive the objections it raised in its June 24, 2013 and August 2, 2013 responses to these written discovery requests. Springfield Coal expressly incorporates the defenses raised therein as if fully stated in this Response in Opposition. *See* Attachment 2 and Attachment 3 to Motion to Compel.

violation notices for any environmental violation against Springfield Coal are relevant or subject to discovery in this matter. Intervernors' Motion to Compel should be denied in its entirety.[2/]

1. **The Information Intervenors Seek Regarding Persons and Entities Not Parties To This Case Is Not Relevant to the Board's Penalty Assessment Or For Any Other Purpose, and It Will Unduly Harass and Prejudice Springfield Coal and Any Implicated Third Parties.**

Intervenors have impermissibly conflated their discovery requests directed at Springfield Coal with requests directed at information relating to "Springfield Coal's principals and their companies", as though Springfield Coal, its principals, and their companies share a unity of ownership and interest. In addition to that request, Intervenors request Springfield Coal provide information about all coal mines owned or controlled by three individuals who are not parties to this case. Yet each of the reasons for which Intervenors advocate this information is relevant is based on statutory factors that are expressly limited to information relating to the **respondent** of an enforcement action.[3/] Michael Caldwell, Brian Veldhuizen, and Thomas Austin are not respondents in this enforcement action. In addition, none of Springfield Coal's principals or any companies or mines owned by them is a respondent to this enforcement action. This information is therefore unquestionably irrelevant and, moreover, is clearly designed to harass and unduly

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2/ To the extent the Hearing Officer does not deny the Motion to Compel in its entirety, Springfield Coal requests that she "limit or condition the production" to the extent necessary to protect Springfield Coal, its principals, and any third parties from undue expense, harassment, or prejudice. *See* 35 Ill. Admin. Code § 101.614.

3/ As relevant to Intervenors' Motion to Compel, 415 ILCS 5/42(h) provides:

> In determining the appropriate civil penalty to be imposed . . . the Board is authorized to consider . . . : (3) any economic benefits accrued by the **respondent** because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance; (4) the amount of monetary penalty which will serve to deter further violations by the **respondent** and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act; (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the **respondent**; . . . .

(emphasis added).

burden not only Springfield Coal, but also the three individuals, along with Springfield Coal's principals, and companies owned by the principals.

Even so, Intervenors articulate no compelling reason to support their claim that the Motion to Compel should be granted as to information concerning the three individuals, Springfield Coal's principals, or companies the principals own—which is not even limited to mines. This is important, because Intervenors' request amounts to a fishing expedition and a warrantless corporate veil piercing that should not be tolerated. Intervenors cite **no authority** to support their baseless conclusion that this information should be compelled, and they cite no precedent in which the Board has compelled such information.[4/] Rather, "[i]t is a fundamental principle that a corporation is a legal entity that is separate and distinct from its shareholders, directors, and officers and from other corporations with which it may be connected." *Gass v. Anna Hosp. Corp.*, 392 Ill. App. 3d 179, 185 (5th Dist. 2009). Intervenors' requests are impermissibly directed at third-party individuals and entities from which Springfield Coal is wholly separate and distinct.

Even assuming Intervenors had a basis to compel this information, however, its relevancy and probative value to this action is nonexistent such that the Motion to Compel should be denied. It would be unduly prejudicial to Springfield Coal to aggregate the assets of its stockholders and any other companies in which they may have an ownership interest for the purpose of calculating a penalty amount that would deter Springfield Coal or for estimating any

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4/ Intervenors' authority is telling. Intervenors cite *Watts* for the proposition that "[t]he history of adjudicated violations by the company as a whole is an important factor the Board considers as it determines the penalty necessary to deter further violations." (Motion to Compel at 5 (citing *People v. James Lee Watts*, 1995 WL 283727 (1995)). Even a cursory reading of *Watts* reveals it contradicts Intervenors' point. *Watts* involved an enforcement against three respondents (a parent company, Watts Trucking Service, Inc., a wholly owned subsidiary, ESG Watts, Inc., and the sole shareholder) relating to two landfills owned and operated by the subsidiary. The Board concluded that "as previously stated, only [the subsidiary] will be held liable" and that "the history of adjudicated violations against [the subsidiary]" reflected the appropriate penalty amount. Nowhere did the Board discuss any adjudicated violations against the parent company or against the sole shareholder, nor did it endorse the propriety of doing so, even in light of the fact that the parent company and sole shareholder were named respondents. *Watts* does not advance Intervenors' position.

economic benefit. For the same reason, it would be unduly prejudicial to calculate any penalty assessed in this matter against Springfield Coal based on violations (whether pending, adjudicated, or only alleged) against mines and companies that Springfield Coal does not own, control, or operate. For these reasons, the information sought falls squarely within the category of documents for which the Hearing Officer "will deny, limit or condition the production[.]" 35 Ill. Admin. Code §101.614. Intervenors' Motion to Compel should be denied.

2. The Information Intervenors Seek Regarding Other Mines Owned or Operated by Springfield Coal Is Not Relevant to the Board's Penalty Assessment Or For Any Other Purpose, and It Will Unduly Harass and Prejudice Springfield Coal.

Intervenors argue that, as to Springfield Coal, the following types of documents are relevant: (i) admissions regarding whether Springfield Coal owns or operates certain mines located in Illinois, (ii) "all previously adjudicated or pending cases where Springfield Coal . . . [was] accused of violations of any environmental regulation, including any cases that have settled"; and (iii) "all violation notices issued to Springfield Coal . . . for violation of any environmental regulation." (Motion to Compel at 3-4.) The overbreadth and irrelevancy of these requests is apparent from their face.

First, 415 ILCS § 5/42(h)(5) is drastically more limited than any of Intervenors' requests, because it provides that the Board may consider "the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent." Most importantly, it is limited to "previously adjudicated violations of this Act" and not pending cases; not settled cases; and not "accused" violations. The reason for this statutory limit is clear: evidence as to pending cases, settled cases, and accused violations is probative of nothing and is unduly prejudicial to the respondent. Intervenors cite no authority in which the Board has ever found this type of information relevant to a penalty assessment. To the contrary, the Board order on which Intervenors rely was strictly limited to "adjudicated violations." *See Watts*, 1995 WL 283727, at

*10-11. Intervenors provide no reason why pending cases, settled cases, or accused violations are relevant or probative.

Second, even as to "adjudicated violations", the statute suggests that only the number, proximity in time, and gravity of the adjudicated violations may be considered. 415 ILCS § 5/42(h)(5). Intervenors' request for all adjudicated violations is overbroad and irrelevant, and it in no way attempts to limit the universe of which adjudicated violations it seeks. Moreover, the requests are not limited to the matter at hand—NPDES permit violations—and the requests seek information as to all environmental violations, presumably for all locations for all time. Intervenors provide no reason why this unduly broad and burdensome request is relevant, and they do not explain its probative value in the Board's ultimate assessment of penalties. The request only serves to prejudice, harass, and burden Springfield Coal.

Third, there is no reason why the Hearing Officer should compel Springfield Coal to invest its resources and expenses to provide publicly-available information to Intervenors. In fact, Intervenors' request directly contradicts Board precedent that discovery requests for publicly available information should be denied. *See People v. Packaging Personified, Inc.*, PCB 04-16 (Oct. 5, 2006). In *Packaging Personified*, the Board affirmed the hearing officer's denial of a motion to compel on the basis that "[a]s the information is contained in public records, the Board finds that the financial and personnel burden of analyzing and copying materials already available to [the discovering party] is not warranted here." Consistent with *Packaging Personified*, Springfield Coal respectfully requests that, to the extent Intervenors seek information that is publicly available in the Board's files or elsewhere, the Hearing Officer should deny the Motion to Compel to prevent Springfield Coal from incurring unnecessary and undue expense or harassment, for which Intervenors should bear the burden.

CONCLUSION

For all of the foregoing reasons, Intervenors' Motion to Compel should be denied in its entirety.

Dated: September 3, 2013

Respectfully submitted,

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NOTICE OF ELECTRONIC FILING

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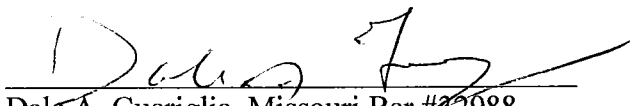
PLEASE TAKE NOTICE that on September 3, 2013, I electronically filed with the Clerk of the Pollution Control Board, Springfield Coal Co., LLC's Response in Opposition to Intervenors' Motion to Compel, copies of which are herewith served upon you.

BRYAN CAVE LLP



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