RECEIVED
CLERK'S OFFICE
JUN 10 2003
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMAN Complainant, v. BOUGHTON TRUCKING AND MATERIALS, INC. Respondent.	PCB 99-187 (Citizen Enforcement, Noise & Air)

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on the 10th day of June, 2003, the undersigned caused to be filed with the Office of the Clerk of the Pollution Control Board the Supplemental Appearance of Michael S. Blazer and Matthew E. Cohn, all on behalf of the Petitioners, copies of which are herewith served upon you.

THE JEFF DIVER GROUP, L.L.C.

By: _____

Michael S. Blazer
Matthew E. Cohn
THE JEFF DIVER GROUP, L.L.C.
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187
(630) 681-2530

RECEIVED
CLERK'S OFFICE
JUN 10 2003
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMAN Complainant, v. BOUGHTON TRUCKING AND MATERIALS, INC. Respondent.	PCB 99-187 (Citizen Enforcement, Noise & Air)

SUPPLEMENTAL APPEARANCE

The undersigned hereby files a Supplemental Appearance in this proceeding on behalf of the Complainant, Gina Patterman.

Michael S. Blazer

Michael S. Blazer
THE JEFF DIVER GROUP, L.L.C.
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187
(630) 681-2530

RECEIVED
CLERK'S OFFICE

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JUN 10 2003

STATE OF ILLINOIS
Pollution Control Board

GINA PATTERMAN Complainant, v. BOUGHTON TRUCKING AND MATERIALS, INC. Respondent.	PCB 99-187 (Citizen Enforcement, Noise & Air)

SUPPLEMENTAL APPEARANCE

The undersigned hereby files a Supplemental Appearance in this proceeding on behalf of the Complainant, Gina Patterman.

Matthew E. Cohn

Matthew E. Cohn
THE JEFF DIVER GROUP, L.L.C.
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187
(630) 681-2530

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the above and foregoing Notice of Filing and Supplemental Appearances of Michael S. Blazer and Matthew E. Cohn, all on behalf of the Complainant, to be served via facsimile transmission upon the following:

Mark R. Ter Molen
Patricia F. Sharkey
Kevin G. Deshamais
Mayer, Brown, Rowe & Maw
190 S. LaSalle Street
Chicago, IL 60603
Fax No. (312) 706-9113

Roger D. Rickmon
Tracy, Johnson & Wilson
116 N. Chicago Street
6th Floor
Joliet, IL 60432
Fax No. (815) 727-4846

on this 10th day of June, 2003.

THE JEFF DIVER GROUP, L.L.C.

By: _____
Michael S. Blazer

RECEIVED
CLERK'S OFFICE
JUN 10 2003
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN Complainant, v. BOUGHTON TRUCKING AND MATERIALS, INC. Respondent.	PCB 99-187 (Citizen Enforcement, Noise & Air)

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on the 10th day of June, 2003, the undersigned caused to be filed with the Office of the Clerk of the Pollution Control Board the Supplemental Appearance of Michael S. Blazer and Matthew E. Cohn, all on behalf of the Petitioners, copies of which are herewith served upon you.

THE JEFF DIVER GROUP, L.L.C.

By: _____

Michael S. Blazer
Matthew E. Cohn
THE JEFF DIVER GROUP, L.L.C.
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187
(630) 681-2530

THIS FILING SUBMITTED ON RECYCLED PAPER

RECEIVED
CLERK'S OFFICE
JUN 10 2003
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN Complainant, v. BOUGHTON TRUCKING AND MATERIALS, INC. Respondent.	PCB 99-187 (Citizen Enforcement, Noise & Air)

COMPLAINANT'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR DISCOVERY SANCTIONS

Now comes Complainant, Gina Pattermann ("Pattermann"), by her attorneys, and hereby submits her Memorandum in Response to the Motion of Respondent, Boughton Trucking and Materials, Inc. ("Boughton") for Discovery Sanctions.

I. INTRODUCTION

This action involves serious allegations of noise and air pollution resulting from Boughton's mining operations. Boughton correctly points out that this matter has been pending since 1999. However, Boughton is incorrect in suggesting that the history of this matter reflects a "pattern of delay and obfuscation" or a "pattern of abuse". Rather, at least until October 2002, the docket of this matter reflects two primary activities: an initial effort by Boughton to dispose of the Complaint as duplicitous and frivolous (granted in part and denied in part in September 1999), followed by an almost two-year settlement effort. It has only been in the last few months, since settlement efforts did not prove fruitful and Pattermann's prior counsel withdrew, that this matter has been on a course toward a hearing. Most recently, Pattermann has retained new counsel experienced in environmental matters and in matters before the Board, further

demonstrating her willingness and ability to pursue this matter to its appropriate conclusion. Under the circumstances, it would be fundamentally unfair to allow Boughton to avoid a hearing on the merits of the claimed violations through a Motion for Sanctions.

II. BOUGHTON HAS NOT ESTABLISHED ANY PREJUDICE RESULTING FROM ANY DELAY IN DISCOVERY

The primary impetus for Boughton's Motion appears to be the evident lack of communication that resulted in the failure of Complainant's noise expert, Greg Zak, to attend his scheduled deposition.[1] Boughton argues that it has "been prejudiced in their ability to defend themselves in this lawsuit". The specific nature of the alleged prejudice is not identified. Rather, instead of focusing on the potential costs that may be incurred in rescheduling the subject deposition, Boughton seeks to bar all evidence on noise issues and to recover the excessive fees billed by Boughton's counsel in the entire discovery process. Absent demonstrated prejudice, sanctions of the type sought by Boughton are improper. See, *e.g., Tinsey v. Chicago Transit Authority*, 140 Ill.App.3d 546, 549 (1st Dist. 1986).

Boughton's Motion seeks too much. First, as noted in the Motion, Pattermann has already disclosed a large number of witnesses, apart from Mr. Zak. The Hearing Officer has ruled that summary statements may be submitted given the large number of witnesses identified. Nevertheless, Boughton's Motion seeks to bar all testimony on the subject of the noise emissions from Boughton's operations.

Even as to Mr. Zak, the solution to the problem, now that new counsel is in the

[1] Boughton speculates at length regarding the nature of Mr. Zak's retention and Pattermann's intent in identifying Mr. Zak as a noise expert. (Boughton Motion at 3-4) Irrespective of the speculation regarding Mr. Zak's status, Pattermann here confirms that Mr. Zak is the retained expert and that she stands ready to compensate him for his services.

THIS FILING SUBMITTED ON RECYCLED PAPER

case and Mr. Zak's retention has been confirmed, is to allow the deposition to proceed and give Boughton the opportunity to learn the substance of the testimony. This is in fact the only prejudice Boughton claims to have suffered in this regard. (Boughton Motion at 4)

The balance of Boughton's assertions relate to claimed deficiencies in Pattermann's prior responses to other discovery requests. The most significant point here, despite Boughton's various disparaging comments, is that Boughton has never filed either a Motion to Compel or other Motion questioning the sufficiency of the responses.[2] Boughton did move to strike Pattermann's witness list. But this Motion was not granted. Rather, the Hearing Officer entered an order on April 23 which allowed Pattermann to select one witness to testify at hearing and to submit written statements from the other witnesses. The balance of Boughton's Motion, which sought to bar testimony, was denied. Despite the prior denial of any "objections" by Boughton, it now seeks to revisit those issues in the guise of the present Motion for Sanctions.[3]

As Boughton points out, the propriety of sanctions is governed by Rule 101.800(c) (35 IADC 101.800(c)), which provides:

> In deciding what sanction to impose the Board will consider factors including: the relative severity of the refusal or failure 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 on the part of the offending party or person.

None of these factors support sanctions to the extent sought by Boughton. Pattermann

---

[2] The only exception is the Motion to Compel referenced at page 8 of Boughton's current Motion, relating to information sought from Pattermann's former husband, which does not appear to have been granted.

[3] Boughton's reliance on cases involving a "pattern" of discovery abuses is misplaced. (Boughton Motion at 8) No such pattern is present here, nor, as noted, has any such conduct been the subject of a Motion to Compel (except for the Motions that were denied).

THIS FILING SUBMITTED ON RECYCLED PAPER

did not refuse to produce Mr. Zak – his failure to appear for his deposition was the evident result of confusion regarding payment, which has now been resolved. Second, the past history of this proceeding reflects years of settlement followed by the more recent preparation for hearing and Pattermann's compliance with discovery requests. As to the third factor, Boughton has not demonstrated any unwarranted delay or prejudice. Nor, as to the fourth factor, does Boughton identify any evidence of bad faith by Pattermann, other than unsubstantiated speculation. The most that can be said is that there was certainly a lack of clarity regarding the responsibility for payment of Mr. Zak's fees.[4] At a minimum, however, this warranted further confirmation by Boughton (or at least its counsel) before thousands of dollars in fees were incurred in "preparing" for a deposition that was not certain to occur.

The cases cited by Boughton do not alter this result. (Boughton Motion at 5) Unlike the cited cases, this is not a situation where the expert's identity or his opinions have not been disclosed. The problem here was the scheduling of the deposition of the expert who was disclosed. The solution is to take his deposition, not bar his testimony.

III. THE ATTORNEYS' FEES SOUGHT BY BOUGHTON FAR EXCEED ANY REASONABLE COMPENSATION FOR THE CANCELLATION OF THE ZAK DEPOSITION

The primary purpose of Boughton's Motion, as noted previously, is to avoid a hearing on the merits of Pattermann's claims. Secondarily, however, the Motion reflects Boughton's effort to foist on Pattermann the billing excesses of its counsel. In other circumstances of an abortive deposition, one would reasonably expect a request for reimbursement of court reporter attendance costs and, possibly, related costs or

[4] Zak's attendance was certainly not confirmed. Boughton acknowledges that Pattermann "stated that she thought Mr. Zak would be there although she herself might not." (Boughton Motion at 2, emphasis added.)

THIS FILING SUBMITTED ON RECYCLED PAPER

expenses. Boughton, however, uses this opportunity to impose on Pattermann attorneys fees totaling $19,520.25, far in excess of anything approaching reasonable costs and expenses.

First, Boughton's request is contrary to this Board's rules. "Section 101.800 does not allow the Board to monetarily sanction the offending party (see Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000)), where the Board eliminated language allowing the Board to sanction the offending party with reasonable costs incurred by the moving party in obtaining an order for sanctions)." *Lawrence v. North Point Grade School*, PCB 02-110, 2003 WL 1891827, Slip Op. at 2.

Apart from the above, as an overall matter, Boughton improperly fails to provide any breakdown or other method for determining the reasonableness of the amounts sought. See generally, *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 984 (1st Dist. 1987). Beyond this, however, the fees claimed confirm Bouighton's attempt at overreaching.

The claimed fees are divided into four categories. First, $3970.50 is sought in connection with a claimed "false witness list". It is unclear what this has to do with Zak's deposition. More to the point, this relates to the Motion that was denied by the Hearing Officer on April 23.

The next item is $365 for "efforts to obtain addresses for complainant's witnesses". This was not the subject of any prior motion nor is it related to the Zak deposition.

The third item is $6388.75 for "preparation for and attendance at Steve

THIS FILING SUBMITTED ON RECYCLED PAPER

Pattermannn and Greg Zak depositions". It is unclear what the preparation for the Steve Pattermann deposition has to do with the abortive Zak deposition. More to the point, Boughton's general description of its attorneys' services includes "preparation and sending of deposition notices and subpoenas, research, document review and writing of deposition questions". Ignoring the lack of any specificity, all of these activities would have to be undertaken no matter what the circumstance, particularly if Boughton's Motion is denied and Zak's deposition proceeds. As noted above, the only "expenses" to which Boughton might arguably be entitled would be "travel to and attendance at depositions". Again, apart from the lack of specificity, there is substantial doubt as to the reasonableness of any charge under the circumstances. It is common practice to confirm a deposition the day before it is to occur. This is especially prudent where some travel is involved. In this case, such confirmation was almost a necessity given the confusion regarding payment to Mr. Zak and the lack of any assurance that the deposition would proceed as scheduled. Rather than making a telephone call, Boughton's attorneys just showed up and now express feigned outrage that the lack of certainty came to fruition.

The fourth element of claimed fees, and the most outrageous, is $8819.00 for "preparation of motion for sanctions". Boughton suggests no basis for an award of fees in connection with the preparation of a motion for an award of fees. Nor, again, does Boughton provide any detail to substantiate this claim.

IV. CONCLUSION

This case has probably dragged on much longer than it should have. But this Board should not ignore the fact that the vast majority of the delay encompassed a

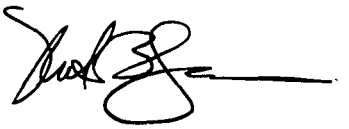
THIS FILING SUBMITTED ON RECYCLED PAPER

protracted period of efforts, albeit unsuccessful, to settle this matter. When settlement efforts ultimately failed, Patterman provided the discovery requested by Boughton. The circumstance of the Zak deposition certainly should and could have been avoided. It seems clear, however, that both parties were guilty of unwarranted assumptions regarding Zak's attendance. This issue can be resolved expeditiously, as set forth above.

The balance of Boughton's Motion must be seen for what it is – a *post hoc* diatribe serving as a vehicle for summary disposition of Pattermann's claims, coupled with an effort to shift the burden for excesses in legal billings. Boughton should not be allowed to avoid a hearing on the merits of this controversy. The Motion for Sanctions should be denied.

Respectfully submitted,

Gina Pattermann



By: _____
One of her attorneys

Michael S. Blazer
Matthew E. Cohn
The Jeff Diver Group, L.L.C.
1749 S. Naperville Road
Suite 102
Wheaton, IL 60187
630-681-2530

THIS FILING SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the above and foregoing Notice of Filing and MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR DISCOVERY SANCTIONS, all on behalf of the Complainant, to be served via facsimile transmission upon the following:

Mark R. Ter Molen
Patricia F. Sharkey
Kevin G. Deshamais
Mayer, Brown, Rowe & Maw
190 S. LaSalle Street
Chicago, IL 60603
Fax No. (312) 706-9113

Roger D. Rickmon
Tracy, Johnson & Wilson
116 N. Chicago Street
6th Floor
Joliet, IL 60432
Fax No. (815) 727-4846

on this 10th day of June, 2003.

THE JEFF DIVER GROUP, L.L.C.

By: _____
Michael S. Blazer