

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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DEC 12 2006

PEOPLE OF THE STATE OF ILLINOIS,)
Complainant,)

PCB 96-98 STATE OF ILLINOIS
Pollution Control Board

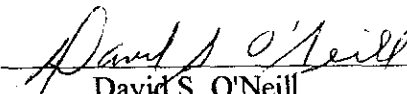
v.)

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.,)
Respondent)

NOTICE OF FILING

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


David S. O'Neill

December 12, 2006

David S. O'Neill, Attorney at Law
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(773) 792-1333

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Respondents)	

**RESPONDENTS' MOTION TO STRIKE IN PART
AND MOTION TO REPLY TO COMPLAINANT'S RESPONSE
TO RESPONDENTS' SECOND MOTION FOR SANCTIONS**

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 its attorney, David S. O'Neill, herein move this Board to strike, in part, or in the alternative to reply to Complainant's Response to Respondents' Second Motion for Sanctions and in support thereof states as follows:

PROCEDURAL HISTORY

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 discovery.
2. The Order 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 the "Respondents' First Set of

Interrogatories Regarding Attorneys' Fees, Costs and Expenses", Respondents' First Set of Document Requests Regarding Attorneys' Fees, Costs and Expenses", "Respondents' First Request for Admission of Facts Regarding Attorneys' Fees, Costs and Expenses" and "Notice of Deposition Regarding Attorneys' Fees, Costs and Expenses".

4. On April 19, 2005, Mr. Michael Partee, Esq. filed an appearance in this matter on behalf of the Complainant. As such, Mr. Partee's costs and fees became potentially eligible for recovery under the Complainant's petition for fees and costs and therefore subject to discovery.
5. In its response to interrogatories, the Complainant listed Mr. Partee as one of the parties it may call as a witness at hearing for this matter. (Complainant's Answers and Objections to Interrogatories of May 24, 200, No. 3.
6. In its Notice of Deposition, the Respondents requested that the Complainant produce Mr. Mitchell Cohen and Mr. Bernard Murphy for deposition on June 24, 2005 pursuant to the provisions of Section 2-1003 of the Illinois Code of Civil Procedure.
7. The Complainant failed to produce either Mr. Cohen or Mr. Murphy for deposition on June 24, 2005 as required under Section 2-1003 of the Illinois Code of Civil Procedure.
8. On July 6, 2005, the Respondents filed a Motion to Strike Complainant's Objections to Discovery and Motion to Compel Complainant's Response to Discovery Request in which the Respondents requested the Board to strike Complainant's objections to discovery and compel Complainant's responses to discovery and cooperation in scheduling depositions.
9. On July 20, 2005, the Complainant filed a Complainant's Response to Respondents' Motion to Strike Complainant's Letters of May 24, 2005 and June 14, 2005 Regarding Discovery and Complainant's Motion for Protective Order and Response to Motion to Compel Complainant's Response to Discovery Request.
10. In its Order of November 11, 2005, the Board refused to uphold the People's objection to discovery. Order at 9. The Board allowed the Respondents thirty days from the date of the Order to further respond to each objection. The Board also stated that it would direct the hearing officer to reserve ruling on the Respondents' Motion to Compel until the time for additional response is lapsed. Id.

11. Consequent to the Respondent's filing of its further responses of December 19, 2005, the Complainant filed a barrage of trivial motions in an attempt to avoid responding to the Respondents' discovery request.
12. In its order of September 7, 2006, the Board addressed the outstanding motions and established a detailed pre-hearing schedule to complete discovery in this matter. Order of September 7, 2006 at 8. In the Order, the Board stated that Notices of Depositions needed to be filed by October 31, 2006. Id.
13. On October 18, 2006, the Respondents filed a Deposition Notice to Complainant Regarding Complainant's Fee Petition. In the Notice, Respondents requested to take the discovery deposition of Mr. Michael C. Partee commencing at 2:00 p.m. on Friday November 10, 2006.
14. In the Order of September 7, 2006, the Board stated that Objections to Notices must be filed and served by November 8, 2006. Id.
15. The Complainant did not file an Objection to the Respondents' Notice to Deposition with the Board prior to November 8, 2006.
16. The Complainant failed to produce Mr. Partee for deposition on November 10, 2006 as required under Section 2-1003 of the Illinois Code of Civil Procedure.
17. In the Order of September 7, 2006, the Board clearly stated its intent to strictly enforce the established timetable to complete discovery by stating:

"All discovery activities must be completed on or before the dates provided above."

and

"The parties are notified that any failure to abide by the schedule set forth will result in sanctions that may include the barring of testimony of the striking of pleadings pursuant to Section 101.800 of the Board's procedural rules."
18. On November 15, 2006 the Respondents file a Second Motion for Sanctions based on the Complainant's failure to produce a witness for deposition.
19. On November 29, 2006, the Complainant filed the Complainant's Response to Respondents' Second Motion for Sanctions.
20. In its Complainant's Response to Respondents' Second Motion for Sanctions the

Complainant included a “de facto” affirmative motion for a final order, in this matter. (Complainant’s Response to Respondents’ Second Motion for Sanctions of November 29 at 10 and 11.)

OBJECTION TO COMPLAINANT’S RESPONSE TO
RESPONDENTS SECOND MOTION FOR SANCTIONS

21. The Complainant’s inclusion of an affirmative motion in a response to a motion is improper.
22. Under the Board’s Procedural Rule 101.500(e) the movant does not have the right to reply to a response to a motion except as permitted by the Board to prevent material prejudice.
23. Absent an opportunity to respond to the Complainant’s de facto motion for a final order, the Respondents’ would be material prejudiced.
24. Complainant’s de facto motion for a final order should be stricken from the Complainant’s Response to Respondents’ Second Motion for Sanctions.

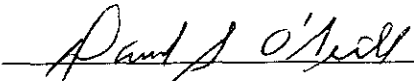
RESPONDENTS MOTION FOR LEAVE TO FILE
A REPLY TO COMPLAINANT’S RESPONSE

25. In the alternative, the Respondents ask leave of the Board to file a reply to the Complainant’s Response to Respondents’ Second Motion for Sanctions.
26. Under the Board’s Procedural Rule 101.500(e), the movant may file a motion for leave to file a reply with the Board and the Board may grant such leave to prevent material prejudice.
27. In light of the fact that the Complainant’s de facto motion involves a final order in the matter, the possibility of material prejudice is unquestionable.
28. The Respondents request leave to file a reply to potential prevent material prejudice that may include a final order without hearing, imposition of legal fees and costs upon the

Respondents and other potential penalties and Board orders with out the Respondents being allowed to fully address the issues.

29. The Respondents also request leave to file a reply to address false statements and misrepresentations made by the Complainants as has been a consistent practice by the Complainants especially in filings where the Respondents are not given an opportunity to reply under the Board's Procedural Rules.

WHEREFORE, the Respondents respectfully move the Board to strike in part, the Complainant's Response to Respondents' Second Motion for Sanctions as the Complainant's Response to Respondents' Second Motion for Sanctions addresses and moves the Board for a final order in this matter and in the alternative the Respondents moves the Board for leave a reply to the Complainant's Response to Respondents' Second Motion for Sanctions.

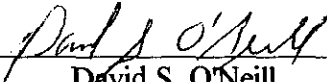

David S. O'Neill

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached RESPONDENTS' MOTION TO STRIKE IN PART AND MOTION TO REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' SECOND MOTION FOR SANCTIONS by hand delivery on December 12, 2006, upon the following party:

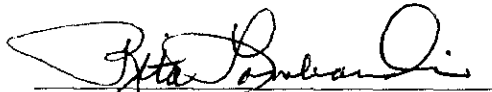
Mitchell Cohen, Esq
and Mr. Michael Partee, Esq.
Environmental Bureau
Assistant Attorney General
Illinois Attorney General's Office
188 W. Randolph, 20th Floor
Chicago, IL 60601


David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 12th

day of December, 20 06


Notary Public

