

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
 by LISA MADIGAN, Attorney General)
 of the State of Illinois,)
)
 Complainant,)
)
 v.)
)
 SKOKIE VALLEY ASPHALT CO., INC.,)
 an Illinois Corporation, EDWIN L. FREDERICK,)
 JR., Individually and as Owner and President of)
 Skokie Valley Asphalt Co., Inc., and)
 RICHARD J. FREDERICK, Individually)
 and as Owner and Vice President of Skokie)
 Valley Asphalt Co., Inc.,)
)
 Respondents.)

PCB 96-98
 (Enforcement – RCRA)


NOTICE OF MOTION

TO: Mr. David S. O'Neill, Esq.
 Mr. Michael B. Jawgiel, Esq.
 5487 North Milwaukee Avenue
 Chicago, Illinois 60630-1249

Ms. Carol Webb, Hearing Officer
 Pollution Control Board
 1021 North Grand Avenue East
 P.O. Box 19274
 Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that I have today filed **Complainant's Motion for Leave to File Reply Instantly to Respondents' Responses to Complainant's Discovery Objections** with the Office of the Clerk of the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
 by LISA MADIGAN, Attorney General
 of the State of Illinois

BY: 

 MICHAEL C. PARTEE
 Assistant Attorney General
 Environmental Bureau/North
 188 West Randolph, Suite 2001
 Chicago, Illinois 60601
 Tel: (312)814-2069
 Fax: (312)814-2347

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the **Notice of Motion and Complainant's Motion for Leave to File Reply Instanter to Respondents' Responses to Complainant's Discovery Objections**, were sent by First Class Mail, postage prepaid, to the persons listed on the Notice of Filing on December 28, 2005.

BY: 
MICHAEL C. PARTEE

It is hereby certified that the foregoing were electronically filed with the Clerk of the Board on December 28, 2005:

Pollution Control Board, Attn: Clerk
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

BY: 
MICHAEL C. PARTEE

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PCB 96-98
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COMPLAINANT'S MOTION FOR LEAVE TO FILE A REPLY INSTANTER TO RESPONDENTS' RESPONSES TO COMPLAINANT'S DISCOVERY OBJECTIONS

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby moves the Board for leave to file a reply instanter to Respondents', SKOKIE VALLEY ASPHALT CO., INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK, (1) Response to Complainant's Objections to Respondents' First Set of Request for Admission of Facts Regarding Attorneys' Fees and Expenses, (2) Response to Complainant's Answers and Objections to Respondents' First Set of Interrogatories Regarding Attorneys' Fees and Expenses, and (3) Response to Complainant's Answers and Objections to Respondents' First Set of Document Requests Regarding Attorneys' Fees and Expenses" (collectively referred to as "Responses"). In support of their motion, the People state as follows:

1. On November 17, 2005, the Board issued an order denying Respondents' motion to strike the People's discovery objections concerning attorneys' fees and costs, and directed Respondents to respond to the People's discovery objections. (Board's Order at 9 (Nov. 17, 2005).)

2. On December 19, 2005, Respondents filed their Responses, which contain irrelevant arguments, as well as outrageous and sanctionable allegations.

3. The People could be materially prejudiced if not afforded the opportunity to reply to Respondents' arguments and allegations.

4. However, Board Procedural Rule 101.500, which covers the filing of motions and responses, does not give the People the right to reply, except as permitted by the Board or Hearing Officer to prevent material prejudice.

WHEREFORE, the People respectively request leave to reply instanter. The People's reply appears as Exhibit A to this motion.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney General
of the State of Illinois

BY: 

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EXHIBIT A

**TO COMPLAINANT'S MOTION FOR LEAVE
TO FILE A REPLY INSTANTER TO
RESPONDENTS' RESPONSES TO
COMPLAINANT'S DISCOVERY OBJECTIONS**

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PCB 96-98
 (Enforcement – RCRA)

**COMPLAINANT'S REPLY TO RESPONDENTS' RESPONSES TO
 COMPLAINANT'S DISCOVERY OBJECTIONS**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and in reply to Respondents', SKOKIE VALLEY ASPHALT CO., INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK, (1) Response to Complainant's Objections to Respondents' First Set of Request for Admission of Facts Regarding Attorneys' Fees and Expenses, (2) Response to Complainant's Answers and Objections to Respondents' First Set of Interrogatories Regarding Attorneys' Fees and Expenses, and (3) Response to Complainant's Answers and Objections to Respondents' First Set of Document Requests Regarding Attorneys' Fees and Expenses" (collectively referred to as "Responses"), states as follows:

RELEVANT PROCEDURAL HISTORY

1. On April 25, 2005, Respondents served the People with discovery requests that purported to pertain to the reasonableness of the People's fee petition in this case. Respondents' discovery requests regarding this narrow issue consist of 43 Requests to Admit Facts, 50 Interrogatories (including subparts), 24 Document Requests and two deposition notices. In comparison, Respondents served only 16 Interrogatories and 14 Document Requests during the entire course of discovery prior to the hearing on all issues in October 2003.

2. On May 24, 2005, the People served timely answers and objections to Respondents discovery. The People's objections were set forth as "general objections" in the sense that these objections pertained to all of Respondents' discovery requests, as well as "specific objections" to individual discovery requests. Also on May 24, 2005, the People sent Respondents' attorney a detailed letter pursuant to Illinois Supreme Court Rule 201(k) in an attempt to informally resolve any potential differences over Respondents' discovery requests.

3. Respondents did not respond to the Rule 201(k) letter, but instead filed motions to strike the Rule 201(k) letter, as well as the People's discovery objections themselves.

4. On November 17, 2005, the Board issued an order denying Respondents' motions to strike.

5. The Board held that the "People are entitled to file discovery objections under Sections 101.618(h) and 101.620(c) of the Board's Procedural Rules, and raised proper objections thereunder." (Board Order at 9 (Nov. 17, 2005)) (underline added).

6. The Board further held that it "agrees with the assertions of the People that the respondents did not adequately respond to the People's objections, or attempt to informally resolve the dispute before seeking Board intervention." (*Id.*) However, the Board allowed

Respondents another opportunity to respond to each objection within 30 days from November 17, 2005. (*Id.*)

7. On December 19, 2005, Respondents filed their Responses with the Board. The Responses still fail to adequately address the People's objections, and instead, are another poorly disguised vehicle for irrelevant, outrageous and sanctionable allegations against the People.

THE PEOPLE'S DISCOVERY OBJECTIONS SHOULD BE SUSTAINED

8. In determining the reasonableness of a fee petition, it is well-established that the inquiry is limited to, among other factors, "the nature of the cause and the novelty and difficulty of the questions at issue, the amount and importance of the subject matter, the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the benefits resulting the client." (Board Order at 3-4 (Apr. 7, 2005).)

9. In the context of an environmental enforcement action before the Board, it is also well-established that a reasonable hourly rate for Assistant Attorneys General is \$120.00 to \$150.00 per hour, with rates assessed in more recent cases at \$150.00 per hour. *See, e.g., People v. J & F Hauling, Inc.*, 02-21, 2003 WL 21129678, at *2 (May 1, 2003) (finding Assistant Attorney General's rate of \$150.00 per hour to be reasonable); *People v. D'Angelo Enterprises Inc.*, PCB 97-66, 2002 WL 31545432, at *2-3 (Nov. 7, 2002) (finding Assistant Attorney General's rate of \$120.00 per hour to be reasonable); *People v. Panhandle Eastern Pipe Line Co.*, PCB 99-191, 2001 WL 1509515, at *33 (Nov. 15, 2001) (finding Assistant Attorney General's rate of \$120.00 per hour to be reasonable); *People v. Spirco Environmental, Inc.*, PCB 97-203, 1999 WL 304591, at *1 (May 6, 1999) (finding Assistant Attorney General's rate of \$120.00 per hour to be reasonable).

10. Therefore, the only remaining issue is whether the People's fee petition comports with the time and labor required and the resulting benefits to the State.

11. The People point out that they have already furnished Respondents with all existing time records in this case, as well as curriculum vitae for Assistant Attorneys General seeking fees.

12. Rather than stick to the relevant issue, Respondents are pursuing highly inappropriate discovery requests (*e.g.*, Respondents asked the People to disclose their attorneys' take home pay), to which the People have objected on numerous and legally-recognized grounds.

13. Respondents still fail to adequately respond to the People's discovery objections.

14. A representative example of the inadequacy of the Responses to the People's discovery objections involves Respondents' Request to Admit Fact Nos. 4, 5, 6, 8, 9, 27, 28, and 30, Interrogatory Nos. 16 and 23(i), and Document Request Nos. 5, 7, 8 and 9, all seeking information regarding personal compensation to the Assistant Attorneys General in this case. For obvious reasons, the People object to these requests on relevance and privacy grounds. An Assistant Attorney General's personal compensation has no bearing on the petition for fees and costs. These requests regarding personal compensation are harassing and made in bad faith, and are not designed to resolve this dispute in a speedy and final manner. Respondents' admitted attempt to develop the argument that an Assistant Attorney General's billing rate does not reflect his salary is not only irrelevant under the legal standard, but it is so vastly oversimplified as to have no validity because it fails to recognize that our billing rate would not reflect our salary because employee benefits, employer's liability insurance, overhead costs (rent, office equipment, support staff; etc.) and many, many other distributions and costs, are also included in that billing rate. Indeed, as the People pointed out in their May 24, 2005 Rule 201(k) letter to Respondents, no attorney "takes home" his hourly billing rate, so his salary is irrelevant to the reasonableness of his requested fees. Respondents also ignore that a State government

environmental attorney's billing rate of \$150.00 is already well below that of a similarly experienced environmental attorney in private practice in downtown Chicago. The People further pointed out that there is no precedent in any fora for consideration of take home pay in a dispute over the reasonableness of a fee petition.

15. Respondents fail to adequately address this discovery objection. Respondents incorrectly respond that "[t]he compensation of Assistant Attorney General's [sic] is a matter of public record." (Response to Complainant's Objections to Respondents' First Set of Request for Admission of Facts Regarding Attorneys' Fees and Expenses at 4.) Without reliance on any authority, the Respondents go on to state that the People's objection to disclosing their attorneys' take home pay is "disingenuous" and "almost too illogical to even allow a response." (*Id.*) This Response does not provide the Board with any basis to overrule the People's objection. Furthermore, when viewed in light of the fact that Respondents' attorneys have refused to disclose their own billing rate and take home pay, this Response smacks of game playing.

16. The balance of the Responses is equally unresponsive to the People's discovery objections, but more than that, consist of *ad hominem* attacks. (*See, e.g.*, Response to Complainant's Objections to Respondents' First Set of Request for Admission of Facts Regarding Attorneys' Fees and Expenses at 3 (Respondents make unfounded allegations of "unethical behavior, fraudulent filings, falsification of documents and intentional and knowing violation of Board procedural rules," which have no application to any remaining issue in this case).)

WHEREFORE, for all of the foregoing reasons, the People respectfully request that the Hearing Officer or Board sustain their objections to Respondents' discovery requests.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney General
of the State of Illinois

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