

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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NOV 19 2004

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.)

STATE OF ILLINOIS
Pollution Control Board
No. PCB 96-9

NOTICE OF FILING

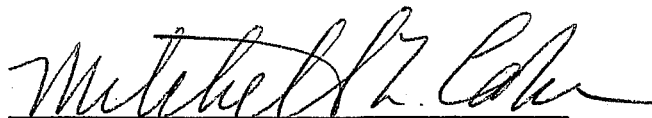
TO: See Attached Service List

PLEASE TAKE NOTICE that on November 19, 2004, we filed with the Illinois Pollution Control Board **Complainant's Motion to Void the Board's October 21, 2004, Order**, a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY:



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STATE OF ILLINOIS
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PEOPLE OF THE STATE OF ILLINOIS,)
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 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.)

No. PCB 96-98

**COMPLAINANT'S MOTION TO VOID
THE BOARD'S OCTOBER 21, 2004, ORDER**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA
 MADIGAN, Attorney General of the State of Illinois, pursuant to
 Sections 101.202, 101.500, and 101.904 of the Board's Procedural
 Regulations, 35 Ill. Adm. Code 101.202, 101.500, and 101.904,
 respectfully moves this Board to void that portion of its October
 21, 2004, Order that changes its September 2, 2004, Order that is
 on appeal. In support of this Motion, the People state as
 follows:

INTRODUCTION

1. On September 2, 2004, the Board issued an Opinion and
 Order ("September Order") finding Respondents violated the

Environmental Protection Act and Board Regulations.¹ This September Order included a finding " . . . that Edwin and Richard Frederick are personally liable for the activities of Skokie Valley."² It also included a finding " . . . that Respondents committed willful, knowing, or repeated violations in this case."³

2. The September Order did not award the People's costs and attorneys' fees as requested, but instead left that issue open for additional filings by the Parties and presumed another Board Order addressing the issue.⁴

3. Based on the evidence, the Board ordered Respondents to pay a civil penalty of \$153,000.⁵

4. Respondents were ordered to pay the civil penalty "[n]o later than October 18, 2004 . . ."⁶ which is approximately 46 days after the Board issued the September Order.⁷

5. Following the "ORDER" language at the end of the September Order, the Board laid out the statutes and regulations

¹ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (September 2, 2004).

² Id. at 11.

³ Id. at 23.

⁴ Id. 1, 6, and 23.

⁵ Id. at 1, 23, and 24.

⁶ Id. at 24.

⁷ The September 2nd Order mistakenly states that October 18, 2004, " . . . is the 60th day after the date of this order" Id.

which essentially explain how to perfect an appeal or motion to reconsider.⁸ This language gives the September Order at least the appearance of a final order even though the issue of the People's costs and attorneys fees remained.⁹

6. As such, in addition to the People's petition for attorneys fees and costs, Respondents response to the petition and related motions, Respondents filed a Petition for Review of the September Order with the State of Illinois' Second District Appellate Court on September 28, 2004.¹⁰

**THE BOARD LOST JURISDICTION OF THIS CASE
SEPTEMBER 28, 2004**

7. The Board lost jurisdiction of this case September 28, 2004, when Respondents filed their Petition for Review.¹¹

8. As the Appellate Court has explained in the Cain v. Sukkar case, "[i]t is fundamental that the proper filing of a notice of appeal causes the jurisdiction of the appellate court to attach *instanter* and deprives the trial court of jurisdiction

⁸ Id. at 24. possibly creating some confusion as to whether the Order was final, or

⁹ Id. at 23, 24.

¹⁰ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004). See also Skokie Valley Asphalt et al. v. Illinois Pollution Control Board et al., No. 04-0977 (Ill. App. 2nd Dist. 2004).

¹¹ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 3.

to modify its judgment or to rule on matters of substance which are the subject of appeal."¹²

9. The Cain Court went on to explain that "[o]nce an appeal has been duly filed in the appellate court by filing a notice of appeal, the trial court is restrained from entering any order which would change or modify the judgment or its scope"¹³

10. The Board acknowledged it " . . . no longer has jurisdiction in this case" and cited the Cain v. Sukkar case.¹⁴

**ONCE THE BOARD LOSES JURISDICTION
ANOTHER ORDER CANNOT ISSUE CHANGING THE APPEALED ORDER**

11. Yet, on October 21, 2004, the Board issued another Order ("October Order") and substantively changed its September Order while it is being appealed.¹⁵

12. The September Order required Respondents to pay the civil penalty by October 18th; the October Order was issued after Respondents were originally ordered to pay the penalty and

¹² Cain v. Sukkar, 521 N.E.2d 1292, 1294, 167 Ill. App. 3d 941, 945 (Ill. App. 4th Dist. 1988).

¹³ Id.

¹⁴ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 2.

¹⁵ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004). See also People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (September 2, 2004) and Skokie Valley Asphalt et al. v. Illinois Pollution Control Board et al., No. 04-0977 (Ill. App. 2nd Dist. 2004).

somehow stayed payment of the penalty imposed in the September Order pending the appeal.¹⁶

13. The same October Order states that " . . . the Board grants the respondents' motion to stay the payment of the penalty" ¹⁷

14. No motion to stay the payment of the penalty exists. Respondents did not file a motion to stay the payment of the penalty.¹⁸

15. In the October Order, the Board correctly summarized the one Motion Respondents filed after the September Order:

In the motion, the respondents request the Board to correct deficiencies in the September 2, 2004 opinion and order that prejudice the parties' rights to proceed in accordance with the Board's procedural rules, and also request a stay or extension of the time to respond to the People's request for attorney fees and costs. Mot. At 1.¹⁹

16. The one Motion Respondents' filed after the September Order is titled "Respondents' Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for

¹⁶ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 2.

¹⁷ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 2.

¹⁸ See Respondents' Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs and the PCB Docket for this case.

¹⁹ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 2.

Attorneys' Fees and Costs."²⁰ It has nothing to do with staying the September Order, or the payment of the penalty.

17. Respondents do not ask to stay the September Order, or the payment of the penalty.²¹

18. Yet, the same October Order states "[t]he Board may, however, consider that portion of the motion seeking to stay the payment of penalty" and sites as an example the Pielet Bros. Trading case.²²

19. There is no portion of Respondents' Motion seeking to stay payment of the penalty and therefore, the Pielet Bros. Trading case does not apply.²³

20. There are at least two reasons the Pielet case does not apply: first, in Pielet Respondents filed a Motion to Stay the Board Order for an appeal, and second, Complainant specifically, in a written response, did not object to staying payment of the

²⁰ See Respondents' Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs filed September 28, 2004.

²¹ See Respondents' Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs and the PCB Docket for this case.

²² People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 2.

²³ See Respondents' Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs and IEPA v. Pielet Bros. Trading, Inc., PCB 80 - 185 (Feb. 4, 1982).

penalty pending appeal.²⁴ Since Complainant did not object to staying payment of the penalty, such action by the Board was not an issue before the 5th District on appeal.²⁵

21. "The Board's procedural rules provide for motions to stay."²⁶ In particular, section 101.514 of the Board's Procedural Rules states "[m]otions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed" ²⁷

22. Respondents did not file a motion to stay the September Order, or a motion to stay payment of the penalty. The Board's procedural rules do not provide the Board with unilateral authority to stay a previous order.

23. "The decision to grant or deny a motion to stay is vested in the sound discretion of the Board."²⁸ However, the motion has to exist before that discretion vests. The motion did not exist prior to the Board issuing its October Order.

24. Just as the Pielet case does not apply to the instant

²⁴ IEPA v. Pielet Bros. Trading, Inc., PCB 80 - 185 (Feb. 4, 1982).

²⁵ Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982).

²⁶ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 2.

²⁷ 35 Ill. Adm. Code 101.514.

²⁸ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (October 21, 2004) at 2.

matter, neither does State Oil.²⁹ In State Oil, cited in the October Order, Respondents filed Motions to Stay the Order with the Board.³⁰

25. The Board lost jurisdiction to change its September Order when Respondents filed their Petition for Review. Though there is precedent to suggest the Board could grant a Motion to Stay a final order in anticipation of, or pending an appeal, such motion does not exist in this case. Therefore, that portion of the October Order which changes the September Order should be voided.

RESPONDENTS ALREADY IN CONTEMPT

26. The September Order required Respondents to pay their civil penalty "[n]o later than October 18, 2004" ³¹ They did not pay the penalty. The penalty was due three days before the Board even issued the October Order.

27. Respondents also did not file a Motion to Reconsider, file a Motion to Stay the Order, file a Motion to Stay Payment of the Penalty, post an appropriate bond,³² or seek similar relief

²⁹ People v. State Oil Co., PCB 97-103 (May 15, 2003).

³⁰ Id.

³¹ People v. Skokie Valley Asphalt Co. et al., PCB 96 - 98 (September 2, 2004).

³² See, for example, IEPA v. Incinerator, Inc., PCB 71 - 69 (October 14, 1971), wherein the Board, after Respondent file a

with the appellate court.

28. Therefore Respondents are in violation of the Board's September Order.

CONCLUSION

29. The Board lost jurisdiction to change the September Order on September 28th when Respondents filed their Petition for Review with the Appellate Court.

30. Respondents did not file with the Board a Motion to Stay the Order, or a Motion to Stay Payment of the Penalty.

31. The Board is without jurisdiction to change the September Order and without authority to grant relief, in the form of staying payment of the civil penalty, which is not sought.

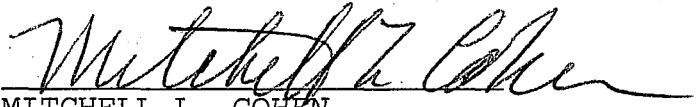
WHEREFORE, Complainant, the People of the State of Illinois, respectfully requests this Board void that portion of the October 21, 2004, Order which changes the September 2, 2004, Order already on appeal and require Respondents to pay the civil

Motion to Stay payment of the penalty, granted the Motion on the condition that Respondent post an appropriate bond.

penalty plus interest in accordance with the September 2, 2004
Order.

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

By:

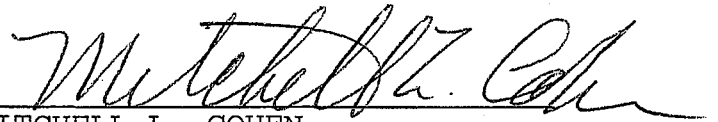


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CERTIFICATE OF SERVICE

I, MITCHELL COHEN, an Assistant Attorney General, certify that on the 19th day of November, 2004, I caused to be served by First Class Mail the foregoing **Complainant's Motion to Void the Board's October 21, 2004, Order**, to the parties named on the attached service list.



MITCHELL L. COHEN
Assistant Attorney General