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OCT 12 2004

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.,)
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

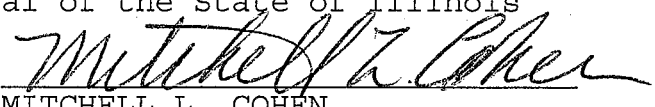
NOTICE OF FILING

TO: Mr. David S. O'Neill Ms. Carol Sudman, Hearing Officer
5487 N. Milwaukee Ave. Illinois Pollution Control Board
Chicago, IL 60630 600 S. 2nd Street, Suite 402
Springfield, Illinois 62704

PLEASE TAKE NOTICE that the Complainant, PEOPLE OF THE STATE OF ILLINOIS, filed with the Illinois Pollution Control Board, **COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION TO STAY AND/OR EXTEND TIME TO RESPOND TO COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS**, a true and correct copy of which is attached hereto and is hereby served upon you.

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

BY:


MITCHELL L. COHEN
Assistant Attorney General
Environmental Bureau
188 West Randolph, 20th Floor
Chicago, IL 60601
(312) 814-5282

Dated: October 12, 2004

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No. PCB 96-98
Enforcement

COMPLAINANT'S RESPONSE TO
RESPONDENTS' MOTION TO STAY AND/OR EXTEND TIME TO RESPOND TO
COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA
MADIGAN, Attorney General of the State of Illinois, acknowledges
"Respondents' Initial Response To And Motion To Stay And/Or
Extend Time To Respond To Complainant's Petition For Attorney
Fees and Costs" as that filing, the Response, is consistent with
the Board's September 2, 2004 Opinion and Order¹ ("Order") and
would not have required any additional work by Complainant;
however, pursuant to Section 101.500 of the Illinois Pollution

¹ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004).

Control Board Regulations ("Board Regulations"), 35 Ill. Adm. Code 101.500, Complainant hereby objects to and responds to that portion of the filing called a "Motion" which seeks either a stay, or extension of time. In response to Respondents' Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorney Fees and Costs ("Motion"), Complainant states as follows:

I. SUMMARY REVIEW OF VIOLATIONS AND LITIGATION

1. By 1978 Edwin and Richard Frederick were the corporate officers and only shareholders of Skokie Valley Asphalt, Inc. ("SVA").²

2. By 1986, the Illinois EPA issued a site specific NPDES permit allowing SVA to discharge stormwater into Grayslake.³

3. Based on NPDES permit violations related to DMRs, the Illinois Attorney General's Office ("AGO") became involved with SVA by the spring of 1993.⁴

4. From December 1994 through April 1995 there was an oily discharge in the Avon Fremont Drainage Ditch.⁵ The Avon Fremont Drainage Ditch is east of the SVA site and flows north through

² Id. at 3.

³ Id. at 2 - 3.

⁴ Resp. Exh. 5: Letter addressed to Asst. A.G. Wallace.

⁵ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004) at 3.

the town of Grayslake into another lake called Third Lake.⁶ When Respondents plugged a drain tile containing water with an oily sheen that flowed from their site to the Avon Drainage Ditch, the oil discharge in the ditch subsided and stopped.⁷

5. In November 1995 the AGO filed the Complaint in this case alleging some of SVA's NPDES permit violations, most of which related to DMRs.⁸

6. In December 1997 the AGO filed an Amended Complaint adding the water pollution count for the oil discharged into the Avon Fremont Drainage Ditch from December 1994 through April 1995 and other NPDES permit violations.⁹

7. In 1998 Edwin and Richard Frederick sold SVA's assets for \$8.2 million and dissolved the corporation.¹⁰

8. The AGO filed a Second Amended Complaint adding Edwin and Richard Frederick as Respondents in July of 2002.

9. As a result, litigation intensified including three

⁶ Id. at 2.

⁷ Id. at 3.

⁸ See PCB 96 - 98 Docket.

⁹ See PCB 96 - 98 Docket.

¹⁰ Compl. Exh. 35; People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004) at 3.

separate motions¹¹ filed by Respondents to dismiss either the Second Amended Complaint, or the Frederick Brothers, two motions to compel¹² filed against Respondents, and days before the hearing Respondents filed four motions to exclude testimony and eight motions in limine.¹³

10. Hearing Officer Sudman heard the case over two days in October, 2003, involving six witness and 50 exhibits creating over 500 pages of transcript.¹⁴

11. On September 2, 2004, the Board found that respondents violated the Act and Water Pollution Regulations by not timely applying for renewal of their NPDES permit, by failing to comply with their NPDES permit reporting requirements, by causing threatening, or allowing water pollution, and exceeding their permit effluent limits.¹⁵

12. The Board also found " . . . that respondents committed willful, knowing, or repeated violations in this case. For example, respondents repeatedly failed to file DMRs on a monthly

¹¹ See PCB 96 - 98 Docket, 9-25-02, 4-23-03, and 9-9-03 entries.

¹² See PCB 96 - 98 Docket, 7-9-03 and 7-28-03 entries.

¹³ See PCB 96 - 98 Docket, 10-27-03 entry.

¹⁴ See PCB 96 - 98 Docket, 11-3-03 and both 11-12-03 entries; People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004) at 2.

¹⁵ Id. at 23.

basis as required by permit and regulation."¹⁶

13. Based on the Board's Order, Complainant filed a Petition for Attorney Fees and Costs September 17, 2004 ("Petition").¹⁷

14. The record indicates that the AGO has been working on and involved with Respondents' environmental violations and this case since the spring of 1993.¹⁸ The assistants at the AGO that have worked, or continue to work on Respondents file or case include Elizabeth Wallace,¹⁹ Ellen O'Laughlin,²⁰ Bradley P. Halloran,²¹ Kelly A. Cartwright,²² Mitchell L. Cohen,²³ Joel J. Sternstein,²⁴ and Bernard J. Murphy.²⁵

15. The People of the State of Illinois' Attorney Fees and Costs Petition only relates to time Assistant Attorney General's ("AAGs") Cohen, Sternstein, and Murphy worked on this case

¹⁶ Id. at 23.

¹⁷ Id. at 23; see also "The People of the State of Illinois' Attorney Fees and Costs Petition."

¹⁸ Resp. Exh. 5: Letter addressed to Asst. A.G. Wallace and PCB 96 - 98 Docket.

¹⁹ Resp. Exh. 5: Letter addressed to Asst. A.G. Wallace.

²⁰ PCB 96 - 98 Docket, 3-1-99 entry.

²¹ PCB 96 - 98 Docket, 3-1-99 and 5-12-00 entries.

²² PCB 96 - 98 Docket, 5-12-00 and 6-14-02 entries.

²³ PCB 96 - 98 Docket, 6-14-02 entry.

²⁴ PCB 96 - 98 Docket, 7-30-02 and 10-23-03 entries; and Board Order 10-16-03.

²⁵ PCB 96 - 98 Docket, 10-23-03 entry.

beginning in May of 2002. It does not include any other work performed in relation to Respondents' environmental violations, or this case, by other AAGs from 1993 through May 2002.

II. RESPONDENTS' OBJECTIONS TO COMPLAINANTS' PETITION

Respondents make a multitude of objections in their most recent Motion attempting to justify a stay or extension of time. Complainant categorizes those objections as follows: whether the Board's September 2nd Order is final and appealable, whether Complainants' Petition warrants additional discovery, whether correcting a mistake constitutes perjury, whether Complainant is entitled to attorney fees for work performed by AAG Sternstein, and whether the rate of \$150.00 per hour is reasonable.

A. Respondents already petitioned Appellate Court to Review Order

Though Respondents try to argue they need to stay the Petition to try and figure out whether the Board's Order is appealable, the argument is moot. Respondents petitioned the Appellate Court for review of the Board's Order the same day they filed their Response and Motion to Stay and/or Extend Time: September 28, 2004.²⁶

B. No additional discovery is necessary

Respondents cite a number of cases trying to convince the Board that a new hearing is appropriate on the issue of

²⁶ A copy of Respondents' Petition for Review to the Second District Appellate Court, Certificate of Service, and Notice of Filing are attached as Exhibit A. See also, PCB Docket 96 - 98.

Complainant's attorney fees and costs, but only after discovery. Not so. None of those cases are Illinois Pollution Control Board cases, and none of those cases involve the Illinois Environmental Protection Act ("Act") that specifically authorizes AGO costs and fees where Respondents willfully, knowingly, or repeatedly violate the Act.

For example, Respondents cite Murakas v. Murakas²⁷ to assert they should be allowed to cross-examine Complainant's attorneys. The Murakas case is a breach of contract case where the trial court ruled on the meaning of a contract related to attorney fees and was affirmed by the Appellate Court.²⁸ Certainly the parties to a contract are allowed to be cross-examined in a breach of contract trial even if one of the parties is an attorney. Nowhere in the Murakas case does the law state, or imply, that Respondents are allowed to cross-examine Complainant's attorneys in this case.

Respondents cite a case, Estate of Healy²⁹, for the

²⁷ Motion at 3. The appellants are Ms. Murakas and James Murakas on behalf of Peter Murakas Estate; the appellee is John J. Enright, the attorney whose fees are at issue.

²⁸ Murakas, 99 Ill.App.2d 342, 240 N.E.2d 797 (1st Dist. 1968).

²⁹ Motion at 3. There are mistakes and/or inconsistencies in Respondents' cites of this case. Attorney Orstrom handled a portion of the Healy Estate probate on behalf of the Tierneys who were testamentary trust beneficiaries. Orstrom is the Appellant, and the Tierneys are the Appellees. Complainant will continue to refer to this case here as Estate of Healy. The cite to the case

following propositions: Complainant has the burden of proof to establish their claim for fees and costs, the Board is not bound by Complainant's attorney's opinion of what constitutes a reasonable fee, and Respondents are entitled to present expert opinion evidence as to the reasonableness of Complainant's fees and costs.³⁰ First, in the Estate of Healy case, the Court acknowledged that an attorney rendering professional services has a right to be compensated assuming there is an express, or implied contract for employment with the party charged for those services.³¹ This is another breach of contract type case relating to attorney fees. The attorney was one of the parties to the alleged contract. In the Estate of Healy case, the attorney could not, however, establish a contract, express, or implied.³² There was no "meeting of the minds" between the parties.³³ Under such circumstances, the party asserting the claim, in the Estate of Healy case an attorney, has the burden of proving the claim. That brief analysis distinguishes the Estate of Healy case from The People of the State of Illinois v. Skokie Valley Asphalt, Inc.,

is: 137 Ill.App.3d 406, 484 N.E.2d 890, 92 Ill.Dec. 159 (2nd Dist. 1985).

³⁰ Motion at 3.

³¹ Estate of Healy, 137 Ill.App.3d at 409.

³² Id.

³³ Id.

Edwin L. Frederick, and Richard J. Frederick. And, even though the case at bar is not a breach of contract case related to attorney fees, Complainant did meet its burden of proof by submitting the attorney fees and costs petition with supporting affidavits as evidence.³⁴ Complainant did not offer any opinion as to the reasonableness of the rate charged; rather Complainant accepted the Board's determination of a reasonable rate and used it within their fee petition.³⁵ Respondents could have presented evidence, expert or not, as to the reasonableness of Complainant's fees and costs in their response, but by their choice did not.³⁶

Respondents cite Johns v. Klecan³⁷ as additional support for their assertion that they could have used expert evidence on the issue of reasonableness. First, the Johns case is a contingency

³⁴ See also 64 East Walton, Inc. v. Chicago Title and Trust Company, 69 Ill.App.3d 635, 387 N.E.2d 751, 25 Ill.Dec. 875 (1st Dist. 1979), where a lease allowed for attorney fees to be awarded to the prevailing party in a dispute; however, the appellate court remanded the issue of attorney fees after the trial court awarded fees because there was no evidence as to the amount of time the attorney expended in the matter. Id. at 649 - 50. In this case, the Board has the evidence of time expended by the AAGs with Complainant's affidavits.

³⁵ The Board has already held that \$150.00 hourly rate for attorney's fees is reasonable. People v. J & F Hauling Inc., PCB 02-221 (May 1, 2003).

³⁶ Section 101.504 of the Board's Regulations, 35 Ill. Adm. Code 101.504.

³⁷ Motion at 3.

fee contract case where a dispute arose related to attorney fees because the first attorney was discharged and another retained.³⁸ Second, Respondent points out the Johns Court states that "[w]hile it may be proper for an attorney seeking fees to present expert testimony on the issue of what is a reasonable fee . . . , he is not required to do so as a matter of law."³⁹ In other words, if the case at bar was not before the Illinois Pollution Control Board which is eminently familiar with the prosecution of environmental enforcement cases, then Complainant could have presented expert evidence on the issue of what is a reasonable fee. Complainant is not required to do so, and rate is not an issue.

Respondents also cite Chicago Professional Sports Limited Partnership et al. v. National Basketball Association⁴⁰ ("NBA Case") to assert they are entitled to discovery and their fees and costs can be used to provide a comparable measure of

³⁸ Johns v. Klecan, 198 Ill.App.3d 1013, 556 N.E.2d 689, 145 Ill.Dec. 71 (1st Dist. 1990).

³⁹ Id. at 24. See also Motion at 3 citing same.

⁴⁰ Motion at 3. Chicago Professional Sports Limited Partnership et al. v. National Basketball Association is a Federal District Court case that is not reported in the Federal Supplement. This case generated many different opinions over the years. Complainant believes that Respondent meant to cite the same case each time in their Motion, but the cites are inconsistent. Through Westlaw Complainant found only one opinion for this case from the Northern District of Illinois in 1996. The Westlaw cite for the case, which does concern attorney fees, is: 1996 WL 66111 (N.D. Ill.).

reasonableness of Complainant's costs and fees.⁴¹ During the pendency of complex antitrust litigation, plaintiff's attorneys believed they substantially prevailed in part of the litigation in such a way that they could proceed with a costs and fee petition while at the same time conduct discovery related to the source of impermissible cost-shifting (through the payment of attorney fees to defendant's attorneys).⁴² Defendants disagreed so plaintiff filed a motion to compel. In ruling on the motion, District Court Judge Holderman explained that "[t]o obtain attorney's fees, a plaintiff must present adequate documentation of reasonable hours and costs invested in connection with their successful claims to establish a reasonable fee award."⁴³

Complainant is not in the middle of complex antitrust litigation with Respondents. This is an environmental enforcement case where the hearing is over, and the Board issued its opinion.⁴⁴ Whether the Complainant is the prevailing party is not an issue. The Board ruled that Respondents committed willful,

⁴¹ Motion at 3.

⁴² Chicago Professional Sports Limited Partnership et al. v. National Basketball Association, 1996 WL 66111 (N.D. Ill.).

⁴³ Id.

⁴⁴ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004).

knowing; or repeated violations of the Act.⁴⁵ Complainant is not claiming attorney fees for the time period of 1993 through May of 2002 and as such does not need information from Respondents' attorneys to help support the claim which the NBA Case would appear to allow.

Complainant presented adequate documentation of a portion of the reasonable hours and costs invested in connection with their successful prosecution of this environmental enforcement case to establish a reasonable fee award.⁴⁶ The documentation complies with the Board's Order,⁴⁷ Section 42(f) of the Act,⁴⁸ and past Board cases where attorney fees and costs were awarded.⁴⁹

Complainant does not seek any discovery on this issue. The

⁴⁵ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004) at 23.

⁴⁶ The People of the State of Illinois' Attorney Fees and Costs Petition.

⁴⁷ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004).

⁴⁸ 415 ILCS 5/42(f) (2002).

⁴⁹ See for example: People v. Freedom Oil Company: PCB 93 - 59 (May 5, 1994); People v. Kershaw: PCB 92 - 164 (April 20, 1995); People v. Kershaw: PCB 92 - 164 (May 4, 1995); People v. Panhandle Eastern Pipe Line Company: PCB 99 - 191 (November 15, 2001) at 35; People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (September 19, 2002); People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (November 7, 2002); People v. J & F Hauling, Inc.: PCB 02 - 21 (February 6, 2003); and People v. J & F Hauling, Inc.: PCB 02 - 21 (May 1, 2003).

fact that Respondents chose not to submit any evidence does not justify further delay or discovery when none is necessary, or allowed.

C. AAG Cohen corrected an earlier mistake.

Respondents charge that the AGO and AAG Cohen committed perjury apparently by correcting an earlier affidavit.⁵⁰ Perjury is "[t]he act or an instance of a person's deliberately making material false or misleading statements while under oath."⁵¹ There is nothing anywhere in the record to suggest that AAG Cohen deliberately made a material false, or misleading statement especially in this case where AAG Cohen identified and corrected a mistake all to the benefit of Respondents.⁵²

After reading the Board's September 2, 2004, Order, AAG Cohen went back and reviewed that portion of Respondents' Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief which pertained to costs and attorney fees in an effort to determine whether to file a more detailed petition.⁵³ Upon that review, AAG Cohen decided that filing a separate petition that included more detailed information related to the

⁵⁰ Motion at 5.

⁵¹ Black's Law Dictionary, 7th Edition (1999).

⁵² The People of the State of Illinois' Attorney Fees and Costs Petition.

⁵³ See AAG Cohen's Affidavit attached as Exhibit B.

attorney fees and costs incurred would address many of Respondents' objections.⁵⁴ In an effort to add more detail to the costs incurred by the State of Illinois, AAG Cohen reviewed the invoices and receipts so that they could be listed separately.⁵⁵ After listing the amounts for depositions from receipts, AAG Cohen added them together for a total of \$1,796.65; this amount was significantly less than the \$3,887.65 reported in an earlier affidavit.⁵⁶ AAG Cohen could not find any other receipts for depositions or recall any other depositions, or possible transcript expenses, in the case which might account for the discrepancy in deposition expenses listed in the affidavits.⁵⁷ Therefore, AAG Cohen corrected the mistake and noted this fact in the Petition.⁵⁸

There is no indication whatsoever that the AGO, or AAG Cohen perjured themselves in correcting a mistake under these circumstances to Respondents' benefit.

D. AAG Sternstein's Fees are more than justified.

Respondents seem to make two arguments related to AAG

⁵⁴ See AAG Cohen's Affidavit attached as Exhibit B.

⁵⁵ See AAG Cohen's Affidavit attached as Exhibit B.

⁵⁶ See AAG Cohen's Affidavit attached as Exhibit B.

⁵⁷ See AAG Cohen's Affidavit attached as Exhibit B.

⁵⁸ See AAG Cohen's Affidavit attached as Exhibit B; see also The People of the State of Illinois' Attorney Fees and Costs Petition.

Sternstein's fees. First, Respondents want to conduct a full blown investigation into possible misconduct at the Board and AGO as to why a past employee of the Board was allowed to work on a case pending before the Board.⁵⁹ The Board already ruled on AAG Sternstein's involvement in the case on October 16, 2003.⁶⁰

"Although no prejudice or bias resulted from Sternstein's prior involvement in this matter, Sternstein is disqualified from further appearing in this proceeding."⁶¹ It has been decided.

Second, Respondents challenge whether Complainant is entitled to attorney fees for the time AAG Sternstein spent working on this case prior to the Board's October 16, 2003, Order.⁶² Of course Complainant is entitled to those fees.

AAG Sternstein entered his appearance as co-counsel in this case on July 30, 2002.⁶³ Respondents' counsel did not file their Motion to Recuse Complainant's Attorney Joel J. Sternstein until September 9, 2003.⁶⁴ Had Respondents filed their Motion to Recuse

⁵⁹ Motion at 4 - 5.

⁶⁰ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (October 16, 2003).

⁶¹ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (October 16, 2003) at 4.

⁶² Motion at 4 - 5.

⁶³ See PCB 96 - 98 Docket.

⁶⁴ See PCB 96 - 98 Docket.

when they first learned AAG Sternstein joined the case rather than wait in hiding seeking to ambush Complainants a month before trial, then a different AAG would have joined the case, just as AAG Murphy did in October 2003, and Complainants would be entitled to those AAGs fees as well.

There is no reason to delay Complainant's Petition, deny Complainant's fees for the work performed by AAG Sternstein before October 16, 2003, and there is no need to allow discovery on a matter that has already been decided.

E. The Board has already found the hourly rate reasonable.

Respondents claim the Complainant's hourly rate is fabricated and unjustified and that ". . . Complainants need to use discovery to determine the true pay rate and actual productive hours applied to this case."⁶⁵ Complainant's hourly rate is not fabricated, is justified and no discovery is needed to the contrary.

This case was heard by the Illinois Pollution Control Board. It is an agency created over thirty years ago through the Illinois Environmental Protection Act for the purpose of controlling pollution, and restoring and protecting the Illinois environment.⁶⁶ The Board can adjudicate enforcement proceedings

⁶⁵ Motion at 4.

⁶⁶ 415 ILCS 5/5 (2002); see also 35 Ill. Adm. 101.106 and 101.108.

for violations of the Act and related regulations and has been doing so for years.⁶⁷ If during the adjudication of an enforcement proceeding, the Board finds that Respondents violations were willful, knowing, or repeated, the Board is authorized to award costs and fees to the AGO (or State's Attorney) and has been doing so for years.⁶⁸

As stated before, the Board is eminently familiar with the prosecution of environmental enforcement cases and what a reasonable fee is for attorneys prosecuting such cases. For example, in 1994, the Board accepted as evidence an AAG affidavit and determined that \$100.00 per hour was reasonable for AAG time after a finding that Respondents committed willful, knowing and repeated violations of the Board's regulations.⁶⁹

In 2001, the Board determined that \$120.00 per hour was a

⁶⁷ 415 ILCS 5/5 (2002); 35 Ill. Adm. 101.106 and 101.108.

⁶⁸ 415 ILCS 5.42(f) 2002); see also People v. Freedom Oil Company: PCB 93 - 59 (May 5, 1994); People v. Kershaw: PCB 92 - 164 (April 20, 1995); People v. Kershaw: PCB 92 - 164 (May 4, 1995); People v. Panhandle Eastern Pipe Line Company: PCB 99 - 191 (November 15, 2001) at 35; People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (September 19, 2002); People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (November 7, 2002); People v. J & F Hauling, Inc.: PCB 02 - 21 (February 6, 2003); and People v. J & F Hauling, Inc.: PCB 02 - 21 (May 1, 2003).

⁶⁹ People v. Freedom Oil Company: PCB 93 - 59 (May 5, 1994) at 11. In 1995, the Board again stated that \$100.00 per hour was a reasonable rate in the Kershaw orders. People v. Kershaw: PCB 92 - 164 (April 20, 1995); People v. Kershaw: PCB 92 - 164 (May 4, 1995).

reasonable rate in the Panhandle Eastern case.⁷⁰ The Board, based on their findings that Respondents committed knowing and repeated violations of the Act, awarded costs and fees pursuant to Section 42(f) with supporting affidavits.⁷¹ In 2002, the Board found that Respondent D'Angelo Enterprises, Inc. committed knowing and repeated violations of the Act and Board regulations, ordered Complainant to file an affidavit of the People's costs and attorney fees, and, as in this case, gave Respondent 14 days to respond to Complainant's claimed costs and fees.⁷² The Board found the rate of \$120.00 per hour supported by affidavits to again be reasonable.⁷³

In 2003, the Board found that \$150.00 per hour was a reasonable rate for attorney fees.⁷⁴ The Board found that Respondent, J & F Hauling, committed knowing and repeated

⁷⁰ People v. Panhandle Eastern Pipe Line Company: PCB 99 - 191 (November 15, 2001). Like the case at bar, the Panhandle Eastern case was a contested hearing. Based on a reading of the Opinion and Order of the Board in that case, it appears that the costs and fees issue was addressed in closing arguments - apparently without objection.

⁷¹ People v. Panhandle Eastern Pipe Line Company: PCB 99 - 191 (November 15, 2001) at 35.

⁷² People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (September 19, 2002) at 20.

⁷³ People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (November 7, 2002) at 2 - 3.

⁷⁴ People v. J & F Hauling, Inc.: PCB 02 - 21 (May 1, 2003).

violations of the Act and Board's regulations.⁷⁵ Therefore, the Board ordered Complainant to file an affidavit of Complainant's costs and fees in the case, and, as in the case at bar, gave Respondents 14 days to respond to the affidavits.⁷⁶ Based on Complainant's affidavits, the Board found the hourly rate of \$150.00 to be reasonable and awarded the same.⁷⁷

Complainant uses and seeks the same hourly rate in its Petition: \$150.00. Complainant does not seek to increase the rate, or dispute the Board's findings that the hourly rate of \$150.00 per hour is reasonable. The Board has already established the reasonable hourly rate. Complainant has not fabricated anything, and there is no need to conduct discovery on an issue already decided.

III. CONCLUSION

This case has been pending before the Board since 1995. In 2004, the Board found that Respondents Edwin and Richard Frederick were individually liable and that Respondents committed willful, knowing, or repeated violations of the Act and Board

⁷⁵ People v. J & F Hauling, Inc.: PCB 02 - 21 (February 6, 2003); and People v. J & F Hauling, Inc.: PCB 02 - 21 (May 1, 2003).

⁷⁶ People v. J & F Hauling, Inc.: PCB 02 - 21 (February 6, 2003) at 9.

⁷⁷ People v. J & F Hauling, Inc.: PCB 02 - 21 (May 1, 2003) at 2 - 3.

Regulations.⁷⁸ As such, the Board accepted Complainants earlier filed affidavits and allowed Complainant to supplement those affidavits, at least in part, based on Respondents' objections. Complainant, based on Respondents' objections, filed more detailed affidavits in a fees and costs petition filed September 17, 2004. Complainant's Petition only seeks attorney fees from May 2002, not for all the work performed by other AAGs years past.

Respondents filed their Response as allowed by the Board.⁷⁹ Respondents chose not to contest any particular entry within Complainant's Petition and chose not to submit any evidence contradicting the Petition, any entry in the Petition, or any evidence challenging the reasonableness of the Petition or hourly rate. Furthermore, this is not a breach of contract, contingency fee, or fee sharing issue. This is a fee petition authorized by the Illinois Environmental Protection Act and the Illinois Pollution Control Board where Respondents committed willful, knowing, or repeated violations of environmental laws or regulations.

The evidence presented by Complainant conforms with the

⁷⁸ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004).

⁷⁹ People v. Skokie Valley Asphalt, Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick: PCB 96 - 98 (September 2, 2004) at 23.

evidence the Board orders and accepts in cases where it finds that Respondents willfully, knowingly, or repeatedly violated the Act or Board regulations.⁸⁰ The Board regularly gives Respondents 14 days to respond or contest Complainant's costs and fees petition and supporting affidavits.

Respondents filed their response and objections. There is no need to stay, or extend time to decide the fee petition. The Board has Complainant's affidavits, is familiar with reasonable hourly rates charged by attorneys practicing environmental law, and the length and complexities of the litigation in this case.⁸¹

WHEREFORE, Complainant, People of the State of Illinois, requests this Board deny Respondents' Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorney

⁸⁰ People v. Freedom Oil Company: PCB 93 - 59 (May 5, 1994); People v. Kershaw: PCB 92 - 164 (April 20, 1995); People v. Kershaw: PCB 92 - 164 (May 4, 1995); People v. Panhandle Eastern Pipe Line Company: PCB 99 - 191 (November 15, 2001) at 35; People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (September 19, 2002); People v. D'Angelo Enterprises, Inc.: PCB 97 - 66 (November 7, 2002); People v. J & F Hauling, Inc.: PCB 02 - 21 (February 6, 2003); and People v. J & F Hauling, Inc.: PCB 02 - 21 (May 1, 2003).

⁸¹ AAGs Cohen and Murphy spent additional time working on this case as a result of Respondents' Motion preparing this Response and as such the amount sought for attorney fees should be increased in the Petition accordingly. See AAG Cohen's second Affidavit attached as Exhibit C, and AAG Murphy's Exhibit attached as Exhibit D.

AAG Cohen spent an additional 34.5 hours on this case since filing the Petition and AAG Murphy spent an additional 2.5 hours on this case since filing the Petition for a total of 37 hours in attorney time. 37 hours X \$150.00 = \$5550.00.

Fees and Costs and further award Complainant's Attorney Fees and Costs consistent with Section 42(f) of the Act, the Board's Order, and the evidence presented in The People of the State of Illinois' Attorney Fees and Costs Petition and this Response which includes an additional 37 hours of attorney time and \$5,550.00 in additional fees.

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

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

ROSEMARIE CAZEAU, Chief
Environmental Bureau

BY:



MITCHELL L. COHEN
BERNARD J. MURPHY, JR.
Assistant Attorney General
Environmental Bureau
188 West Randolph, 20th Floor
Chicago, IL 60601
(312) 814-5282
(312) 814-3908

RECEIVED

SEP 28 2004

04-0977

ROBERT J. MANGAN, CLERK
APPELLATE COURT 2nd DISTRICT

IN THE APPELLATE COURT OF ILLINOIS
FOR THE SECOND DISTRICT

COPY

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.,)

Petitioners)

v.)

ILLINOIS POLLUTION CONTROL BOARD,)
Illinois Pollution Control Board Chairman J)
PHILIP NOVAK, Illinois Pollution Control Board)
Member G. TANNER GIRARD, Illinois)
Pollution Control Board Member THOMAS E.)
JOHNSON, Illinois Pollution Control Board)
Member NICHOLAS J. MELAS, Illinois)
Pollution Control Board Member ANDREA S.)
MOORE, Assistant to Illinois Pollution Control)
Board Member Johnson JOHN KNITTLE, Illinois)
Pollution Control Board Hearing Officer Carol)
Sudman, PEOPLE OF THE STATE OF ILLINOIS)
and their attorney the ILLINOIS ATTORNEY)
GENERAL'S OFFICE, Assistant Attorney)
General Mitchell L. Cohen, Assistant Attorney)
General Joel J. Sternstein and Assistant Attorney)
General Bernard J. Murphy Jr.,)

Respondents.)

Petition for Review
of Order of the
Illinois Pollution Control Board
and Docket Number
PCB 96-98

CLERK OF APPELLATE COURT
SECOND DISTRICT

2004 SEP 28 AM 11:23

FILED

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., hereby petition
the court for review of the order of the Illinois Pollution Control Board which finds that the

EXHIBIT

A

tabbles

Respondents/Petitioners violated the Environmental Protection Act (415 ILCS 5 (2002)) and Illinois Pollution Control Board but withholds a decision regarding attorneys' fees and costs until this matter is fully addressed by the parties entered on September 2, 2004.


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 Petition for Review of Order of the Illinois Pollution Control Board for Docket Number PCB 96-98 by hand delivery on September 28, 2004, upon the following parties:

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

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

Bernard J. Murphy Jr.
Environmental Bureau
Assistant Attorney General
Illinois Attorney General's Office
188 W. Randolph, 20th Floor
Chicago, IL 60601

Clerk of the Illinois Pollution Control Board
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

J. Philip Novak
Chairman
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

G Tanner Girard
Board Member
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

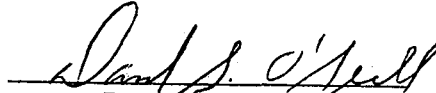
Thomas E. Johnson
Board Member
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

Nicholas J. Melas
Board Member
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

Andrea S. Moore
Board Member
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

John Knittle
Assistant to Board Member Johnson
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

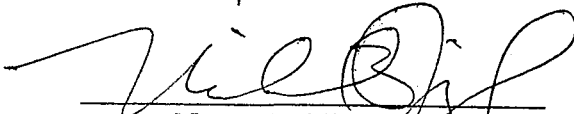
Carol Sudman
Hearing Officer
Illinois Pollution Control Board
Thompson Center 11th Floor
100 W. Randolph St.
Chicago, IL 60601

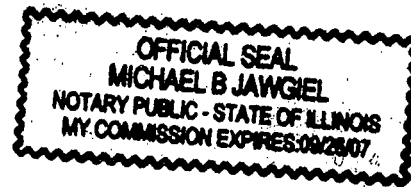

David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 28th

day of September, 20 04


Notary Public



IN THE APPELLATE COURT OF ILLINOIS
FOR THE SECOND DISTRICT

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.,)

Petitioners)

v.)

ILLINOIS POLLUTION CONTROL BOARD,)
Illinois Pollution Control Board Chairman J)
PHILIP NOVAK, Illinois Pollution Control Board)
Member G. TANNER GIRARD, Illinois)
Pollution Control Board Member THOMAS E.)
JOHNSON, Illinois Pollution Control Board)
Member NICHOLAS J. MELAS, Illinois)
Pollution Control Board Member ANDREA S.)
MOORE, Assistant to Illinois Pollution Control)
Board Member Johnson JOHN KNITTLE, Illinois)
Pollution Control Board Hearing Officer Carol)
Sudman, PEOPLE OF THE STATE OF ILLINOIS)
and their attorney the ILLINOIS ATTORNEY)
GENERAL'S OFFICE, Assistant Attorney)
General Mitchell L. Cohen, Assistant Attorney)
General Joel J. Sternstein and Assistant Attorney)
General Bernard J. Murphy Jr.,)

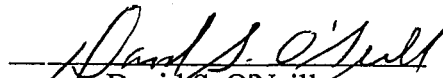
Respondents.)

Petition for Review
of Order of the
Illinois Pollution Control Board
and Docket Number
PCB 96-98

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the
APPELLATE COURT OF ILLINOIS FOR THE SECOND DISTRICT Petitioners' Petition for
Review of Order of the Illinois Pollution Control Board for Docket Number PCB 96-98, a copy

of which is hereby served upon you.


David S. O'Neill

September 28, 2004

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

State of Illinois)
) SS
County of Lake)

AFFIDAVIT

I, Mitchell L. Cohen, upon affirmation, state as follows:

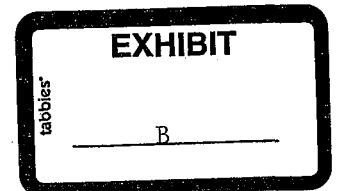
1. I am an Assistant Attorney General in the Environmental Bureau North of the Illinois Attorney General's Office and assigned to assist in the representation of the People of the State of Illinois in the case styled, People v. Skokie Valley Asphalt Co., Inc., et al., PCB No. 96-98, filed before the Illinois Pollution Control Board.

2. After reading the Board's September 2, 2004, Order, I went back and reviewed that portion of Respondents' Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief which pertained to costs and attorney fees in an effort to determine whether to file a more detailed petition.

3. After that review, I decided that filing a separate petition that included more detailed information related to the attorney fees and costs incurred would address many of Respondents' objections.

4. In an effort to add more detail to the costs incurred by the State of Illinois, I reviewed the invoices and receipts so that they could be listed separately.

5. After listing the amounts for depositions from receipts, I added them together for a total of \$1,796.65; this amount was significantly less than the \$3,887.65 reported in an

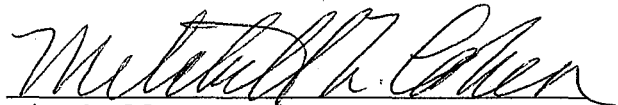


earlier affidavit.

6. I could not find any other receipts for depositions or recall any other depositions, or possible transcript expenses, in the case which might account for the discrepancy in deposition expenses listed in the affidavits.


7. Therefore, I corrected the mistake and noted this fact in the Petition.

Further affiant sayeth not.

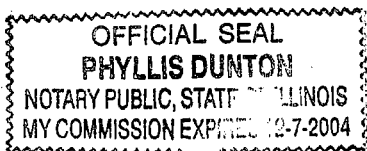


Mitchell L. Cohen
Assistant Attorney General
Environmental Bureau North

Subscribed to and affirmed before me
this 12th day of October, 2004.



Notary Public



State of Illinois)
) SS
County of Lake)

AFFIDAVIT

I, Mitchell L. Cohen, upon affirmation, state as follows:

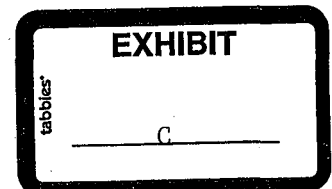
1. I am an Assistant Attorney General in the Environmental Bureau North of the Illinois Attorney General's Office and assigned to assist in the representation of the People of the State of Illinois in the case styled, People v. Skokie Valley Asphalt Co., Inc., et al., PCB No. 96-98, filed before the Illinois Pollution Control Board.

2. After filing The People of the State of Illinois' Attorney Fees and Costs Petition September 17, 2004, I have worked an additional thirty-four and one-half (34.5) hours on this case as a direct result of Respondents' filings September 28th, 2004.

3. On September 28, 2004, I spent one (1) hour reading and discussing "Respondents' Initial Response To And Motion To Stay And/Or Extend Time To Respond To Complainant's Petition For Attorney Fees And Costs" and the Petition for Review and related documents filed before the Appellate Court.

4. On October 5, 2004, I spent two (2) hours reviewing the same documents filed By Respondents September 28th and meeting with management to discuss the same.

5. On October 6, 2004, I spent four (4) hours researching Complainant's Response to Respondents' Motion.



6. On October 7, 2004, I spent four (4) hours researching and outlining Complainant's Response to Respondents' Motion.

7. On October 8, 2004, I spent six (6) hours researching and drafting Complainant's Response to Respondents' Motion.

8. On October 10, 2004, I spent seven and one half (7.5) hours researching and drafting Complainant's Response to Respondents' Motion.

9. On October 11, 2004, I spent six (6) hours drafting Complainant's Response to Respondents' Motion and a related affidavit.

10. On October 12, 2004, I spent four (4) hours editing Complainant's Response to Respondents' Motion and preparing this affidavit and preparing the Response for filing.

Further affiant sayeth not.

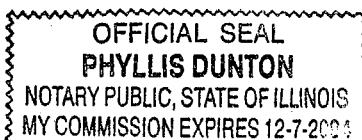


Mitchell L. Cohen
Assistant Attorney General
Environmental Bureau North

Subscribed to and affirmed before me
this 12 day of October, 2004.



Notary Public



State of Illinois)
) SS
County of Lake)

AFFIDAVIT

I, Bernard J. Murphy, Jr., upon affirmation, state as follows:

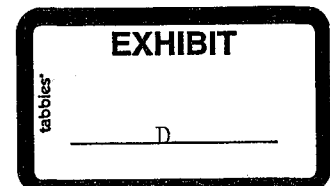
1. I am an Assistant Attorney General in the Environmental Bureau North of the Illinois Attorney General's Office and assigned to assist in the representation of the People of the State of Illinois in the case styled, People v. Skokie Valley Asphalt Co., Inc., et al., PCB No. 96-98, filed before the Illinois Pollution Control Board.

2. After filing The People of the State of Illinois' Attorney Fees and Costs Petition September 17, 2004, I have worked an additional two and one-half (2½) hours on this case as a direct result of Respondents' filings September 28th, 2004.

3. On September 29, 2004, I spent one (1) hour reading "Respondents' Initial Response To And Motion To Stay And/Or Extend Time To Respond To Complainant's Petition For Attorney Fees And Costs" and the Petition for Review and related documents filed before the Appellate Court.

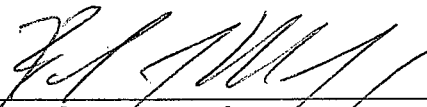
4. On October 5, 2004, I spent one (1) hour reviewing the same documents filed By Respondents September 28th and meeting with management to discuss the same.

5. On October 12, 2004, I spent one-half (½) hour editing




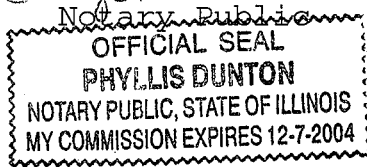
Complainant's Response to Respondents' Motion and preparing this affidavit.

Further affiant sayeth not.


Bernard J. Murphy, Jr.
Asst. Chief
Assistant Attorney General
Environmental Bureau North

Subscribed to and affirmed before me
this 12th day of October, 2004.





CERTIFICATE OF SERVICE

I, MITCHELL L. COHEN, an Assistant Attorney General, do certify that I caused to be mailed this 12th day of October, 2004, the foregoing **COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION TO STAY AND/OR EXTEND TIME TO RESPOND TO COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS** and NOTICE by first-class mail in a postage prepaid envelope and depositing same with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois, 60601.


MITCHELL L. COHEN