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MAR 30 2006

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

Complainant,)

v.)

SKOKIE VALLEY ASPHALT CO., INC.,)
an Illinois Corporation, EDWIN L. FREDERICK,)
JR., Individually and as Owner and President of)
Skokie Valley Asphalt Co., Inc., and)
RICHARD J. FREDERICK, Individually)
and as Owner and Vice President of Skokie)
Valley Asphalt Co., Inc.,)

Respondents.)

PCB 96-98
(Enforcement – RCRA)


NOTICE OF MOTION

TO: Mr. David S. O'Neill, Esq.
Mr. Michael B. Jawgiel, Esq.
5487 North Milwaukee Avenue
Chicago, Illinois 60630-1249

Ms. Carol Webb, Hearing Officer
Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that I have today filed **Complainant's Motion for Final Order**, with the Office of the Clerk of the Illinois Pollution Control Board, true and correct copies of which are attached hereto and herewith served upon you.

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

BY: 
MICHAEL C. PARTEE
Assistant Attorney General
Environmental Bureau/North
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601
Tel: 312.814.2069
Fax: 312.814.2347
E-Mail: mpartee@atg.state.il.us

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COMPLAINANT'S MOTION FOR FINAL ORDER

Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People"), by LISA MADIGAN, Attorney General of the State of Illinois, hereby moves the Board, pursuant to 35 Ill. Adm. Code 101.516, for a final order granting the People's September 17, 2004 verified petition for attorneys' fees and costs, as modified by the Board's April 7, 2005 Order. In support of this Motion, the People state and allege as follows:

RELEVANT BACKGROUND

1. On September 2, 2004, following a hearing on all issues on October 30 and 31, 2003, the Board entered an Order finding willful, knowing or repeated violations of the Illinois Environmental Protection Act ("Act") and Board rules, assessing a \$153,000 civil penalty, and assessing the People's attorneys' fees and costs against the Respondents. The Board further directed the People to file a petition for attorneys' fees and costs.

2. On September 17, 2004, the People then filed a verified petition for \$134,250.00 in attorneys' fees and \$3,482.84 in costs ("Fee Petition"), which reflects only a portion of the People's fees and costs in this case. A copy of the People's Fee Petition is attached hereto as Exhibit A.

3. The Fee Petition was verified with the affidavits of Assistant Attorneys General ("AAGs") Mitchell Cohen, Joel Sternstein and Bernard Murphy, whose fees were included in the Fee Petition. Each service included in the Fee Petition is listed with the corresponding specific time allotment. (*See* Fee Petition at Exhs. A, B and C.) The People's costs were also itemized in their Fee Petition.

4. On September 28, 2004, Respondents filed their "Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs" in which they disputed AAG Sternstein's fees based on a tenuous argument involving his prior Board employment, made desperate and unfounded allegations against the People's attorneys, and stridently demanded discovery, including the depositions of "Members and employees of the Illinois Pollution Control Board."

5. On October 21, 2004, the Board stayed the Respondents' payment of the \$153,000 civil penalty pending resolution of the dispute over the People's Fee Petition.

6. On December 16, 2004, the Board ruled that the stay of Respondents' \$153,000 civil penalty payment would remain in effect until the dispute over the People's Fee Petition was resolved through a final order. The Board further ruled that "The Board will not hold any hearings on the issue of attorney's fees and costs, but will allow the respondents additional time to respond." (Dec. 16, 2004 Order at 3 (underline added).)

7. On January 10, 2005, despite the Board's clear Order to the contrary, the Respondents did not respond, but instead moved the Board for a discovery schedule and hearing on the People's Fee Petition.

8. On January 18, 2005, the People responded to Respondents' motion for a discovery schedule and hearing by objecting to the need for any discovery or hearing on a verified fee petition.

9. On April 7, 2005, the Board disallowed AAG Sternstein's fees of \$33,675.00 (224.5 hours at \$150.00/hour) and granted Respondents' request for discovery regarding the Fee Petition for the remaining \$100,575.00 in fees (reflecting a deduction of \$33,675.00 for AAG Sternstein's disallowed fees) and \$3,482.84 in costs, but ordered that discovery shall be "limited," that "the parties are not to address [AAG Sternstein's disallowed fees] in conducting discovery" and that "any pleading by either party not designed to further a speedy and ultimate resolution of this case will not be tolerated by the hearing officer or the Board." (April 7, 2005 Order at 1 and 4 (underlines added).)

10. On April 25, 2005, despite the clear limitations placed on discovery by the Board, Respondents served the People with voluminous discovery requests, including 43 Requests to Admit Facts, 50 Interrogatories including subparts, 24 Document Requests and two deposition notices.¹ Respondents' voluminous discovery requests not only addressed AAG Sternstein's fees and costs, which were previously disallowed and were not to be addressed pursuant to the Board's April 7, 2005 Order, but contained further *ad hominem* attacks on the People's attorneys

¹ Respondents' discovery requests regarding the People's Fee Petition are significantly more voluminous than the sum of Respondents' discovery prior to the hearing on all issues in this case, which consisted of 16 Interrogatories and 14 Document Requests. Even measured against their own prior discovery in this case, Respondents' recent discovery requests cannot be considered "limited."

and sought highly inappropriate information (*e.g.*, the People's attorneys' take home pay), for which Respondents never adequately explained the need.

11. On May 24, 2005, the People timely responded to the Respondents' voluminous discovery requests. As part of their responses, the People provided Respondents with all available attorney time records, receipts for costs, and *curriculum vitae* for AAGs involved in this case. Copies of this back-up documentation is attached hereto as Exhibit B.

12. After receiving this back-up documentation, Respondents' attorneys ceased all communications with the People's attorneys. Respondents then commenced a campaign of delay by filing eight motions to strike or quash various discovery items, all of which were denied by the Board or Hearing Officer. (*See* Respondents' motions filed on July 6, 2005 (three motions to strike), August 15, 2005 (one motion to strike), December 14, 2005 (one motion to quash), and January 9, 2006 (two motions to strike).) Throughout, the People's attorneys have, in full and good faith, attempted to informally resolve discovery disputes with Respondents, but again, Respondents' attorneys have refused to communicate with the People's attorneys. (*See* People's Rule 201(k) Letters, dated May 24, 2005, June 14, 2005, Dec. 15, 2005, and Feb. 16, 2006 (Exhibit C hereto).)

13. At the same time, Respondents have refused to respond to the People's limited discovery requests.

14. On February 8, 2006, the Hearing Officer entered a protective order requiring that "respondents' attorneys must relate the measures taken to resolve the problem with complainant's attorneys before the filing of the motion." (Feb. 8, 2006 Order at 3.)

15. Respondents then unilaterally filed an interlocutory "Appeal" of the Hearing Officer's February 8, 2006 Order, which is currently pending before the Board. As part and

parcel of their Appeal, and contrary to Rule 101.502(c) of the Board's Procedural Rules (Motions Directed to the Hearing Officer), Respondents have taken the position that their own dispute of the People's Fee Petition is stayed. (Rule 101.502(c) provides that the appeal to the Board of a hearing officer order does not stay a proceeding absent a Board Order, and that all hearing officer orders will remain in effect during the pendency of any appeal to the Board.)

16. As of today's date, two and a half years after the hearing on all issues in October 2003 and one year after the Board authorized limited discovery regarding the People's Fee Petition, a final order has not yet been entered in this case due to Respondents' unsubstantiated dispute of the Fee Petition. Despite the benefit of an entire year's worth of discovery on the remaining \$100,575.00 in fees and \$3,482.84 in costs requested in the People's Fee Petition, Respondents have failed to specifically identify a single hour of attorney time or a single cost that was excessive for the corresponding service performed, nor will they because that would, of course, allow the Board to decide this dispute, thereby resulting in a final order.

APPLICABLE LEGAL STANDARDS

17. Section 42(f) of the Act, 415 ILCS 5/42(f) (2004), provides, in relevant part, as follows:

. . . Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board . . . may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the . . . Attorney General in a case where he has prevailed against a person who has committed a wilful, knowing or repeated violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.

18. On September 2, 2004, after a hearing on all issues, the Board entered an Order finding, in part, that Respondents committed willful, knowing or repeated violations of the Act

and Board rules and assessing the People's attorneys' fees and costs against the Respondents. (Sept. 2, 2004 Order at 22-24.)

19. On April 7, 2005, the Board set forth the general standard for the reasonableness of a petition for attorneys' fees and costs (April 7, 2005 Order at 3-4):

In determining this reasonableness, the Board will be guided by the factors set out in long-established precedent. The Board will consider, among other factors, [a] the nature of the cause and the novelty and difficulty of the questions at issue, [b] the amount and importance of the subject matter, [c] the degree of responsibility involved in the management of the cause, [d] the time and labor required, [e] the usual and customary charge in the community, and [f] the benefits resulting to the client.

20. In the context of environmental enforcement actions before the Board pursuant to the Act, it is also well-established that the usual and customary charge for AAGs is \$120.00 to \$150.00 per hour, with rates in recent cases assessed at \$150.00 per hour. *See, e.g., People v. J & F Hauling, Inc.*, 02-21, 2003 WL 21129678, at *2 (May 1, 2003) (finding AAG's rate of \$150.00 per hour to be reasonable); *People v. D'Angelo Enterprises Inc.*, PCB 97-66, 2002 WL 31545432, at *2-3 (Nov. 7, 2002) (finding AAG's rate of \$120.00 per hour to be reasonable); *People v. Panhandle Eastern Pipe Line Co.*, PCB 99-191, 2001 WL 1509515, at *33 (Nov. 15, 2001) (finding AAG's rate of \$120.00 per hour to be reasonable); *People v. Spirco Environmental, Inc.*, PCB 97-203, 1999 WL 304591, at *1 (May 6, 1999) (finding AAG's rate of \$120.00 per hour to be reasonable).

THE BOARD SHOULD ISSUE A FINAL ORDER

21. The People's Fee Petition contains sworn affidavits and itemized costs, and is supported by extensive back-up documentation. Despite the limitations placed on discovery by the Board, Respondents served voluminous discovery requests on the People to which the People

responded and, at the same time, Respondents refused to answer any questions regarding their own fees and costs.

22. Allowing discovery on a petition for attorneys' fees and costs is unprecedented. The People were unable to locate a Board decision in any prior case, including those cited in paragraph 20 above, where a respondent was allowed to conduct discovery regarding a fee petition. Moreover, the People were unable to locate any precedent, in any fora where a respondent or defendant was allowed an entire course of voluminous written and oral discovery, followed by a hearing, in order to challenge a fee petition.

23. As of today's date, a year after the Board authorized a speedy course of limited discovery and a hearing on Respondents' dispute of the People's Fee Petition, Respondents have not yet identified a single hour of attorney time or single cost improperly included in the \$100,575.00 in fees (reflecting a deduction of \$33,675.00 for AAG Sternstein's disallowed fees) and \$3,482.84 in costs remaining in the People's Fee Petition.

24. Instead, Respondents have used their unprecedented discovery opportunity for the purpose of delaying entry of a final order.

25. The People's Fee Petition is supported by affidavits and documentation, Respondents have not filed any counter-affidavits and, based on the following factors, the People's Fee Petition is reasonable as a matter of law and the Board should enter a final order granting the People \$100,575.00 in fees and \$3,482.84 in costs.

The People's Fee Petition Should Be Granted Based on the Nature of the Cause and the Novelty and Difficulty of the Questions at Issue, and the Amount and Importance of the Subject Matter

26. Fundamentally, Section 42(f) of the Act includes no limitation on the Attorney General's fees and costs based on the nature of the cause and the novelty and difficulty of the

questions at issue because all fee petitions pursuant to Section 42(f), including the Fee Petition in the present case, involve cases of the same nature. Notwithstanding, the issues in the present case were not necessarily novel, but were difficult relative to other cases involving the Act. The present case involved not only violations of the general prohibition against water pollution under Section 12(a) of the Act, 415 ILCS 5/12(a), but also involved numerous statutory and regulatory violations of the National Pollutant Discharge Elimination System Permit Program over a period of time measured in years. (Sept. 2, 2004 Order at 19 and 24.) The present case also involved administrative law and procedure issues, expert testimony and evidentiary issues at hearing, and numerous and lengthy legal briefs by both parties, including the People's 48 page post-trial brief filed on January 15, 2004. Furthermore, the Board's decision after the October 2003 hearing necessitated a 24-page Board Order. (See Sept. 2, 2004 Order.)

27. In terms of the amount of subject matter, the present case involved numerous statutory and regulatory violations over a period of time measured in years. (Sept 2, 2004 Order at 19.)

28. This case also involved important subject matter. The public has a right to healthy and safe environment. "By enactment of the Environmental Protection Act the General Assembly declared the public policy of the State of Illinois with reference to water pollution, and subsequently the public policy of the State, by adoption of the 1970 Constitution, was declared to be that every person has an inherent right to a clean and healthful environment." *Meadowlark Farms, Inc. v. Illinois Pollution Control Bd.*, 17 Ill.App.3d 851, 856, 308 N.E.2d 829, 832 (Ill. App. 5th Dist. 1974). A more important example of a public right cannot be imagined.

The People's Fee Petition Should Be Granted Based on the Degree of Responsibility Involved in the Management of the Cause

29. AAGs assumed the responsibility for preparation and trial of this case and there is no potentially-duplicative supervisory or management level attorney oversight time requested.

The People's Fee Petition Should Be Granted Based on the Time and Labor Required

30. The remaining \$100,575.00 in requested fees is documented, supported with sworn affidavits, and represents only a portion of the People's actual time and labor required to resolve this case.

31. The affidavits and documentation in support of the People's Fee Petition adequately supports the fees sought and Respondents have not filed any counter-affidavits specifically identifying any excessive fees for the corresponding service performed.

32. The People's time and labor required to resolve this case was also the direct result of Respondents' own decision to actively oppose the People's case.

33. Furthermore, as mentioned above, the People's Fee Petition only includes a portion of the actual time and labor required to resolve this case. First, AAG's Sternstein's fees were disallowed. AAG Sternstein was responsible for, and performed numerous tasks in, the preparation of this case for hearing. His \$33,675.00 in fees will not be assessed against Respondents according to the Board's April 7, 2005 Order. Second, and perhaps more significantly, the Complaint in this case was filed on November 3, 1995, but the earliest fees or costs included in the People's Fee Petition are AAG Cohen's fees beginning on May 29, 2002. "Nothing in the record indicates that the People were not diligent in pursuing their claim." (Sept. 2, 2004 Order at 8.) However, six out of the eight years that the People spent prosecuting this case are not included in their Fee Petition.

34. Put in perspective, the People's Fee Petition only covers 25% of the years spent prosecuting case (approximately two out of eight years are included in the Fee Petition) and, as to the two years covered by the Fee Petition, only 75% of the People's attorneys' fees are included (\$100,575.00 out of \$134,250.00, reflecting a reduction of \$33,675.00 for disallowance of AAG Sternstein's fees).

35. Held to a standard of reasonableness, the time and labor requested in the People's Fee Petition is reasonable because it is accurate, documented, supported by affidavits, and only represents a fraction of the actual time and labor required to resolve this case.

The People's Fee Petition Should Be Granted Based on the Usual and Customary Charge in the Community and the Benefits Resulting to the Client

36. This case was handled by experienced attorneys for the People. At the time of the hearing in October 2003, AAG Cohen had about 14 years of experience as a lawyer, about 12 years of which was spent as a prosecutor, and AAG Murphy had about 12 years of experience as a lawyer, about eight years of which was spent as a prosecutor. (*See curriculum vitae* at Exhibit B hereto.)

37. Moreover, even without consideration of the annual increases in billing rates for environmental lawyers in downtown Chicago, the \$150.00 per hour rate requested in the People's Fee Petition is supported by the Board's prior decisions in *J & F Hauling, Inc.*, *D'Angelo Enterprises Inc.*, *Panhandle Eastern Pipe Line Co.*, and *Spirco Environmental, Inc.*

38. Therefore, the \$150.00 per hour rate requested in the People's Fee Petition is reasonable, and the market would support an even higher rate.

39. In terms of the benefits resulting to the People, the People prevailed in this case and the purpose of the Act will be served when a final order is entered.

Lastly, the People's Fee Petition Should Be Granted Because Respondents Have Failed Over the Last Year to Specifically Identify Any Excessive Fees or Costs Included Therein

40. In addition to the non-exclusive factors set forth by the Board for determining the reasonableness of the People's Fee Petition (*See* April 7, 2005 Order at 3-4), the Board should also consider that the Respondents have had an entire year and an unprecedented discovery opportunity to specifically identify any attorney time or cost that was excessive for the corresponding service performed, but they failed to do so because that would, of course, allow the Board to decide this dispute, thereby resulting in a final order.

41. Respondents also refused to answer any questions regarding their own fees and costs. Instead, Respondents have used this proceeding for the sole purpose of delaying the entry of a final order.

42. Allowed to continue, at some point in the not too distant future, Respondents will force the People to incur more attorneys' fees and costs in obtaining the relief requested in their Fee Petition than are actually sought in the Fee Petition itself, which is abusive and defeats the purpose of Section 42(f) of the Act.

CONCLUSION

43. The People's Fee Petition is supported by sworn affidavits, adequate documentation and is reasonable based on the factors set forth by the Board. It is also reasonable in light of the extraordinary length of time and scope of discovery afforded Respondents and the fact that they have failed to specifically identify any attorney time or costs that are excessive relative to the corresponding service performed.

44. Respondents have used their unprecedented opportunity to create endless discovery disputes and, thereby, delay entry of a final order in this case.

45. Because Respondents have failed to substantiate their dispute of the People's Fee Petition, the Board should, as a matter of law, enter a final order assessing \$100,575.00 in fees and \$3,482.84 in costs against Respondents' and assessing any further relief that is fair and just under the circumstances.

46. If for any reason, the Board does not grant this Motion, the People respectfully request that the Board direct the Hearing Officer to schedule a final hearing to occur no later than 60 days after deciding this Motion.

WHEREFORE, the People respectfully request that the Board enter a final order assessing \$100,575.00 in fees and \$3,482.84 in costs against Respondents' and for any further relief that is fair and just under the circumstances. If the Board does not enter a final order based on this Motion, the People respectfully request that the Board direct the Hearing Officer to set a final hearing as soon as possible, and not later than 60 days after a decision on this Motion.

Respectfully submitted,

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

BY: 

MICHAEL C. PARTEE
Assistant Attorney General
Environmental Bureau/North
188 West Randolph, Suite 2000
Chicago, Illinois 60601
Tel: 312.814.2069
Fax: 312.814.2347