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.,	)	PCB 96-98 (Enforcement – RCRA)
Respondents.	)	

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 Second Motion for Protective Order and Response to Respondents' Motion to Quash Deposition Notices** 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 Second Motion for Protective Order and Response to Respondents' Motion to Quash Deposition Notices**, 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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Respondents.	)	

COMPLAINANT'S SECOND MOTION FOR PROTECTIVE ORDER AND RESPONSE TO RESPONDENTS' MOTION TO QUASH DEPOSITION NOTICES

Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People"), by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to Respondents', SKOKIE VALLEY ASPHALT CO., INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK, Motion to Quash Complainant's Deposition Notices ("Motion to Quash"). The People also hereby move for a protective order requiring Respondents' attorney(s) to participate in a full and good faith conference with the People's attorney regarding any future discovery dispute prior to seeking Board intervention. In support of their combined response and motion, the People state as follows:

RELEVANT PROCEDURAL HISTORY

1. On September 28, 2004, Respondents filed a pleading, titled "Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys'

Fees and Costs" ("Initial Response"). In their Initial Response, Respondents made unsupported, factual allegations regarding their own attorneys' fees and costs, the following of which are two examples:

> "It is hard to justify a claim for attorneys' fees and cost [*sic*] by the Illinois Attorney General's office that is approximately ten times the amount that three Respondents combined paid to defend themselves against frivolous claims" (Initial Response at ¶ 17); and
>
> "It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though the Respondents' attorneys [*sic*] fees include costs." (*Id.*)

2. On April 25, 2005, the People served Respondents with limited interrogatories, document requests and deposition notices aimed at discovering the factual basis for the above allegations.

3. On December 5, 2005, pursuant to Board Order, Respondents provided their answers and objections to the People's interrogatories and document requests. Respondents' answers and objections consist almost entirely of inappropriate objections.

4. Therefore, on December 15, 2005, the People sent Respondents yet another detailed letter in the spirit of Illinois Supreme Court Rule 201(k) to attempt to informally resolve any potential discovery dispute before seeking Board intervention. (Exhibit A.)

5. Respondents have not yet responded to the People's December 15, 2005 Rule 201(k) letter, and it appears that they are unlikely to do so.

6. Nevertheless, neither Respondents' December 5, 2005 discovery answers and objections, nor the People's December 15, 2005 Rule 201(k) letter, address the People's deposition notices. Toward orderly discovery, it was the People's implicit understanding that depositions would not occur until written discovery was adequately answered, which has yet to

occur as set forth in the People's December 15, 2005 Rule 201(k) letter.

7. However, on December 14, 2005, without any informal attempt to resolve differences, Respondents filed their Motion to Quash.

REPONDENTS' MOTION TO QUASH SHOULD BE DENIED AND A PROTECTIVE ORDER SHOULD BE ENTERED REQUIRING A FULL AND GOOD FAITH ATTEMPT TO INFORMALLY RESOLVE ANY FUTURE DISCOVERY DISPUTE PRIOR TO SEEKING BOARD INTERVENTION

8. The stated basis for the Motion to Quash is as follows:

MOTION TO QUASH

(6) The Respondents have not placed their attorneys' fees at issue in this matter.

(7) The Respondents have not placed their expenses at issue in this matter.

(8) The Complainant's deposition of Respondents' attorneys will not allow for the discovery of information calculated to be admissible at the time of the hearing on the issue of the reasonableness of the Complainant's attorneys' fees and costs.

(9) The Complainant's deposition of Respondents' attorneys will violate the attorney-client privilege between the Respondents and the Respondents' attorneys.

(10) Allowing the Complainant to take the deposition of Respondents' attorneys is inconsistent with the Board's Order of April 7, 2005 which called for limited discovery on the subject of the reasonableness of attorneys' fees and costs. Order of April 7, 2005 at 3.

9. Procedurally, the Motion to Quash is premature and unwarranted. The Respondents have not yet adequately answered the People's discovery requests, yet seek to quash deposition notices before the People are even afforded the opportunity to review adequate and complete written discovery answers.

10. Substantively, the Motion to Quash is undeveloped, conclusory, without any authority, and does not set forth an adequate basis for the Board to grant the relief requested.

11. Paragraphs 6 and 7 of the Motion to Quash are flatly contradicted by Respondents' prior allegations in their Initial Response, where they clearly placed their attorneys' fees and costs at issue by going so far as to reference certain, as yet undisclosed, calculated comparisons between the parties' attorneys' fees and costs.

12. Paragraphs 8 through 10 of the Motion to Quash are insufficient on several grounds and also fail to provide a basis for the relief requested.

13. More specifically, Paragraph 8 of the Motion to Quash baldly asserts that the People's deposition notices are not calculated to lead to admissible evidence. No factual basis is provided for the stated objection and the objection fails for this reason. Respondents fail to even account for the reciprocal argument as to why they should be allowed to depose the People's attorneys. Further, the depositions are clearly relevant and Respondents make no relevancy objection. Illinois case law is legion that the concept of relevancy in discovery is broader than relevancy for admission of evidence at trial. *See Bauter v. Reding*, 68 Ill.App.3d 171, 175, 385 N.E.2d 886, 890 (Ill. App. 3d Dist. 1979) (citing *Krupp v. Chicago Transit Auth.*, 8 Ill.2d 37, 41, 32 N.E.2d 532, 535 (Ill. 1956)).

14. Paragraph 9 of the Motion to Quash baldly asserts, without any factual grounds, that depositions of Respondents' attorneys will violate the attorney-client privilege between the Respondents and their attorneys. However, there is no privilege available as to attorney's fees and costs when the very issue in dispute is the appropriate amount of attorney's fees and costs. *See, e.g., LaHood v. Couri,* 236 Ill.App.3d 641, 649, 603 N.E.2d 1165, 1171 (3d Dist. 1992). Further, assuming *arguendo* that such a privilege existed, Respondents waived it by making allegations regarding the amount of their attorneys' fees and costs and by requesting and

obtaining the same information from the People.

15. Last, Paragraph 10 of the Motion to Quash incorrectly asserts that allowing the People to take depositions of Respondents' attorneys "is inconsistent with the Board's Order of April 7, 2005 which called for limited discovery on the subject of the reasonableness of attorneys' fees and costs." Again, this is a premature argument because Respondents have not yet even furnished adequate answers to the People's written discovery requests. Nevertheless, Respondents fail to explain how the People's deposition notices are inconsistent with the Board's April 7, 2005 Order. Further, the April 7, 2005 Order was clarified by the Board's November 17, 2005 Order, wherein the Board stated that the People will be allowed the same opportunity to conduct discovery similar to that served by Respondents. (Board's Order at 3 (Nov. 17, 2005).)

16. Respondents' Motion to Quash is frivolous and achieves nothing more than to further delay of this proceeding and increase litigation costs. The Motion to Quash may have been entirely avoided if Respondents' attorney(s) made a full and good faith attempt to informally resolve this apparent discovery dispute prior to once again seeking Board intervention.

17. As noted in the committee comments to Rule 201(k), many discovery differences could be eliminated if the attorneys responsible for trying the case were involved in attempts to resolve discovery differences. "Counsel responsible for trying the trial of a case are required to have or attempt a personal consultation before a motion with respect to discovery is initiated." (Committee Comments on Rule 201(k).)

18. A full and good faith attempt by counsel to informally resolve discovery disputes is a necessary part of the discovery process.

19. In order to avoid any further, needless Board intervention regarding discovery disputes, the Hearing Officer or the Board should issue a protective order pursuant to Rule

101.616(d) of the Board's Procedural Rules requiring counsel to engage in a full and good faith attempt to informally resolve any future discovery dispute prior to seeking Board intervention.

20. Furthermore, the Board has already held that this is not a one-sided proceeding. (*See* Board Order at 3 (Nov. 17, 2005) ("To allow the respondent to conduct discovery on this matter and not allow the People the opportunity to conduct similar discovery would place the People on unequal footing . . .").) Therefore, People respectfully request that, if Respondents continue to fail to cooperate in conducting discovery that they themselves initiated, this phase of the proceeding should end immediately and the People's fee petition should be granted.

WHEREFORE, the People respectfully request that the Board deny Respondents' Motion to Quash, that the Board enter a protective order requiring counsel to engage in a full and good faith attempt to informally resolve any future discovery dispute prior to seeking Board intervention, and for any further relief that is fair and just under the circumstances.

Respectfully submitted,

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
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Chicago, Illinois 60601
Tel: (312)814-2069
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EXHIBIT A

TO COMPLAINANT'S SECOND MOTION FOR PROTECTIVE ORDER AND RESPONSE TO RESPONDENTS' MOTION TO QUASH DEPOSITION NOTICES

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 15, 2005

Sent Via First Class Mail
and Facsimile (773.792.8358)

Mr. David S. O'Neill, Esq.
5487 North Milwaukee Avenue
Chicago, Illinois 60630-1249

Re: People v. Skokie Valley Asphalt Co., Inc., *et al.*, PCB 96-98

Dear Mr. O'Neill:

The purpose of this letter is to initiate a conference in the spirit of Illinois Supreme Court Rule 201(k) to informally resolve potential disputes over Respondents' answers to Complainant's interrogatories and document requests prior to seeking Board intervention. These written discovery requests were served on Respondents on April 25, 2005, and were answered on December 5, 2005. The following is a full explanation of our position on each potential dispute. Please respond to this letter as requested within 14 days by providing the requested discovery or explaining your position so that we can make a fully informed and joint decision whether it is absolutely necessary to seek Board intervention regarding these potential disputes. On a related note, regarding Respondents' written discovery requests to Complainant, the Board granted Respondents until December 3, 2005, to provide additional responses to Complainant's discovery objections. As of today, I have not heard from you and assume that any potential differences over Complainant's answers are resolved.

Respondents' Answers to Complainant's Interrogatories

Complainant served Respondents with 11 interrogatories requesting information regarding Respondents' hearing plans (*e.g.*, the identity of any witnesses to be called at hearing) and attorneys' fees and costs. The Respondents each elected to answer the interrogatories separately, but their answers are all the same, with the exception of Skokie Valley Asphalt's ("SVA") answer to Interrogatory #1.

In answer to Interrogatory #1, which requests the identity of the individual answering the interrogatories, SVA answered that it "is no longer a legal entity under the laws of the State of Illinois" and "Therefore, [it] is incapable of responding to these interrogatories." However, SVA is one of the Respondents that moved to stay Complainant's fee petition in the first place. More

significantly, SVA is also one of the Respondents that served discovery requests on Complainant. Rhetorically, how can SVA oppose Complainant's fee petition and serve discovery, but cannot answer discovery? In addition, under Illinois law, a corporation can be sued (and must have a registered agent for a period of five years) even after dissolution. Given the circumstances, SVA's answer to Interrogatory #1 is unacceptable. In order to informally resolve this dispute, we require SVA to answer Interrogatory #1 within 14 days of this letter.

In answer to Interrogatory #2, the Respondents listed me as a potential witness at hearing. I am the attorney representing Complainant at hearing. Further, none of my fees and costs is included in Complainant's fee petition. Thus, I will not be testifying at the hearing. In order to informally resolve this potential dispute, please contact me within 14 days of this letter if you disagree. If you disagree, we will obviously need to seek a protective order. If we do not hear from you within 14 days, we will reasonably assume that you agree with our position.

In answer to Interrogatory #3, which requests information regarding any opinion witness to be called by Respondents at hearing, Respondents identified Deborah A. Stonich, but did not provide any other requested information because she apparently has not completed her case assessment. However, it is not necessary to wait for her case assessment in order to provide information regarding her qualifications and previous opinion testimony, as specifically requested in subparts (b) and (d) of Interrogatory #3. In order to informally resolve this dispute, we require Respondents to answer Interrogatory #3(b) and (d) within 14 days of this letter.

In answer to Interrogatory #4, Respondents provided none of the requested information. Instead, Respondents all objected on the same grounds and as follows:

> Objection. This interrogatory is not calculated to be to [*sic*] admissible evidence at the time of the hearing. Furthermore, this interrogatory asks for irrelevant information and violates the attorney-client privilege between the Respondent and the Respondent's attorneys. The Respondent has not placed his attorney's fees or its expenses at issue in this matter.

First, absent some direction from the Board, the objections based upon admissibility and relevance are not grounds to withhold information (or documents as discussed below). Respondents' attorneys' fees and costs were, in fact, placed at issue through their "Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs," which contains numerous and specific factual allegations regarding the Respondents' attorneys' fees and costs. (See, *e.g.*, Initial Response at ¶ 17 ("It is hard to justify a claim for attorneys' fees and cost [*sic*] by the Illinois Attorney General's office that is approximately ten times the amount that three Respondents combined paid to defend themselves against frivolous claims" and "It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though the Respondents' attorneys [*sic*] fees include costs").) In opposing Complainant's Petition for Attorneys' Fees and Costs, Respondents drew a direct comparison between the parties' attorneys'

fees and costs, yet Respondents now refuse to disclose their own attorneys' fees and costs.

Second, regarding the attorney-client privilege asserted, our interrogatories contain an entire section, Section II, titled "Claims of Privilege," wherein we specifically requested that Respondents identify the "statute, rule or decision which is claimed to give rise to the privilege or the reason for its unavailability." Respondents did not object to this instruction or provide us with the legal basis for the asserted privilege. Frankly, our research indicates that attorneys' fees and costs are not privileged in a dispute over attorneys' fees and costs. Furthermore, and even if there was such a privilege, Respondents waived it by previously requesting (and obtaining) the very same information from Complainant.

Third, the Board ruled that " . . . the People must be allowed to conduct discovery on the reasonableness of the attorney fees and costs." (Order at 3 (Nov. 17, 2005).) "To allow the respondent to conduct discovery on this matter and not allow the People the opportunity to conduct similar discovery would place the People on unequal footing, and would not serve the best interests of administrative justice."

For all of these reasons, in order to informally resolve this dispute over Interrogatory #4, we require Respondents to provide the requested information within 14 days of this letter.

In answer to Interrogatories #5 through #11, Respondents again provided none of the requested information and repeated their previous objection to Interrogatory #4. As with Interrogatory #4, in order to informally resolve this dispute, we require Respondents to provide the requested information within 14 days of this letter.

Respondents' Answers to Complainant's Document Requests

Through seven document requests, Complainant requested documents relevant to Respondents' attorneys' fees and costs. In answer to our document requests, Respondents did not produce any documents whatsoever. Instead, the Respondents stated the following objection to each document request:

> Objection. This interrogatory is not calculated to be admissible evidence at the time of the hearing. Furthermore, this interrogatory asks for irrelevant information and violates the attorney-client privilege between the Respondent and the Respondent's attorneys. The attorneys for the Respondent has not placed his or, in the case of Skokie Valley Asphalt Company, Inc., its attorney's fees at issue nor has the Respondent placed his or, in the case of Skokie Valley Asphalt Company, Inc., its expenses at issue in this matter.

For all of the same reasons that Respondents' answers to Interrogatories #4 through #11 are unacceptable, Respondents' answers to all document requests are unacceptable. Again, these reasons include that the Board has already ruled that Complainant is entitled to conduct discovery

on this issue. Also, we are not aware of any legal basis to assert a privilege under the circumstances, but regardless, Respondents clearly waived any privilege by previously requesting (and obtaining) the very same information from Complainant. Further, pursuant to specific instructions in Complainant's discovery requests (See Instruction 2 in our Interrogatories), Respondents were asked to provide a detailed privilege log for withheld documents. We did not receive any privilege log. Essentially, Respondents have refused to disclose any documents and, at the same time, failed to adequately assert and define the basis for their refusal.

In order to informally resolve this dispute, we require Respondents to produce the requested documents within 14 days of this letter.

Again, please respond to this letter within 14 days. Please contact me with any questions in the interim.

Sincerely,

Michael C. Partee
Assistant Attorney General
Environmental Bureau
188 West Randolph Street, Suite 2001
Chicago, Illinois 60601
Tel: (312)814-2069
Fax: (312)814-2347
E-Mail: mpartee@atg.state.il.us

cc: Carol Webb, Hearing Officer *(Via First Class Mail)*
Michael B. Jawgiel, Esq. *(Via First Class Mail)*

Confirmation Report – Memory Send

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OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Lisa Madigan
Attorney General

ENVIRONMENTAL ENFORCEMENT/ASBESTOS LITIGATION DIVISION

ATTENTION:	David S. O'Neill
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DATE:	December 15, 2005
NUMBER OF PAGES:	5 (including cover)
COMMENTS:	**Please see the following letter in the People v. Skokie Valley Asphalt, et al., matter.**

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