

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MICHAEL WATSON,

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MAY 05 2003

Petitioner,

No. PCB 03-134

vs.

STATE OF ILLINOIS  
(Pollution Control Facility Site Appeal) ~~Pollution Control Board~~

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

Consolidated With PCB 03-125, 03-133,  
03-135, 03-144)

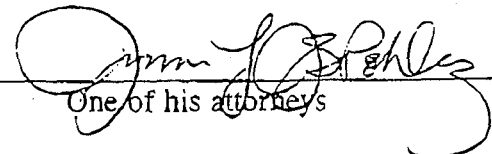
Respondent.

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on May 5, 2003, we filed, with the Illinois Pollution Control Board, the following: **Response to the WMIP's Motion to Bar and for Sanctions.**

PETITIONER MICHAEL WATSON

  
One of his attorneys

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PROOF OF SERVICE

Alesia Mansfield, under penalties of perjury, certifies that she served the foregoing Notice of Filing and document(s) set forth in said Notice, on the following parties and persons at their respective addresses/fax numbers, this 5<sup>th</sup> day of May, 2003, by or before the hour of 4:30 p.m. in the manners stated below:

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Alesia Mansfield

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON,

Petitioner,

vs.

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

Respondent.

No. PCB 03-134

(Pollution Control Facility Siting Appeal)

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

RESPONSE TO THE WMII'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 Waste Management of Illinois, Inc.'s 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, Waste Management of Illinois, Inc. (WMII) filed a Motion to Bar and for Sanctions against Petitioner Watson. WMII's Motion, both with respect the bar and sanctions is unjustified; 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; and seeks monetary damages which are not allowed by Section 101.800.

2. WMII makes, essentially, three complaints in its Motion: (1) that Petitioner Watson's Witness List was a Rule 237 Notice to Produce which was not allowed by the Hearing Officer; (2) that Petitioner's request for Mr. Addleman to testify or answer written questions should be barred; and, apparently, that (3) Petitioner should not be allowed to preserve objections to the Hearing Officer's prior rulings concerning Mr. Moran's deposition

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testimony and hearing testimony. None of these three arguments serve as a rational to bar Petitioner or to impose sanctions on Petitioner. In fact, nothing in the Motion meets, discusses or references the appropriate facts to be considered by the Illinois Pollution Control Board in determining whether to impose sanctions under Section 101.800 of its Rules. Therefore, the Motion should be denied in its entirety.

3. First, as respects WMII's objection to Petitioner's Rule 231 notice, the Witness List references the following in terms of the format or enforcement of the list at trial:

(Please consider this a S.Ct. Rule 237 notice. If WMII contends that the named persons below are "witnesses" opposed to parties, and Illinois Pollution Control Board Rule 101.662(a) applies, it is requested that WMII (a) so inform counsel for Petitioner Watson immediately, and inform Petitioner whether WMII will object to produce the following people, (b) inform Petitioner Watson whether WMII will accept service of subpoenas through counsel Moran or, if WMII will not, without waiving Petitioner's objection to such a circumstance, that WMII then provide the business and home addresses of the following people for service purposes)

4. This language was added to the Witness List in order to determine whether counsel for WMII would be objecting on some technicality and arguing a subpoena was necessary for a party, and since, there was no verbiage in the Hearing Officer's May 1, 2003, Order concerning a witness list filed on May 2, 2003, having enforceability in terms of requiring a party's representative to be present, the language was added to "cover the basis" so to speak on the mechanisms that, from the Rules, appear to be available to require a party's presence and to seek WMII's position on production of the requested people (other than Moran who was listed for the purpose of preserving the record). Nothing in Petitioner's actions comes close to being sanctionable, to rule otherwise suggests that WMII's own actions in submitting a witness

list without subpoena, without any request for voluntary compliance is, itself, sanctionable. Therefore, the portion of WMII's complaints concerning the language referenced above in Paragraph 3 should be denied.

5. **Second**, WMII argues that Petitioner should be barred from obtaining any testimony from Lee Addleman, either in oral or written form. WMII argues that this request is in violation of the Hearing Officer's May 1 and April 30 Orders and WMII represents that the Hearing Officer's prior rulings in this case provided that "WMII need not make Mr. Addleman available as a witness in these proceedings." (Motion ¶6). WMII is wrong.

6. The Hearing Officer's April 30<sup>th</sup> Order denied a request for the discovery deposition of Mr. Addleman and made no reference to his hearing testimony. The Hearing Officer's May 1, 2003, Order made no reference to Mr. Addleman's hearing testimony. WMII provides absolutely no basis for imposing a sanction of barring Petitioner from obtaining oral or written testimony (as sought in the alternative in the Witness List) from Mr. Addleman at trial. To find for WMII on this basis, would require a finding that any Petitioner seeking the hearing testimony of a witness, for the first time, when no ruling has been made with respect to the hearing testimony of that witness, subjects that Petitioner to sanctions? Such finding would be in contravention of the Illinois Supreme Court Rules and Pollution Control Board Rules, and has no basis in the law. Further, per WMII's own Motion, the Witness List was filed "at or around 1:00 p.m" on May 2, which was the required time to provide that list, thus, any argument of WMII that Petitioner should be denied any access to Mr. Addleman on the basis of an allegation that the request was "last minute" should be denied as the List was timely. Therefore, WMII's motion should be denied.

7. Third, WMII seeks to bar Petitioner and seeks sanctions against Petitioner for the inclusion of Donald Moran on the Witness List. Interestingly, WMII understood that the intent of the Witness List was to preserve objections (See, Motion ¶7), however, still objects to it, despite such acknowledgement. How is preservation of an issue for appeal harassment? How is preservation of an issue on appeal “defiance” of an Order? To hold that preservation is sanctionable for these reasons, is to contradict the Illinois Supreme Court in Pfaff v. Chrysler Corporation, et al., at a minimum, and prejudice Petitioner’s due process rights to be heard on issues, be it before the Illinois Pollution Control Board or the Illinois Appellate Courts.

8. 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.**

9. WMII’s allegations of repeated attempts by Petitioner Watson to require Messrs. Addleman and Moran at hearing as a rational for sanctions is unfounded given the circumstances of this case. First, Petitioner Watson only listed the subject individuals 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 (opposed to appearing at a discovery deposition, See, Slatten v. City of Chicago

12 Ill.App.3d 808, 813, 299 N.E.2d 442 (1973), *citing* Cleary's Handbook of Illinois Evidence, 2d ed., par. 1.5, p. 7, for an explanation between discovery and evidence depositions), then WMII would argue Petitioner has no right to appeal on that issue.

10. Further, 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. As sated above, there was no refusal to comply by Petitioner, as there was no order regarding Mr. Addleman's appearance at hearing and Petitioner's Witness List as respects Mr. Moran was preserving and issue for appeal. Petitioner's past history in this proceeding has been respectful, Petitioner has complied with Hearing Officer Orders, and 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 the subject individuals in the witness list, and WMIII alleges no such delay or prejudice. And, there is no bad faith on the part of Petitioner in filing the subject Witness List. Any allegations to the contrary in WMII's Motion should be, sanctioned and stricken, as they are bald, conclusory and baseless allegations, and are contrary to the facts in this case. The Motion is no more than an attempt to bully and delay Petitioner in its preparation for the first day of hearing, by forcing Petitioner to respond to this baseless Motion.

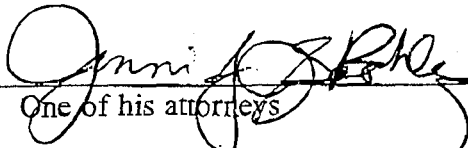
11. Finally, Petitioner seeks monetary sanctions, its attorneys' fees for, apparently, the entire appeal, as a sanction against Petitioner Watson for asserting his rights in filing a legal and timely Witness List. Petitioner's request is in defiance to Illinois Pollution Control Board Rule 101.800, and well-established holdings, providing that 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 with reasonable costs incurred by the moving party in obtaining an order for sanctions; *also see*, Rebecca S. Lawrence v. North Point Grade School, PCB No. 02-10 (April 3, 2003)(denying request for fees in preparing motion for sanctions, as not allowed by the IPCB rules). Further, based on WMII's own argument for imposing sanctions against Watson, sanctions should be imposed on WMII for making this request, which has repetitively been denied by the IPCB and is clearly not allowed in its Rules.

WHEREFORE, WMII's Motion to Bar and for Sanctions should be denied for the reasons stated above.

Dated: May 5, 2003

PETITIONER MICHAEL WATSON

  
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One of his attorneys

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