

**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 FILING**

**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 Response to Respondents' Motion for Appeal of Hearing Officer's February 8, 2006 Order**, with the Office of the Clerk of the Illinois Pollution Control Board, true and correct copies of which are attached hereto and herewith served upon you.

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

BY: 

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PEOPLE OF THE STATE OF ILLINOIS, )  
 by LISA MADIGAN, Attorney General )  
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 Complainant, )  
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 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  
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**COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR APPEAL OF HEARING OFFICER'S FEBRUARY 8, 2006 ORDER**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People"), by LISA MADIGAN, Attorney General of the State of Illinois, and in response to Respondents', SKOKIE VALLEY ASPHALT CO., INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK, Motion for Appeal of Hearing Officer's February 8, 2006 Order, state as follows:

**RELEVANT PROCEDURAL HISTORY**

1. On February 8, 2006, the Hearing Officer denied Respondents' motion to quash deposition notices and Respondents' motion to strike the People's second motion for protective order. (February 8, 2006 Order at 1.) The Hearing Officer granted the People's second motion for protective order and directed counsel to participate in a full and good faith conference regarding future discovery disputes prior to seeking Board intervention. (*Id.*) The Hearing Officer further ordered that, "[i]n any motion, objection, or other filing related to any discovery problem, respondents' attorneys must relate the measures taken to resolve the problem with

complainant's attorneys before the filing of the motion." (*Id.*) The Hearing Officer also scheduled a status conference (held on March 9, 2006) and ruled on Respondents' objections to the People's discovery requests. Regarding Respondents' responses to the People's discovery requests, the Hearing Officer found that these responses (consisting entirely of objections, except for a single, perfunctory answer) "violate the spirit of the Board's [November 17, 2005] Order" and specifically noted that Respondents "have provided no argument or case law to defend" their discovery objections. (*Id.*)

2. On February 23, 2006, without a written motion and Board authority, Respondents filed an interlocutory "Appeal" of the Hearing Officer's February 8, 2006 Order.

3. On March 10, 2006, because Respondents' Appeal violates Board Procedural Rule 101.518 (Motions for Interlocutory Appeal from Hearing Officer Orders) and also fails to present sufficient cause to overturn the Hearing Officer's February 8, 2006 Order, the People filed a Motion to Deny Respondents' Appeal ("Motion to Deny"). The People's Motion to Deny set forth the relevant procedural history of the Hearing Officer's February 8, 2006 Order.

4. On March 20, 2006, 40 days after issuance of the Hearing Officer's February 8, 2006 Order, Respondents' attempted to correct the procedural deficiency in their unilateral Appeal by filing a Motion for Appeal of Hearing Officer's February 8, 2006 Order ("Motion for Appeal").

**APPLICABLE PROCEDURE AND LEGAL STANDARD  
FOR APPEALING A HEARING OFFICER'S ORDER**

5. Respondents' Appeal is not a motion. Rule 101.518 of the Board's Procedural Rules, which is not cited in Respondents' Appeal, provides that "[i]nterlocutory appeals from a ruling of the hearing officer may be taken to the Board. The Board may consider an interlocutory appeal upon the filing of a written motion." 35 Ill. Adm. Code 101.518 (underline)

added); *see also People v. Poland*, PCB 98-148, 2001 WL 179835, at \*1 (Feb. 15, 2001) (A motion to allow interlocutory appeal is necessary to satisfy the procedural requirement under Rule 101.518).

6. Respondents' Motion for Appeal argues that the Board should assume that their Appeal is actually a Motion for Appeal (Motion for Appeal at ¶ 4, p. 2), despite the fact that it was not filed pursuant to Rule 101.518 and was not even identified as a motion.

7. Respondents further contend that a response to their Appeal "is not allowed under the Board's Procedural Rules." (Motion for Appeal at ¶ 10, p. 3.) Respondents do not provide any authority for this contention.

8. Finally, Respondents acknowledge that the Board may determine that their Appeal does not comply with Rule 101.518 and, therefore, Respondents attempt to correct this procedural deficiency by moving for an Appeal *instanter*. (Motion for Appeal at ¶¶ 14 and 15, p. 3.)

**THE BOARD SHOULD DENY RESPONDENTS' MOTION FOR APPEAL**

9. Respondents' Motion for Appeal is an acknowledgement that their Appeal did not comply with the requirement under Rule 101.518 for a written motion for appeal.

10. In addition, Respondents' attempt to comply with Rule 101.518 is untimely because it comes 40 days after the Hearing Officer's February 8, 2006 Order. A motion for appeal 40 days after issuance of the appealed order is untimely by any standard.

11. Additionally, Rule 101.502(c) of the Board's Procedural Rules (Motions Directed to the Hearing Officer), provides as follows:

Unless ordered by the Board, neither the filing of a motion, nor any appeal to the Board of a hearing officer order will stay the proceeding or extend the time for performance of any act. Unless otherwise provided, all hearing officer orders will remain in effect during the pendency of any appeal to the Board.

12. Since filing their interlocutory Appeal, Respondents have taken the position that this dispute over the People's Fee Petition, which they created, is entirely stayed pending the outcome of their Appeal. On November 17, 2005, the Board ordered Respondents to respond to the People's discovery requests. Having not done so by February 8, 2006, the Hearing Officer then ordered Respondents' attorneys to participate in a full and good faith conference with the People's attorneys in an attempt to informally resolve any discovery differences. Respondents have created another standstill by refusing to participate in discovery or in any conference with the People in an attempt to informally resolve any remaining differences over discovery pending the outcome of their Appeal. Pursuant to Rule 101.502(c), unless ordered by the Board, neither Respondents' Appeal nor their Motion for Appeal can stay their performance of any act ordered by the Hearing Officer.

13. There is no Board Order staying this proceeding pending the outcome of Respondents' Appeal, nor is there any reason for a stay based on the rulings contained in the Hearing Officer's Order.

14. Respondents' position that this proceeding is stayed is contrary to Rule 101.502(c) and substantiates the notion that their Appeal is only intended to work a further delay in this proceeding.


#### **CONCLUSION**

15. The Board should deny Respondents' Motion for Appeal on both procedural and substantive grounds and should affirm the Hearing Officer's February 8, 2006 Order. Respondents' have violated the letter and spirit of the Board's November 17, 2005 Order, the Hearing Officer's February 8, 2006 Order, Board Procedural Rules 101.518 and 101.520(c), and the rules of discovery.

WHEREFORE, the People respectfully request that the Board deny Respondents' Motion for Appeal and affirm the Hearing Officers' February 8, 2006 Order, 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

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**CERTIFICATE OF SERVICE**

It is hereby certified that true and correct copies of the **Notice of Filing and Complainant's Response to Respondents' Motion for Appeal of Hearing Officer's February 8, 2006 Order**, were sent by First Class Mail, postage prepaid, to the persons listed on the Notice of Filing on March 30, 2006.

BY:   
MICHAEL C. PARTEE

It is hereby certified that the above referenced documents were electronically filed with the following person on March 30, 2006:

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

BY:   
MICHAEL C. PARTEE