BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Pollution Control Board

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

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 for Reconsideration, a copy of which is hereby served upon you.

David S. O'Neill

December 5, 2007

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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' MOTION FOR RECONSIDERATION AND MOTION TO STAY DATE OF FINAL ORDER

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 and in accordance with the Board's procedural rules, 35 Ill. Adm. Code 101.520 herein file their Motion for Reconsideration of the Board's Final Order of November 1, 2007 and hereby request a stay of the date of the final order to stay Respondents' obligation to pay civil penalty and preserve the Respondents' right to appeal until a time after a final opinion and order that considers the motion for reconsideration has been entered and in support thereof states as follows:

FACTUAL BACKGROUND

Skokie Valley was an asphalt-paving contractor with its main office located at 768 South Lake Street, Grayslake, Lake County (site). (Tr. at 277-78.) East of the site is the Avon-Fremont Drainage Ditch that flows north through the town of Grayslake into a lake called Third Lake. (Tr. at 145-46; Comp. Exs 25 and 32.) The lake, Grayslake, for which the town is named,

is located to the northeast of the site. (Comp. Ex. 32.) On April 4, 1986, the Agency issued a site specific NPDES permit to Skokie Valley for the storm water runoff from the site. (Tr. at 137, Comp. Ex.1.) Skokie Valley was permitted to discharge storm water into Grayslake under NPDES permit No. IL 0065005. (Tr. at 221;Comp.Ex. 1.) The permit, which became effective on May 4, 1986, and expired on March 1, 1991, required Skokie Valley to submit monthly DMRs. (Tr. at 27-29, Comp. Ex.1.) To comply with this requirement, Skokie Valley would have an employee take a sample from a discharge pipe and deliver the sample to North Shore Sanitary District for testing. (Tr. at 283.) The results were mailed to Skokie Valley and the DMR was usually completed by Skokie Valley dispatcher Bob Christiansen and signed by Richard Frederick as an officer of Skokie Valley Asphalt. (Tr. at 286, 313.)

Skokie Valley was an Illinois corporation until its sale to Curran Contracting and dissolution in 1998. (Tr. at 299-300, 432.) The sale was a sale of assets and included all of the records of Skokie Valley. (Tr. at 319-21.) Edwin Frederick was the president of Skokie Valley from 1978 until its sale in 1998. (Tr. at 432-35.) Edwin Frederick's brother, Richard Frederick, was the vice president of Skokie Valley from 1978 until its sale in 1998. (Tr. at. 276.) Edwin and Richard Frederick each owned 50 percent of Skokie Valley, were the only shareholders of Skokie Valley and were the only corporate officers of Skokie Valley. (Tr. at 435-37.)

Richard Frederick was responsible for the scheduling of all jobs, estimating, budgeting, hiring, and controlling of all employees and subcontractors, equipment purchasing and repair and review of equipment. (Tr. at 279-80.) Edwin Frederick was responsible for estimating, insurance issues, management of payroll, job-site meetings, consultation with foremen and engineers, and liaison with government officials and customers. (Tr. at 282.)

Prior to 1978, Liberty Asphalt operated the Skokie Valley site. (Tr. at 124.) Liberty Asphalt was an asphalt manufacturing company owned and operated by Edwin and Richard Frederick's parents. (Tr. at 279.) Edwin Frederick worked for Liberty Asphalt for over 20 years. *(Id.)* Neither Richard Frederick or Edwin Frederick were owners or management participants in Liberty Asphalt. (*Id.*)

From 1978 to at least 1981 the site was operated as an asphalt plant. (Tr. at 279, 294-96.) The Respondents sold the plant and had it removed in 1981 or 1982. (Id.) Since the removal of the plant, the site was used as an office, and a maintenance and storage garage for equipment, trucks, asphalt liquid stored in above-ground tanks, asphalt primer coatings stored in above-ground storage tanks and other above-ground storage tanks. (Tr. at 278, 438, Comp. Ex. 32 and 34.) The site housed the estimating department, the office and all the people who did billing. (Tr. at 277-78.)

The land between the site and the Avon-Fremont Drainage Ditch is a working farm field. (Tr. at 359.) A farm drainage tile ran through the site toward the Avon-Fremont Drainage Ditch. (Tr. at 340-41.) The outfall from the tile drains to the ditch due east of the site. (Comp. Ex.22.) From December 1994 through April 1995, there was an oily discharge in the Avon Fremont Drainage Ditch. (Tr. at 340-41, Comp. Ex.34.) Upon discovering the oily sheen on the water in the tile, the respondents plugged it. (Tr. at. 340.) After the respondents plugged the drain tile on their property, the oil discharge in the ditch subsided and stopped. (Tr. at 361-62; Comp. Ex. 34.)

In March 1995, the Agency sampled the effluent from the farm drainage tile that ran through the site at the Avon-Fremont drainage ditch. (Tr. at 152.) The concentration of oil gravimetric of the sample contained 664 milligrams of oil per liter. (Tr. at 155-56; Comp. Ex. 21.) The Agency does not have any records showing that Skokie Valley submitted any DMR's in 1986 or 1987. (Tr. at 49-50; Comp. Exs. 1, 8A and 26.) According to the Agency's DMR Submission Record, Skokie Valley submitted two DMRs in 1988, five DMRs in 1989, and eleven in 1990. (Tr. at 51-52; Comp.Exs. 1, 8 and 26.) The Agency does not have a record of Skokie Valley submitting a DMR for the month of July in 1992. (Tr. at 53; Comp.Ex. 8F.)

The DMR submitted for December 1990, contained the same data as the submitted for November 1990. (Tr. at 37-38; Comp.Exs.2-3.) The DMR originally submitted by Skokie Valley for February 1991 contained the same data as the report submitted for January 1991. (Tr. at 40; Comp.Exs.4-5.) Skokie Valley subsequently submitted a corrected DMR for February of

1991. (Tr. at 485. Resp.Ex.4.) Attached to the letter were non-duplicative DMRs for the two months in question. (Id.)

The DMR that Skokie Valley submitted in August 1991 indicated a 30-day average concentration for TSS of 55 mg/L and a daily maximum concentration for TSS of 55 mg/L. (Tr. at 54; Comp.Ex.9.) The DMR that Skokie Valley submitted for September 1991 indicated that their storm water discharge had a 30-day average concentration for TSS of 25 mg/L. (Tr. at 54-55;Comp.Ex.10.) The DMR that Skokie Valley submitted for October 1991 indicated that their storm water discharge had a 30-day average concentration for TSS of 41 mg/L and a daily maximum concentration of 41 mg/L. (Tr. at 55;Comp.Ex.11.) The DMR that Skokie Valley submitted for February 1992 showed that their storm water discharge had a 30-day average concentration for TSS of 18 mg/L .(Tr. at 55-56;Comp.Ex.12.) The DMRs that Skokie Valley submitted for November and December 1992 indicated that their storm water discharge had a 30-day average concentration for TSS of 22 mg/L and 24 mg/L respectively. (Tr. at 56; Comp.Exs.13 and 14.) The DMR that Skokie Valley submitted for May 1993 indicated that their storm water discharge had a 30-day average concentration for TSS of 24 mg/L. (Tr. at 56-57;Comp.Ex.15.) The DMR that Skokie Valley submitted for June 1993 indicated that their storm water discharge had a 30-day average concentration for TSS of 35 mg/L and a daily maximum concentration of 35 mg/L. (Tr. at 57;Comp.Ex.16.) The DMR that Skokie Valley submitted for April 1995 indicated that their storm water discharge had a 30-day average concentration for TSS of 126 mg/L and a daily maximum concentration of 126 mg/L. (Tr. at 57-58; Comp.Ex.17.)

The Complainant's witness, Mr Garetson, testified that the high levels of TDS were the result of a number of factors beyond the control of the permit holder including rain fall and run off from neighboring farm fields. (Trial at 78.) Mr. Huff testified that the IEPA had decided before this case was filed that the TDS standards that were routinely inserted in NPDES permits at the time that Skokie Valley's permit was issued were too stringent. They subsequently changed the standard and did not enforce against the exceedences in existing permits (Id. at 414-415.)

In numerous discussions with the IEPA, the Respondents were informed that they would not be required to reapply for an NPDES permit. They were informed that their permit requirement could be covered by an industry permit. For reasons not known to the Respondents the IEPA changed the requirement. (Id. at 416-417) Because the NPDES permit expired in March of 1991, the Agency sent a compliance inquiry letter to Skokie Valley in April 1991. (Tr. at 42-46; Comp.Ex.6.) The Respondents discussed the idea of coverage under a blanket permit instead of an individual NPDES permit with an Agency representative, (Tr. at 322-325.) but decided to submit an application for an NPDES permit. The Agency received Skokie Valley's NPDES permit renewal application on June 5, 1991. (Tr. at 42; Comp.Ex. 6.) To date, the IEPA has not issued the NPDES permit for the site. It appears that an NPDES permit was not required.

Agency inspector Kallis inspected the site on May 21, 1991, even though he did not have a warrant to enter the site. (Tr. at 139-40; Comp.Ex.19.) Donald Klopke worked in the Agency's Office of Emergency Response on April 19, 1995, when he inspected the site, the Avon-Fremont drainage ditch and the surrounding area. (Tr. at 218-22.) On that day, Mr. Klopke inspected the site with fellow Agency employees Ken Savage and Betty Lavis – the on-scene coordinator from the U.S. EPA. (Tr. at 227-28.; Comp.Ex.25.) Mr. Klopke saw the oil sheen on the surface of the ditch. (Tr. at 222.) Ms. Lavis prepared a pollution report on May 3, 1995 describing her visit to the site on April 18, 1995, that mistakenly stated the source of the petroleum release into the Avon-Fremont drainage ditch was Skokie Valley. (Tr. at 227-28; Comp.Ex.25.) In her report, Ms. Lavis wrote that she had planned to conduct additional sampling, but that she was informed by Edwin and Richard Frederick that they had found a leak and would address the problem with the assistance of their consulting engineer, Mr James Huff. (Tr. at 228-31; Comp.Ex.25.) The Respondents signed a notice of federal interest in an oil pollution incident and agreed to submit a clean-up project plan to the U.S. EPA for review. (Comp.Ex.25.) The U.S. EPA requested that Skokie Valley search for additional sources of the release on their site and suspected that there might be a pool of oil product accumulated under their site. (Id.)

Three USTs that were installed in 1978 by the former owner of the site – Liberty Asphalt – were removed from the site after the April 1995 incident at the total expense of Skokie Valley Asphalt, Edwin Frederick and Richard Frederick, individually and as officers of Skokie Valley Asphalt. (Comp. Ex. 34, pg. 8.). This amount was in excess of $150,000 at the time of the hearing and has since risen to over $200,000.

Agency inspector Chris Kallis also investigated the site in 1995. On March 1, 1995, Mr. Kallis took samples from the point where the farm drainage tile discharged into the ditch, observing at the time, an oil sheen coming from the farm drainage tile and downstream in the ditch. (Tr. at 151-55.) Mr. Kallis did not notice any sign of contaminant upstream from the drainage tile. (Tr. at 154.)

On April 22, 1995, the Respondents contacted and retained environmental engineer James Huff after finding a visible sheen of oil on an opened drain tile on Respondents' property and after no other party including the Illinois EPA and the USEPA and other landowners abutting the site took ant action to address the problem (Tr. at 347-48). On Huff's advice, the Respondents plugged the drain tile on respondents' property at the total expense of the Respondents. (Tr. at 340-41.) Solely at their own expense, the Respondents were able to resolve the problem of releases to the Avon Ditch. No releases have occurred since Respondents plugged the drain tile. (Tr. at 348.) Huff visited the site a few days later and saw that the drain tile had been plugged and the soil brought to grade. (Tr. at 352.) The Respondents addressed the oil sheen problem by having absorbent booms placed in the Avon-Fremont drainage ditch by the USEPA. (Tr. at 348.) Mr. Huff noticed an oil sheen near where the booms were in place and observed that the oil sheen did not exist a mile downstream from were the drain tile empties into the ditch. (Tr. at 348-49.)

On April 25, 1995, Respondents excavated a trench at the site to again locate the drain tile and Huff noticed oil in the center of the trench. On April 28, 1995, the Respondents discovered that an underground heating oil tank contained in water and reported a leaking underground storage tank incident to the Illinois Emergency Management Agency (IEMA). (Tr.

at 363-68.) On April 28, 1995, the Respondents followed Mr. Huff's recommendation and purchased higher quality booms and placed them in the drainage ditch. (Tr. at 351-352.)

After removing the underground storage tank, Huff determined that the release from that tank was minor and now thinks the oil sheen on the drainage ditch from 1994 to 1995 was caused by one or more items on the south side of the site. (Tr. at 386-87.) Huff ultimately concluded that the release to the drainage ditch was attributed to the abandoned gasoline and diesel lines from an above ground storage tank to the former pump island, that had been installed by a previous site owner. (Comp. Ex. 34.)

After the sale of the site, and continuing at least until the time of the hearing, Edwin and Richard Frederick continue to fund the effort to eliminate any potential source of a release from the site as individuals and not on behalf of the dissolved Skokie Valley Asphalt Co., Inc. (Tr. at 387-88.) To date, the Fredericks have paid Huff at least $150,000 for environmental work performed at the site. (Tr. at 467-68.)

PROCEDURAL HISTORY

On November 3, 1995, the Complainant filed a complaint against Skokie Valley Asphalt Co., Inc. The complaint alleged violations dating back to 1986. Prior to the filing of the Complaint the Respondent worked in good faith to resolve the issues on which the complaint was based and was of the opinion that the matter had been resolved with the Attorney General's office. The Complainant filed a first amended complaint on December 29, 1997 that added an additional count against Skokie Valley Asphalt, but did not add any additional Respondents.

In June of 1999, the first discovery period for this matter was established. The Complainant's First Set of Interrogatories and First Request for Production were sent to Skokie Valley Asphalt on June 10, 1999. The Respondent filed complete responses to Complainant's discovery request on January 21, 2000. The Respondent made no discovery request to Complainant during the first discovery period.

The Board allowed the Complainant's a second discovery period on April 7, 2000. Under a hearing officer order, all discovery was to be completed by October 20, 2000. During this discovery period, the parties agreed to a settlement of the matter. The settlement included the execution of a consent decree which was to be prepared by the Complainant and the payment of a penalty of approximately $20,000.00. Neither party requested any further discovery during this second discovery period.

Mr. Halloran left the Attorney General's office before executing the consent decree with the Respondent. Ms. Kelly Cartwright filed an appearance in this matter on May 12, 2000. The Respondent and its attorney discussed the settlement with Ms. Cartwright and she recognized the existence of the agreement and the need for the Complainant to prepare the consent decree but she failed to do so.

On April 16, 2001, the Complainant filed a motion for summary judgment. The Respondent filed a response to the motion for summary judgment on April 30, 2001 and the motion was denied by the Board on May, 2001. The Board also denied the Complainant's motion for reconsideration of its order denying summary judgment on June 6, 2001.

In September of 2001, the hearing officer set a third discovery schedule for this matter at the request of the Complainant. All written discovery was to be completed by November 16, 2001 and all depositions were to be completed by December 17, 2001. The Respondent fully complied with the Complainant's request for discovery. The Respondents made no request for discovery upon the Complainant. On May 2, 2002, the matter was set for hearing. The hearing was scheduled for June 27, 2002. However, prior to the hearing, the parties agreed to settle the matter on the terms previously agreed to by the parties. Again, the Complainant was supposed to prepare the consent decree but failed to do so.

On June 14, 2002, Mr. Cohen filed an appearance on behalf of the Complainant. On the motion of the Complainant, the Board canceled the hearing that was scheduled for June 27, 2002. The Respondents agreed to the canceling of the hearing based on representations made by

Mr. Cohen that he would honor the settlement agreement made with Ms. Cartwright and Mr. Halloren. However, instead of preparing the required consent decree, Mr. Cohen filed a second amended complaint in which Mr. Cohen added Mr. Richard Frederick and Mr. Edwin Frederick as Respondents. The second amended complaint was filed with the Board on July 26, 2002, without previous notice to the Respondent's attorney and without leave of the Board to file an amended complaint as required by Board procedural rules.

On July 26, 2002, a full fifty-six months after the first amended complaint was filed and eighty-one months after the original complaint was filed and fourteen years after the alleged violations first occurred, the Complainant filed a second amended complaint. In the complaint, the Complainant added the Fredericks as Respondents. The second amended complaint alleged that the Fredericks violated Sections 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f)(2002)), as well as Sections 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a) of the Board's regulations. The complaint alleged that the Fredericks falsified discharge monitoring reports, submitted a late application for a National Pollutant Discharge Elimination System (NPDES) permit, failed to comply with sampling and reporting requirements in their NPDES permits, discharged oil into a drainage ditch, and violated NPDES permit effluent limits.

On July 30, 2002, Mr. Joel Sternstein filed an appearance on behalf the Complainant in clear violation of the Board's procedural rules which prohibits a former Board employee from representing a client in a matter before the Board if that attorney had previous worked on that case while a Board employee. While both the Board, the Complainant and Mr. Sternstein knew that Mr. Sternstein was previously a Board employee who had done a substantial amount of work in this case at the Board, they allowed Mr. Sternstein to file his appearance, work on the matter and failed to divulge the conflict and breach of the rules to the Respondent or the Respondents' attorney.

On September 25, 2002, the Respondents filed a Motion to Strike Complainant's Second Amended Complaint because the Complainant's failed to ask leave of the Board to file its

Second Amended Complaint as required by the Board's Procedural Rules. The Complainant's filed a response to the Respondents Motion. The Response was prepared by Mr. Sternstein who was not supposed to be practicing before the Board on this matter. Even though Mr Sternstein's response failed to address the main issue put forth in the Respondent's motion, the Board ruled in favor of their former employee. In its Order of October 17, 2002, the Board found that the Complainant did, in fact, again violate Board procedural rules by failing to ask leave of the Board to file an amended complaint. However, the Board said they would not enforce their procedural rules against Mr. Sternstein and the Complainants choosing to allow the filing of the Second Amended Complaint in the interest of "judicial economy" and at the expense of the Respondent's right to due process. As a result of this ruling in favor of Mr. Sternstein, the Respondents lost their right to contest the Complainant's Second Amended Complaint. To date, Complainant's Second Amended Complaint has not been properly served on any of the Respondents.

On October 17, 2002, the Board accepted the People's second amended complaint. People v. Skokie Valley Asphalt, CO., PCB 96-98 slip op. at 3 (Oct. 17, 2002). On December 20, 2002, the Respondents filed Respondents' Answer and Affirmative Defense to the Complainant's Second Amended Complaint. In this filing the Respondents offered an affirmative defense based on laches.

On January 3, 2003, the Complainant, through Mr. Sternstein, filed a trivial Motion to Deem Facts Admitted and for Summary Judgments. The Respondents filed a response to Mr. Sternstein's Motion on January 17, 2003. On March 20, 2003, the Board issued an order that denied the Complainant's motion for summary judgment, accepted the Respondents' answer into the record, and directed the hearing officer to proceed to hearing. People v. Skokie Valley Asphalt, Co., PCB 96-98 (June 5, 2003).

A hearing was held on October 30 and 31, 2002 at the Village Hall in Libertyville. Six witnesses testified. The People filed 42 Exhibits, and the Respondents filed eight exhibits. All offered exhibits were accepted into evidence. On November 3, 2003, Board Hearing Officer,

Carol Sudman, issued a hearing repot that set a briefing schedule and found the witnesses credible.

On January 15, 2004, the Complainant filed its Closing Argument and Post Trial Brief in the above captioned matter along with a Motion to File Instanter which was required because the closing argument was filed after the deadline for filing set by the hearing officer's order. Again, the Board allowed the Complainant to defy a Board order and allowed the brief to be filed late. The Board did not allow the Respondents extra time to respond to the Complainant's late filed Closing argument. On March 12, 2004, the Respondents filed their closing brief on time and in accordance with the Board's imposed deadline.

In the Closing Argument and Post Trial Brief, the Complainant failed to ask for attorneys' fees with the specificity required under Illinois law and instead made an ambiguous plea for "Complainant's costs and fees". (Complainant's Closing Argument of January 15, 2004 at 48). On April 15th, 2004, the Complainant filed its Closing Rebuttal Argument and Reply Brief which included a petition for attorneys' fees and costs. (Complainant's Rebuttal Argument and Reply Brief at 38.) On May 17, 2004, the Respondents filed a Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief, in which, in part, the Respondents objected to the Complainant introducing materials beyond the scope of rebuttal in the filing including the petition for attorney's fees and costs. (Resp. Mot. at 1-2.) In its Order of September 2, 2004 the Board failed to address the issue of whether or not the Complainant could seek attorneys' fees if it had not raised the issue at hearing or in closing arguments. Again, the Board allowed the Complainant to act in clear defiance of the Board's procedural rules

In its order of September 2, 2004, the Board granted the Respondents' motion to strike in regards to attorneys' fees and costs. (Order of September 2, 2004.) The issue of attorneys' fees was not raised by the Complainant at hearing or in its closing argument and because the Board granted the Respondents' motion to strike "that portion of the People's reply that addresses attorney fees and cost exceed the scope of the arguments made in the Respondents' brief..." (Id at

6.) Therefore, the issue of attorneys' fees and costs was never brought to the Board for consideration.

However, the Board somehow granted the Complainant's non-existent request for attorneys' fees and costs (Id. at 23.) and in doing so the Board stated that it would "withhold a decision regarding attorney fees and cost until the matter is **fully** addressed by the parties." (Id. at 2.) (emphasis added). On December 16, 2004 the Board contradicted its Order of September 2, 2004 by issuing an order in which it stated that it would not hold any hearings on the issues of fees and costs. (Order of December 16, 2004 at 3.) In doing so, the Board, without basis or justification, denied the Respondents the right to fully address the issue of attorneys' fees and cost that the Board had granted to the Respondents in the Order of September 2, 2004.

April 7, 2005, the Board issued an Order in which the Board granted the Respondents' motion for extension of time to allow for discovery. The Order states that "the Board will grant the Respondents additional time in order to conduct discovery..." (Order of April 7, 2005 at 3). This Order again contradicted the Board's granting of the Respondents' right to fully address the attorneys' fees and costs issues in the September 2, 2004 Order by stating that "the Board grants the Respondents' motion for extension of time to allow for **limited** discovery". (Id. At 1.) (Emphasis added.) 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.).

The Board Order of April 7, 2005 also denied the Respondents' the right to discovery on the issue of Mr. Sternstein's improper participation in this matter, even though the Plaintiff's clearly open the door to such discovery by requesting fees and costs for Mr. Sternstein's participation in their petition for attorneys' fees and cost of September 17, 2004. (Resp. Motion at 2-3.)

Following the limited discovery and the filing of a series of motions, the hearing officer conducted a hearing on fees and costs on December12, 2006. The hearing officer filed her hearing report on December 14, 2006 and the parties filed their post-hearing briefs on January

19, 2007. The Board issued its opinion and order of the issue of attorneys' fees and costs on November 1, 2007.

In the order, the Board awarded the Complainant 30, 225 in attorney fees and $2,291 in costs, for a total of $32,516.20. (Order of Nov.1, 2007 at 30.) The Board also ordered a lift of the stay of the Respondents' obligation to pay the civil penalty of $153,000 and stated that the opinion constitutes the Board's final order subject to motion for reconsideration under Board procedural rule 101.520.

DECISION ON VIOLATIONS AND CIVIL PENALTY

In its September 2, 2004 decision, the Board first held that Edwin and Richard Frederick are personally liable for the activities of Skokie Valley Asphalt Co., Inc. (Skokie Valley) because of their participation or personal involvement in the company:

> The Fredericks, together, were responsible for the day-to-day operation of Skokie Valley. Both were present for environmental investigations and inspections. They also both corresponded and met with environmental government officials. While perhaps not driving the train, the Fredericks both sat beside the driver and gave instructions, and had the ability to control the activities that gave rise to the instant complaint. Accordingly, the Fredericks can be held personally liable under the doctrine set forth in [People v. C.J.R. Processing, Inc., 269 Ill. App. 3d 1013, 647 N.E.2d 1035 (3rd Dist. 1995)] for any violations committed by Skokie Valley. See People v. Skokie Valley Asphalt Co., Inc., PCB 96-98, slip op. at 11 (Sept. 2, 2004).

The Board then addressed each of the five counts of the People's complaint in turn. In count I of the complaint, the People alleged that respondents violated the Act and Board regulations by falsifying Skokie Valley's December 1990 and January 1991 discharge monitoring reports (DMRs). The People alleged that respondents falsified the DMRs by altering the dates of previously submitted reports and submitting the duplicates to the Illinois Environmental Protection Agency (Agency). The Board found that respondents made a false statement, representation, or certification to the Agency in at least these two instances, and held that respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2006)) and 35 Ill. Adm. Code 305. 102(b). See Skokie Valley Asphalt, PCB 96-98, slip op. at 12-13.

The People alleged in count II of their complaint that respondents violated the Act and Board regulations by not applying for reissuance of Skokie Valley's NPDES permit 80 days prior to the expiration date contained in the existing permit. The Board found that Skokie Valley did have an NPDES permit, and that any permittee wishing to continue to discharge was required by regulation to file for renewal prior to 180 days before NPDES permit expiration. The Board further found that Skokie Valley did not timely apply for renewal, and therefore held that respondents violated Section 12(f) of the Act and 35 Ill. Adm. Code 309.102(a) and 309.104(a). See Skokie Valley Asphalt, PCB 96-98, slip op. at 13-14.

In count III of the complaint, the People alleged that respondents violated the Act and Board regulations by failing to submit DMRs to the Agency as required by Skokie Valley's NPDES permit and by not maintaining an accessible effluent sampling point for Skokie Valley's discharge from its lagoon. The Board found that respondents violated Section 12(f) of the Act, as well as 35 Ill. Adm. Code 305.102(b) and 309.102(a) and special condition number of the NPDES permit, by failing to properly submit DMRs on a regular basis. The Board also found, however, that the People failed to meet their burden of proof that respondents violated special condition number 1 of the NPDES permit, and the accompanying statutory and regulatory provisions, by failing to maintain an accessible sampling point. See Skokie Valley Asphalt, PCB 96-98, slip op. at 15.

Count IV of the complaint alleged that respondents violated the Act and Board regulations by causing or allowing the discharge of contaminants into a drainage ditch located east of the site. The Board found that from December 1994 through April 1995, there was an oily discharge in the ditch constituting the "discharge of a contaminant to the environment so as to cause water pollution, I. e. , a discharge to State waters that will or is likely to create a nuisance or render such waters harmful or detrimental or injurious." Skokie Valley Asphalt, PCB 96-98, slip op. at 1 7. Further, the Board found that the People met their burden of proving that the oily sheen in the drainage ditch was caused, threatened, or allowed by respondents. Id. Accordingly, the Board held that respondents violated Section 1 2(a) of the Act (4 1 5 ILCS 5/1 2(a) (2006)) and 35 Ill. Adm. Code 302.203, 304. 105, and 304. 106. Additionally, the Board found that

respondents violated 35 Ill. Adm. Code 304.124© of the Board's effluent standards as laboratory analysis revealed that a water sample far exceeded 1 5 milligrams per liter (mg/L) of oil. Id.

The People alleged in count V of the complaint that respondents violated the Act and Board regulations by causing or allowing the discharge of effluent from the Skokie Valley facility to exceed concentration limits for total suspended solids (TSS) as set forth in Skokie Valley's NPDES permit. The permit contains effluent limits for TSS of(1) 15 mg/L for a 30-day average and (2) 30 mg/L for a daily maximum. After reviewing the DMRs submitted by respondents, the Board found nine exceedences of the 30-day average concentration limit and four exceedences of the daily maximum concentration limit. The Board further found that respondents violated the limits in the NPDES permit for two consecutive months twice and for three consecutive months in 1991 . The Board held that respondents violated Section 12(f) of the Act and 35 Ill. Adm. Code 305. 102(b) and 309. 102(a). Skokie Valley Asphalt, PCB 96-98, slip op. at 18.

After finding the violations, the Board considered the factors set forth in Section 33© of the Act (415 ILCS 5/33© (2006)) to determine whether a civil penalty should be imposed on the Respondents. The Section 33© factors bear on the reasonableness of the circumstances surrounding the violations, including the technical practicability and economic reasonableness of reducing or eliminating the discharges or deposits at issue. After considering these factors, the Board found that a civil penalty was warranted. Skokie Valley Asphalt, PCB 96-98, slip op. at 18-20. The Board then considered the factors of Section 42(h) of the Act (415 ILCS *5/42(h)* (2006)) to determine the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, including the duration and gravity of the violations. Based on the Section 42(h) factors, the Board imposed a $153,000 civil penalty on respondents. Id. at 20-23.

The Board issued its opinion and order of the issue of attorneys' fees and costs on November 1, 2007. In the order, the Board awarded the Complainant $30,225 in attorney fees and $2,291 in costs, for a total of $32,516.20. (Order of Nov.1, 2007 at 30.)

ISSUES FOR RECONSIDERATION

1. **The Board failed to properly apply the facts of the case to the Respondents' affirmative defense of laches.**

"Laches is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party." Riverview FS, Inc. V. Illinois Environmental Protection Agency, PCB 97-226 at 1 (May 3, 2001 citing Tully v. Illinois, 143 Ill. 2d 425, 432, 574 N.E. 2d 659, 662 (1991). "There are two principal elements of laches: lack of due diligence by a party asserting a claim and prejudice to the opposing party." People v. Royster-Clark, Inc., PCB 02-8 at 6 (January 24, 2002) citing Van Milligan v. Board of Fire and Police Commission, 158 ILL.2d at 89, 630 N.E.2d at 833.

In its Opinion and Oder of September 2, 2004, the Board denied the Respondents' affirmative defense based on laches. The Complainant was aware of the roles of Respondents Edwin L. Frederick and Richard J. Frederick in the alleged violations prior to the filing of the original complaint in 1995 and all discovery pertinent to the parties involved in this matter was completed by the year 2000. No new information or additional allegations involving Respondents Edwin L. Frederick and Richard J. Frederick has been introduced by the Complainant to justify the untimely addition of these parties. The untimely addition of these parties is solely the result of a lack of diligence by the Complainant.

The Board held that both parties were responsible for "the lengthy nature of time interval". Order of Sept. 2, 2004 at 8. It must be noted that the Respondent had no duty to shorten the time interval. It is the duty of the party asserting a claim to diligently pursue their claim. Van Milligan v. Board of Fire and Police Commissioners, 158 Ill. 2d 85, 630 N.E.2d830,833 (1994). Additionally, there is no case law that suggest that lack of diligence by a respondent somehow justifies or offsets the lack of diligence of a complainant. A finding that both parties were responsible for "the lengthy nature of time interval"is, in fact, a finding that the Complainant was responsible for "the lengthy nature of time interval", with the culpability of the Respondent being irrelevant. Order of Sept. 2 at 8. Therefore, the Board has determined that the

first element necessary to show laches – lack of diligence by a party asserting a claim – does exist.

The Board also found that "nothing in the record indicates that the People were not diligent in pursuing their claim. Id. at 8. This finding is not supported by the record. An initial discovery period was established by the Hearing Officer and was concluded by January 21, 2000. By order of the Board Hearing Officer the Complainant was allowed a second discovery period in which all discovery was ordered to be completed by October 20, 2000 (Hearing Officer Order of April 7, 2000.) The Respondent complied with this discovery schedule but the Complainant was not diligent in their efforts to complete discovery and requested no additional discovery materials. On September 6, 2001, the Complainant requested a third discovery schedule. Over the objections of the Respondents, the Board Hearing Officer granted the Complainant additional discovery time and ordered that all discovery be closed by February 1, 2002 (Hearing Officer Order of April 7, 2000). Again the Respondent complied with the discovery schedule. However, the Complainant did not request any discovery information during this third discovery period. No additional information concerning the liability of the Respondent or other parties was requested or proffered during this additional discovery period. The Respondents contend that this total lack of activity of any kind during these discovery periods is unquestionably a showing of lack of diligence.

With respect to the element of prejudice, the Board states that it "cannot find that being added to the Complaint in 2000 prejudiced the Fredericks". In fact, Richard J. Frederick and Edwin L. Frederick were not named as additional Respondents until July of 2002. (Second Amended Complaint of July 26, 2002 at 1.) This two year difference in the date considered by the Board and the actual date by which the prejudice took place is significant. During that period, the Fredericks relied on representations by the Complainant that prior to May 12, 2000 a settlement had been reached with the Complainant to settle the matter and that the Complainant was preparing a consent decree. Also by October 20 of 2000, the second and third discovery periods had been closed and the Fredericks had every reason to rely on the actions and lack of action of the Complainant in not requesting any discovery information and not naming additional Respondents after discovery was completed to conclude that their records with respect to the various counts in the complaint would not be an issue. Therefore, they had no reason to suspect there was a need to ask Curran to preserve their records.

As a direct result of the Complainant's lack of due diligence, the Respondents Richard Frederick and Edwin Frederick have been prejudiced in their ability to produce records, recall witnesses and remember events relevant to their defense in this matter. In 1998, during the period of the Complainant's lack of due diligence, the assets of the Respondent Skokie Valley Asphalt were sold to a third party (Trial at 435,475). These assets included all of the records of Skokie Valley Asphalt including records on NPDES permits, responsibilities of employees including Edwin Frederick and Richard Frederick, records on DMR submittals, records on past operations at the plant, records on environmental Skokie Valley Asphalt , the new owners decided they had no need for the records of Skokie Valley Asphalt and disposed of the records.

Edwin and Richard Frederick had no control over the new owners decision to dispose of these records and also had no reason to suspect that these records would be of value to them. This litigation had started two years earlier and the Fredericks were not named Respondents. There was no knew information divulged through discovery that would lead a reasonable person to suspect that they would be named as Respondents. Therefore, they made no attempt to retain any of Skokie Valley Asphalt's records. For similar reasons, the did not retain any of their personal records relevant to Skokie Valley Asphalt beyond the periods these records would have been required for other purposes.

In the September 2, 2004 Opinion and Order, the Board says that "[t]here is no indication that any evidence beyond what is need to defend Skokie Valley Asphalt was needed to defend the Fredericks." Order of Sept. 2 at 9. A conclusion that the Fredericks requirements for defense were fully aligned with Respondent Skokie Valley Asphalt can not be supported by the record or logical analysis. Skokie Valley Asphalt was a dissolved corporation with liability limited to its corporate assets. It had supplied full responses in two discovery periods, had reached a settlement agreement with the Complainant, had not raised any affirmative defenses and had retained counsel to represent it in litigation. Skokie Valley Asphalt had every reason to either rely on the Complainant ethically to complete the settlement agreement or to proceed to hearing and a decision with civil penalties it would be wiling to pay.. Under either scenario, Skokie Valley Asphalt had every justification to decide that it had no need to retain additional documents or ask Curran to not destroy the documents.

The Fredericks interest were far from aligned with those of Skokie Valley Asphalt. By the time the Fredericks were named as co-Respondents in the Second Amended Complaint, the Respondents realized that the Complainants were not going to act ethically to execute the consent agreement as the Complainants had said they would do for years and that the Complainants had used as a basis for getting Skokie Valley asphalt and their attorney to agree to the postponement of the hearing that had been schedule but for which the Complainant was not prepared. The Fredericks also had greater concerns with protecting their limited retirement assets against a civil penalty and an interest in protecting their personal reputations in a matter where they were the only party that took corrective action and spent a considerable amount of money and now were being accused of causing the problem for which they had previously been told they would not be held responsible.

The statement in the Board's Opinion and Order of September 2, 2004 that the Respondents had they rights to the records owned by Curran is irrelevant. Once Curran made the decision to destroy the records, they could not be recovered. The Fredericks could not be expected to make the better decision with respect to requesting Curran to retain the records because they relied on the actions and inactions of the Complainant in determining what records it may need. This sis exactly the prejudice required for the second element of a laches defense.

The Respondents take great exception to the Board's finding that the Respondents statements regarding record retention are "specious" (Opinion of Sept. 2, 2004 at 9.) and other personal attacks on Edwin Frederick and Richard Frederick by the Board throughout the opinion (Id. at 11, inter alia.) and the entire proceeding. These conclusions are especially disturbing in light of the fact that it is the Board's credibility that should be in question in light of the Sternstein issue. In the Hearing Officer Report, the Hearing Officer stated that she found the Respondents credible. No other Board representative was present at the hearing. Additionally, on cross examination, the Complainant did not refute the position of the Respondents with respect to record retention. Therefore the Board's position that the Respondents' position is "specious" is baseless and should not be part of the decision concerning the affirmative defense. If the decision on the affirmative defense of laches is based on the record as opposed to the decision maker's *speculation*, the decision would be reversed upon reconsideration.

Laches is based on the notion that courts will not readily come to the aid of a party who has "slept on his rights to the detriment of the opposing party." Riverview FS, Inc. v. Illinois Environmental Protection Agency, PCB 97-226 at 5 (May 3, 2001) citing Tully, 143 Ill. 2d 425, 432, 574 N.E. 2d 659, 662 (1991). The record shows that the Complainant's lack of due diligence has in fact resulted in a detriment to the Respondents Edwin L. Frederick and Richard J. Frederick. While the Board does not fully address the requirement of "compelling circumstances" needed to apply laches against a government entity in its Opinion and Order of September 2, 2004, it does state that "the Board can find no compelling circumstances to apply laches to the People in this matter". Id. At 9.

In Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966), the Illinois Supreme Court established the standard for applying laches to the state. In that case, the court stated:

> It is, of course, elementary that ordinary limitations statutes and principles of laches and estoppel do not apply to public bodies under usual circumstances, and the reluctance of courts to hold government bodies estopped to assert their claims is particularly apparent when the governmental unit is the State. There are sound basis for such policy. *** [A]pplication of laches or estoppel doctrines may impair the functioning of the state in the discharge of its government function, and [] valuable public interests may be jeopardized or lost by its negligence, mistakes or inattention of public officials.
>
> But it seems equally true that the reluctance to apply equitable principles against the State does not amount to absolute immunity of the State from laches and estoppel under all circumstances. The immunity is a qualified one and the qualifications are variously stated. It is sometimes said laches and estoppel will not be applied against the state in its governmental, public or sovereign capacity, and it cannot be estopped from its exercise of its police powers or in its power of taxation or the collection of revenue.

It has, however, been stated with frequency that the State may be estopped when acting in a proprietary, as distinguished from its sovereign or governmental, capacity and even, under more compelling circumstances, when acting in its governmental capacity.

Therefore, laches can be applied to the state under "compelling circumstances", even when the state is acting in a governmental capacity. People v. State Oil Company, William Anest et. al. PCB 97-103 (May 18, 2000) citing Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966).

In the present case, it is not apparent that the State's ability to discharge its government function is impaired or that any valuable public interest is jeopardized or lost if the doctrines of laches and equitable estoppel are imposed to disallow the naming of additional Respondents. The dismissal of Richard Frederick and Edwin Frederick will not act as impairment of the State's right to discharge its government function and protect public interests because the State will still be able to protect the public interest and perform its government function by enforcing against the remaining party – Skokie Valley Asphalt Co., Inc. Dismissing the Fredericks under the doctrine of laches will allow the Fredericks the protection against undue prejudice and the Complainants efforts to use administrative proceedings to increase the cost and effort to the Respondents of defending themselves in this matter, without jeopardizing the State's ability to pursue its case against the Respondent it selected as the culpable party at the time it was in possession of all discovery material, had full knowledge of all of the parties involved, knew the roles each party played in the matter and was fully informed of all other facts of the case.

The Board needs to reconsider the release of Richard J. Frederick and Edwin L. Frederick from liability in this matter to protect the Respondents against the prejudice that has resulted from the unreasonable delay of the Complainants in naming additional Respondents. Under the standard established in the Hickey decision, "compelling circumstances" must exist for the Board to invoke laches and equitable estoppel against the state when the state is acting in its governmental capacity. People v. State Oil Company, William Anest et. al. PCB 97-103 (May 18, 2000) citing Hickey. The "compelling circumstances" in this matter, include the fact that the Respondents' were unable to fully defend themselves against charges of alleged incidents that occurred up to seventeen (17) years ago, five (5) years after the Respondents terminated their employment with the entity involved in the matter and three (3) years after discovery related to the liability of the parties was completed. The "compelling circumstances" include the fact that a party in the position of the Respondents should have every right to rely on the representations and actions of the State to conclude that it will not be required to defend

themselves against allegations raised well after their retirement and after it had justifiably determined that it had completed its responses to discovery requests.

For the Board to find that "compelling circumstances" are not established by the fact pattern in this matter, the Board would need to find that the term "compelling circumstances" has no meaning and that laches can never be applied against the State. Such a ruling would be contrary to the decisions of the Illinois Supreme Court on the issue. The Illinois Supreme Court has also stated that "mere non-action of governmental officers is not sufficient to work an estoppel ... there must be some positive acts by the officials which may have induced the actions of the adverse parties" Id. See also Van Milligan v. Board of Fire and Police Commissioners, 158 Ill 2d 85, 630 N.E. 2d 830 (1994); People v. ESG Watts (February 5, 1998), PCB 96-107 at 7; People v. Bigelow Group Inc. (January 8, 1998), PCB 97-217, at 2.

In the case before the Board, the filing of the First Amended Complaint on December 29, 1997 without naming the Respondents as additional parties, the failure of the State to name the Respondents as parties after requesting and receiving all information concerning all of the parties involved after the discovery period that ended on October 20, 2000 and the fact that the Complainants requested second and third discovery periods without making a request of the Respondent for additional information regarding the parties, all were positive acts by the officials which induced the Respondents to take actions which have prejudiced the Respondents ability to properly defend themselves in this matter.

Wherefore, the Respondent respectfully requests that the Board dismiss the Respondent Edwin L. Frederick Jr.,.individually and as owner and President of Skokie Valley Asphalt Co., Inc., and the Respondent Richard J. Frederick, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc. under the doctrines of laches and equitable estoppel.

2. The issue of the prejudice resulting from Mr. Sternstein's involvement in this mater needs to be fully explored in order to determine the impact on the procedures.

On July 30, 2002, Mr. Joel Sternstein filed an appearance on behalf the Complainant in clear violation of the Board's procedural rules which prohibits a former Board employee from

representing a client in a matter before the Board if that attorney had previous worked on that case while a Board employee. While both the Board, the Complainant and Mr. Sternstein knew that Mr. Sternstein was previously a Board employee who had done a substantial amount of work in this case at the Board, they allowed Mr. Sternstein to file his appearance and work on the matter while failing to divulge the conflict and breach of the rules to the Respondent or the Respondent's attorney.

However, in an action completely in violation of its own procedural rules and in violation of any semblance of justice and due process, the Board sent Mr. Sternstein a copy of the decision apparently prior to the decision being made available to the general public or the Respondents. The copy of the decision made available to Mr. Sternstein included retractions from an earlier draft of the Order. A copy of this document is included in this Motion for Reconsideration as Appendix "A". The document or the fact that the Order was provided to Mr. Sternstein was never divulged to the Respondents by the Board or the Complainant. The Respondents first became aware of this document when it received the Complainant's partial response to its request for documents with respect to legal fees. The copy of the document discovered by the Respondents from the Complainant's files has a hand written note on it which says "Mitch– enjoy – we are probably not supposed to see the crossed-out stuff! – Joel".

On July 30, 2002, Mr. Joel Sternstein filed an appearance on behalf the Complainant in clear violation of the Board's procedural rules which prohibits a former Board employee from representing a client in a matter before the Board if that attorney had previous worked on that case while a Board employee. While both the Board, the Complainant and Mr. Sternstein knew that Mr. Sternstein was previously a Board employee who had done a substantial amount of work in this case at the Board, they allowed Mr. Sternstein to file his appearance, work on the matter and failed to divulge the conflict and breach of the rules to the Respondent or the Respondents' attorney.

On January 3, 2003, the Complainant, through Mr. Sternstein, filed a trivial Motion to Deem Facts Admitted and for Summary Judgments. The Respondents filed a response to Mr. Sternstein's Motion on January 17, 2003. On March 20, 2003, the Board issued an order that denied the Complainant's motion for summary judgment, accepted the Respondents' answer into

the record, and directed the hearing officer to proceed to hearing. People v. Skokie Valley Asphalt, Co., PCB 96-98 (June 5, 2003).

However, in an action completely in violation of its own procedural rules and in violation of any semblance of justice and due process, the Board sent Mr. Sternstein a copy of the decision apparently prior to the decision being made available to the general public or the Respondents. The copy of the decision made available to Mr. Sternstein included retractions from an earlier draft of the Order. A copy of this document is included in this Motion for Reconsideration as Appendix "A". The document or the fact that the Order was provided to Mr. Sternstein was never divulged to the Respondents by the Board or the Complainant. The Respondents first became aware of this document when it received the Complainant's partial response to its request for documents with respect to the issue of legal fees. The copy of the document discovered by the Respondents from the Complainant's files has a hand written note on it which says **"MITCH - ENJOY - WE ARE PROBABLY NOT SUPPOSE TO SEE THE CROSSED -OUT STUFF! – JOEL"**.

On September 25, 2002, the Respondents filed a Motion to Strike Complainant's Second Amended Complaint because the Complainant's failed to ask leave of the Board to file its Second Amended Complaint as required by the Board's Procedural Rules. The Complainant's filed a response to the Respondents Motion. The Response was prepared by Mr. Sternstein who was not supposed to be practicing before the Board on this matter. Even though Mr Sternstein's response failed to address the main issue put forth in the Respondent's motion, the Board ruled in favor of their former employee. In its Order of October 17, 2002, the Board found that the Complainant did, in fact, again violate Board procedural rules by failing to ask leave of the Board to file an amended complaint. However, the Board said they would not enforce their procedural rules against Mr. Sternstein and the Complainants. As a result of this ruling in favor of Mr. Sternstein, the Respondents lost their right to contest the Complainant's Second Amended Complaint and the false circumstances under which the Complainant was able to postpone the June 27, 2002 hearing. To date, Complainant's Second Amended Complaint has not been properly served on any of the Respondents.

The Board's overwhelming concern with "judicial economy" at the expense of the Respondent's right to due process is inconsistent with the Board's other decisions in this case that showed a total disregard judicial economy or the expense of litigation suffered by the Respondents. The Board allowed the Complainant five discover periods, allowed the Complainants to file numerous documents after the deadline without sanctioning the Complainant and allowed the Complainant to file a barrage of trivial motions without ever sanctioning the Complainant. The Board's decision in favor of Mr. Sternstein in its Order of October 17, 2002, is to say the least – "specious".

On October 17, 2002, the Board accepted the People's second amended complaint. People v. Skokie Valley Asphalt, CO., PCB 96-98 slip op. at 3 (Oct. 17, 2002). On December 20, 2002, the Respondents filed Respondents' Answer and Affirmative Defense to the Complainant's Second Amended Complaint. In this filing the Respondents offered an affirmative defense based on laches. On April 18, 2003, the Complainant filed a Motion to Dismiss or Strike Respondent's Affirmative Defenses. The Respondents only offered one affirmative defense based on laches and equitable estoppel. In its response to the Complainant's Second Amended Complaint, the Respondent clearly entitled the section including its Affirmative Defense as "Affirmative Defense" and not "Affirmative Defenses". The Respondents simply delineated the elements of the affirmative defense in the Response as is proper practice.

However, the Board has allowed the Complainant to confuse this issue with claims that the Respondents had filed multiple defenses. The Board has failed to sanction the Complainants for filing numerous trivial actions based on the fabricated multiple defenses position and instead has caused the Respondent to spend a great deal of time and money addressing a non-issue fabricated by the Complainant and adopted by the Board.

In its Order of June 5, 2003, the Board struck the element of the Respondents' affirmative defense of laches before allowing the Respondents to present any evidence or argument to prove the elements of the affirmative defense at hearing.. The Board denied the Respondents' motion to reconsider the June 5, 2003 order in a July 24, 2003 Board order. *See* People v. Skokie Valley Asphalt, Co., PCB 96-98 (July 24, 2003). In its Order of July 24, 2003,

the Board attempted to clarify a decision that never should have been entered by saying that the issue of laches could still be considered. However, the Board's predisposition to not consider the position of the Respondents was already divulged and is apparent in the superfluous review presented of the laches argument in the Opinion and Order of September 4, 2004.

The Board has acted diligently to prevent the Respondents from including any information concerning Mr. Sternstein in its discovery efforts. The Board Order of April 7, 2005 denied the Respondents' the right to discovery on the issue of Mr. Sternstein's improper participation in this matter, even though the Plaintiff's clearly opened the door to such discovery by requesting fees and costs for Mr. Sternstein's participation in their petition for attorneys' fees and cost of September 17, 2004. Resp. Motion at 2-3. In light of the new evidence presented in Appendix "A", the Board must reconsider it actions with respect to Mr. Sternstein's violations and reverse its decisions against the Respondents.

3. The Board has failed to properly apply the factors set forth in Section 33(c) of the Act to each count of the complaint to determine the civil penalty that should be imposed for each count.

Under section 33© of the Act, the Board is required to take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

I. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
ii. The social and economic value of the pollution source;
iii. The suitability or unsuitability of the pollution source to the area in which it is located, including the question of the priority of location in the area involved;
iv. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
v. Any subsequent compliance.

In the matter before the Board, only two of the counts involved "emissions, discharges or deposits. The first of those counts involves exceedences of NPDES permit limitations for total suspended solvents (TSS). The Board discusses the fact that the Respondent failed to submit some DMR reports and says that complying with the requirements of an NPDES permit is part of

doing business in Illinois (Board Opinion and Order of September 2, 2004 at 19.) even though these issues are not relevant to the factors of Section 33©. The record shows that Skokie Valley Asphalt – the only Respondent that held a permit and had responsibility for permit compliance – complied with all of its permit discharge limitations except the limitation for TSS. While finding that the Respondents exceeded their TSS discharge levels, the Opinion does not say the recording of elevated TSS concentrations had any character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people and such a finding could not be supported by the record. While the Board did not state so in their Opinion this factor of must be decided for the Respondents.

The technical practicality and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such a pollution source are critical factors in understanding the complete unreasonableness of this Count. Testimony by both Mr. Huff and Mr. Kallis confirmed that the violations sited existed as a result of runoff of soil from neighboring farm fields during intense rain events (Trial at 200, 516-517.). The Respondents had installed a retention pond to allow the solids to settle before discharge and this activity did reduce the level of TSS in the discharge (Trial at 516-517). However, it is technically impossible and consequently economically unreasonable for the Respondents to control rain events. The unreasonableness of this count is illustrated by the testimony of Mr. Kallis who stated that the state seldom enforced violations that involved exceedences of TDS and TSS releases in circumstances similar to those reported by Skokie Valley Asphalt (Trial at 201.), and the testimony of Mr. Huff who pointed out that the IEPA had made a mistake in placing this requirement in a storm water NPDES permit like the one issued to Skokie Valley Asphalt and that the IEPA had corrected their mistake when they issued a draft renewal permit in 1996 (Trial at 518).

The Board holds that practicable and economically reasonable to comply with the requirements of the NPDES permit. Opinion and Order of Sept. 2, 2004 at 20. Compliance is not the issue under 33 ©. The issue is the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from a pollution source. The *record shows that it* was not technical practicability and economic reasonableness to

reduce or eliminate TSS discharges from this source. This factor must be reconsidered in favor of the Respondents.

The remaining factor for reconsideration is the subsequent compliance with the permit condition. While it was done for independent reason, the Respondents did ultimately comply with the limits on TSS discharges in the only way technically possible – they ceased operations. Until the Complainant filed this Complaint, the Respondents were never told the exceedences of the NPDES limits was of concern to the Agency. In fact, they were of the opinion that they would be treated like everyone else doing business in the state of Illinois and that the TSS discharges would be accepted as unavoidable and mistakenly included in the permit. Trial at 201.

It is hard to understand how the Board could conclude that the Complainant was diligent in pursuing this legal matter before the Board but then find the Respondent's efforts to be sluggish. It is even more difficult to comprehend how the Board could question if the compliance has been completed when the plant activities have ceased and Skokie Valley no longer has discharges of any kind. However, the most basic question should be how the Board could possibly expect the Respondents to move faster to eliminate TSS discharges that had been shown to be outside of Skokie Valley Asphalt's control.

The second count that involves a discharge of contaminants into the Avon Drainage Ditch. In the Opinion, the Board simply declares that "[t]he water pollution in the Avon-Fremont drainage ditch threatened the public health". Opinion and Order of Sept 2, 2004 at 19. Again, this declaration is not supported by the record. With respect to the character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people, there is no evidence that any such factors exist.

The Complainant's witness, Mr. Donald Klopke, who has responded to hundreds of emergency situations of behalf of the IEPA (Trial at 215, 216) and in charged with protecting the environment for the people of the state of Illinois, testified that the damage caused by the release to the Avon-Fremont Drainage Ditch was of a temporary nature. He noted the sheen on the water in the ditch that was gone shortly after the incident and the possibility of odor problems

while the released materials were exposed as the only possible effects. Neither rises to the level of a threat to the public health that would allow the Board to make such a finding in its Opinion and Order of September 2, 2004. Neither Mr. Klopke nor any other witness at hearing testified as to any permanent health concerns or concerns for property damage as a result of this release (Trial at 272, 273).

In fact, the IEPA Emergency Response Unit, which included Mr. Klopke, considered this release to be of such minor impact that they did not even bother to identify the number of drain tiles that fed into the farm tile, what farm tiles fed into the Avon-Fremont Drainage Ditch (Trial at 241), take samples of the materials in the drainage ditch and attempt to match the released materials to at the Skokie Valley Asphalt site (Trial at 234), investigate the tanks at the Skokie Valley Asphalt site to determine if they were the source of the contamination or even determine how many tanks were at the site (Trial at 235), fully investigate other potential sources (Trial at 247) or even attempt to identify other sources of the contamination and definitively show what source was responsible for the release to the Avon-Fremont Drainage Ditch (Trial at 238).

An additional indication of the lack of concern that the IEPA had for this release is the fact that neither the Emergency Response Unit or any other response group from the IEPA revisited the site after their initial visit on April 19, 1995, even though they had not identified the source of the release and the release to the Avon-Fremont Drainage Ditch continued (Trial at 255). If the release represented any notable degree of potential injury to, or interference with, the protection of the health, general welfare and physical property of the people, the IEPA surely would have follow through with their duty to rectify the situation.

In it Opinion, the Board states that the only addressed the water pollution when under scrutiny by the Agency (Opinion and Order of Sept.2, 2004 at 19.) This statement is totally fabricated. The Agency had so little concern with the impact of this release that they never followed up with Skokie Valley Asphalt in any way (Trial at 239). The fact that the IEPA determined that this release was so minor that it did not require any follow up is the clearest indication of the *minor* impact this incident had regarding interference with the protection of the health, general welfare and physical property of the people.

Mr. James Huff also testified that actions taken at the request and at the expense of Edwin Frederick and Richard Frederick such as placing oil absorbing booms on the waters to collect the sheen materials were effective in collecting and limiting the spread of the discharge material (Trial at 351,352). The Fredericks continue to take the actions necessary to ensure that discharges to the Avon-Fremont Drainage Ditch are avoided (Trial at 347).

The evidence presented at hearing also clearly indicate that it was not technically practical and economically reasonable for the Respondents to avoid the discharge into the drainage ditch. Regardless of whether there existed a practical technical solution or an economically reasonable solution, none of the Respondents were in a position to take the necessary action to reduce or eliminate the discharge until the source of the discharge was identified .

Only after Richard Frederick and Edwin Frederick accidentally discovered the drain tile that went through the Skokie Valley Asphalt property and after Mr. James Huff theorized that the drain tile was a probable source of the discharge into the Avon-Fremont Drainage Ditch was it possible to even consider factors of technical practicality and economic reasonableness in reducing or eliminating the discharge. Once the probable source was identified, the consideration of the technical practicality and economic reasonableness not only support an argument that these are mitigating factors but also show that the Respondents acted in good faith to eliminate the discharges.

Both Richard Frederick and Edwin Frederick took all actions necessary and available to reduce and eliminate the discharge as soon as they identified the suspected source. Although neither of these Respondents had a clear responsibility for the discharge because neither was personally involved in or actively participated in the cause of the discharge or had the ability to control the acts or omissions that gave rise to the violation, they authorized action to address the situation. At no point did any of the Respondents attempt to hinder the effort to eliminate the discharge because the remediation action would be technically impractical or economically unreasonable.

With respect to the factor of subsequent compliance, the extent of the technical effort is shown by the fact that Respondents Edwin L. Frederick and Richard J. Frederick continued to employ and pay Mr. James Huff and his firm to identify and remediate possible pollution sources until compliance was achieved (Trial at 463). In the Opinion, the Board states that the "[r]espondents did, ultimately, address the water pollution in the Avon-Fremont drainage ditch, but only when under scrutiny by the U.S. EPA and the Agency". Opinion and Order of Sept.2, 2004 at 19. Therefore the Board actually found that the Respondents did subsequently come into compliance. There is no indication that the scrutiny of the US EPA was the driving factor in the compliance effort. Either way, the scrutiny by the US EPA and the Agency is immaterial to the factor to be considered and the fact that compliance was achieved. However, the Board's final decision somehow weighed this factor against the Respondent. Upon reconsideration this factor must be reversed and weighed in favor of the Respondents.

The Board needs to reconsider its determination on the issue civil penalties based on information in the record and not on factors such as perceived sluggishness, fathom scrutiny by government agencies and non-compliance with factors that are not delineated in Section 33 © of the Act. The evidence and testimony presented at hearing and available on the record indicate that none of the factors to be considered in Section 33© should be weighed against the Respondents for either of the two counts involving discharges. As such, no civil penalty should be imposed . Upon reconsideration, the Board should find that no civil penalty should be imposed.

4. The Board failed to properly apply the factors set forth in Section 42(h) of the Act to each count of the complaint and to each Respondent to determine the proper amount of the civil penalty that should be imposed for each count.

The Board is required to issue an independent, item-by-item analysis of the violations in determining the appropriate civil penalty. The Board has failed to do so in this matter. Instead, the Board developed its civil penalty by using the Complainant's request for penalties as the basis from which the civil penalties would be determined. Opinion and Order of September 2, *2004 at 22,23. Granting this* type of deference to the position of the Complainant, without any consideration to the position of the Respondents, is inherently unjust.

Not only does the Board use the Complainant's recommended penalties as the basis for its determination of the civil penalty, it does so without any analysis of the Complainant's recommendation. Their recommended penalty is arbitrary and baseless. In offering its recommended penalty, the Complainant argues that all of the Respondents were guilty of all counts and that the factors delineated in Section 42(h) of the Act do not represent mitigation for any of the Respondents. It does not correspond to the decision of the Board and can not effectively be used as a basis for the determination of penalties without great prejudice to the Respondents.

The Board needs to use an independent reference point in determining the civil penalty. An assumption of zero penalty or the maximum statutory penalty would be more effective than the approach adopted by the Board. However, in the Opinion and Order, the Board states that the maximum penalty is $4,600,000. Id. At 22. The Board fails to support that assumption and it is the position of the Respondents that this statement is false and needs to be corrected. The Board also indicates that there are ongoing violations in this matter. Id. This statement is also false and not supported by the record. To the extent the Board's decision on civil penalties is based on the false assumption that the violations are ongoing, the penalty amount needs to be adjusted.

The Board's determination of the civil penalty does not differentiate between the Respondents in determining their liability and in applying the factors that should be considered regarding matters of mitigation or aggravation of penalty. The Board treats the penalties as joint and severable. The assumption of joint and several liability is not based on the Act. Instead, the act calls for the Board to determine the culpability of each party independently and apply the factors in section 42(h) of the Act to each Respondent and to each count independently. In this matter, the liability of the Fredericks and the remediation efforts of the Fredericks are much different than those of Respondent Skokie Valley Asphalt in each count.

Section 42 of the Act, 415 ILCS 5/42 (from Ch. 111 ½, par. 1042) addresses civil penalties for any person that violates any provision of the Act or any regulation adopted by the Board, *or any permit or term* or condition thereof or that violates any determination or order of

the Board pursuant to the Act. Paragraph (h) of Section 42 authorizes the Board to consider any matters of record in mitigation or aggravation of penalty. The section states:

> (h) In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3) or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> (1) the duration and gravity of the violation;
>
> (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
>
> (3) any economic benefit accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
>
> (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
>
> (5) the number, proximity in time, and gravity or previously adjudicated violations of this Act by the Respondent;
>
> (6) whether the respondents self-disclosed in accordance with subsection (I) of this Section, the non-compliance to the Agency; and
>
> (7) whether the respondent has agreed to undertake a "supplemental environmental project" which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the Respondent is not otherwise legally required to perform.

An independent application of these factors to each of the Counts and to the Respondents Richard and Edwin Frederick on each Count indicates that civil penalty to the Fredericks should be greatly reduced and well below the penalty imposed on Respondent Skokie Valley Asphalt.

COUNT I

In Count I, the Complainant accused the Respondents of making false statements in the DMRs it submitted to the IEPA under Skokie Valley Asphalt's NPDES permit. Since the required testing and report preparation were performed, the Respondents did not avoid any expense by submitting the wrong data. In fact, they incurred substantial additional cost in making the required correction and addressing the problem through their lawyers with the Attorney General's Office. There can be no argument that the Respondents received an economic benefit from this mistake.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count I. The duration of the alleged offense was only for one reporting period. The gravity is minor considering it was only a reporting matter that did not involve any harm to the public health or the environment. The Respondents acted diligently as soon as they were informed that a mistake had been made and they subsequently submitted the proper data. No economic benefit accrued as a result of the delay in compliance. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondents were not in a position to self-disclose the violation because they were not aware of the alleged violation until the IEPA made them aware of the mistake.

The Fredericks culpability is even less than that of Skokie Valley Asphalts because neither of the Fredericks were the permit holder and as such had no duty to comply with the permit. The Fredericks also have little possibility of a repeat offense because they are both retired and there is no reason to expect that they will have an NPDES permit in the future and cause a repeat offense

COUNT II

In Count II, the Complainant maintained the Respondents failed to make timely application for renewal of their NPDES permit. Skokie Valley Asphalt did not apply for the renewal because they were told by IEPA officials and other experts familiar with NPDES permits that they would not be required to have an individual permit for the site. Skokie Valley Asphalt did subsequently apply for the permit even though their remains an issue as to whether or not a permit is required.

Since the required application was subsequently completed and submitted, the Respondents did not avoid any expense by submitting the wrong data. In fact, they incurred substantial additional cost in trying to clarify this matter and in attempting to get the IEPA to issue the permit. To date, IEPA has not issued a permit renewal. There can be no argument that the Respondents received an economic benefit from this mistake.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count II. The duration of the alleged offense was only a delay of a few months from the date the application was supposed to be filed and the date it was actually filed. This period is much shorter than the number of years it is taking the IEPA to issue the actual NPDES permit. The gravity is minor considering it was only a reporting matter that did not involve any harm to the public health or the environment. Skokie Valley Asphalt continued to control discharges from the site as it had during the period the NPDES permit was in place. The Respondents acted diligently as soon as they realized that there was a question as to whether or not a permit was required and they subsequently submitted the proper application. No economic benefit accrued as a result of the delay in applying. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondents did in fact self -disclose this violation through its inquiries to the state concerning the need to file an application.

Again, because neither of the Fredericks were not the permit holder and as such had no duty to comply with the permit, the Fredericks culpability is even less than that of Skokie Valley Asphalt. No action by either Edwin or Richard Frederick would justify a civil penalty for either of them under this Count.

COUNT III

Despite the finding by the Board, Skokie Valley Asphalt was able to show that they had taken all the required samples, had the samples analyzed and prepared the required DMR reports. This information was submitted to the IEPA and the Attorney General's Office as soon as Skokie Valley Asphalt realized there was an issue involving their compliance with the reporting requirements. Based on the IEPA's previous record of mishandling DMRs and the lax procedures used in handling DMRs, there is a presumption that the DMRs were submitted by Skokie Valley Asphalt and lost by IEPA.

Since the required testing and report preparation were performed, Skokie Valley Asphalt did not avoid any expense by submitting the wrong data. In fact, they incurred substantial

additional cost in addressing the problem through their lawyers with the Attorney General's Office. There can be no argument that the Respondents received an economic benefit from this mistake.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count I. Even if it were somehow determined that Skokie Valley Asphalt failed to file some of the reports, the duration of the alleged offense only for a few reporting periods through the life of the permit. The gravity is minor considering it was only a reporting matter that did not involve any harm to the public health or the environment. It also should be noted that if, in fact, the Agency did not receive the DMR reports in a timely manner, it never notified the Respondents of this shortcoming. This lack of action must be interpreted as an indication that the Agency actually received the reports or thought the requirement to submit the report was not important. The Respondents acted diligently as soon as they were informed that DMRs were missing and they supplied copies of the report to the IEPA and the Attorney General's Office. No economic benefit accrued as a result of the loss of these reports. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondents were not in a position to self-disclose the violation because they were not aware of the alleged violation until the IEPA made them aware of the mistake.

Again, it is Skokie Valley Asphalt, as the permit holder, that should bear the majority of penalty for this Count. Not only did the Fredericks not have a duty to comply with the permit but they also were subject to additional expenses in having to deal with this issue with the Agency and the Attorney General's office in clarifying the issue..

COUNT IV

In Count IV, the Complainant maintain the Respondents allowed or caused the discharge of an oily substance to the Avon-Fremont Drainage Ditch. None of the Respondents caused or allowed the discharge *and none* of the Respondents were in a position to prevent the discharge. However, after potential sources of the discharge were identified, the Respondents Richard

Frederick and Edwin Frederick took extra ordinary efforts to address the problem. Because of the large expenditures to address the discharge and the elimination of the potential sources, the Fredericks did not avoid any expense by allegedly "allowing or causing" the discharge. In fact, the Fredericks incurred substantial additional cost on a voluntary basis, much of which they were not required to spend, in trying to ensure that the releases would stop. There can be no argument that the Fredericks received an economic benefit from this activity.

Consideration of the other factors delineated in Section 42 to the Fredericks also support a finding that no civil penalty is justified under Count IV against the Fredericks. The duration of the alleged offense was only for a short period and it has not reoccurred since the Fredericks took the lead in addressing the problem. This period is much shorter than the number of years the problem would have persisted if the IEPA's actions to address the problem had been the only action taken. The gravity is minor considering that all of the witnesses at trial stated that the main problem was a slight petroleum odor concern and a temporary sheen on a drainage ditch. The incident did not involve any lasting harm to the public health or the environment. Skokie Valley Asphalt continued to control discharges from the site as it had during the period the NPDES permit was in place. But it was the Fredericks who acted diligently as soon as they identified the potential source of the release and worked with the IEPA and the USEPA even before they thought that the release could possibly be coming from Skokie Valley Asphalt's property. No economic benefit accrued as a result of the release to any of the Respondents.

The site previously owned by Skokie Valley Asphalt has been sold to a third party, Skokie Valley Asphalt Co., Inc. has been dissolved and none of the Respondents presently are involved in the ownership or operation of the site, so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Fredericks did, in fact, self-disclose the potential source of the release immediately upon discovering the source. The Fredericks activities with respect to addressing the discharge to the Avon-Fremont Drainage Ditch and Grays Lake represent a de facto supplemental environmental project because Edwin Frederick and Richard Frederick took actions beyond the actions required to address the discharge from the Skokie Valley Asphalt site. The expenditures for this additional activity should be credited to Richard and Edwin Frederick against any possible penalty.

COUNT V

In Count V, the Complainant accused the Respondents of exceeding the discharge limits established in Skokie Valley Asphalt's NPDES permit. The record shows that these permit requirements could not be complied with during periods following intense storm events. Since the required testing and report preparation were performed, Skokie Valley Asphalt did not avoid any expense. Regardless of the effort and expenditures made by the Respondents, they would not have been able to avoid the exceedences. Therefore, they did not avoid any expense by not addressing the problem. In fact, they incurred substantial additional cost in addressing the problem through their lawyers with the Attorney General's Office. There can be no argument that the Respondents received an economic benefit from this event.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count V. The duration of the alleged offense was only for a few, isolated reporting periods following intense storm events. The gravity is minor considering it was only a reporting of slightly elevated suspended solids levels that do not result in any harm to the public health or the environment. The Respondents acted diligently as soon as they were aware of the problem by addressing the problem with their consulting environmental engineer, but even acting diligently to investigate the problem, there was nothing the Respondents could do to alleviate the potential for slight exceedences from the poorly established standard. No economic benefit accrued as a result of a delay in compliance. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondent Skokie valley Asphalt self-disclosed the violations through its DMR reports. The other Respondents were not involved in the activities involved in this Count V and therefore had no duty to self report.

As previously argued, the Fredericks culpability is even less than that of Skokie Valley Asphalts because neither of the Fredericks were the permit holder and as such had no duty to comply with the permit. As a result the civil penalty applied to the Fredericks should be less than that applied to the respondent Skokie Valley Asphalt.

The application of the 42(h) factors to each Count individually highlights the lack of damage done under each of the Counts and also clarifies that the liability of the Fredericks was minor in each situation. In light of this information, the civil penalties imposed in this matter should be reduced accordingly.

While the Board discusses reducing the civil penalty that they adopted from the Complainant to offset the expense incurred by Edwin Frederick and Richard Frederick, the reduction does not appear to have been properly applied if it was applied at all. First, the Board only recognizes an expenditure of $150,000 by the Respondents in environmental work on the site. Id. In fact, the record shows that $150,000 was the amount that was paid to Mr. Huff and his firm alone. (Tr at 467-468). The actual expenditures to address the release to the drainage ditch is in excess of $200,000 and these expenses are still being incurred.

Second, the Board fails to recognize that these expenditures were made by the Respondents Edwin and Richard Frederick individually and not by, or on behalf of, the Respondent Skokie Valley Asphalt. By the time the effort and expenditures for addressing the release from to the Avon-Freeman Drainage Ditch were needed, Skokie Valley was dissolved and no longer existed. It was the Fredericks that made the agreements with the US EPA to address the source of the release and eliminate the threat. Tr at 227-228 and Comp Ex 25. This effort was taken on a voluntary before the source of the contaminant had been identified.

Because the Fredericks were the Respondents performed the remediation and spent the necessary money, it is the Fredericks that should be granted any offset from the civil penalties resulting from the remediation effort. It is extremely difficult to follow the logic in determining the final civil penalty used by the Board. Assuming the Board gave the Respondents dollar-for dollar credit for the remediation effort that the Board mistakenly stated was $150,000 and the final penalty assessed was $153,000, it could be concluded that the penalty before offsets was $303,000. Absent a clear decision form the Board, this value of $303,000 will be used as a basis for further evaluation even though this penalty amount appears to be extremely harsh in light of the foregoing section 33 and section 42 analysis.

There is no basis for making the civil penalty joint and several. Each of the respondents had different responsibilities and culpabilities. Again, because the Board did not properly analyze the independent liabilities, we are limited in assigning the responsibilities. While it is obvious from the record that the culpabilities of the Fredericks was less than that of Skokie Valley Asphalt, we will adopt a conservative assumptions that each of the Respondents were equally liable and therefore should each be assessed a civil penalty of $101,000. At this point the offsets should be applied but only to the Respondents Edwin Frederick and Richard Frederick. Assigning half of the $150,000 offset to each of the Fredericks would reduce their civil penalties to $26,00 each while retaining Skokie Valley civil penalty at $101,000. This assignment of the civil penalty is consistent with the proper application of section 42(h).

Wherefore, the Respondents respectfully request the Board reconsider its decision and penalties in this matter before the Board and stay the date of the final decision until this Motion for reconsideration has been fully considered.

Respectfully submitted,

David S. O'Neill

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"EXHIBIT A"

Mitch —
enjoy
We're probably
not supposed
to see the
crossed-out
stuff!
-Joel

ILLINOIS POLLUTION CONTROL BOARD
March 20, 2003

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):

In this water enforcement action, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion to deem facts admitted and for summary judgment as to respondents Edwin L. Frederick, Jr. and Richard J. Frederick (collectively the Fredericks). The immediate dispute centers solely on the timely filing of pleadings. The Board denies the People's motion and directs this case to proceed to hearing.

PROCEDURAL HISTORY

On July 26, 2002, the People filed a second amended complaint. That complaint added Edwin Frederick and Richard Frederick as respondents. Furthermore, the second amended complaint alleged that the Fredericks violated Sections 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f) (2000)), as well as Sections 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a) of the Board's regulations. Moreover, the complaint alleged that the Fredericks falsified discharge monitoring reports, submitted a late application for a National Pollutant Discharge Elimination System (NPDES) permit, failed to comply with sampling and reporting requirements in their NPDES permits, discharged oil into a drainage ditch, and violated NPDES permit effluent limits.

The Fredericks filed an untimely motion to strike the People's second amended complaint on September 25, 2002. On October 1, 2002, the People filed their response to the Fredericks' motion together with a motion for leave to file a second amended complaint. On October 17, 2002, the Board denied the motion to strike as moot and accepted the People's second amended complaint. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Oct. 17, 2002). The final sentence of that order read, "The respondents may file an answer as provided in Section

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Respondents' Motion for Reconsideration by hand delivery on December 5, 2007, upon the following party:

Paula Becker Wheeler, 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 5th

day of December, 2007

"OFFICIAL SEAL"
AGNIESZKA SCIOG
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 10-18-2010

Agnieszka Scog

Notary Public