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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 MOTION FOR CLARIFICATION OF  
BOARD'S ORDER OF AUGUST 7, 2003**

Now comes Complainant, Gina Pattermann ("Pattermann"), by her attorneys, and for her Motion for Clarification of the Board's Order of August 7, 2003 in connection with the Motion of Respondent, Boughton Trucking and Materials, Inc. ("Boughton") for Discovery Sanctions, states:

1. On August 7, 2003 the Board issued its Order granting in part and denying in part Boughton's Motion for Discovery Sanctions. A copy of the Order is attached hereto as Exhibit A.

2. In the August 7 Order, this Board held that it "will not grant Boughton's motion to bar the testimony of any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony. However, the Board notes that the current discovery schedule set by the parties together with the hearing officer ordered all depositions completed by May 2, 2003, and all dispositive motions filed on or before May 30, 2003."

3. On April 2, 2003, the Hearing Officer issued an Order in connection with Boughton's Motion to Strike Pattermann's Witness List. A copy of this Order is attached

hereto as Exhibit B. The Hearing Officer allowed Pattermann to select one witness from her disclosure list to testify as her witness at the hearing of this matter. The hearing officer further stated that written statements may be submitted at the hearing by the recently-disclosed witnesses as participants subject to cross-examination. The order also provided that notices of witnesses to be disposed had to be served by March 21, 2003, and all depositions completed by May 2, 2003. Finally, the hearing officer denied Boughton's Motion to Limit Statements by Excluded Witnesses.

4. Mr. Zak, the witness who has now been excluded, would have testified regarding Boughton's violation of IEPA regulations and possible modifications to Boughton's facility. In reading the foregoing Orders together, it is unclear whether the Board in its August 7 Order intended to allow Pattermann to designate a new witness to testify regarding these subjects or whether Pattermann is limited to submitting such testimony from witnesses already identified. In either case, it is also unclear whether the Board envisions an extension of the deposition cut-off date in connection with such substitute testimony, particularly given the Board's concluding finding in the August 7 Order that the sanction imposed will "promote timely discovery in the future."

5. Pattermann does not by this Motion seek to unnecessarily delay these proceedings, nor does she seek an open-ended extension of the discovery cut-off (particularly since any further depositions would be for Boughton's benefit). Rather, Pattermann only seeks clarification regarding the designation of substitute witnesses in connection with the subject matter of Mr. Zak's proposed testimony and the concomitant need for a limited re-opening of discovery as set forth above.

6. The Board should note that the Hearing Officer in his most recent order,

with the concurrence of counsel for Pattermann, provided for the filing of the instant Motion but also directed that the parties shall schedule a dispositive motion cut-off date at next status conference, set for September 24, 2003.

7. Based on the foregoing, Pattermann asks this Board to clarify its Order of August 7, 2003 and provide direction to the parties regarding the nature of the evidence Pattermann will be allowed to tender in lieu of Mr. Zak's testimony and any further discovery that may be necessitated by such substituted evidence.

Respectfully submitted,  
Gina Pattermann

A handwritten signature in black ink, appearing to read "Michael S. Blazer", with a long horizontal line extending to the right.

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he caused the above and foregoing Notice of Filing and COMPLAINANT'S MOTION FOR CLARIFICATION OF BOARD'S ORDER OF AUGUST 7, 2003, 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  
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Joliet, IL 60435  
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on this 21<sup>st</sup> day of August, 2003.

THE JEFF DIVER GROUP, L.L.C.



By: \_\_\_\_\_  
Michael S. Blazer

ILLINOIS POLLUTION CONTROL BOARD

August 7, 2003

GINA PATTERMANN,

Complainant,

v.

BOUGHTON TRUCKING AND  
MATERIALS, INC.,

Respondent.

PCB 99-187

(Citizens Enforcement - Noise, Air)

ORDER OF THE BOARD (by N. J. Melas):

On May 23, 2003, respondent Boughton Trucking and Materials, Inc., (Boughton) filed a motion for discovery sanctions against the complainant in this proceeding, Ms. Gina Patterman (Mot.). Ms. Patterman filed this citizens' enforcement complaint against Boughton on June 17, 1999, alleging noise and air pollution violations. On June 10, 2003, Ms. Patterman filed a response to the motion for discovery sanctions (Resp.). Boughton replied to Ms. Patterman's response on June 20, 2003 (Reply). The Boughton facility is a stone quarry that produces crushed stone, located at 11746 South Naperville Plainfield Road in Plainfield, Will County.

For the following reasons, the Board grants Boughton's motion for discovery sanctions in part and denies the motion in part. The Board bars Mr. Zak from testifying at hearing regarding Boughton's noncompliance with Illinois Environmental Protection Agency (Agency) regulations and possible modifications to Boughton's facility. However, the Board does not bar any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony, nor does the Board award Boughton attorney fees.

**BACKGROUND**

Boughton alleges that Ms. Patterman represented she had retained Mr. Greg Zak as an expert witness to testify at hearing. Mot. at 2. Boughton issued Mr. Zak a subpoena and sent him a notice of deposition for April 23, 2003. *Id.* In response, Mr. Zak sent Boughton a contract stating the fee for his services. Boughton informed Ms. Patterman and Board hearing officer Brad Halloran of the alleged erroneous billing. Mot. at 2. Boughton alleges that in a telephonic status conference with all three parties on March 27, 2003, Ms. Patterman stated she understood her responsibility to retain her expert witness. *Id.*

Boughton deposed Ms. Patterman on April 8, 2003. Mot. at 2. At the deposition, Boughton claims that its attorney asked Ms. Patterman to confirm that Mr. Zak would attend his deposition and Ms. Patterman stated she thought Mr. Zak would be there. *Id.*

On April 23, 2003, Mr. Zak did not appear at his scheduled deposition with Boughton. Mot. at 3. Boughton contacted Mr. Zak by telephone who responded that he had not been

retained by Ms. Patterman. Boughton and Mr. Zak left a voice mail message to this effect for hearing officer Halloran. *Id.*

Ms. Patterman claims that she has retained Mr. Zak as a noise expert witness and that she is prepared to compensate him for his services. Resp. at 2. However, Ms. Patterman did not support these facts with a signed affidavit.

### **APPLICABLE REGULATIONS**

Under Section 101.800(b), the Board will order sanctions when a party fails to comply with procedural rules, board orders or hearing officer orders. 35 Ill. Adm. Code 101.800(b). Sanctions can include barring the offender from filing pleadings or documents related to any issue to which the refusal or failure relates. 35 Ill. Adm. Code 101.800(b)(2). The Board may also bar a witness from testifying concerning that issue. 35 Ill. Adm. Code 101.800(b)(6).

In deciding what sanction to impose, the Board must consider four factors:

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. 35 Ill. Adm. Code 101.800(c).

### **BOUGHTON'S ARGUMENTS**

Boughton requests the Board to bar Mr. Zak as a witness and bar any additional witnesses, pleadings, or documents pertaining to the subject matter of his testimony. Mot. at 5, 9. Boughton also asks the Board to award Boughton attorney fees attributable to Ms. Patterman's abuse of discovery process in the amount of \$19,520.25. Mot. Exh. 4.

Boughton argues that Ms. Patterman's assertion that she has retained Mr. Zak was unsupported by an affidavit as required by Section 101.504 of the Board rules, and therefore, insufficient as a matter of law. Reply at 1; citing 35 Ill. Adm. Code 101.504.

Boughton further argues that Ms. Patterman's alleged retention is late. Reply at 2. Board hearing officer Brad Halloran ordered the parties to complete all depositions by May 2, 2003. Mr. Zak's deposition was scheduled for April 23, 2003. Ms. Patterman did not seek to remedy her failure to provide Mr. Zak for deposition until she filed the response on June 10, 2003. Reply at 5.

Boughton argues that in this instance sanctions are warranted due to Ms. Patterman's negligence and abuse of Board procedural rules. Boughton contends that Ms. Patterman's history of abuse of the discovery process in this proceeding warrants sanctions. Mot. at 5-6. Boughton argues that Ms. Patterman refused to produce a document identified in her interrogatory responses pertaining to property values in the subdivision allegedly impacted by Boughton's operations. Mot. at 6. Boughton filed a motion to compel production of the document and Ms. Patterman claimed her husband from whom she had recently separated possessed the document. Boughton subpoenaed Mr. Patterman for the document and he failed to

appear at the deposition and failed to provide the subpoenaed document. Boughton argues that Ms. Patterman has failed to appear at least six status conferences set by hearing officer order. Boughton further argues that Ms. Patterman failed to provide addresses or phone numbers for two of her four witnesses that has caused Boughton significant delay in proceeding with discovery.

Boughton argues that Ms. Patterman also exhibited bad faith. Mot. at 10. Boughton opines that Ms. Patterman knew she had not retained Mr. Zak at the time she identified him as her witness. If not intentional, Boughton argues that causing Boughton to incur the expenses associated with preparing for and traveling to a deposition where the deponent did not appear was clearly negligent. Mot. at 11. Boughton contends that Ms. Patterman knew she did not retain Mr. Zak and neglected to inform Boughton.

Boughton argues that for all of these reasons, sanctions against Ms. Patterman are warranted.

### **PATTERMAN'S RESPONSE**

Ms. Patterman's responds that Boughton has not established prejudice resulting from the delay in discovery, has not shown any bad faith on the part of Ms. Patterman. Resp. at 3-4. Ms. Patterman admits that there was a lack of clarity surrounding Mr. Zak's attendance at the deposition scheduled for April 23, 2003. Ms. Patterman states she merely *thought* that Mr. Zak would attend the deposition and that Boughton should have confirmed Mr. Zak's attendance before preparing for a deposition that was not certain to occur. *Id.*

Ms. Patterman also contends that she has officially retained Mr. Zak. Resp. at 3. Ms. Patterman argues that Boughton's contentions of bad faith are merely "unsubstantiated speculation." Resp. at 4. Ms. Patterman argues the solution is to take Mr. Zak's deposition, not bar his testimony. *Id.*

Ms. Patterman also contends that the attorney fees Boughton seeks for the cancelled deposition are unreasonable. Resp. at 4. Ms. Patterman argues the Board procedural rules do not allow the Board to monetarily sanction the offending party. Resp. at 5; citing Revision of the Board's Procedural Rules: 35 Ill. Adm Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000). Ms. Patterman further asserts that Boughton provided no breakdown of costs or other method for determining the reasonableness of the amounts sought. Ms. Patterman does concede, however, that Boughton may be arguably entitled to costs for travel to and attendance at the cancelled deposition.

### **DISCUSSION**

In assessing whether sanctions are warranted, the Board must determine if Ms. Patterman violated a hearing officer order, board order, or procedural rule, including any subpoena issued by the Board. 35 Ill. Adm. Code 101.800(a). The Board must also consider 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. The goal of imposing discovery sanctions is to promote discovery, not

necessarily to punish. IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 522 N.E.2d 888 (3rd Dist. 1988).

The Board finds Ms. Patterman's conduct has amounted to an abuse of discovery and grants Boughton's motion for discovery sanctions in part. Under Section 101.616(f), failure to comply with any order regarding discovery may subject the offending persons to sanctions. 35 Ill. Adm. Code 101.616(f). Here, Mr. Zak did not appear at his scheduled deposition because Ms. Patterman had not retained him. Ms. Patterman does not dispute these facts. In addition, the hearing officer ordered that the parties complete all depositions by May 2, 2003. By not making Mr. Zak available at his scheduled deposition or any other time before May 2, 2003, Ms. Patterman did not comply with the hearing officer's order to complete all depositions by a time certain. In addition, Ms. Patterman prevented Boughton from completing any discovery deposition of her expert noise witness. Ms. Patterman has violated several hearing officer orders in the past by not appearing at status meetings and by not producing a document subpoenaed by Boughton. The Board finds that Ms. Patterman's conduct amounts to an abuse of the discovery process.

The Board will not grant Boughton's motion to bar the testimony of any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony. However, the Board notes that the current discovery schedule set by the parties together with the hearing officer ordered all depositions completed by May 2, 2003, and all dispositive motions filed on or before May 30, 2003.

Regarding attorney fees, the appellate court has held that the Board has no authority to award attorney fees as a sanction. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 337-338, 676 N.E.2d 299, 307-08 (3d Dist. 1997); *see* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000). Accordingly, the Board denies Boughton's motion for attorney fees.

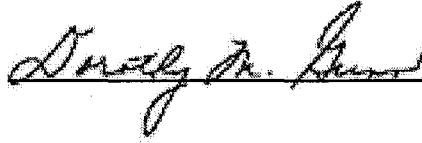
### CONCLUSION

The Board grants Boughton's motion for discovery sanctions in part and denies the motion in part. The Board bars Mr. Greg Zak's testimony at hearing, but denies Boughton's motion to bar any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony. The Board also denies Boughton's motion for attorney fees. The Board finds the sanction it imposes today is appropriate to remedy the abuse of the discovery process the Board finds today and to promote timely discovery in the future.

IT IS SO ORDERED.



I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 7, 2003, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

ORIGINAL

ILLINOIS POLLUTION CONTROL BOARD

April 2, 2003

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APR - 2 2003

STATE OF ILLINOIS  
Pollution Control Board

GINA PATTERMANN,

Complainant,

v.

BOUGHTON TRUCKING AND  
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) PCB 99-187  
) (Citizens Enforcement - Noise, Air)  
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**HEARING OFFICER ORDER**

On March 17, 2003, and again on March 27, 2003, telephonic conferences were held in this matter. At the conferences, the status of the matter was discussed and the hearing officer made rulings on the outstanding motions.

On March 5, 2003, respondent filed a motion for expedited hearing officer order striking complainant's witness list. In the motion, respondent represents that complainant recently tendered a witness list to the respondent that included 100 witnesses that complainant intends to call at the hearing. Complainant orally responded to the motion at the March 17, 2003, telephonic conference.

In the motion, respondent argues that 97 of the witnesses recently disclosed were not included in the answers to respondent's interrogatories served on or before July 23, 2001. Respondent also argues that the witness list is vague, cumulative and lacks sufficient information to allow respondent to determine the nature of the testimony the witnesses would provide. At the March 17, 2003, conference, complainant orally argued that she did not know of any additional witnesses at the time she answered the interrogatories and that she seasonably supplemented the answer with the recent disclosure of the additional 97 witnesses.

Respondent represented that the "great majority" of the recently disclosed witnesses were listed in the local directory in the year 2000 and could have been disclosed in complainant's answers to respondent's interrogatories served on or before July 23, 2001. The hearing officer agreed. By waiting over a year and a half to disclose 97 additional witnesses, the hearing officer found that complainant's disclosure was not reasonable nor was it seasonable. The hearing officer also found that the subject of their testimony was vague. Complainant did not indicate that these witnesses had personal knowledge of the contested matter only that "the following persons shall testify as to how respondent's actions affect their daily lives." The hearing officer, however, allowed complainant to select one witness from the disclosure list to testify as complainant's witness at the hearing. Complainant represented that she intends to call Donald

Boudreau as her additional witness. To that end, respondent's motion was granted in part and denied in part.

Also at the March 17, 2003, conference, the hearing officer stated that pursuant to Section 101.628 of the Board's procedural rules, written statements may be submitted at the hearing by the recently disclosed witnesses as participants subject to cross-examination. Should the participant decline to be cross-examined, or if the participant is unavailable, it will be treated as public comment. Respondent objected. The respondent represented that it would file a written objection on or before March 21, 2003. Complainant was directed to file a response on or before March 25, 2003.

Additionally, complainant represented that she would file a stipulation stating that there will be no evidence presented at hearing regarding the loss of valuation allegation on any house built by Patterson Builders other than the house she presently lives in. Finally, it was agreed that notices of the witnesses to be disposed must be served on or before March 21, 2003, and that all depositions be completed on or before May 2, 2003.

At the March 27, 2003, conference, the hearing officer addressed respondent's written motion to limit statements by excluded witnesses. Complainant filed her response on March 27, 2003. Respondent argues in its motion that to allow the previously excluded witnesses to file written statements as participants pursuant to Section 101.628 of the Board's procedural rules would circumvent modern rules of discovery. Complainant responded that the Act permits such written statements.

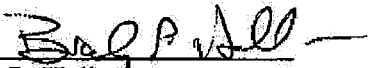
The hearing officer found that the plain language of Section 101.628 clearly allows for statements from participants regardless of intervening actions or events. Respondent's motion was denied.

The hearing officer also directed that complainant serve on the respondent any additional reports that her expert may have generated on or before April 3, 2003. Reports not turned over on or before April 3, 2003, either from the complainant or the respondent, will not be allowed without good cause.

Finally, in light of the April 3, 2003, cut-off date for the parties' disclosure of their respective experts reports, all dispositive motions must be filed on or before May 30, 2003.

The parties are directed to participate in a telephonic status conference with the hearing officer on April 16, 2003, at 2:00 p.m. The status conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance. At the status conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 West Randolph Street  
Chicago, Illinois 60601  
312.814.8914

# CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, to each of the following on April 2, 2003:

Jaimy M. Levine  
Kevin G. Desharnais  
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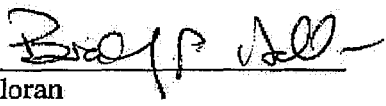
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It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 2, 2003:

Dorothy M. Gunn  
Illinois Pollution Control Board  
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Chicago, Illinois 60601

  
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
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100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601  
312.814.8917