BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on January 26, 2005, I filed with the Illinois Pollution Control Board an original and four copies of this Notice of Filing and the attached BOUGHTON'S RESPONSE AND OBJECTION TO COMPLAINANT'S MOTION TO CANCEL HEARING, copies of which are attached hereto and hereby served upon you.

Dated: January 26, 2005

BOUGHTON TRUCKING AND MATERIALS, INC.

By: _____
One of its Attorneys

Patricia F. Sharkey
Mark R. Ter Molen
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BOUGHTON'S RESPONSE AND OBJECTION TO COMPLAINANT'S MOTION TO CANCEL HEARING

NOW COMES Respondent, Boughton Trucking and Materials, Inc. ("Boughton"), by its attorneys, Mayer, Brown, Rowe & Maw LLP pursuant to 35 Ill. Admin. Code 101.500(d) and an oral agreement with the Hearing Officer made on January 25, 2005 to file an expedited response, and responds to Complainant's Motion To Cancel Hearing.

COMPLAINANT FAILED TO FILE A TIMELY MOTION TO CANCEL THE SCHEDULED HEARING

After five and a half years of litigation and a multitude of discovery abuses, Complainant's filing of a Section 5/2-1009 motion to dismiss without prejudice eleven days before the rescheduled hearing date is an abuse of the Board's procedures and highly prejudicial to Respondent. As Complainant failed to file its Motion to Cancel Hearing until seven days before the scheduled hearing date, the motion is not timely. Board rules do not allow untimely cancellation of a hearing as of right. Board Rule 101.510 allows the Board or the Hearing Officer to exercise discretion to grant a motion after the prescribed time; however, that authority is limited to instances in which the movant "demonstrates that the movant will suffer material

prejudice if the hearing is not cancelled." The Complainant has not demonstrated material prejudice in this instance. Neither the Hearing Office nor the Board should exercise discretion to remedy a situation which is of the Complainant's own making and which Complainant has crafted to avoid the consequences of her lack of diligence and bad decisions, all to the material prejudice of the Respondent.

Complainant's filing of a Section 5/2-1009 voluntary motion for dismissal at the eleventh hour after five and a half years of litigation in this proceeding is precisely the type of abuse that the Supreme Court has recognized as one of "a myriad of abusive uses of the voluntary dismissal statute." Gibellina v. Handley, 127 Ill.2d 122, 136, 535 N.E. 2d 858, 865 (1989) (motion for voluntary dismissal on the eve of trial characterized as an abuse of Section 5/2-1009.). Since Gibellina, the Illinois Supreme Court has authorized the imposition of Supreme Court Rule 219(e) "reasonable expenses" specifically to deter this type of abuse. *See* Committee Comment accompanying Rule 219.

While the Board may, in its discretion, decide to hear Complainant's Section 5/2-1009 motion, it is not bound to do so. 35 Ill.Adm. Code 101.100(b) ("The provisions of the Code of Civil Procedure and Supreme Court Rules do not expressly apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and Supreme Court Rules for guidance where the Board's procedural rules are silent."); *see, e.g.*, People of the State of Illinois v. Community Landfill Company, Inc., PCB 97-193 (March 18, 2004), 2004 WL 604933, *3. Moreover, the Board is not bound to assist the Complainant in an abusive use of Section 5/2-1009 by bending its rules or exercising its discretion to cancel a scheduled hearing. The hour is very late and the alleged hardship is entirely self-imposed.

COMPLAINANT HAS FAILED TO ALLEGE FACTS THAT SUPPORT A FINDING OF MATERIAL PREJUDICE

Complainant's basis for claiming that material prejudice will occur if the hearing is not cancelled is the following:

> As a result of the decision to seek Voluntary Dismissal, no further hearing preparation was conducted by Pattermann and no exhibits were exchanged by either of the parties, as otherwise provided by the Joint Pre-Trial Memorandum filed in this matter.
>
> Certification of Michael S. Blazer, January 25, 2005.

The Board should not attempt to remedy a timing dilemma created unilaterally by Complainant and designed to unilaterally benefit Complainant, at the expense of Respondent who has now diligently prepared for hearing twice in this case. Rather, the Board should follow its rules and precedent, and deny Complainant's motion to cancel the hearing. The hearing should be allowed to go forward and Complainant can either appear at that hearing or take an adverse judgment for failure to establish its case. This is the just consequence of Complainant's own actions, and does not constitute "material prejudice."

A SELF-IMPOSED HARDSHIP IS NOT MATERIAL PREJUDICE

The only hardship Complainant has alleged is that she can't be ready for the long scheduled and re-scheduled hearing because she apparently made an initial *decision not to prepare for the hearing* until the week before and then made another *decision to stop preparing for the hearing* before the hearing had been cancelled or her motion had been ruled upon. These two decisions may create a 'hardship" for Complainant – *i.e.*, she and her counsel may have to work over the weekend and she may have a few days less to prepare for hearing than she had

earlier anticipated – but they are hardships of her own making and they clearly do not constitute "material prejudice" requiring the cancellation of the hearing.

In fact, Complainant's statements serve only as an admission that Complainant has not acted in good faith over the last several weeks and months in representing her intent to go to hearing. Complainant has already decided she doesn't want to go to hearing – that is why she filed her motion. She actually has no intention of preparing for hearing. Mr. Blazer stated in the status conference with the Hearing Officer on January 25, 2005 that if the hearing isn't cancelled he would simply walk in and state on the record that he isn't ready to proceed. Rather than go forward with the scheduled hearing date for which she admits not being ready and for which she is *not willing to get ready*, Complainant has made the decision to try to preserve all of her rights to refile at any time in the next year – perhaps when she has time to get ready for hearing – while leaving Respondent with five and a half years of attorneys fees and without a final judgment.

Again, while Complainant may have the right to file a Section 5/2-1009 motion at the last moment, the granting of that motion is subject to the Board's discretion and procedures, and the requirements of Supreme Court Rule 219. The filing of that motion does not trump all other Board rules and orders. Complainant does not have a unilateral right to cancel the scheduled hearing. Complainant stopped working on her case prior to a decision on her motion *at her own risk*. As noted, Complainant was so confident in her ability to circumvent the Hearing Officer's orders and the Board's rules that she didn't even file a motion to cancel the hearing or request expedited Board consideration until five days after filing her motion for dismissal. The Board should not now exercise its discretion to elevate what is plainly a nonchalant, risky set of assumptions made by Complainant into something akin to "material prejudice."

The Board has long held that "absent a showing of unavoidable circumstances, the failure to request relief in a timely matter is a self-imposed hardship." Community Landfill Corporation v. IEPA, PCB 95-137 (Sept. 21, 1995); American National Can Co. v. IEPA, PCB 88-203, 102 PCB 215 (Aug. 31, 1989). All the way back to EPA v. Incinerator, Inc., PCB 71-69 (Sept. 30, 1971), the Board has held that "self-imposed hardship brought about by [a party's] own dilatoriness" is not a basis for avoiding the consequences of a Board order.

The fact that Complainant might have to spend some money to prepare for and attend the scheduled hearing, as she complains in her motion, is not a grounds for finding material prejudice. Johnson v. ADM, PCB 98-31 (July 8, 1998) (Board denied motion for leave to file because it was untimely and because party being required to bear the costs of defending itself at hearing did not amount to material prejudice).

THE BOARD SHOULD NOT, AT RESPONDENT'S EXPENSE, EXERCISE ITS DISCRETION TO EXTRICATE COMPLAINANT FROM THE RESULTS OF HER OWN REPEATED LACK OF DILIGENCE

Complainant's delay in the filing of her Section 5/2-1009 motion, in her preparation for hearing both before and after, and in filing this motion to cancel the hearing, all demonstrate a lack of diligence. As stated above, Complainant's counsel has admitted that his client made a decision to file for voluntary dismissal eleven days before hearing, after five and a half years of litigation and after rescheduling the hearing at the last minute in December. Complainant's counsel has also admitted that Complainant was unprepared for hearing and made a decision to stop preparing for hearing upon filing her motion to dismiss. These admissions demonstrate a lack of diligence on the part of a party who filed a lawsuit and bears a burden of proof.

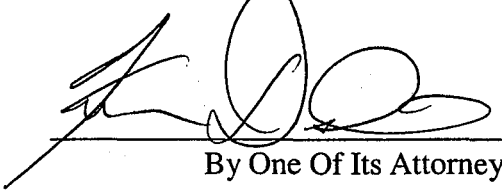
There also can be no question – after five and a half years of attorneys fees, expert witness fees, employee witness salaries, deposition and discovery costs, and preparation for trial

twice – that Respondent will be highly prejudiced by the cancellation of this hearing. After this protracted litigation, Respondent has a right to a final judgment by the Board.

WHEREFORE, Complainant's motion to cancel the scheduled hearing at this late date should be denied based on 35 Ill. Adm. Code 101.510, and Complainant's failure to demonstrate material prejudice.

Respectfully submitted,

BOUGHTON TRUCKING AND MATERIALS, INC.



By One Of Its Attorneys

January 26, 2005

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CERTIFICATE OF SERVICE

Kevin Desharnais, an attorney, hereby certifies that a copy of the attached Notice of Filing and BOUGHTON'S RESPONSE AND OBJECTION TO COMPLAINANT'S MOTION TO CANCEL HEARING was served on the persons listed below by the means indicated, on January 26, 2005.

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601
(Via Facsimile)

Michael S. Blazer
Matthew E. Cohen
The Jeff Diver Group, LLC
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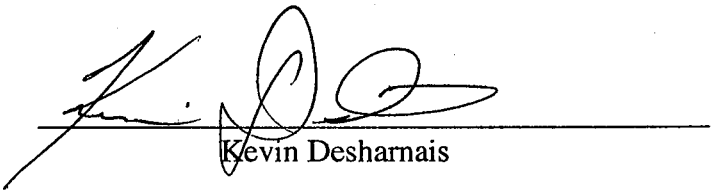

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