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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
Complainant,)	
)	PCB 96-98
)	
v.)	Enforcement
)	
)	
SKOKIE VALLEY ASPHALT, CO., INC.,)	
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.)	

**RESPONDENTS' OBJECTIONS TO AND MOTION TO STRIKE COMPLAINANT'S
MOTION FOR LEAVE TO FILE REPLY INSTANTER TO RESPONDENTS'
RESPONSE TO COMPLAINANT'S DISCOVERY OBJECTIONS**

The Respondents, SKOKIE VALLEY ASPHALT, CO., INC., 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., by and through their attorney, David S. O'Neill, herein object to and move to strike the Complainant's Motion for Leave to File Reply Instanter to Respondents' Response to Complainant's Discovery Objections and in support thereof states as follows:

PROCEDURAL BACKGROUND

1. On April 7, 2005, the Board issued an Order in the above-captioned matter. In this Order, the Board granted the Respondents' motion for extension of time to allow for limited discovery.
2. The Order specifically states that "the Board will grant the respondents additional time in order to conduct discovery...". Order of April 7, 2005 at 3. In the Conclusion of the

Order, the Board “grants respondents’ motion for extension of time and authorizes respondents to conduct discovery on the attorney fees issue”. Id at 4.

3. On April 25, 2005, the Respondents filed with the Board and served upon the Complainant the Respondents’ First Request for Admission of Facts regarding Attorneys’ Fees, Costs and Expenses.
4. On May 24, 2005, Complainant filed its Answer and Objections to Respondents’ First Request for Admission of Facts regarding Attorneys’ Fees, Costs and Expenses.
5. In the Order of November 17, 2005, the Respondents were directed to respond to the Complainant’s Answer and Objections to Respondents’ First Request for Admission of Facts regarding Attorneys’ Fees, Costs and Expenses within thirty days of the date of the Order.
6. As directed by the November 17, 2005 Order, the Respondents were directed to respond to the Complainant’s Answer and Objections to Respondents’ First Request for Admission of Facts regarding Attorneys’ Fees, Costs and Expenses.
7. On December 28, 2005, the Complainant filed a Motion for Leave to File Reply Instantly to Respondents’ Response to Complainant’s Discovery Objections.

OBJECTION TO COMPLAINANT’S MOTION

8. 35 Illinois Administrative Code 101.500(e) states in relevant part:

“The moving person shall not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice.”
9. In its motion, the Complainant falsely maintains that “[t]he People could be materially prejudiced if not afforded the opportunity to reply to Respondents’ arguments and allegations” but fails to state what the possible material prejudice might be.
10. It is clearly established by Board rulings that the party claiming a right to file a reply that is not usually permitted must establish that it will suffer material prejudice if its filing is not allowed. *Illinois v. Peabody Coal Company* PCB 99-134 (June 5, 2003). The assertion of material prejudice is not sufficient, absent a statement of what the actual

material prejudice may be. *City of Kankakee v. County of Kankakee, et. al.* PCB 03-125, 03-133, 03-134, 03-135 (May 1, 2003).

11. In addition to the fact that the Complainant fails to make a statement with respect to a claim of material prejudice, there is no foreseeable basis for any argument that material prejudice could possibly occur.
12. Because the Complainant has failed to meet its burden of stating what material prejudice would occur and because the Board has no basis to grant the Complainant the right to reply based on an argument of preventing material prejudice, the Motion for Leave to File Reply Instantly to Respondents' Response to Complainant's Discovery Objections should be denied.

MOTION TO STRIKE COMPLAINANT'S MOTION

13. With the filing of its Motion for Leave to File Reply Instantly to Respondents' Response to Complainant's Discovery Objections, the Complainant continues to demonstrate its total disregard and disrespect for the Board's procedures. Under the Board's Procedural Rules, there was no reason for the Complainant to file its motion instantly. The proper procedure would have been to file a motion for leave and then file the reply if granted leave by the Board.
14. It is suspected that the Complainant knew that if it had properly followed procedural rules, the motion to reply would have been denied because there is absolutely no basis for claiming material prejudice in this matter.
15. The Complainant was well aware of the requirement to demonstrate material prejudice under 35 Illinois Administrative Code 101.500(e) because the Complainant had previously attempted the same tactic to add unpermitted arguments into the record. Complainant's Motion of May 7, 2003. The Board denied that motion because the Complainant did not demonstrate material prejudice. Board Order of June 5, 2003 at 3.
15. However, by claiming to file the motion instantly, the Complainant has allowed itself an opportunity to attach its reply brief to the motion and consequently add additional false,

- inflammatory and prejudicial statements and arguments into the record.
16. Under the Board's Procedural Rules, the Respondents have no mechanism to address the attacks that the Complainant has made in its purported Reply to Respondent's response to Complainant's Discovery Objections.
 17. This tactic is a continuation of the Complainant's effort to add false, inflammatory and prejudicial statements into the record through extraneous correspondence that are unnecessarily copied to the hearing officer and other maneuvers.
 18. It is also a continuation of the Complainant's abuse and disregard of the Board's procedures which have resulted in unnecessary cost and obstruction of justice for both the Board and the Respondents.
 19. The only possible purpose of these filings is an attempt to exhaust the Respondents' limited financial resources and to prejudice the trier of fact in the matter before the Board.
 20. Because the Complainant's Motion for Leave to File Reply Instanter to Respondents' Response to Complainant's Discovery Objections is baseless, fails to adhere to the Board's Procedural Rules and can only serve to prejudice the trier of fact in this case, the motion should be stricken from the record.

WHEREFORE, the Respondents respectfully move this Board to strike the Complainant's Motion for Leave to File Reply Instanter to Respondents' Response to Complainant's Discovery Objections or in the alternative to deny the same.

Respectfully submitted,

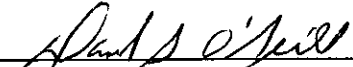

David S. O'Neill

David S. O'Neill, Attorney at Law
5487 N. Milwaukee Avenue
Chicago, Illinois 60630-1249
(773) 792-1333

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached RESPONDENTS' OBJECTIONS TO AND MOTION TO STRIKE COMPLAINANT'S MOTION FOR LEAVE TO FILE REPLY INSTANTER TO RESPONDENTS' RESPONSE TO COMPLAINANT'S DISCOVERY OBJECTIONS by hand delivery on January 9, 2006 upon the following party:

Mitchell Cohen
Environmental Bureau
Assistant Attorney General
Illinois Attorney General's Office
188 W. Randolph, 20th Floor
Chicago, IL 60601



David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 9th _____

day of January, 20 06 _____



Notary Public



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NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the RESPONDENTS' OBJECTIONS TO AND MOTION TO STRIKE COMPLAINANT'S MOTION FOR LEAVE TO FILE REPLY INSTANTER TO RESPONDENTS' RESPONSE TO COMPLAINANT'S DISCOVERY OBJECTIONS, a copy of which is hereby served upon you.


David S. O'Neill

January 9, 2006

David S. O'Neill, Attorney at Law
5487 N. Milwaukee Avenue
Chicago, IL 60630-1249
(773) 792-1333