

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)	(Consolidated – Water –
POLICY CENTER, on behalf of PRAIRIE)	Enforcement)
RIVERS NETWORK and SIERRA CLUB,)	
ILLINOIS CHAPTER,)	
)	
Intervenor,)	
)	
v.)	
)	
FREEMAN UNITED COAL)	
MINING CO., L.L.C., and)	
SPRINGFIELD COAL COMPANY, L.L.C.,)	
)	
Respondents.)	

**SPRINGFIELD COAL COMPANY, LLC’S LEAVE TO FILE ITS
REPLY IN SUPPORT OF ITS APPLICATION FOR CONFIDENTIAL AND NON-
DISCLOSABLE INFORMATION DESIGNATION, SEAL, AND PROTECTIVE ORDER**

Springfield Coal Company, L.L.C., (“Springfield Coal”) hereby files a MOTION FOR LEAVE TO REPLY to Intervenor’s Opposition and People’s Response to Springfield Coal’s Application for Confidential and Non-Disclosable Information Designation, Seal, and Protective Order (collectively, the “Responses”). In support of this Motion, Springfield Coal states the following:

1. This Board has authority to grant Springfield Coal an opportunity to reply in support of its own motion “to prevent material prejudice.” 35 Ill. Admin. Code 101.500(e).
2. The Responses raise issues not addressed in Springfield Coal’s Application, such as the applicability of a protective order to public hearings in this matter.

3. Because these issues were raised for the first time in the Responses, Springfield Coal has not had an opportunity to address them with the Board.

4. Springfield Coal's Reply seeks to address the new issues raised in the Responses.

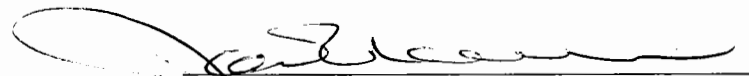
5. If this Motion for Leave to Reply is denied, Springfield Coal will be materially prejudiced not only because it has not had an opportunity to address the issues raised in the Responses, but also because Springfield Coal has significant business and proprietary interests at stake that require the Board's full consideration of all matters raised in the Responses.

WHEREFORE, Springfield Coal respectfully requests that the Board GRANT its Motion for Leave to Reply and file the attached Reply in Support of its Application for Confidential and Non-Disclosable Information Designation, Seal, and Protective Order.

Dated: July 9, 2013

Respectfully submitted,

BRYAN CAVE LLP



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*Attorneys for Respondent,
Springfield Coal Company, LLC*

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NOTICE OF ELECTRONIC FILING

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Assistant Attorney General
Environmental Bureau
500 South Second Street
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Carol Webb
Hearing Officer
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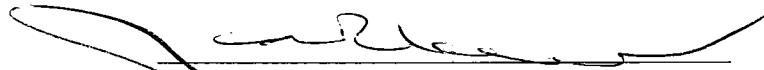
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PLEASE TAKE NOTICE that on July 9, 2013, I electronically filed with the Clerk of the Pollution Control Board, Springfield Coal Co., LLC's Motion for Leave to File Its Reply in Support of Its Application for Non-Disclosable Designation, copies of which are herewith served upon you.

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**SPRINGFIELD COAL COMPANY, LLC’S REPLY IN SUPPORT OF ITS
APPLICATION FOR CONFIDENTIAL AND NON-DISCLOSABLE INFORMATION
DESIGNATION, SEAL, AND PROTECTIVE ORDER**

In opposing Springfield Coal Company, L.L.C.’s, (“Springfield Coal”) Application for Confidential and Non-Disclosable Information Designation, Seal, and Protective Order (“Application”), neither Prairie Rivers Network and Sierra Club (collectively, “Intervenors”) nor the People of the State of Illinois (the “State”) articulate credible reasons for which the Board should deny Springfield Coal’s Application. First, the State does not object to the confidentiality designation, but rather, it prematurely lodges an argument directed at hearing procedure. Second, the Intervenors have failed to articulate any reason supporting their argument that a confidentiality designation is not warranted. Third, if the Application is not granted, Springfield Coal’s business and proprietary interests will be substantially harmed by public disclosure of its

confidential business records. For the reasons articulated herein, the Board should grant Springfield Coal's Application and designate its business records as confidential Non-Disclosable Information.¹

1. The State Does Not Object to Springfield Coal's Request that Its Business Records Be Designated Confidential, Non-Disclosable Information.

The State does not object to Springfield Coal's request for confidentiality, explaining that it "certainly does not object to a protective order in the event that the Board's determination pursuant to Section 130.408 that [Springfield Coal] has met its burden to establish the documents contain non-disclosable information."² (*See* People's Response to Application for Confidential and Non-Disclosable Information Designation, Seal, and Protective Order ("State Response") at 2, 5.) Importantly, the State does not suggest that Springfield Coal has not met its burden under the Board regulations or suggest any reason why a confidentiality designation is not warranted.

Rather, the State only takes issue with the scope of a protective order as it relates to the parties' use of the Non-Disclosable Information at a public hearing. The State argues that Springfield Coal must file a motion *in limine* if it wishes to restrict use of the Non-Disclosable Information at a hearing. (*See* State Response at 3.) However, Springfield Coal's Application was directed at discovery — not public hearing. Springfield Coal did not request the Board close all future public hearings as they relate to this Non-Disclosable Information, and it recognizes that motions *in limine* may become necessary as the parties move toward hearings.

Accordingly, whether and how the parties will use the confidential Non-Disclosable Information at a hearing is a premature consideration at this juncture. The parties are still

¹ The documents for which Springfield Coal seeks a confidentiality designation were submitted to the Board for its consideration concurrently with the Application on June 24, 2013.

² Springfield Coal maintains that it met any burden established in Section 130.408, and it respectfully requests that the Board also consider the contents of this Reply prior to entering its order.

responding to written discovery requests and producing expert witnesses. A protective order is appropriate today to protect immediate proprietary interests without regard to a future hearing. If necessary, the Board can address issues related to any motions *in limine* regarding the use of confidential Non-Disclosable Information at a later time.

2. Intervenors Advance No Reason Why This Protective Order Is Not Appropriate.

Unlike the State, Intervenors challenge the entry of a protective order. Significantly, Intervenors advance no reason why the protective order is not warranted. The relevancy of the business documents has no bearing on whether a protective order is warranted.³

Intervenors argue that Springfield Coal must produce “evidence to support its assumption that such financial information inherently constitutes ‘confidential data’ within the meaning of the Board’s regulations.” (Intervenors’ Opposition to Springfield Coal Co., LLC’s Application for Confidential and Non-Disclosable Information Designation, Seal, and Protective Order (“Intervenors’ Opposition”) at 2.) Intervenors point to no authority to support this argument. Moreover, Springfield Coal has met its burden under Section 130.404 by identifying the documents that constitute Non-Disclosable Information; the reasons for which such documents constitute Non-Disclosable Information; persons who have knowledge of the documents; and how Springfield Coal has protected the documents’ confidentiality. (Application ¶ 7.) It is

³ Despite Intervenors’ suggestion to the contrary, Springfield Coal has not objected to the relevancy of the documents for which it seeks a protective order. (See Intervenors’ Response at 2.) Springfield Coal’s written discovery responses have been consistent with its Application and have stated that such documents will be produced when they have been designated confidential. (See, e.g., Springfield Coal’s Responses to Intervenors’ Second Interrogatories and Request for Production of Documents at 4 (“Springfield Coal also objects to this Interrogatory [seeking net profits] because it requests extremely sensitive business, proprietary, and financial information that, if produced, needs to be designated as ‘Confidential and Non-Disclosable Information.’”).)

unclear what more Intervenors would have the law require to establish the confidential nature of these documents under the regulations.⁴

The Board has recognized that sensitive business information constitutes confidential, Non-Disclosable Information. In fact, the Board has indicated deference toward a company's position that public disclosure will potentially damage its business, because the Board is "not disposed to second guess a company as to the probability of damage resulting from disclosures when it feels that substantial detriment would ensue." *EPA v. Mystik Tape*, PCB 72-180, at *2 (Sept. 6, 1972). In *Mystik*, the Board granted the respondent's motion for protective order to protect its non-public financial statements that showed profit or loss, and gross and net sales, because the respondent had maintained the documents as confidential and represented to the Board that public disclosure would harm its business and proprietary interests. *Id.* Similarly, in *Horsehead Resource*, the Board granted respondent's motion for a protective order to protect its invoices and information related to the company's profitability, on the basis that disclosure would give respondent's competitors and customers an unfair advantage, and the company had been careful to maintain the confidentiality of the documents. *In re Petition of Horsehead Res. and Devel. Co., Inc.*, AS 00-2 (IPCB Sept. 9, 1999); *see also In re Proposed Site-Specific Rule Change for Reilly Tar and Chem. Corp., Granite City Facility*, R88-9 (IPCB Oct. 20, 1988) (granting respondent's motion for non-disclosure of "Confidential Business Information").

On the other hand, Intervenors' authority (Intervenors' Opposition, at 2-3) does not inform this Board's decision with regard to entering a protective order, because neither order contains any information suggesting the facts, circumstances, or reasons supporting the Board's

⁴ Although the previous regulation, 35 Ill. Adm. Code 101.161, provided that the "application shall be verified by affidavit", the new section 130.404 requires an affidavit only for "facts set forth in the application for nondisclosure that are not of record in the proceeding." In the event the Board finds additional documentation is necessary to grant the Application, Springfield Coal respectfully requests leave to comply with such requests.

decision not to enter a protective order. *See People of the State of Illinois v. ESG Watts, Inc.*, PCB 96-107 (Oct. 31, 1996) (denying without explanation a protective order on respondent's "corporate tax records and financial data."); *IEPA v. Cargill, Inc.*, PCB 78-41 (July 6, 1978) (denying without explanation a protective order for "profit and loss statements, dividends, and taxes."). These orders add little to no information to assist this Board to make a determination with respect to this matter.⁵

3. Public Disclosure Would Substantially Harm Springfield Coal's Business and Proprietary Interests While Providing No Benefit to Intervenors or the State.

There can be no question that public disclosure of the documents for which Springfield Coal seeks a protective order would adversely affect its business and proprietary interests. Public disclosure of a company's financial condition inherently affects its business and proprietary interests.⁶ Among other things, public disclosure would unfairly benefit Springfield Coal's competitors and adversely affect Springfield Coal's relations with its suppliers, customers, and the public-at-large. In particular, the financial health of Springfield Coal, if known to its competitors, suppliers, and customers, will provide an unfair advantage as to pricing. These are nearly identical circumstances that have compelled the Board to grant protective orders in the past. *E.g.*, *Mystik Tape*, PCB 72-180; *Horsehead Res.*, AS 00-2.1. This enforcement action does not affect Springfield Coal's right to protect its confidential records.

⁵ For both orders cited by Intervenors, the underlying motions for protective orders and responses in opposition do not appear accessible electronically, so it is not clear the bases on which such relief was sought and opposed.

⁶ Illinois courts have recognized the inherent sensitive and confidential nature of business records and the risk of pretrial discovery abuse. *See, e.g., May Centers, Inc. v. S.G. Adams Printing & Stationery Co.*, 153 Ill. App. 3d 1018, 1023 (1987) (remanding to trial court for entry of protective order on various agreements, recognizing the "inherently sensitive nature of financial data and the need to protect such data from exploitation in the process of discovery except as necessary to prepare the parties to try the lawsuit").

Springfield Coal has complied with and will continue to comply with Intervenors' discovery demands, but it must receive some baseline protection from this Board to prevent substantial detriment to its business and proprietary interests prior to disclosing these records.

In addition, neither the Intervenors nor the State identifies any compelling benefit for not entering a protective order. Intervenors make no argument that they will be unduly burdened or prejudiced if this Application is granted, because they have no argument to make. Intervenors will receive the documents they have requested in their written discovery requests, and they will be able to use those documents to prosecute their claims in this case. Springfield Coal is able to produce these documents – the exact documents that the Intervenors requested in discovery – subject to a protective order. A protective order will incur no harm or burden to Intervenors, while effectively avoiding great harm to Springfield Coal.

The only benefit either party has articulated with regard to not entering a protective order relates to public hearings. (*See* Intervenors' Response at 3; State Response at 3.) It is worth repeating that that determination is not the function of Springfield Coal's Application, and any determination on the same is premature.⁷ The State and Intervenors cannot presently know if and how they will use Springfield Coal's confidential business records without having reviewed them. Moreover, discovery is on-going. Any order as it relates to how confidential documents should be presented at a public hearing would be uninformed and premature. Because a public hearing is only one of many ways that Springfield Coal's confidential information might be publicly disclosed, a protective order is warranted now.

Absent a protective order, there will be nothing that limits the Intervenors' use of Springfield Coal's confidential business documents. Intervenors' Response calls into question

⁷ Springfield Coal reserves its right to request—at the appropriate time—how this information should be handled at a public hearing, including the procedures employed in *Packaging Personified*, PCB 04-016.

their motive for opposing Springfield Coal's Application. Although Springfield Coal has stated that the Intervenor can use these records in this case, Intervenor's Opposition indicates that they wish to use records outside of this case. Is it the Intervenor's intent to publicize Springfield Coal's financial records on the internet or otherwise to discredit and damage Springfield Coal in the public and with its competitors? This would be extremely inappropriate if the Board would allow the Intervenor to have Springfield Coal's financial records for purposes outside of this present action. It is not enough to trust that public dissemination of Springfield Coal's documents will not occur. The Board has the ability to issue a protective order to ensure that Springfield Coal's business and proprietary interests from inappropriate and unnecessary disclosure.

For the reasons stated herein and in Springfield Coal's Application for Confidential and Non-Disclosable Information Designation, Seal, and Protective Order, Springfield Coal respectfully requests the Illinois Pollution Control Board grant Springfield Coal's Application and enter an order to designate that each of the Articles herein referenced are Confidential Non-Disclosable Information that may not be disclosed or transmitted to third parties and to enter any other orders as appropriate or necessary to achieve the objectives articulated herein.

Dated: July 9, 2013

Respectfully submitted,

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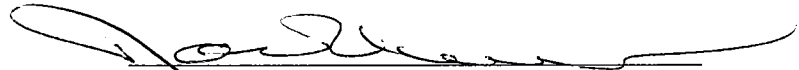
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