

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
 by LISA MADIGAN, Attorney General )  
 of the State of Illinois, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 SKOKIE VALLEY ASPHALT CO., INC., )  
 an Illinois Corporation, EDWIN L. FREDERICK, )  
 JR., Individually and as Owner and President of )  
 Skokie Valley Asphalt Co., Inc., and )  
 RICHARD J. FREDERICK, Individually )  
 and as Owner and Vice President of Skokie )  
 Valley Asphalt Co., Inc., )  
 )  
 Respondents. )

PCB 96-98  
 (Enforcement – RCRA)

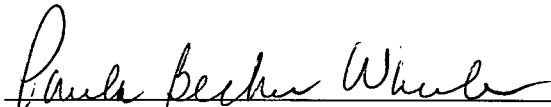
**NOTICE OF FILING**

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

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

PLEASE TAKE NOTICE that today I caused to be filed **Complainant's Argument in Support of the People of the State of Illinois' Fees and Costs Petition** with the Office of the Clerk of the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and herewith served upon you.

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

BY:   
 PAULA BECKER WHEELER  
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Dated: January 19, 2007

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an Illinois Corporation, EDWIN L. FREDERICK,	)	
JR., Individually and as Owner and President of	)	
Skokie Valley Asphalt Co., Inc., and	)	
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and as Owner and Vice President of Skokie	)	
Valley Asphalt Co., Inc.,	)	
	)	
Respondents.	)	

**ARGUMENT IN SUPPORT OF THE PEOPLE OF THE STATE OF ILLINOIS’  
ATTORNEYS’ FEES AND COST PETITION**

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS (“People”), by LISA MADIGAN, Attorney General of the State of Illinois, and pursuant to Hearing Officer Webb’s December 14, 2006 Order, and the Board’s September 7, 2006 Order, presents its Closing Argument and Post Hearing Brief related to attorneys’ fees and costs. The People’s Closing Argument and Post Hearing Brief relies on the record made throughout the litigation of this case beginning in 1995 and continuing through this date. The record includes, but is not limited to, the hearing transcripts and exhibits admitted into evidence on October 30 and 31, 2003, and December 12, 2006. The People specifically reserve the right to raise any issue for appeal preserved in the record at hearing.

**CASE HISTORY**

Respondents repeatedly and knowingly committed violations of the Illinois Environmental Protection Act (“the Act”), and its rules and regulations. Beginning in 1988,

Respondents repeatedly and knowingly failed to comply with their National Pollutant Discharge Elimination System ("NPDES") permit, failed to submit Discharge Monitoring Reports ("DMR's"), and filed false documents with the Illinois Environmental Protection Agency ("Illinois EPA"). In 1995, Respondents hindered a water pollution investigation by failing to disclose the fact that they had unregistered underground storage tanks on their property. As a result, this cause of action was filed in 1995. Since then, several Assistant Attorneys General have been assigned to litigate this case.

On September 2, 2004, following a hearing on all issues held on October 30 and 31, 2003, the Board entered an Order finding willful, knowing or repeated violations of the Illinois Act and Board rules, assessing a \$153,000 civil penalty, and further 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. On September 17, 2004, the People filed a verified petition for attorneys' fees and costs ("Fee Petition"), as directed by the Board. On April 7, 2005, over the People's objection, the Board disallowed AAG Sternstein's fees reducing the amount by \$33,675.00, leaving a balance of \$100,575.00 in fees and \$3,482.84 in costs.

The Fee Petition filed by the People only covers Assistant Attorney General ("AAG") time spent on the case from May 2002 through September 15, 2004. (Comp. Exh. 100.) The Fee Petition does not include AAG time spent litigating this case before May 2002, or the time AAGs' Cohen, Partee and Wheeler have spent litigating this case since September 15, 2004. The Fee Petition was verified with the affidavits of AAGs' Cohen, Murphy, and Sternstein. (Comp. Exh. 100.) The date each AAG worked on this case is listed with a brief description of the work performed followed by a time allotment. The People's costs were also itemized in their Fee Petition.

On December 12, 2006, more than three years after the October 2003 hearing on all issues, a Hearing was held to address the reasonableness of the People's attorneys' fees and costs requested in the Fee Petition.

### THE BOARD'S AUTHORITY TO AWARD FEES AND COSTS

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

... 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.

In this case, the Board found that Respondents committed willful, knowing or repeated violations of the Act and Board rules, and awarded the People attorneys' fees and costs against the Respondents. (Sept. 2, 2004 Order at 22-24.)

On April 7, 2005, the Board set forth, for this case, the general standard for the reasonableness of the People's 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.

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 at this time for AAGs is at least \$150.00 per hour. The Board established this rate in 2003. *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); *See also 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 older cases cited above list \$120.00 per hour, while in 2003, the amount found to be reasonable is \$150.00. Since this case is being litigated well past 2003, the Board should consider the higher hourly rate appropriate.

### ARGUMENT

In its April 7, 2005 Order, the Board stated that this pending matter is limited solely to issues regarding the reasonableness of the People's attorneys' fees and costs. (Apr. 7, 2005 Order at 3.) The Board also stated in that same Order that this matter had been pending before the Board for approximately eight years at that time and all pleadings should be designed to further a speedy and ultimate resolution to this case (Apr. 7, 2005 Order at 4.) It is now almost two years later, and this matter has achieved no finality. Thus, in keeping with the Board's expressed directive, this Brief will attempt to promote a speedy and ultimate resolution and not focus on issues unrelated to the reasonableness of the fees and costs.

#### A. The People's Fee Petition Should Be Granted Because Respondents Have Failed Specifically to Identify Any Excessive Fees or Costs Included Therein

The Respondents presented one witness at the hearing, apparently to give her opinion about what is reasonable in the community. While the Hearing Officer found her credible, her testimony was largely irrelevant and, if relevant in any part, was based on inaccurate or insufficient underlying assumptions.

Ms. Stonich is an attorney at CNA Insurance, who reviews insurance claims and bills for attorneys contracted to represent the insurance company. (Tr. at 260-261.) She was not qualified as an expert in any way, and stated that she had never been deposed as an expert, had

not testified as an expert, and had never prepared an expert report. (Tr. at 300-302.) She herself has never taken a deposition. (Tr. at 300.) Her only private practice legal experience was for six months to a year in 1987 at the Jeffery Leving Law Firm. (Tr. at 303). Her trial and hearing experience, if any, is minimal. She presented no resume or curriculum vitae. She also stated that she knows nothing about the underlying case upon which the Fee Petition is based. She never met the Respondents, never visited the site, does not know the subject matter other than it involves pollution, and only glanced at one of the file boxes from the underlying case. (Tr. at 317-319.)

More importantly in terms of the reasonableness of the time and labor involved in the underlying case, Ms. Stonich does not know how many documents were exchanged in discovery, how many motions were filed or responded to, or how many witnesses or trial exhibits were introduced at the hearing. (Tr. at 317-319.) Clearly, her opinion is not based on any information whatsoever regarding the underlying case in which the fees and costs were incurred. Because of her lack of experience, and her lack of knowledge about the underlying case, her testimony has no relevant or reliable basis and should be disregarded in its entirety.

Furthermore, Ms. Stonich's report is based on billing "guidelines" in private practice, none of which are applicable to a government legal office generally or to the Attorney General's Office particularly. She admitted that she was not aware if any of the "guidelines" that she considered and on which her report is based, were ever applied by the Board in awarding fees. (Tr. at 345.) She also admitted that her report is not based on any Board or Court precedent, and that the "guidelines" do not supersede any Board or Court precedent. (Tr. at 337, 345-346.)

Ms. Stonich further stated that she made factual and legal assumptions when applying the "guidelines" to the Fee Petition in the case at hand. (Tr. at 337-338.) For instance, in her

opinion, unless there is some statute or regulation or guideline or policy that allows an Assistant Attorney General to bill a certain amount and gives notice of that amount, then the Assistant Attorney General should only be able to bill what he or she is paid on an hourly basis. (Tr. at 346-347.) Otherwise, she opined, the Attorney General's Office would receive a windfall. (Tr. at 347.) This statement completely ignores the fact that this is an award of attorneys' fees and costs for willful, knowing or repeated violations of the law by the Respondents, not a contractual matter between attorney and client. She does admit however, that the Attorney General's Office has significant overhead costs not paid as compensation to attorneys, and that she is not aware of any law firm that does not build such overhead costs into its hourly rates. (Tr. at 347-349.)

She also assumed that Mr. Cohen did not work from home and that our office did no copying in-house, (Tr. at p.338), neither of which is accurate. (Tr. at 140, 188, 59.) Mr. Cohen testified that on one of the days immediately prior to the original hearing, October 28, 2003, he spent twelve hours working on the case, including time that was based on work at home. The parking receipt submitted for that date only covers the time at the office. Because the parking receipt was for less time than Mr. Cohen's hours recorded working on the case that day, Ms. Stonich assumed his hours were incorrect, instead of considering that he did work from home. (Resp. Exh. 102). With respect to the copying, she assumed that since the costs submitted included a Kinko's bill, that no copying was done in-house. (Tr. at 338.)

Ms. Stonich also testified at length about the time for travel and typing done by AAGs' Cohen and Murphy, stating that such time should not be billed. (Tr. at 298.) This testimony is suspect because she admitted herself that she similarly is recording such time to submit to the attorneys for the Respondents in this same case. (Tr. at 322.) She was billing more than 63 hours up to the time of her deposition, (Tr. at 321), but she could not estimate how much time she

actually spent drafting her report. (Tr. at 321.) The 63 hours of time recorded by Ms. Stonich before the date of her deposition was essentially spent preparing her ten-page report and preparing for her deposition. Clearly, this amount of time should be contrasted with Mr. Cohen's 104.5 hours spent for trial preparation. (Tr. at 287.) His preparation was for a two-day hearing with six witnesses, and 43 exhibits including voluminous technical reports, purchase agreements and other documents submitted a few days before the hearing. (Tr. at 32.)

In her position, Ms. Stonich stated that she requires extensive documentation from attorneys at CNA for billing. (Tr. at 265.) Despite that statement, she herself started working on this matter for free per her usual practice. (Tr. at 319-320.) She admitted doing at least some of her own typing, (Tr. at 337), and keeping track of her time spent traveling. (Tr. at 322.) At some point, because it was taking so much more time than she thought, she reached an informal arrangement with Respondents' Attorney, Mr. O'Neill, whereby she would somehow get paid some amount, at some time in the future for her now extensive time spent on the case. (Tr. at 319-320.) Apparently, Ms. Stonich would have the Attorney General's Office do as she says, but not as she does.

In short, Ms. Stonich's testimony and report explaining her opinion are not helpful to the Board because they lack any specificity to this case, and have no relevance to an award of attorneys' fees and costs to a government office prosecuting violations of State of Illinois statutes and regulations. Her testimony should be disregarded in its entirety.

With regard to the costs submitted by the People in the Fee Petition, Mr. Cohen was extensively cross-examined concerning the fact that an initial affidavit for costs was filed and then amended by the filing of a second one. Mr. Cohen clearly stated that the second affidavit was filed because of the inability to find all of the supporting documentation for the first one.



(Tr. at 179-182.) The change was made in a timely fashion and nothing was withheld from the Board. Thus, the costs, which were reduced considerably by the second affidavit, are reasonable and should be awarded as stated in the Fee Petition.

B. 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

Pursuant to the Board's April 7, 2005 Order, the initial factors to consider in determining the reasonableness of the Fee Petition include the nature of the cause and the novelty and difficulty of the questions at issue, and the amount and importance of the subject matter.

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 somewhat novel since Respondents filed false documents with the Illinois EPA, and failed to cooperate in the People's water pollution investigation, and were difficult relative to other cases involving the Act. This case not only involved water pollution, but also numerous statutory and regulatory violations of the NPDES Program over a period of more than ten years. (Sept. 2, 2004 Order at 19 and 24.) The litigation included expert witnesses and reports, evidentiary issues, and numerous, 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. (Sept. 2, 2004 Order.)

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), including the atypical situation of repeated, knowing and willful violations.

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. In light of the difficulty of the case and the importance of the subject matter – actual or potential harm to the public health and the environment – the People’s request for fees and costs should be upheld.

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

Several different AAGs assumed the responsibility for preparing and litigating this ten year old case and there is no potentially duplicative supervisory or management level attorney oversight time requested.

D. The People’s Fee Petition Should Be Granted Based on the Time and Labor Required

The remaining \$100,575.00 in requested fees is documented, supported with testimony and sworn affidavits, and represents only a portion of the People’s actual time and labor required to resolve this case. The Hearing Officer’s Report stated that three witnesses testified, and that credibility is not an issue in this matter. (Dec. 14, 2006 Hearing Report at 1.)

The testimony, affidavits, and documentation in support of the People’s Fee Petition adequately validate the requested fees. Mr. Cohen and Mr. Murphy, the only attorneys whose time is sought in the Fee Petition, both testified at the Hearing. They stated, with one exception,

that they kept contemporaneous time records and rounded down their hours. (Tr. at 50 .) Mr. Murphy, who was assigned to the case shortly before the hearing date, reconstructed his time records for his first three weeks of his time on the case. He testified that he was extremely busy at the time, but did create a conservative estimate of his time after about three weeks on the case. (Tr. at 197-199.)

The time entries had brief but adequate descriptions of the work involved. (Comp. Exh. 100 and 101.) The entries at the time of the Hearing on December 12, 2006, were approximately three to five years old. Any testimony lacking details of work performed on a specific day is entirely understandable after the lengthy passage of time. Most importantly, the Fee Petition identified the attorney requesting time, identified the time spent on the particular day of the entry, identified the subject matter of the work performed that day, and identified an hourly rate.

The Board should also note the entire record of this matter which has now lasted more than a decade. 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 pursuant to the Board's April 7, 2005 Order. Second, and 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. In addition, more than two years have elapsed since September 16, 2004, the last date on the Petition, and none of this time is included either.

Put in perspective, the People's Fee Petition only covers 25% of the time spent prosecuting the environmental 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).

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 credible testimony and affidavits, and only represents a fraction of the actual time and labor required to resolve this now decade old case.

E. 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

This case was handled by experienced attorneys for the People. At the time of the hearing in October 2003, AAG Cohen had approximately 14 years of experience as a lawyer, about 12 years of which was spent as a prosecutor, and AAG Murphy had approximately 12 years of experience as a lawyer, eight years of which was spent as a prosecutor. ( Exhibits 103, 104.)

In addition, even without consideration of the annual increases in billing rates for environmental lawyers, the \$150.00 per hour rate requested in the People's Fee Petition is supported by the Board's prior 2003 decision in *People v. J & F Hauling, Inc.*, 02-21, 2003 WL 21129678 (May 1, 2003).

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

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.

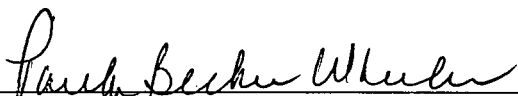
**CONCLUSION**

The People's Fee Petition is supported by sworn affidavits, sworn credible testimony, and adequate documentation, and is reasonable based on the factors set forth by the Board. 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.

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, lifting the stay of the \$153,000.00 penalty assessed in the Board's September 2, 2004 Order, and for any further relief that is fair and just under the circumstances.

Respectfully submitted,

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

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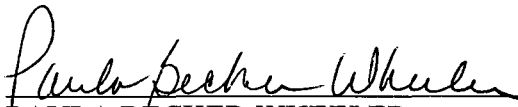
**CERTIFICATE OF SERVICE**

It is hereby certified that true and correct copies of the **Notice of Filing and Complainant's Argument in Support of the People of the State of Illinois' Fees and Costs Petition**, were sent by First Class Mail, postage prepaid, to the persons listed on the Notice of Filing on January 19, 2007.

BY:   
PAULA BECKER WHEELER

It is hereby certified that the foregoing were electronically filed with the Clerk of the Board on January 19, 2007:

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

BY:   
PAULA BECKER WHEELER