BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of:

Air Pollution Control Permit #03-POY-328 dated April 26, 2004 Issued To Madison-Kipp Corporation

Case No: IH-04-02

PETITIONERS' ("CLEAN AIR'S") NOTICE AND MOTION FOR PROTECTIVE ORDERS AND FINDINGS

PLEASE TAKE NOTICE that by this document and through their attorneys, Progressive Law Group, the Petitioners in this matter ("Clean Air") hereby move for protective orders under Wis. Stats. § 804.01(3):

1. Precluding Kipp from further threatening any of the Petitioners, directly or indirectly, with motions for findings of frivolousness unless Kipp simultaneously presents such motion or motions to the hearing examiner for consideration (See Exhibits 2 & 3 [bookmarked .pdf documents]);

2. Preventing Kipp, absent supporting findings from the examiner, from making threats to the effect that, or implying that, Petitioners' homes or other assets are placed at risk as a consequence of Clean Air having brought and advanced this review of DNR's permit issuance (See: Exhibit 3, referencing the value of petitioners' homes and Steven Klafka, the petitioners' expert, by name);

3. Precluding Kipp from any additional deposition of the Petitioners' expert, Steven Klafka, unless Mr. Klafka enters an amended expert report;

4. Limiting any additional deposition of Steven Klafka, in the event he files an amended expert report, to matters arising from that amended expert report.

5. Making specific findings that Kipp has:

    a. Engaged in oppressive conduct under Wis. Stats. § 804.01(3), and

b. Abused the discovery process:

6. Charging Kipp with the costs and fees, to be based on Kipp's attorneys and experts billing rates, reasonably associated with developing and bringing this motion.

In support of this Motion, the petitioners offer the included Exhibits **1** (Bookmarked .pdf of Klafka deposition of 2-11-05), **2** (Threatening letter from Kipp's attorneys) **3** (Another threatening letter from Kipp's attorneys specifically referencing research Kipp has undertaken into the value of Petitioners' homes in conjunction with threat of filing a "frivolousness" motion); **4** (Affidavit of Steven Klafka 2-24-05), and **5** (Kipp's falsely labeled notice of "continued" deposition of Steven Klafka and abusive Subpoena Duces Tecum [a form of process not available against parties, whose production is governed by Discovery statutes, rules and orders]) and state as follows:

Kipp is seeking to compel a seventh deposition in this matter, a case in which the Petitioners contemplate presenting one (1) affirmative (i.e., non-adverse) witness. Kipp is also issuing multiple threats that it will seek findings of frivolousness, which are particularly disturbing to citizens who are not used to litigation. It is time for a basic decision as to whether the petitioners will be allowed to prepare and present their case in an orderly fashion and without harassment.

Kipp's latest round of assertions and demands extend a documented pattern of harassment ranging from thinly veiled threats to the petitioners' homes on the spurious theory that Clean Air's case is "frivolous" (See: Exhibit 2, and especially Exhibit 3, the last paragraph [launch bookmark]) to the current round of motions, including one transparently intended as a "lightning rod" (the motion to preclude Klafka's testimony) that Kipp has interposed to make the plan to further harass petitioners' counsel and expert appear to be reasonable by comparison, when it is not.

Kipp has not made no predicate showing of a colorable disqualifying conflict of interest. Moreover, it already had a full and fair opportunity to investigate the potential for such a conflict. It chose instead to explore Mr. Klafka's opinions on subjects such as airport relocation, railroads, drunk drivers, and public access to lakes.

In his deposition of February 11, 2005, Steve Klafka specifically indicated that he had been in the Kipp facility in the early 1990's. This provided Kipp any opportunity to pose questions about why. Kipp did not.

Klafka's answers to the only questions that could conceivably make his 15 year old transient interface with Kipp relevant in this matter were each a direct "no:"

> Deposition of STEVEN KLAFKA, P.E., DEE 2/11/05
> VERBATIM REPORTING, LIMITED (608) 255-7700
>
> ******
>
> Q. And have you ever been in the Kipp building that comprises the Atwood Avenue facility?
> A. Yes.
> Q. And when were you in there, sir?
> A. I think early '90s, I think.
> **Q. Were you ever in there with respect to this permit?**
> **A. No.**
> **Q. Did you ever make any observations or calculations inside the Atwood Avenue building with respect to your work as an expert witness with regard to this permit?**
> **A. No.**
>
> Tr.: 118 (Exhibit 1, attached [please launch bookmarks).

The answers to the questions Kipp saw fit to ask show no connection between this case and any 15 year old visit to Kipp. Kipp's attorneys themselves undertook no follow-up questioning, despite continuing the deposition for another three hours.

Having foregone the opportunity to explore any potentially related issues when it presented itself during Mr. Klafka's day-long deposition, Kipp now wants a chance to harass Mr. Klafka, under the ugly and false assertion that Mr. Klafka has a disqualifying conflict of interest because of some information that is supposedly lodged in his memory from 15 years ago. Tellingly, this purported information is reflected nowhere in the expert report prepared for this proceeding, and thus is not part of the case being asserted for Clean Air.

Apparently aiming to make it appear the hearing examiner can "split the difference" by allowing this harassment, Kipp cleverly presents an additional motion, the motion to have Klafka disqualified. This "lightning rod," motion is unsupported, and

cannot be supported. It is apparent that the real intent is to harass the petitioners through yet another deposition, the seventh deposition they will have held, if allowed, in a proceeding where petitioners project one affirmative witness.

To justify their failure to follow up in the day-long deposition they already held, *half of which did not even touch on Mr. Klafka's expert report*, Kipp's attorneys also deceptively intimate that the information on Klafka's transient 15 year old professional connection to Kipp came to Kipp only through independent sleuthing.

Facts show otherwise. When they deposed Klafka, Kipp's attorneys had long possessed information that Mr. Klafka had worked for a consulting firm that had worked for their client. (See: Exhibit 4, Affidavit of Steven Klafka, Allegation 2). This information was reconfirmed in the deposition itself. (See: Exhibit 1, Klafka Deposition Tr.: 14: 13-14 [Klafka's Dames & Moore Employment 1988-91] [Please launch bookmarks]).

Kipps attorneys could readily have secured information on Klafka's activities for Kipp. They could have had Kipp contact Dames and Moore itself. They could have reviewed Kipps own files involving Dames and Moore's work for Kipp. Apparently they chose not to do so.

Nothing prevented Kipp from developing in advance the questions they now, post hoc, assert to be important (although, because of remoteness in time and utter irrelevance to Klafka's expert report, they are not). Instead, *after* re-verifying Mr. Klafka's association with Dames and Moore, the firm that worked for Kipp, Kipp's attorneys undertook other inquiries, including a lengthy string of questions about meaningless issues such as Klafka's letters to the editor on trains, lake access for the public, airport relocation and drunk drivers. (See: Exhibit 1, Klafka Deposition, [Bookmarks]). Despite the false label of their notice of the seventh deposition they plan for this matter, describing the new deposition as a "continued" deposition, Kipp's attorneys specifically closed the deposition (Compare: Exhibit 1, Klafka Deposition, [Last Bookmark] with Exhibit 5). There is nothing open to "continue." What Kipp seeks now is another opportunity to harass an engineer who is working for free. Granting it that opportunity would signal that harassment is welcomed and abided in these proceedings.

If Kipp's attorneys actually *chose* to direct their investigation activities toward Klafka's non-technical writings *in lieu of* investigating the technical background portrayed in his resume, even though Klafka worked for a consulting firm that worked for their client, then it is not the Petitioners obligation to be forced to endure a seventh deposition because of Kipp's choice to engage in harassment instead of discovery.

Mr. Klafka's report, which more than anything else embodies Clean Air's expert analysis, *neither relies on nor cites to information about Kipp that goes back that far.* Moreoaver, Mr. Klafka has provided an affidavit, Exhibit 4 to this filing, indicating that, beyond the simple recollection of having been in Kipp's plant and that his presence there was through a Dames and Moore consulting project, he has no specific recollection about the visit or the associated work. His review of Kipp's filing has not jogged any memory, and he took no copies of any Kipp related documents with him when he left Dames and Moore.

Kipp's "lighting rod" motion, i.e., its assertion that Mr. Klafka has a disqualifying conflict of interest, is neither supported nor supportable. Kipp cites no court case, no administrative disciplinary action, and no ethical or professional rule interpretation by any authority. Petitioners' counsel has found nothing that would support Kipp's contentions, despite research.

To the contrary, what petitioners' counsel has found is what one would expect. It is not at all unusual for engineers to work adverse to clients from the deep past, and working on the opposite side of a previous client is not considered unethical unless information secured under some confidential arrangement is possessed and applied. Mr. Klafka took no Kipp information with him when he left Dames and Moore. The petitioners have not applied any information from that long ago in their analysis of the permit at issue, nor even used the discovery process to try to get anything from DNR or Kipp from that long ago. The circumstances in which a conflict of interest might be found for an engineer do not exist. An articulated principle recognizes the following:

> "While engineers clearly have certain basic professional obligations to their employers and clients to protect their interests, engineers do not have a duty of absolute loyalty under which the engineer can never take a position adverse to the interests of a former client. Being a "faithful agent and trustee" to a client does not obligate an engineer to a duty of absolute devotion in perpetuity (See Code

> Section II.4.). Such an approach would be impractical and compromise the autonomy and professional independence of engineers." ***NSPE Case No. 98-4: Expert Witness Testmony -- Serving Plaintiffs and Defendants*** http://onlineethics.org/cases/nspe/nspe98-4.html

Klafka's activities in 1990 as an employee of another company and regarding permits issued several cycles before the permits at issue here would be too remote in time for there to be any materiality or conflict of interest. Kipp has therefore not made the requisite showing for any further deposition of Mr. Klafka.

The reasonable appraisal of what Kipp is about here is that Kipp is knowingly harassing the petitioners and their representatives. Kipp knows most of the legal work and all of the engineering work for Clean Air are being contributed. Its also knows Clean Air is a small volunteer-operated citizens group. Its response to these circumstances has been to file multiple spurious motions that impair the ability of the professionals to work the actual substantive matter, and to issue multiple, barely veiled, threats, the latest one transparently calculated to imply the Petitioners' homes will be seized by Kipp to, among other things, underwrite Kipp's attorneys' investigations into Steven Klafka's attitudes about drunk drivers, public access to Madison's lakes, airport relocations, smart growth, railroads and email he neither sent nor received. The implied seizure is to occur under the theory that the petitioners' concern for their health and welfare and the health and welfare of local children, as articulated through this review proceeding, is "frivolous."

Frivolousness is a very difficult standard to meet. As reiterated *in Juneau County v. Courthouse Employees* 221 Wis.2d 630, 640, 585 N.W.2d 587, 591 (Emphasis in original)

> "…a court must be cautious in declaring an action frivolous, *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis.2d 605, 613, 345 N.W.2d 874 (1984), lest it stifle "the ingenuity, foresightedness and competency of the bar...." *Id.* "Because it is only when *no* reasonable basis exists for a claim or defense that frivolousness exists, the statute resolves doubts in favor of the litigant or attorney." *In re Estate of Bilsie*, 100 Wis.2d 342, 350, 302 N.W.2d 508 (Ct.App.1981) (emphasis in original). *See also Atkinson v. Mentzel*, 211 Wis.2d 628, 648, 566 N.W.2d 158 (Ct.App.1997)."

Kipp cannot meet the very high standard necessary to demonstrate frivolousness, and has not filed the threatened motions. However, frivolousness jurisprudence in

Wisconsin *obligates Kipp to have filed those motions.* As stated in *Booth v. American States Ins. Co.* 199 Wis.2d 465, 477, 544 N.W.2d 921, 926 (Emphasis in original, except for Bold, which was added):

> " with respect to § 802.05, Stats., we made clear in *Northwest Wholesale Lumber* that prompt action in seeking sanctions on documents alleged to violate the statute is **necessary**. In discussing Fed.R.Civ.P. 11, after which § 802.05 was patterned, we cited with favor the following passage from a federal case:
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> > If a party's action is "abusive" as contemplated by Rule 11, the adversary should be able to realize immediately that an offense has occurred. *Seldom should it be necessary to wait for the district court or the court of appeals to rule on the merits of an underlying question of law. If there is doubt how the district court will rule on the challenged pleading or motion, the filing of the paper is unlikely to have violated Rule 11.*
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> *Northwest Wholesale Lumber,* 191 Wis.2d at 290, 528 N.W.2d at 507 (emphasis added) (citing *Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90, 99 (3d Cir.1988)

Kipp's threats of frivolousness, then, are indistinguishable from intentional attempts to emotionally distress the citizen volunteers.

Kipp's permit rests on a DNR analysis that DNR's own documents indicate is incapable of providing the information about exposures for people at locations where people are actually located. Beyond that Mr. Klafka has found that DNR failed to accurately identify the location of Kipp's stacks, or even the spatial orientation of the Kipp buildings. DNR pretends the area is flat, when it is not, and rural, when it is not. These technical shortcomings among many others presented in the expert report leave Kipp's permit at significant risk.

The petitioners must be allowed to develop and present their case free of further harassment. Without forceful intervention to protect the process, and specific recognition that Kipp's harassment is exactly what it appears to be, Kipp will effectively deny them that opportunity simply by force of superior resources, repeated threats and endless motion practice. Safeguards within the system are supposed to allow real controversies to be resolved on evidence, analysis and the law. All of Clean Air's Motions should be granted to protect the integrity of the process, as well as to protect petitioners and their professional representatives from harassment, including harassment constituted of

threatened frivolousness motions that Kipp is too cowardly to present for consideration of the hearing examiner.

The bookmark statements referencing parts of .pdf documents submitted electronically as Exhibits to this filing are incorporated by reference into this Motion and its supporting analysis. Exhibits constituted of Kipp's threats are not presented as evidence of "liability for or invalidity of" any claim in this matter, but solely to demonstrate the pattern of threats and harassment which merits issuing some of the protective orders Clean Air requests. Petitioners, needless to say, neither view their case as "frivolous," nor ascribe to the litany of assertions Kipp has been too spineless to present for actual consideration by the hearing examiner. Petitioners are requesting orders that will give them a real opportunity to attend to the merits of the matter, and that will require Kipp to stand behind its threats, or stop issuing them.

Dated February 25, 2005.

/s/

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