

RECEIVED
CLERK'S OFFICE

65448-POH

MAY 05 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

MICHAEL WATSON,

Petitioner,

No. PCB 03-134

vs.

(Pollution Control Facility Siting Appeal)

COUNTY BOARD OF KANKAKEE COUNTY,
ILLINOIS, and WASTE MANAGEMENT OF
ILLINOIS, INC.,

Consolidated With PCB 03-125, 03-133,
03-135)

Respondent.

RESPONSE TO THE COUNTY'S MOTION TO BAR AND FOR SANCTIONS

Now Comes Petitioner Michael Watson, by and through his attorneys at Querrey & Harrow, Ltd. and as and for his Response to the County Board of Kankakee's (County Board) Motion to Bar and for Sanctions, states as follows:

1. Petitioner Watson filed his List of Witnesses to Testify at the Public Hearing on May 2, 2003 (Witness List). In response, the County Board filed a Motion to Bar and for Sanctions against Petitioner Watson. The County Board's Motion, both with respect the bar and sanctions is unjustified, and with respect to sanctions, does not meet the prerequisite requirement for filing such a motion under Section 101.800 of the Illinois Pollution Control Board (IPCB) rules.

2. The County Board seeks sanctions on the apparent basis that it incorrectly perceived the reference to "Elizabeth Harvey" on the Witness List to be "flaunting of repeated decisions on this issue." (Motion ¶8). Nothing can be further from the truth and nothing in the Witness List "flaunts" any person, order or issue. Further, the fact that a Motion with such serious allegations against counsel for Petitioner would be filed by counsel for the County without a

courtesy call to clarify the intent of the filing if it was not understood, is outrageous.

3. Ms. Harvey's name was footnoted with a reference to Footnote 2. Footnote 2 references the Hearing Officer's two orders, the first pertaining to the discovery deposition of Ms. Harvey (and Mr. Moran, among others), and the second pertaining to a Rule 237 request filed by counsel for Petitioner Karlock. The footnote goes on to say:

"Petitioner reserves his objections to this ruling and reiterates his response to objections to the discovery deposition of this individual that since Mr. Mo[r]an and Ms. Harvey were the only two people identified as being involved in their conversations occurring, ex parte, during January 2003, and prior to the County's decision on January 31, 2003, they are the only source for information concerning the exact substance of that communication."

4. The fact that the names of Mr. Moran and Ms. Harvey's names are footnoted with an acknowledgement of the Hearing Officer's rulings and a reservation with respect to Petitioner's objections, should have signaled that the listing of these individuals was hardly intended to "harass," be "vexatious", and whatever other terms the County Board has unjustifiably used against Petitioner Watson.

5. To clarify the Witness List: Mr. Moran and Ms. Harvey were listed in order to preserve the issue on appeal. Absolutely nothing, no word, no sentence in Petitioner's Witness List rising to the level of "vexatious" or "flaunting" and such allegations are offensive on their face. Should Petitioner Watson not have listed these two individuals, surely the County Board would argue Petitioner waived the issue on appeal.

6. Preserving by repleading with reservation is not only a common legal practice in Illinois, it is a perfectly acceptable and non-sanctionable act. See, Pfaff v. Chrysler Corporation, et al., 155 Ill.2d. 35, 610 N.E.2d 51 (S. Ct. 1992). In Pfaff, the Illinois

Supreme Court found that a party had abandoned its rights to appeal the Section 2-615 dismissal of certain counts of its complaint, when the party voluntarily withdrew its repleading of those counts, and amended its complaint without those counts. Albeit a complaint is distinguishable from a discover request, however, the legal concept of a withdraw due to failure to preserve is the same.

7. Moreover, both the County Board's allegations of repeated violations of IPCB and Hearing Officer's Orders as a rationale for sanctions is unfounded given the circumstances of this case. First, Petitioner Watson only listed the subject individuals (Harvey and Moran) once, prior to its Witness List when it joined in the City of Kankakee's list of deponents. Second, had Petitioner Watson not made a record that these individuals were being requested to appear at the hearing by him, then the County Board would argue Petitioner has no right to appeal on that issue. Third, nowhere in the Witness List did it reference the IPCB's order of May 1, 2003 and, in fact, Petitioner's counsel did not at that time and (other than the County Board's representations in its Motion) does not at this time know what that Order states, as, to this counsel's knowledge it is not yet published on-line (counsel has looked for it) and has not been served on counsel for this Petitioner. Further, with the time limitations, number of filings, and depositions that have proceeded (in this and other cases handled by counsel for this Petitioner), since yesterday, when such an Order would have been entered, counsel has not had the time to call the IPCB to orally find out what the Order states.


8. Finally, Section 101.800(c) provides that the IPCB considers the following factors in determining whether to award sanctions: the relative severity of the refusal to comply, the past history of the proceeding, the degree to which the proceeding has been delayed or prejudiced, and the existence or absence of bad faith. There was no refusal to comply by

Petitioner, the listing of Mr. Moran and Ms. Harvey on the witness list was simply an attempt to preserve an objection. Petitioner's past history in this proceeding has been respectful, Petitioner has complied with Hearing Officer Orders, and, contrary to the County Board's allegation, Petitioner has not violated any Order of this Board or the Hearing Officer. The proceeding has not been delayed or prejudiced by the inclusion of the names of Mr. Moran and Ms. Harvey in the witness list, and the County Board alleges no such delay or prejudice. And, there is no bad faith on the part of Petitioner in filing the subject Witness List, and the County Board alleges no such bad faith.

9. It is unfortunate that the intent to preserve rather than the intent to call as a witness was not understood, however, it is unclear, whether it would have made any difference to the County Board had it been understood. It was something that a simple phone call could have avoided, should the County Board have so misunderstood the wording of the Witness List. It is not something that is sanctionable¹. It is not something that warrants a motion to bar. Therefore, the County Board's Motion to Bar and for Sanctions should be denied as moot or, alternatively, simply denied.

Dated: May 2, 2003

PETITIONER MICHAEL WATSON


One of his attorneys

Jennifer J. Sackett Pohlenz
QUERREY & HARROW, LTD.
175 West Jackson Boulevard, Suite 1600
Chicago, Illinois 60604
(312) 540-7000
Attorney Registration No. 6225990
Attorneys for Petitioner Michael Watson

¹ It should be noted that no prayer for or identity of a sanction is provided by the County Board in its Motion, therefore, it is impossible for Petitioner to respond to that aspect of the Motion. Given no relief is sought on the sanctions portion of the Motion, Petitioner seeks to have it stricken by the IPCB.

PROOF OF SERVICE

I, Jennifer J. Sackett Pohlenz, an attorney, certify that I have served the foregoing **Response to the County Board's Motion to Bar and for Sanctions**, on the following parties and persons at their respective addresses/fax numbers, this 2nd day of May 2003, by or before the hour of 7:00 p.m. in the manners stated below:

Via Facsimile

Donald Moran
Pedersen & Houpt
161 North Clark Street
Suite 3100
Chicago, IL 60601-3242
Fax: (312) 261-1149

Attorney for Waste Management of Illinois, Inc.

Via U. S. Mail

Patricia O'Dell
1242 Arrowhead Drive
Bourbonnais, IL 60914
Interested Party

Via Facsimile

Kenneth A. Leshen
One Dearborn Square
Suite 550
Kankakee, IL 60901
Fax: (815) 933-3397
Representing Petitioner in PCB 03-125

Via Facsimile

Keith Runyon
1165 Plum Creek Drive
Bourbonnais, IL 60914
Fax: (815) 937-9164
Petitioner in PCB 03-135

Via Facsimile

George Mueller
George Mueller, P.C.
501 State Street
Ottawa, IL 61350
Fax: (815) 433-4913
Representing Petitioner in PCB 03-133

Via Facsimile

L. Patrick Power
956 North Fifth Avenue
Kankakee, IL 60901
Fax: (815) 937-0056
Representing Petitioner in PCB 03-125

Via U. S. Mail

Leland Milk
6903 S. Route 45-52
Chebanse, IL 60922-5153
Interested Party

Via Facsimile

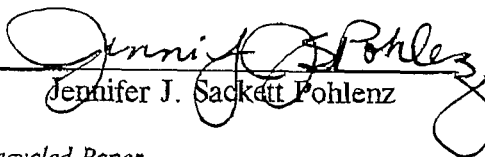
Elizabeth S. Harvey, Esq.
Swanson, Martin & Bell
One IBM Plaza, Suite 2900
330 North Wabash
Chicago, IL 60611
Fax: (312) 321-0990
Representing Kankakee County Board

Via Facsimile

Charles Helston
Richard Porter
Hinshaw & Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389
Fax: (815) 490-4901
Representing Kankakee County Board

Via Facsimile

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 W. Randolph Street
Chicago, IL 60601
Hearing Officer


Jennifer J. Sackett Pohlenz

Printed on Recycled Paper