BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
	)	PCB 96-98
v.	)	Enforcement
SKOKIE VALLEY ASPHALT, CO., INC., EDWIN L. FREDERICK, JR., individually and as owner and President of Skokie Valley Asphalt Co., Inc., and RICHARD J. FREDERICK, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc., Respondent	)	

RESPONDENTS' MOTION TO STRIKE AND OBJECTIONS TO COMPLAINANT'S CLOSING ARGUMENT AND REPLY BRIEF

The Respondents, SKOKIE VALLEY ASPHALT, CO., INC., EDWIN L. FREDERICK, JR., individually and as owner and President of Skokie Valley Asphalt Co., Inc., and RICHARD J. FREDERICK, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc.,, by and through its attorney, David S. O'Neill, object to and herein move this Board to Strike portions of the Complainant's Closing Rebuttal Argument and Reply Brief and in support thereof states as follows:

BACKGROUND AND LEGAL STANDARD

1. 35 Ill.Adm. Code 101.506 (2001) reads as follows:
"All motions to strike, dismiss or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result."
2. On January 15, 2004, the Complainant filed a Closing Argument and Post Trial Brief and Motion to File Instanter in the above captioned matter. (Complainant's Closing Argument or CCA)

3. The Respondents filed their Closing Argument and Post Trial Brief with the Board on March 12, 2004. (Respondents' Closing Argument or RCA)

4. On April 15, 2004, the Complainant filed a Closing Rebuttal Argument and Reply Brief in the above captioned matter. (Complainant's Reply Brief or CRB)

5. All of these filings were in accordance with the order given by the Hearing Officer at the close of the hearing on October 31, 2003. (Hearing)

6. The Movant timely filed this motion to strike and objections to consistent with 35 Ill.Adm. Code 101.506 to allow the Board to determine if sections of the Complainant's Reply Brief should be stricken from the record.

7. At hearing, the Hearing Officer stated that the Complainant was to be given a opportunity to submit a "reply" after the Complainant and the Respondents had submitted their "briefs"(Hearing at 522)

8. The relevant rules concerning the context of a Closing Rebuttal Argument and Reply Brief are stated in Dodds v. Western Kentucky Navigation (297 Ill.App.3d 702, 697 N.E.2d 452,231Ill.Dec. 898). In Dodds v. Western Kentucky Navigation, the Illinois Appellate Court, Fifth District, stated that the scope of closing argument is within the sound discretion of the court (Id. at 710). The court also stated that the closing arguments, commentary should be limited to facts in evidence (Id.).

9. In People v.Woolley (205 Ill.2d 296, 793 N.E.2d 519, 275 Ill.Dec. 748), the Illinois Supreme Court further stated that "although the character and scope of closing argument is left largely to the trial court, argument designed solely to inflame the passions of the jury is prohibited" (Id. at 297).

10. In the matter before the Board, the Hearing Officer's order that the Complainant's Reply Brief was to be a "reply" is well within the discretion of the Hearing Officer to determine the scope and character of the closing argument. Consequently, any statement in the Complainant's Reply Brief that is not a reply to the Respondents' Closing argument should be stricken.

11. Because closing arguments, commentary should be limited to facts in evidence, any statements in the Complainant's Reply Brief that are not based on the evidence should be

stricken.

12. Because argument designed solely to inflame the passions of the jury is prohibited, any such statements in the Complainants Reply Brief must be stricken.

OBJECTIONS

1. **The "Facts" Section of the Complainant's Reply Brief should be stricken in its entirety.** The Complainant was given ample opportunity to state the facts in this case in Complainant's Closing Argument. In fact, Complainant made such statements in its Complainant's Closing Argument (CCA at 2-5). Similarly, the Respondents made its statement of facts in its Respondents' Closing Argument (RCA at 1-8). Both parties presented the facts that best supported their arguments.

The Respondents cited facts that it thought were important for the Board to consider to gain a full appreciation of the background for the alleged violations and the corrective actions taken. Every fact included in the Respondents' Closing Argument was supported by a cite to the record of the Hearing. The trier of fact in this matter will have full access to the Hearing record transcripts and will be in a position to determine the accuracy of the statement of facts in the Complainant's Closing Argument and Respondents' Closing Argument.

The "Facts" section of the Complainant's Reply Brief is, in fact, not intended to be a statement of facts but instead is an attempt to inject statements of unsupported opinion and speculation, not in evidence, into the process at the stage in the legal process that would deny the Respondents the opportunity to refute the basis for the comments. This "Facts" section of the Complainant's Reply Brief represents nothing more than a restatement of the facts presented by the Complainant in the Complainant's Closing Argument augmented by irrelevant, baseless and false statements that are not consistent with the objective a Reply Brief – to respond to and enhance the arguments raised in the previously submitted Closing Arguments. The intent and potential impact of the statements presented by the Complainant in the "Facts" section is to mislead and prejudice the trier of fact and to inflame the passions of the trier of fact . Because this section does not serve the purpose for which the Reply Brief is intended, it should be

stricken.

2. **Misleading statements in "Section A. Respondent Repeatedly Violate Permit Requirements"should be stricken.** The striking of a number of specific statements in this section would yield a remainder that would be little more than a restatement of the facts presented by the Complainants in the Complainant's Closing Argument. Among the statements that must be stricken are:

- "Because their facts or statements have no basis in the record" (CRB at 1) should be stricken because it is a false statement unsupported by the record.

- Statements concerning the Respondents failure to submit DMRs (CRB at 2-4) should be stricken because these statements do not rebut any statement included in the Respondent's Closing Argument. In the Respondents' Closing Argument, the Respondents point out that there were violations for total suspended solids (RCA at 4). The Complainant delineating these violations is not appropriate in the Complainant's Rebuttal Brief. Even less appropriate are the comments in this section in which the Complainant depends on speculation and conjecture in an attempt to inflame the passions of the trier of fact and conclude that there were more violations than alleged in the Complainants Second Amended Complaint because the Illinois EPA lost copies of DMRs submitted by the Respondent Skokie Valley Asphalt and therefore these DMRs must have included self-reported violations. Even less appropriate to the Complainant's Reply Brief is the fact that the Complainant ignores and fails to rebut the information in the record and in the Respondents' Closing Argument that the IEPA had a history of mishandling and failing to log DMRs and most likely had done so in this matter (RCA at 19, Hearing 66, 195, 197), that the violations were minor and did not result in any action by the IEPA at the time it became aware of the minor violations (RCA at 19, Hearing at 67,68), that the Respondent Skokie Valley Asphalt submitted to the IEPA information that showed that the DMRs had been submitted and that no violations had occurred (RCA at 5, Hearing at 317, 318) or that the standards for TDS listed in the Skokie Valley Asphalt NPDES permit were mistakenly established at a level that made strict compliance impossible (RCA at 20, Hearing at 78, 414-415).

- "Respondents admit in RCA that they willfully and knowingly submitted the data from one month's test to the Illinois EPA for two separate months" should be stricken. Not only is

this section of Complainant's Reply Brief inappropriate because it does not reply to any previous comments in the closing arguments but it also a false and misleading statement not supported by the evidence. At no time does Respondent admit to willfully and knowingly submitting false data. Such a conclusion that the action was willing and knowing calls for a determination by the trier of fact. The trier of fact needs to base this decision on the record and not on deceitful statements by the Complainants designed solely to inflame the passions of the trier of fact.

- The final paragraph in the "Facts" section which begins "No one will ever know how many times the Respondents violated the TSS concentration limits" CRB at 7) should be stricken for the reasons stated for striking the statements concerning the Respondents failure to submit DMRs. They are not based on the evidence.

3. **False statements in "Section B. Respondent Knowingly Cause Water Pollution to Last Longer"should be stricken.** The Respondents strongly disagree with the Complainant's comment in Complainant's Reply Brief that the Respondents "ignore the evidence in the record" in arguing that only the Respondents' expert determine the source of the contamination and that the determination of the source was only possible well after the releases had occurred. The Respondent respectfully requests the Board to review the statements in both the Respondents' Closing Argument and the Complainant's Reply Brief, as well as the record, to determine that the Respondents accurately based its arguments on the facts in record. If the arguments are based on the record, this section of the Complainant's Reply Brief should be stricken because it is not limited to facts in evidence.

The Complainant includes a lengthy litany of alleged past environmental offenses (RB at 10-12) under the guise of supporting its position that IEPA and USEPA, as opposed to the Respondents and Respondents' consultant, determined the source of the release and took the actions necessary to stop the release, perform the necessary remediation and take actions to ensure that no future releases would occur. This reiteration of alleged past problems at the site does not refute the fact that the Respondents were solely responsible for determining the source of the discharge and that IEPA and USEPA failed to do so (RCA at 7). As such, this section is inappropriately included in the Complainant's Reply Brief because it is not a reply as required by the Hearing Officer and therefore should be stricken. Further, comments by the Complainants

concerning alleged past environmental problems at the site do nothing to rebut statements in the Respondents' Closing Argument. The only value of the inclusion of these statements appears to be an attempt to prejudice the trier of fact and are designed solely to inflame the passions of the trier of fact. As such, they should be stricken.

This section of the Complainant's Reply brief also includes a number of purportedly factual statements that have no basis in the evidence. Examples of such statements are "...not once, with all of the environmental issues, did respondents investigate their own site to determine the extent of the contamination for possible remediation" (CRB at 12), statements that Respondents knew about the underground storage tanks and mislead government officials about their presence and conditions (CRB at 13,14), that the Respondents "willfully, knowingly and intentionally lie about a potential pollution source on their site" (CRB at 14), "[r]espondents could have shortened have shortened the time oil was released into the Avon-Fremont Drainage Ditch by more than thirty day, from April to March 22nd, had they not lied about USTs on site (CRB at 14). The Respondents urges the Board to strike these statement because of their lack of factual basis.

4. **"The Facts Are In The Record" Section of the Complainant's Reply Brief should be stricken in its entirety.** Nothing in this section is consistent with the intended scope of the reply brief determined by the Hearing Officer. This combination of confusing, baseless, non-responsive and irrelevant statements do nothing to address the issues in the Complainant's Closing Argument and the Respondents' Closing Argument and therefore should be stricken.

5. **Irrelevant and Non-Responsive Statements in "Section II. What is Respondents' Defense" of the Complainant's Rebuttal Brief should be stricken.** All references to the asset purchase agreement for Skokie Valley Asphalt (CRB at 15-19) should be stricken from the Complainant's Reply Brief because they are not relevant to the affirmative defense of laches raised by Edwin Frederick and Richard Frederick. The sale of the assets of Skokie Valley Asphalt was in 1998. The counsel to the Respondents in that transaction was not involved in the matter before the Board but had knowledge that Skokie Valley Asphalt was named as the Respondent in the complaint. He also knew that his clients Richard Frederick and Edwin Frederick were not named as Respondents in the complaint, even though the Illinois Attorney

General's Office was well aware of the existence and roles of Richard Frederick and Edwin Frederick in this matter and had ample opportunity to name the Fredericks in the original complaint, perform discovery or amend the complaint to add the Fredericks as Respondents. Based on the fact that the Fredericks were not parties to the Complaint, the attorney that represented Skokie Valley Asphalt and the Fredericks in the asset sale had no reason to believe that he needed to protect records that would be of value to the Fredericks in their defense in this action before the Board.

No aspect of the sale of Skokie Valley Asphalt alters the fact that the Complainant was not diligent in pursuing the claim or that the records involved in the asset sales as well as other records and information once possessed by the Respondents was no longer available - resulting in prejudice to both Edwin Frederick and Richard Frederick. Unless details of the asset sale effect one of these two elements of an argument for laches, they do not have any relevance to the laches debate and therefore have no place in the Complainant's Reply Brief. This information should be stricken.

More specifically, any reference to the total payment made by the purchaser of the assets should be stricken both because they are not relevant and also because they are misleading and potentially prejudicial. It is clear from the record that the Respondents Richard Frederick and Edwin Frederick did not sell their assets for the $8.2 million that the Complainant intentionally and repeatedly misrepresents in the Complainant's Reply Brief (CRB at 16,17,18, 22, 29, 31, 38). The record clearly indicates that the purchase price was in payment of all of the debts, accounts payables, releases of liens, bank fees, taxes, legal fees and closing costs involved in Skokie Valley Asphalt. The actual money that each of the Respondents Richard and Edwin Frederick realized from the sale of the asset of their lifetime family business was approximately $125,000 each (Hearing at 475). This number is close to the approximate $150,000 that the Respondents Edwin and Richard Frederick had spent up to the time of the hearing to get closure on all of the potential sources of contaminants. The effort and expense of closure continues through this date (Hearing at 468).

If the record clearly indicates that the Respondents economic benefit from the sale of Skokie Valley's assets was not in any way related to the $8.2 million repeatedly sited by the

Complainants, this number has no place in the Complainant's Reply Brief. It appears that the only reason this number appears in the Complainant's Reply Brief is that the Complainant was disrespectfully attempting to prey on the assumed lack of knowledge of the trier of fact with respect to this type of complex asset sale and was attempting to appeal to the assumed prejudice against a party with the ability to pay a substantial penalty. Complainant's attempt to benefit by submitting false and misleading information and inflame the passions of the trier of facts, can be eliminated by striking these references from the Complainant's Reply Brief.

6. **The Section "1. The Frederick Brothers were Named Over a Year Before the Hearing" should be stricken in its entirety.** The amount of time before a hearing that the Respondents are charged has no relevance to the elements of due diligence and prejudice that are material to the affirmative defense of laches. These statement only serve to reinforce how late in the process the Respondents Edwin Frederick and Richard Frederick were named and reinforces the point that the Complainants were not diligent in pursuing the claim against these Respondents. This section should be stricken.

7. **The Section "2. The Frederick Brothers Were Not Prejudiced. " should be stricken in its entirety.** The Complainant's statement that "[t]he Respondents had the ability to, but chose not to produce records" is unsupported by the evidence before the Board and is in fact false. Further, Complainants assumption that the Respondents could defend themselves consistent with the defense of the remaining Respondent – Skokie Valley Asphalt – is wrong and denies the Respondent their right to defend themselves as they choose. The assumptions and false statements do nothing to address the prejudice caused to the Respondents and should be stricken from the Complainant's Reply Brief.

8. **False statements in "Section III. Edwin and Richard Frederick Are Personally Liable For The Environmental Violations"should be stricken.** The paragraph that begins "Edwin and Frederick are personally liable for the environmental violations of their company..." (CRB at 25) should be stricken because they are not supported by any information in the record. There is no showing that the Fredericks could have complied with the NPDES permit or that they had a duty to comply with a permit that was issued solely to Skokie Valley Asphalt and not to them individually. There is also no information offered to show that the Fredericks had the

ability to prevent the 1994/1995 incident by remediating sources that they had not identified and did not know existed. Because these statements are not supported by the recorded and are based solely on speculation by the Complainants, they are not proper to the Complainant's Reply Brief and should be stricken.

9. **The restatements of facts in the "Section IV. What Penalty is Appropriate?" should be stricken from the record.** The Complainant repeatedly attempts to restate the facts in the case with the interjection of speculation, opinion, misstatements and fabrication (CRB at 27, 28, 29, 32, 33, 35, 36, 37, 38). As previously stated, the Complainant was given ample opportunity to state the facts in this case in Complainant's Closing Argument and made such statements in its Complainant's Closing Argument (CCA at 2-5). The Complainant presented the facts that best supported its arguments. The trier of fact in this matter will have full access to the Hearing record transcripts and will be in a position to determine the accuracy of the statement of facts in the Complainant's Closing Argument and Respondents' Closing Argument.

Again, the restatement of facts in this section of the Complainant's Reply Brief is, in fact, not intended to be a statement of facts but instead is an attempt to inject statements of unsupported opinion and speculation into the process at the stage in the legal process that would deny the Respondents the opportunity to refute the basis for the comments. The intent and potential impact of the restated facts presented by the Complainant in this section is to mislead and prejudice the trier of fact. Because this section does not serve the purpose for which the Reply Brief is intended, it should be stricken.

10. **Misleading statements in ""Section IV. What Penalty is Appropriate?" "should be stricken.** A number of specific statements in this must be stricken:

- "Respondents never complied with their NPDES permit" (CRB at 27) should be stricken because it is a false statement unsupported by the record. It also must be stricken because it implies – as the Complainant has attempted to do throughout this Complainant's Reply Brief – that all of the Respondents had NPDES permit. In fact, only the Respondent Skokie Valley Asphalt possessed an NPDES permit and only the Respondent Skokie Valley Asphalt can be held liable for violation of the permit.

- "Respondents never had a representative discharge sampling point through at least May,

1991" (CRB at 27) should be stricken because it is a false statement unsupported by the record. Also, the maintenance of a representative discharge point is not an element of any of the causes of actions brought by the Complainant in its Second Amended Complaint. Therefore, it is not relevant to this case and has only potential prejudicial value. It should be stricken both because it is false and because it is irrelevant.

- The paragraph that begins "The only thing that could be more serious than intentionally filing false reports..." is a series of false statements and speculation based on the false statements. These statements are not limited to facts in evidence. These statements must be stricken.

11. **Statements recommending specific penalty amounts in "Section IV. What Penalty is Appropriate?" of the Complainant's Reply Brief should be stricken.** In the Respondents' Closing Argument the Respondents appropriately reviewed the standard for damages under Section 33 of the Act, 415 ILCS 5/33 (RCA at 27- 44) and the mitigating factors to be considered by the trier of fact under paragraph (h) of Section 42 of the Act (RCA at 35-44). The analysis was limited to the facts placed into evidence at the Hearing. Because no information was entered into evidence concerning the amount of penalties that would be appropriate, the Respondent was not allowed to make recommendations as to the amount of any penalties that should be imposed and did not do so. Further, because the Complainant's did not make any statements recommending any penalty amounts either at Hearing or in the Complainant's Closing Argument, the Respondents had no recommendations to which to reply. The Respondents' Closing Argument was limited to a showing that if the Board determined that violations actually occurred, no penalties were warranted based on the gravity of the infractions and the mitigating factors involved.

Because the Complainant's Reply Brief is to be limited to a reply to the Respondents' Closing Argument and because the Complainant's Reply brief must be limited to facts in evidence, the statements that recommend specific penalty amounts and the manner in which these penalties should be determined for each Count (CRB at 32, 33, 34) should be stricken. Further, these fabrications of penalty amounts are not only without basis in the Hearing record but are also based on facts that are false and sensantionalized in an attempt to inflame the passions of the trier of fact. For this reason also, the statements should be stricken.

12. **Statements purporting to apply Section 42(h) factors in "SECTION IV. What Penalty is Appropriate?" of the Complainant's Reply Brief should be stricken.** In its alleged application of the Section 42(h) factors to the determination of civil penalties, the Complainant both claims are not relevant (CRB at 35) and then attempts to apply the factors based on misstated facts and materials that are not in the record. Again, Complainant had ample opportunity to make its statements of facts in its Complainant's Closing Argument. By presenting, inflammatory, misleading, misstated and fabricated information at this stage of the proceedings – where the Respondents are denied the opportunity to challenge the statements and correct the information for the Board – the Complainant is surpassing the limitations of the Complainant's Reply Brief imposed by the Hearing Officer and the relevant case law. These comments in the Complainant's Reply Brief should be stricken.

13. **The "V. The People of the State of Illinois Are Entitled to Their Cost and Attorney Fees from Respondents" Section of the Complainant's Reply Brief should be stricken in its entirety.** In the Respondents' Closing Argument the Respondents made no comment concerning Complainant's entitlement to costs and attorney's fees. There was no evidence entered at the Hearing that supported either the justification of attorneys' fees and costs or the amount and appropriateness of the costs and attorneys' fees that could be justified. Further, because the Complainant's did not make any statements recommending any penalty amounts either at Hearing or in the Complainant's Closing Argument, the Respondents had no recommendations to which to reply.

Because the Complainant's Reply Brief is to be limited to a reply to the Respondents' Closing Argument and because the Complainant's Reply brief must be limited to facts in evidence, the statements that address the Complainant's right to reimbursement for costs and attorneys' fees and the manner in which these penalties should be determined (CRB at 38-41) should be stricken.

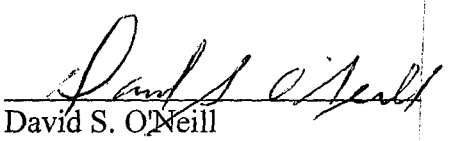
Further, these fabrications of costs and fees are not only without basis in the Hearing record but are also based on facts that are unsupported by sufficient documentation and have most likely been fabricated solely for the purposes of this claim. The Complainants have failed to submit actual time sheets, pay stubs, pay rates, invoices or receipts to support any of their request for

fees and costs. The submission of affidavits at this juncture in the proceedings in totally improper and can not be accepted as a substitute for evidence on the record. The pay rates for the attorneys is obviously fabricated. The payment of attorneys' fees based on this rate would result in an unjustified windfall for the Illinois Attorney General's Office. Further, the request for Attorneys' Fees and Cost does nothing to account for all of the wasted attorneys' hours employed by the Illinois Attorney General's Office is filing frivolous motions, amended complaints, answering motions to object to the Complainant's attorney mistakes, delays, useless discovery. It is hard to justify a claim for attorneys; fees and cost by the Illinois Attorney General's office that is ten times the amount that three Respondents combined paid to defend themselves against frivolous claims. It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though Respondents' attorneys fees include costs. For this reason also, the statements should be stricken.

14. **Statements in Complainant's Reply Brief attacking the character of Respondents' counsel should be stricken.** While the subject of the misconduct of the IllinoisAttorney General's Office, the Illinois Environmental Protection Agency and the Board with respect to allowing Mr. Joel Sternstein to participate in this case is a subject that the Respondents feel will be more appropriately addressed on appeal, the Respondents argue that references to this matter in Complainant's Reply Brief (CRB at 39) are inappropriate and should be stricken. Again, there is nothing in evidence on which the Complainant can base the argument presented in the Complainant's Reply Brief. Further, the Respondents did not raise this issue in the Respondents' Closing Argument. Therefore, the Complainant has no basis for raising this argument. It should be stricken.

The Complainant's statements attacking Respondents' counsel is even more inappropriate to this proceeding. The statements are not only not based on information in evidence but are totally baseless in reality. The Board has the information in their records and their collective personal knowledge to know that these statements are lies fabricated to inflame the passions of the trier of fact. Any insinuation that Respondents' counsel in any way attempted to violate the Board's rules of conduct or in any way attempted to conduct the type of influence peddling that is the trademark of the Illinois Attorney General's Office should be stricken.

Wherefore, the Respondent respectfully requests that the Board strike the sections of the Complainant's Reply Brief as argued above.



David S. O'Neill

David S. O'Neill, Attorney at Law
5487 N. Milwaukee Avenue
Chicago, Illinois 60630-1249
(773) 792-1333

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Respondents' Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief by hand delivery on May 17, 2004, upon the following party:

Mitchell Cohen
Environmental Bureau
Assistant Attorney General
Illinois Attorney General's Office
188 W. Randolph, 20th Floor
Chicago, IL 60601

David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 17

day of May, 20 04

Notary Public

OFFICIAL SEAL
DENNIS R O'NEILL
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/20/07

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
	)	PCB 96-98
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NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Respondents' Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief, a copy of which is hereby served upon you.

David S. O'Neill

May 17, 2004

David S. O'Neill, Attorney at Law
5487 N. Milwaukee Avenue
Chicago, IL 60630-1249
(773) 792-1333