BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
by LISA MADIGAN, Attorney General)
of the State of Illinois,)
)
Complainant,)
)
v.)
) PCB 96-98
SKOKIE VALLEY ASPHALT CO., INC.,) (Enforcement – Water)
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.)

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 electronically **Complainant's Response to Respondents' Motion for Reconsideration and Motion to Stay Date of Final Order** 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,
LISA MADIGAN, Attorney General
of the State of Illinois

BY: [signature]

PAULA BECKER WHEELER
Assistant Attorney General
Environmental Bureau
69 West Washington, Suite 1800
Chicago, Illinois 60602
Tel: 312.814.1511

Dated: December 31, 2007

CERTIFICATE OF SERVICE

It is hereby certified that on December 31, 2007, true and correct copies of the **Notice of Filing** and **Complainant's Response to Respondents' Motion for Reconsideration and Motion to Stay Date of Final Order**, were sent by overnight UPS Mail, postage prepaid, to the persons listed on the Notice of Filing.

BY: ______________________________
PAULA BECKER WHEELER
Assistant Attorney General

It is hereby certified that the foregoing were electronically filed with the Clerk of the Board on December 31, 2007:

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

BY: ______________________________
PAULA BECKER WHEELER
Assistant Attorney General

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-Water)

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR RECONSIDERATION AND MOTION TO STAY DATE OF FINAL ORDER

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, ("People") through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Sections 101.520 and 101.902 of the Board's Procedural Regulations, 35 Ill. Adm. Code 101.520, 101.902, and requests that the Illinois Pollution Control Board ("Board") deny Respondents' Motion for Reconsideration and Motion to Stay Date of Final Order. In support thereof, Complainant states as follows:

I. Standard for Motion to Reconsider

1. In ruling on a motion for reconsideration, the Board will consider new evidence, a change in law, or errors in the court's previous application of the law. *Grand Pier Center, LLC,*

et al., v. River East LLC, et al., PCB 05-157, 2006, slip op at 1, March 6, 2006, (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, (1st Dist. 1991)).

2. Respondents, SKOKIE VALLEY ASPHALT, CO., INC., ("SVA"), 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., (collectively the "Fredericks") have not offered new evidence, nor have they alleged a change in the Act or the pertinent Pollution Control Board regulations. Rather, in their Motion for Reconsideration and Motion to Stay Date of Final Order ("Mot. for Rec. and Stay"), Respondents appear to challenge the Board's interpretation of the extensive record in this matter, by simply re-offering arguments that have been made numerous times, and that have been previously considered by the Board and rejected by the Board.

3. Accordingly, the People rely on the total record, including the two previous hearings and the exhibits at hearing (such as the Asset Purchase Agreement) and asks the Board to do the same. Complainant also specifically adopts and incorporates the following pleadings, motions, and responses previously filed with the Board: People's Closing Argument and Post-Trial Brief filed January 15, 2004, People's Closing Rebuttal Argument and Reply Brief filed April 15, 2004, and Complainant's Response to Respondents' Motion to Recuse Complainant's Attorney, Joel J. Sternstein with Mr. Sternstein's affidavit, filed on September 11, 2003.

II. Discussion

4. Rather than address each and every misstatement by the Respondents in their Mot. for Rec. and Stay, the People rely on the on the facts contained in the Hearing Records of October 30th and 31st, 2003, and December 12th, 2006, and on prior pleadings before the Board,

and categorically deny any statement not supported in the record, and more specifically, the egregious misstatements discussed below.

5. For instance, although settlement negotiations surely occurred, there was no agreement to settle this case as stated in Respondents' Mot. for Rec. and Stay at pp. 8 and 9, and elsewhere. Respondents make no citation to the record because these statements are not true and are not supported in the record. Furthermore, whatever settlement negotiations may have occurred are irrelevant. Settlement did not occur and this matter proceeded to a vigorously contested hearing.

6. Respondents erroneously state that Mr. Joel Sternstein, a former Board employee, did a substantial amount of work on this case for the Board while a Board employee and that the Respondents' attorneys was unaware of the potential conflict. (Mot. for Rec. and Stay at p. 9.). Again, Respondents do not cite to the record because this statement is not supported any where, and, in fact, is **directly** contradicted in the record by Mr. Sternstein's affidavit. Mr. Sternstein's affidavit, attached to the Response to the Respondents' Motion to Recuse Complainant's Attorney, Joel J. Sternstein, filed September 11, 2003, states that he had no involvement with this case while working at the Board, and that Mr. David O'Neill, one of Respondents' attorneys, knew him at the time and knew that he worked at the Board. Finding that Board Member Melas had voted on two orders in this case, the Board granted Respondents' motion to recuse and Mr. Sternstein withdrew as one of the People's attorneys. However, the Board found no prejudice or specific bias because of Mr. Sternstein's short involvement as an attorney of record during the long history of this case.

7. Respondents raise this same issue later in their brief and attach a document as

Exhibit A (or Appendix A as it is variously called), which purports to include a hand-written statement from Mr. Sternstein to Mr. Cohen. (Mot. for Rec. and Stay at pp.23, 24.) The Exhibit is a Board Order that is supposed to have "strikeouts" in it. However, these "strikeouts" are not apparent to this reader on the one page document attached. More importantly, according to the Respondents, this document was tendered to them during discovery and prior to the December 12, 2006 hearing. Most likely, it is a copy of the Order made available on the date of the Board's meeting to discuss and vote on it. Regardless, this document was tendered to the Respondents before the last hearing date and the issue could have been raised prior to that hearing. It is not new evidence. The Court in *John Alden Life Ins. Co. v. Propp*, 627 N.E. 2d 703, 707, stated "civil proceedings already suffer from far too many delays, and the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." (emphasis in original). Ironically, the hand-writing is on a Board Order, dated March 3, 2003, denying the People's motion for summary judgment. This order can hardly demonstrate undue bias towards the People's attorneys.

8. In their first stated issue, Respondents argue that their defense of laches should be reconsidered. This issue has been argued and ruled on properly by the Board in prior motions and rulings. Again, as throughout the Respondents Mot. for Rec. and Stay, numerous statements are made without reference to the record because they statements are not supported in the record. The Respondents argue that the Fredericks individually were added too late to the complaint, claiming that discovery was closed in the year 2000, and that they did not have access to the records after selling the company for over eight million dollars. Mot. for Rec. and Stay at

pp. 16-19. However, discovery was not closed until 2003, and the Asset Purchase Agreement plainly shows that the Fredericks were entitled to any records they wanted, and explicitly notes that they were obligated to perform remediation. In it's Opinion and Order of September 2, 2004, the Board found there was no indication that any evidence beyond what was needed to defend SVA was needed to defend the Fredericks. The Fredericks are now trying to distance themselves from the company and have the penalties accrue to a dissolved corporation with no assets. If the Fredericks honestly believed that they had conflicting defenses, they would have hired different counsel than SVA's counsel to represent these allegedly different interests.

9. The Respondents also argue that the Board Opinion and Order of September 2, 2004, attacks the Fredericks personally, and therefore shows bias. Mot. to Rec. and Stay at p. 19. This is patently false. In it's Opinion and Order of September 2, 2004, the Board dispassionately and clearly stated the reasons for their findings including a finding that the Respondents submitted false records.

10. Respondents' final two issues are that the Board did not apply the Section 33(c) factors and 42(h) factors properly. While the People may not agree with the entire rationale for the penalty assessed, as the People stand by the previous request for $493,000.00 in penalty against the Respondents, the Board considered the same arguments as those raised by Respondents in their Mot. to Rec. and Stay, and provided a well-reasoned and complete analysis to the 33(c) and 42(h) factors.

11. Furthermore, the record is clear that there were three underground storage tanks contributing to the discharge, that the Respondents' knew about them, and did not disclose them until the U.S. EPA required the Respondents to search for additional sources. Complainant's Ex.

25 and Ex. 34, p. 8 at Hearing on October 30th, 31st, 2003. Moreover, although the Respondents finally came into compliance, it was only after scrutiny by the U.S. EPA and the Illinois Environmental Protection Agency, and because they were required to by the Asset Purchase Agreement. All of these facts should be weighed against the Respondents in assessing a penalty.

12. The Board also correctly ruled that the penalty assessment applied jointly and severally. The Fredericks were the sole shareholders and the President and Vice-President of this closely-held company. Prior to1998, when they sold the assets of the company, they were responsible for all environmental non-compliance because of their personal involvement and active participation in management decisions, and because they were the corporate officers. After 1998, they were responsible for the environmental remediation, not only because that was and is the law, but also because they agreed to do it pursuant to the terms of the Asset Purchase Agreement. The People could argue that the Fredericks were even more personally liable because they controlled all aspects of the company which was only a shell to shield their personal assets.

13. Additionally, the Respondents argue that the penalties assessed should be offset by the expenses incurred for remediation in the amount of at least $150,000.00. They state that now more than $200,000 has been spent and expenses are still being incurred, and that this new figure should be used as an offset. There is no evidence in the record that this amount has been spent or that expenses are ongoing. In fact, it defies logic that expenses are ongoing when supposedly the remediation is complete and the site is in compliance as stated previously by Respondents. Mot. to Rec. and Stay at p. 31.

14. Respondents further argue that the $150,000 requested offset of the penalty should

only apply to the Fredericks and not to the dissolved corporation from which the assets were sold for more than $8,000.000.00. Because the Respondents are jointly and severally liable, they are all responsible for paying the penalty, and although the People believe no offset should be given for costs incurred because of the Respondents' violations of the law, any offsets that are considered should go to the entire penalty, and not to any respondent individually, as the Board properly found.

15. In summary, Respondents have failed to present any new evidence, any change in the law, or any errors in the Board's previous application of the law. Respondents' Motion for Reconsideration and Motion to Stay Date of Final Order should be denied, and Respondents should be ordered to pay all assessed penalties, fees and costs immediately.

WHEREFORE, Complaint respectfully requests that the Board deny 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., Motion for Reconsideration and Motion to Stay Date of Final Order, order the Respondents to pay all previously assessed penalties, fees and costs immediately, and order any further relief that the Board deems appropriate.

Respectfully Submitted,

LISA MADIGAN
Attorney General of the State of Illinois

BY: ______________________

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