

ILLINOIS POLLUTION CONTROL BOARD  
November 2, 2006

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 96-98  
) (Enforcement – Water)  
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. )

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a motion for sanctions filed by the Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents) on October 10, 2006. The People of the State of Illinois (People) filed a response to the motion on October 13, 2006. For the reasons explained more fully below, the Board denies the respondents' motion for sanctions.

**PROCEDURAL BACKGROUND**

On September 2, 2004, the Board issued an order in this matter finding that the respondents violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2004)) and Board regulations. The Board ordered the respondents to pay a civil penalty of \$153,000, but withheld a decision regarding attorney fees and costs until the matter was fully addressed by the parties. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 1 (Sept. 2, 2004). After a lengthy series of pleadings, the Board issued an order on September 7, 2004, setting up a detailed pre-hearing schedule and directing the hearing officer to schedule a hearing no later than December 22, 2006. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 8 (Sept. 7, 2004). In that order, the Board noted that no additional discovery requests would be allowed. *Id.* On October 6, 2006, the Board's hearing officer set this matter for a hearing to occur on December 12, 2006.

**RESPONDENTS' MOTION FOR SANCTIONS**

In its motion, the respondents assert that the People failed to file and serve new responses to the pending written discovery by September 19, 2005, as ordered by the Board. Mot. at 4. The respondents contend that the People repeatedly stated to both the respondents and the

Board's hearing officer that it had no intention of complying with the Board order of September 7, 2006, and would not be filing and/or serving new responses to the pending written discovery that had been requested by the respondents. *Id.*

The respondents argue that they have been materially prejudiced by the failure of the People to comply with the Board's order and to respond to written discovery. Mot. at 4. The Respondents assert that they do not have the materials required to properly depose the witnesses for the People, and that the respondents' opinion witness does not have the information she requires to form her opinion and prepare her expert report. *Id.*

The respondents argue that in accordance with the language in the Board's order of September 7, 2006, the Board is required to impose sanctions against the People. Mot. at 4. The respondents contend that by stating that sanctions "will" be imposed against a party, the party that fails to abide by the schedule, the Board eliminated any discretion with respect to whether or not sanctions would be imposed. *Id.* The respondents contend that since the People unreasonably failed to comply with a Board order entered into under Supreme Court Rules controlling discovery and the issue is material to the claims and defenses asserted, that the Board should apply S. Ct. Rule 219 (c)(v) to dismiss this action with prejudice. Mot. at 5. In the alternative, the respondents urge the Board to bar any and all testimony and strike all pleadings involving issues addressed by the discovery requests of the Respondents in accordance with Section 101.800 of the Board's procedural rules. *Id.*

### **PEOPLE'S RESPONSE**

In response, the People argue that the motion for sanctions should be stricken on procedural grounds or denied on substantive grounds. Resp. at 1. The People assert that the motion for sanctions does not comport with the clear and unambiguous pre-hearing schedule set forth in the Board's September 7, 2006 order and the requirement to attempt to informally resolve discovery disputes before seeking Board intervention set forth in the hearing officer's February 8, 2006 order. *Id.* Further, the People contend that the motion seeks extraordinary relief without stating any legal or factual basis and should be denied because it is without merit. *Id.*

The People assert that as a threshold issue, respondents' motion for sanctions is not addressed by the pre-hearing schedule established by the Board and should be stricken. Resp. at 5. The People contend that respondents' motion for sanctions is based on alleged discovery violations, is a discovery pleading on its face, and that the Board's September 7, 2006 order makes clear how such pleadings are to be treated. Resp. at 4-5. The People argue that the Board ruled that discovery pleadings, including replies to the objections, that are not addressed by the schedule would not be allowed. *Id.*

Further, the People argue that, viewed in light of the Rule 101.800(c) factors to be considered in imposing sanctions, respondent's motion for sanctions is completely without merit. Resp. at 5. The People note that the Rule 101.800(c) factors include: (a) the relative severity of the refusal or failure to comply; (b) the past history of the proceeding; (c) the degree to which the proceeding has been delayed or prejudiced; and; (d) the existence or absence of bad faith on the

part of the offending party or person. Resp. at 5-6. The People argue that none of these factors support any sanctions against the People. *Id.*

The People contend they have never missed a deadline established by rule or order, and have done nothing short of trying to resolve this case through numerous attempts at informal discovery dispute resolution and a March 30, 2006 motion for final order. Resp. at 7. The People argue that there is no evidence of any bad faith on the part of the People in this case. *Id.*

The People further assert that the motion does not specifically identify any withheld information or documents that could conceivably prevent them from properly preparing for hearing on December 12, 2006, but that respondents' merely make vague, conclusory and unsupported allegations regarding the People's alleged discovery violations and the Respondents' inability to prepare for hearing which fall far short of the Rule 101.800(c) factors. Resp. at 7.

The People argue that the issue of the People's discovery objections that forms the basis for the Motion for Sanctions is identical in every way to the issue that was already conclusively decided by the Board on September 7, 2005, and the hearing officer on February 8, 2006. Resp. at 7.

### **DISCUSSION**

The Board may impose sanctions for any unreasonable failure to comply with a Board or hearing officer order pursuant to Section 101.800 of the Board's procedural rules. 35 Ill. Adm. Code 101.800. The respondents argue that they have been materially prejudiced by the failure of the People to comply with the Board's order and to respond to written discovery. This argument is based on the theory that the People's decision not to file any additional discovery responses was in contravention of the Board's September 7, 2006 order.

The Board finds that the People did not fail to comply with the September 7, 2006 Board order. That order allowed for new responses to outstanding discovery requests to be filed on or before September 19, 2006. However, the order did not direct any of the parties to file a new response, but merely provided an opportunity to do so. Neither the People nor the respondents violated the Board order by opting not to file additional discovery responses. The Board notes that pursuant to the schedule set forth in the September 7, 2006 order, the respondents could have filed objections to the People's existing discovery responses but did not avail themselves of that opportunity.

In addition, the Board cannot see how the respondents have been prejudiced in this instance. Respondents have been able to conduct extensive written discovery on the fee petition, and may still conduct depositions prior to the hearing on the fee petition itself. Respondents have had ample opportunity to pursue its claims on the fee petition. Over two years have passed since the Board initially issued the September 2, 2004 order directing the respondents to pay a civil penalty of \$153,000, but withholding a decision regarding attorney fees and costs until the matter was fully addressed by the parties. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 1 (Sept. 2, 2004). Any perceived failure of the respondents to fully address the People's fee and cost petition during this time is a problem solely of the respondents' own making.

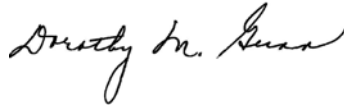
Thus, the Board finds that the People have abided by the schedule set forth in the September 7, 2006 order, and sanctions are not warranted. The respondents' motion for sanctions is denied.

**CONCLUSION**

The Board denies the respondents' October 10, 2006 motion for sanctions. The parties and the hearing officer are directed to proceed expeditiously to hearing in this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 2, 2006, by a vote of 4-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board