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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS 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.)

No. PCB 96-98

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on September 22, 2003, we filed with the Illinois Pollution Control Board **Complainant's Pre-hearing Memorandum**, a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,

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State of Illinois

BY:



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PEOPLE OF THE STATE OF ILLINOIS,)
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Complainant,)
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SKOKIE VALLEY ASPHALT, CO., INC.,)
an Illinois corporation,)
EDWIN L. FREDERICK, JR.,)
individually and as owner and)
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Co., Inc., and)
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Skokie Valley Asphalt Co., Inc.,)
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Respondents.)

STATE OF ILLINOIS
Pollution Control Board
No. PCB 96-98

COMPLAINANT'S PRE-HEARING MEMORANDUM

Comes now, the People of the State of Illinois, Complainant, and pursuant to Hearing Officer Sudman's July 11, 2003, Order submits the following prehearing memorandum:

I. Introduction

Complainant filed a Second Amended Complaint against Respondents, Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick. The Second Amended Complaint alleges five counts against Respondents: 1. Failure to Comply with Reporting Requirements - Filing False Reports; 2. Late Application for Renewal of NPDES Permit; 3. Failure to Comply with Sampling and Reporting Requirements; 4. Water Pollution; and 5. Violation of NPDES Permit Effluent Limits.

II. Facts

Through lengthy litigation and discovery¹, the following facts are not in dispute:

Skokie Valley Asphalt, Co., Inc. ("SVA") was an Illinois corporation located in Grayslake.² SVA operated and/or exercised control over its facility in Grayslake at all relevant times, from the time it owned or leased the site until May, 1998.³ SVA, after amending their name to LRF, Inc., filed Articles of Dissolution with the Illinois Secretary of State December 28, 1998.⁴

While in business in Grayslake, SVA was a vehicle storage, dispatching, and material storage facility.⁵ The SVA site in Grayslake had a lagoon which discharged into a storm sewer ditch, then into the Avon Drainage Ditch and ultimately into Third Lake.⁶

¹ On September 4, 2003, the Board issued an Order granting, in part, Complainant's Second Motion to Compel Respondents to Respond to Discovery Requests. This Prehearing Memorandum, due September 22nd, does not include the information and materials Respondents must provide by September 30th. Therefore, this Prehearing Memorandum may have to be supplemented following Respondents complying with the Board's Order.

² Resp.s' Answer, para. 4.

³ SVA's Response to 1st Set of Interrogatories, No. 9.

⁴ Resp.s' Response to Request for Production of Documents.

⁵ Resp.s' Response to Request for Admission of Facts, No. 7.

⁶ Resp.s' Response to Req. for Admission of Facts, No. 10.

The SVA site also had underground storage tanks ("UST").⁷

Because of SVA's lagoon discharging into waters of the state, the Illinois Environmental Protection Agency ("Illinois EPA") issued SVA an NPDES Permit.⁸ The NPDES Permit issued to SVA required SVA, inter alia, to accurately comply with NPDES reporting requirements.⁹

SVA's NPDES Permit expired on March 1, 1991.¹⁰ SVA failed to submit an NPDES permit application to the Illinois EPA for renewal by September 2, 1990.¹¹ SVA submitted an application for its NPDES permit renewal to the Illinois EPA on June 3, 1991.¹²

Also, while in business, Respondent Edwin L. Frederick, Jr. was the President of SVA.¹³ He had a 50 per cent ownership interest in SVA.¹⁴ As President, Edwin Frederick was responsible

⁷ Resp.s' Response to Req. for Admission of Facts, No. 60.

⁸ Resp.s' Response to Req. for Admission of Facts, No. 11.

⁹ Resp.s' Response to Req. for Admission of Facts, No. 12.

¹⁰ Resp.s' Response to Req. for Admission of Facts, No. 22.

¹¹ Resp.s' Response to Req. for Admission of Facts, No. 24.

¹² Resp.s' Response to Req. for Admission of Facts, No. 25.

¹³ Resp.s' Answer, para. 5; Resp.s' Response to Req. for Admission of Facts, No. 2; Resp. SVA's Response to Interrogatories, para.s 3 and 7; Resp. Edwin Frederick's Response to Interrogatories, para. 1; and Resp. Richard Frederick's Response to Interrogatories, para. 1.

¹⁴ Resp.s' Edwin and Richard Frederick Response to Interrogatories, para.s 3 and 4.

for the entire operation.¹⁵ He was President during the entire period of alleged violations. "His duties and responsibilities included financial matters. Financial matters included liaison with banks and suppliers and purchasing material, making payments, managing payroll and reviewing accounts receivable and accounts payable. He was also responsible for sales and preparing bid quotations. The sales and price quote duties involved preparation of price quotes, estimating jobs, negotiations, contracts, calling on customers and submitting bids. His duties also included supervising jobs at job sites. The supervision duties involved on-site meetings, reviewing on-site work, daily consultation with foreman and engineers, liaison with state, county, federal officials and private owners for whom work was performed."¹⁶

Also, while in business, Respondent Richard Frederick was Vice President of SVA.¹⁷ He had a 50 per cent ownership interest in SVA.¹⁸ As Vice President, Richard Frederick was responsible for

¹⁵ SVA's Response to Interrogatories, para. 7.

¹⁶ Resp.s' Edwin and Richard Fredericks Response to Interrogatories, para. 1.

¹⁷ Resp.s' Answer, para. 6; Resp.s' Response to Req. for Admission of Facts, No. 3; Resp. SVA's Response to Interrogatories, para.s 3 and 7; Resp. Edwin Frederick's Response to Interrogatories, para. 2; and Resp. Richard Frederick's Response to Interrogatories, para. 2.

¹⁸ Resp.s' Edwin and Richard Frederick Response to Interrogatories, para.s 3 and 4.

the entire operation.¹⁹ "His duties and responsibilities included construction management. Construction management involved handling personnel, equipment and material scheduling and budgeting for all work performed. The personnel work involved the hiring and control of employees and the review and approval of all time cards, union contracts and personnel relations issues. Richard was also responsible for all equipment matters including purchasing and maintaining equipment, daily review of equipment matters with outside maintenance shops. Richard's duties included the scheduling of all jobs, employees and subcontractors. He also was responsible for all traffic controls and safety matters. Richard also reviewed and approved all contact items, bills and invoices."²⁰ Richard Frederick also signed the Discharge Monitoring Reports ("DMR") SVA submitted to the Illinois EPA.²¹

III. Discussion

The Illinois Environmental Protection Act ("Act") is a strict liability statute; no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt.²² The stated purpose of the Act is "to establish a unified state-wide program

¹⁹ SVA's Response to Interrogatories, para. 7.

²⁰ Resp.s' Richard and Edwin Frederick Response to Interrogatories, para. 2.

²¹ Deposition Transcript at 22, 26-27, 35, 36, 60, and 61.

²² See Perkinson v. PCB, 187 Ill.App.3d 689, 694, 543 N.E.2d 901, 904-905 (3d Dist. 1989).

supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them."²³ "The terms and provisions of [the] Act shall be liberally construed so as to effectuate the purposes of [the] Act."²⁴

The Pollution Control Board's ("Board") regulations are promulgated pursuant to the Act. Respondents are liable for penalties for committing violations of both the Act and the Board's regulations.²⁵

A. The Respondents and the Bases for Their Liability

1. Respondent SVA

Respondent SVA was incorporated in the State of Illinois during all times relevant to this matter. Section 3.315 of the Illinois Environmental Protection Act ("Act") broadly defines "person" for purposes of liability.²⁶ Expressly included in the definition of person under Section 3.315 of the Act is a "corporation, association, [and] joint stock company."²⁷ Respondent SVA, a corporation, clearly falls within the

²³ 415 ILCS 5/2(b) (2002).

²⁴ 415 ILCS 5/2(c) (2002).

²⁵ 415 ILCS 5/42 (2002).

²⁶ See 415 ILCS 5/3.315 (2002).

²⁷ Id.

definition of person under the Act and is, therefore, liable for the violations of the Act.

2. Respondents Richard J. Frederick and Edwin Frederick

The standard for corporate officer liability in environmental enforcement actions is set forth in People v. C.J.R. Processing, Inc., et al.²⁸ The C.J.R. case involved a facility which produced and stored large amounts of waste.²⁹ As in the instant case, the State sued both the company and its corporate officers, including its president, for violations of the Act.³⁰ The C.J.R. Court held that corporate officers are also "persons" as defined under Section 3.315 of the Act.³¹ The court reasoned that, first, the definition of person under Act expressly includes individuals, and does not exclude corporate officers.³² Second, the General Assembly intended for the Act to be liberally construed; a constricted interpretation of Section 3.315 would not serve the Act's express purpose of imposing responsibility upon those who cause or allow harm to the

²⁸ See 269 Ill.App.3d 1013, 647 N.E.2d 1035 (3d Dist. 1995).

²⁹ Id. at 1014, 647 N.E.2d at 1036.

³⁰ Id.

³¹ Id. at 1016, 647 N.E.2d at 1037. Section 3.315 of the Act was formerly numbered Section 3.26 of the Act.

³² Id.

environment.³³ Imposing liability only on the corporation and not on the individuals involved in harming the environment would undermine the Act's purpose.³⁴

The C.J.R. Court further held that a corporate officer can be held personally liable for his company's environmental violations if he was personally involved in or actively participated in a violation of the Act, or if he had the ability or authority to control the acts or omissions that gave rise to the violation.³⁵ The C.J.R. Court's use of the term "personal involvement" in addition to "active participation" shows that the court intended liability to attach to more than just those corporate officers who control the day-to-day operations at a facility. Indeed, other courts have articulated this reasoning. In United States v. Northeastern Pharmaceutical & Chemical Co., et al., one of the cases upon which the C.J.R. decision was based, the federal government sought to have a corporation's president and vice-president held personally liable for their company's improper hazardous waste disposal.³⁶ The Northeastern Court held that corporate officers can be held individually

³³ Id.

³⁴ Id. at 1018, 647 N.E.2d at 1038.

³⁵ Id. at 1017-1018, 647 N.E.2d at 1038.

³⁶ Id. at 1017, 647 N.E.2d at 1038 (citing to Northeastern, 810 F.2d 726 (8th Cir. 1986)).

liable if they were personally involved in or directly responsible for corporate acts or omissions in violation of the environmental statute.³⁷ Liable corporate officers not only included those in control of the day-to-day operations, but also corporate officers with ultimate authority to control the disposal of the wastes.³⁸ Moreover, there is "an emerging body of [state and] federal law holding individual corporate officers liable for violations of . . . environmental laws when those officers either participated in those violations, controlled or supervised the corporate activities that resulted in the violations, or had the power to prevent violations from occurring and failed to exercise that power."³⁹

Respondents Edwin L. Frederick, Jr. and Richard J. Frederick (see Section II, *supra*), as corporate officers of SVA, were in control of the day-to-day operations at the site and directly responsible for the acts or omissions that gave rise to the environmental violations at the site, including discharges from the SVA lagoon, Discharge Monitoring Reports filed with the Illinois EPA, and the leaking underground storage tank. Therefore, under the principles set forth by the C.J.R. Court,

³⁷ See 810 F.2d at 745.

³⁸ Id.

³⁹ See BEC Corp. v. Dep't of Env'tl. Protection, 775 A.2d 928, 940-941 (Conn. 2001) (citing to the courts' decisions in Northeastern and C.J.R., among other cases).

Edwin L. Frederick, Jr. and Richard J. Frederick are personally liable for the violations.

B. The Violations of the Act and the Board's Regulations

Section 3.550 of the Act, 415 ILCS 5/3.550 (2002), provides the following definition:

"WATERS" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through or border upon this State.

The farm drainage tile, Avon Drainage Ditch, and Third Lake are located in, and therefore are, waters of the State of Illinois.

1. Section 12(f) of the Act (Count I)

Count I of the Second Amended Complaint alleges that the Respondents violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2002), in that Respondents filed false reports. Section 12(f) provides as follows:

No person shall:

* * *

- f. Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 38(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program (emphasis added).

Section 305.102(b) of the Board's regulations, 35 Ill. Adm. Code 305.102(b), provides as follows:

Reporting Requirements

- b. Every holder of an NPDES Permit is required to comply with the monitoring, sampling, recording and reporting requirements set forth in the permit and this chapter.

Standard Condition No. 19 of Respondents' NPDES Permit No.

IL0065005 provides as follows:

The permittee shall not make any false statement, representation or certification in any application, record, report, plan or other document submitted to the Agency or the U.S. EPA, or required to be maintained under the permit.

On April 25, 1991, Respondents filed with the Illinois EPA their DMR for the month of December 1990. Respondents falsified the December 1990 DMR by duplicating the November 1990 DMR, altering the date from "90/11/01 to 90/11/30", to "90/12/01 to 90/12/30" and then submitting the duplicate as the December 1990 DMR.

Also on April 25, 1991, Respondents filed with the Illinois EPA their DMR for the month of January 1991. Respondents falsified the January 1991 DMR by duplicating the February 1991 DMR, altering the date from "91/02/01 to 91/02/28", to "91/01/01 to 91/01/28", and then submitting the duplicate as the January 1991 DMR.

By submitting false DMRs, Respondents violated Standard Condition No. 19 of their NPDES permit. By submitting false records/reports in violation of Standard Condition No. 19 of

their NPDES permit, Respondents violated Section 305.102(b) of the Board's regulations. By violating Section 305.102(b) of the Board's regulations, Respondents violated section 12(f) of the Act.

2. Section 12(f) of the Act and Sections 309.102(a) and 309.104(a) of the Board's Regulations (Count II)

Count II of the Second Amended Complaint again alleges that the Respondents violated Section 12(f) of the Act. Count II also alleges violations of Sections 309.102(a) and 309.104(a) of the Board's Regulations, 35 Ill. Adm. Code 309.102(a) and 309.104(a) in that Respondents filed an NPDES Permit renewal application late. Those sections of the Board's regulations provide, respectively, as follows:

NPDES Permit Required

- a. Except as in compliance with the provisions of the Act, Board regulations, and the CWA (33 U.S.C. 1251 et seq.), and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into waters of the State from a point source or into a well shall be unlawful.

* * *

Renewal

- a) Any permittee who wishes to continue to discharge after the expiration date of his NPDES Permit shall apply for reissuance of the permit not less than 180 days prior to the expiration date of the permit.

The Respondents NPDES Permit No. IL0065005 expired on March 1, 1991. The Respondents did not submit to the Illinois EPA an

application for reissuance of that NPDES permit until June 3, 1991.

Respondents continued to discharge from the lagoon on their Site via the farm drainage tile, to Avon Drainage Ditch, and then into Third Lake even after the expiration of their NPDES permit on March 1, 1991. Respondents failed to apply for the renewal of their NPDES permit by September 2, 1990, which was 180 days before the March 1, 1991 expiration date. Therefore, Respondents violated Section 309.104(a) of the Board's regulations. Since Respondents continued to discharge into the farm drainage tile, the Avon Drainage Ditch, and into Third Lake in violation of their NPDES permit, they were in violation Section 309.102(a) of the Board's regulations. By violating Sections 309.102(a) and 309.104(a) of the Board's Regulations, Respondents violated section 12(f) of the Act.

3. Section 12(f) of the Act, and Sections 305.102(b) and 309.102(a) of the Board's Regulations (Count III)

Count III of the Second Amended Complaint again alleges that the Respondents violated Section 12(f) of the Act. In addition, Count III alleges that Respondents violated Sections 305.102(b) and 309.102(a) of the Board's regulations, 35 Ill. Adm. Code 305.102(b) and 309.102(a) by failing to comply with sampling and reporting requirements.

Special Condition No. 1 of Respondents' NPDES Permit No. IL0065005 provides as follows:

Samples shall be taken in compliance with the effluent monitoring requirements and shall be taken at a point representative of the discharge, but prior to entry into the receiving stream.

From at least November 1988 and continuing to February 1992, Respondents did not maintain an accessible effluent sampling point at the SVA facility for the discharge from the lagoon into the farm drainage tile and therefore could not have taken samples representative of the discharge.

Special Condition No. 4 of Respondents' NPDES Permit No. IL0065005 provides as follows:

The permittee shall record monitoring results on Discharge Monitoring Report forms using one such form for each discharge each month. The completed Discharge Monitoring Report form shall be submitted monthly to IEPA, no later than the 15th of the following month, unless otherwise specified by the Agency.

Respondents failed to submit ever DMRs to the Illinois EPA for eight months, namely November 1988, April 1989, June 1989, August 1989, October 1989, November 1989, December 1989, and July 1992. Respondents thus failed to comply with Special Condition No. 1 and Special Condition No. 4 of their NPDES permit. By failing to comply with the conditions in its NPDES permit, Respondents violated Section 305.102(b) and 309.102(a) of the Board's regulations. By violating Sections 305.102(b) and 309.102(a) of the Board's regulations, Respondents violated Section 12(f) of the Act

4. Section 12(a) of the Act, Sections 302.203, 304.105 and 304.106 of the Board's Regulations (Count IV)

Count IV of the Second Amended Complaint alleges that Respondents violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2002) and Sections 302.203, 304.105 and 304.106 of the Board's regulations, 35 Ill. Adm Code 302.203, 304.105 and 304.106, and as such caused or allowed water pollution.

On December 23, 1994, January 5, 1995, March 1, 1995, March 9, 1995, March 22, 1995, and April 18, 1995 there was an oily discharge from a farm drainage tile located .25 miles east of SVA. The farm drainage tile discharges to the Avon Drainage Ditch, which flows north through the Village of Grayslake to Third Lake.

The oily discharge from the farm drainage tile to Avon Drainage Ditch resulted in a fuel odor and a visible surface oil sheen on the Avon Drainage Ditch.

On March 3, 1995, the Illinois EPA took a sample of the effluent from the farm drainage tile, and this sample revealed oil and grease levels of 664 milligrams per liter (mg/l).

Section 3.165 of the Act, 415 ILCS 5/3.165 (2002), provides the following definition:

"CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

Section 3.545 of the Act, 415 ILCS 5/3.545 (2002), provides the following definition:

"WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological, or radioactive properties of any waters of the State, or such discharge of any contaminants into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

The oily discharge is a contaminant. The oily discharge from the farm drainage tile to Avon Drainage Ditch, resulting in fuel odor and a visible surface oil sheen constitutes water pollution. To summarize, Respondents caused or allowed the discharge of contaminants to waters of the State of Illinois.

Section 302.203 of the Board's regulations provides, in pertinent part, as follows:

Offensive Conditions

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin...

Respondents caused or allowed oil to be discharged to the Avon Drainage Ditch, causing a visible oil sheen on the surface of the water, in violation of Section 302.203 of the Board's regulations.

Section 304.106 of the Board's regulations provides, in pertinent part, as follows:

Section 304.106 Offensive Discharges

In addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels.

Respondents caused or allowed oil to be discharged to the Avon Drainage Ditch, where it caused a visible oil sheen and emitted odors, in violation of Section 304.106 of the Board's regulations.

Section 304.124(c) of the Board's regulations provides, in pertinent part, as follows:

- c. Oil may be analytically separated into polar and nonpolar components. If such separation is done, neither of the components may exceed 15 mg/l (i.e. 15 mg/l polar materials and 15 mg/l nonpolar materials).

An effluent sample of Respondent's discharge showed 664 mg/l. This sample exceeded the standard of 15 mg/l set forth in Section 304.124(c) of the Board's regulations.

Section 304.105 of the Board's regulations, 35 Ill. Adm. Code 304.105, provides, in pertinent part, as follows:

Violation of Water Quality Standards

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard.

...

Respondents' discharge to the Avon Drainage Ditch caused or allowed effluent to exceed the standard set forth in Section 304.124(c) of the Board's regulations and therefore resulted in Respondents violating Section 304.105 of the Board's regulations.

Section 12(a) of the Act provides as follows:

No person shall:

- a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to

cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

Respondents caused or allowed the discharge of contaminants to waters of the State of Illinois which is a violation of Section 12(a) of the Act. In addition, by causing violations of Sections 302.203, 304.105, and 304.106 of the Board's regulations, Respondents have also violated Section 12(a) of the Act.

**5. Section 12(f) of the Act, and Sections 304.141(a) and 309.102(a) of the Board's Regulations
(Count V)**

Count V of the Second Amended Complaint again alleges that the Respondents violated Section 12(f) of the Act. Count V also alleges violations of Sections 304.141(a) and 309.102(a) of the Board's regulations, 35 Ill. Adm. Code 304.141(a) and 309.102(a) in that Respondents exceeded their NPDES Permit effluent limits.

Section 304.141(a) of the Board's regulations, 35 Ill. Adm. Code 304.141(a) provides, in pertinent part, :

NPDES Effluent Standards

- a. No person to whom an NPDES Permit has been issued may discharge any contaminant in his effluent in excess of the standards and limitations for that contaminant which are set forth in his permit.

Respondents' NPDES Permit No. IL0065005 contains the following effluent limits for total suspended solids ("TSS"):

TSS Concentration Limits (mg/l)

30 day Average
15.0

Daily Maximum
30.0

During some months for a period beginning in August of 1991 and continuing until April of 1995, Respondents caused or allowed the discharge of effluent from their facility to exceed concentration limits set forth in NPDES Permit No. IL0065005 as follows:

TSS Concentration Limits (mg/l)

<u>DATE</u>	<u>30 day Average</u>	<u>Daily Maximum</u>
April 1995	126.0	126.0
June 1993	35.0	35.0
May 1993	24.0	
December 1992	24.0	
November 1992	22.0	
February 1992	18.0	
October 1991	41.0	41.0
September 1991	25.0	
August 1991	55.0	55.0

These readings are set forth in the DMRs that Respondents' submitted to Illinois EPA for the SVA facility's discharge for the nine months listed above.

Respondents have therefore discharged effluent which contained TSS that exceeded the limits set in their NPDES Permit. By violating the TSS effluent limits set in their NPDES Permit, Respondents violated Section 304.141(a) of the Board's regulations. By violating the terms of their NPDES permit and by violating Section 304.141(a) of the Board's regulations, Respondents have violated Section 309.102(a) of the Board's regulations. By violating Sections 304.141(a) and 309.102(a) of

the Board's regulations, respondents have also violated section 12(f) of the Act.

IV. The Complainant's Witnesses at Trial

The Complainant may call the following witnesses at trial:

Chris Kallis of Illinois EPA, Bureau of Land, Field Operations Section will testify as to his observations made during his visits to the SVA facility. Kallis will also provide testimony regarding Illinois EPA reports, records, and filings.

Ken Savage and/or **Don Klopke** (Illinois EPA, Office of Emergency Response) and **Betty Lavis** (U.S. EPA) will testify that they observed an oily discharge from the SVA facility, in the farm drainage tile, and in the Avon Drainage ditch.

Mike Garretson of Illinois EPA, Bureau of Water, Compliance Assurance Section will testify regarding SVAs NPDES Permit requirements, the filing and record keeping of DMRs at the Illinois EPA, and SVA's filing of DMRs.

Respondent **Richard J. Frederick** will testify that he was responsible for the day-to-day operations at SVA during the period of time that the alleged violations occurred. He will also testify that he signed all of the DMRs at issue in this matter.

Respondent **Edwin L. Frederick, Jr.** will testify that he was also responsible for the day-to-day operations at SVA during the period of time that the alleged violations occurred. He will also testify that he signed the June 3, 1991 NPDES Permit application.

James Huff of Huff & Huff regarding his business, relationship with Respondents, contamination found on the SVA site, and remediation work he has performed for SVA at their Grayslake site.

The Complainant also reserves the right to call additional witnesses as necessary.

V. Exhibits

Complainant anticipates using the following documents as Exhibits during the hearing of this case. This list may not be complete, and the numbers may change.

- Complainant's Exhibit No. 1: NPDES Permit No. IL006005 issued by the Illinois EPA to SVA.
- Complainant's Exhibit No. 2: November 1990 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 3: December 1990 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 4: January 1991 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 5: February 1991 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 6: SVA's June 3, 1991, NPDES Permit Renewal Application.
- Complainant's Exhibit No. 7: March 1, 1995 Lab Sample Sheet and Results.
- Complainant's Exhibit No. 8: Illinois EPA Inspection Report dated March 22, 1995.
- Complainant's Exhibit No. 9: Illinois EPA Memorandum dated May 12, 1995.
- Complainant's Exhibit No. 10: Illinois EPA Photo of oily discharge from SVA's facility.
- Complainant's Exhibit No. 11: Illinois EPA Photo of oily discharge from SVA's facility.
- Complainant's Exhibit No. 12: Illinois EPA Photo of oily discharge from SVA's facility.
- Complainant's Exhibit No. 13: Illinois EPA Photo of oily discharge from SVA's facility.
- Complainant's Exhibit No. 14: August 1991 DMR submitted by SVA to

Illinois EPA.

- Complainant's Exhibit No. 15: September 1991 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 16: October 1991 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 17: February 1992 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 18: November 1992 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 19: December 1992 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 20: May 1993 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 21: June 1993 DMR submitted by SVA to Illinois EPA.
- Complainant's Exhibit No. 22: April 1994 DMR submitted by SVA to Illinois EPA.

Complainant anticipates additional documents will be necessary at hearing based on additional discovery due from Respondents, Respondents prehearing memorandum, testimony, and the defenses presented at trial.

VI. Potential Defenses

Respondents attempted to raise three affirmative defenses. The Board struck two of them, and the only affirmative defense which remains is:

Under the doctrines of laches and equitable estoppel, the Complainants should not be allowed to amend its Complaint to include Respondents Edwin L. Frederick Jr and Richard J. Frederick, as Respondents and these Respondents should not be required to respond to said Complaint.

In addition to the affirmative defense above, the Complainant expects the Respondents to generally argue as they have in previous motions that Edwin L. Frederick Jr and Richard J. Frederick are not appropriate Respondents and should not found liable for the violations of the Act and the Board's regulations.

VII. The Relief Requested

A. Finding of Violations and Joint and Several Liability

The Complainant seeks a finding by the Court that the Respondents caused or allowed each and every violation alleged in the Second Amended Complaint, and that the Respondents are jointly and severally liable for the civil penalties, injunctive relief, and Attorney General's fees and costs.

B. Civil Penalties

As provided under Section 42(a) of the Act, 415 ILCS 5/42(a) (2002), the Complainant seeks the imposition of the maximum civil penalties in the amount of \$50,000 for each and every violation of the Act, and an additional penalty of \$10,000 for each day during which each violation of the Act continued.

"The statutory maximum penalty is a natural or is the logical benchmark from which to begin considering factors in aggravation or mitigation of the penalty amounts. This is consistent with the discussions in the U.S. Supreme Court Tull and Gwaltney decisions, with U.S. EPA Penalty Policy; and with

Illinois decisions discussing a maximum penalty."⁴⁰

In determining the appropriate civil penalty to be imposed against the Respondents, Section 42(h) of the Act, 415 ILCS 5/42(h) (2002), authorizes the Court to consider matters in aggravation or mitigation of the penalty, including, but not limited to, the duration and gravity of the violations, the presence or absence of due diligence on the part of the violators in attempting to comply with the requirements of the Act, any economic benefit accrued by the violators because of delay in compliance with the Act, and the necessary deterrence from future violations that a civil penalty will serve. In the present case, as the evidence will show, all of these factors tend to aggravate the penalty amount to be assessed against the Respondents.

C. Attorney General's Fees and Costs

As provided under Section 42(f) of the Act, 415 ILCS 5/42(f) (2002), the Attorney General seeks to tax all costs in this action, including witness, consultant, and attorney fees against the Respondents. The applicability of Section 42(f) has been made clear by the Illinois Supreme Court which has held that "the Attorney General has the authority to attempt to recover reasonable attorney fees and costs when prevailing against a person committing a 'willful, knowing or repeated' violation of

⁴⁰ See Illinois EPA v. Barry, PCB 88-71, 1990 WL 271319, *48 (May 10, 1990); see also People v. Gilmer, PCB No. 99-27, 2000 WL 1246533, *7 (Aug. 24, 2000).

the Act."⁴¹

The evidence presented at trial will show that the Respondents willfully, knowingly and repeatedly caused or allowed violations of the Act. Therefore, the Attorney General should be awarded his reasonable fees and costs as proven by affidavits which will be submitted to the Court for review and approval at the conclusion of this case.

⁴¹ People v. NL Industries, et al., 152 Ill.2d 82, 102, 604 N.E.2d 349, 357 (Ill. 1992).

VIII. Conclusion

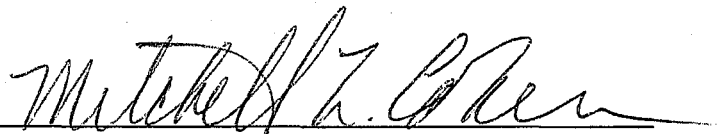
WHEREFORE, Complainant respectfully requests that this Board find that Respondents violated the Act as alleged in each count of the Second Amended Complaint, assess a civil penalty against Respondents, award attorneys' fees, costs and expenses and such other relief the Board deems appropriate.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
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CERTIFICATE OF SERVICE

I, MITCHELL COHEN, an Assistant Attorney General, certify that on the 22nd day of September, 2003, I caused to be served by First Class Mail the foregoing **Complainant's Pre-hearing Memorandum** to the parties named on the attached service list, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.



MITCHELL L. COHEN
Assistant Attorney General