

ILLINOIS POLLUTION CONTROL BOARD  
November 17, 2005

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 96-98  
) (Enforcement – Water)  
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. )

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a number of motions filed by the People of the State of Illinois (People) and the Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents). The motions all relate to discovery on the issue of attorney fees and costs.

**PROCEDURAL BACKGROUND**

On September 2, 2004, the Board issued an order in this matter finding that the respondents violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2004)) and Board regulations. The Board ordered the respondents to pay a civil penalty of \$153,000, but withheld a decision regarding attorney fees and costs until the matter was fully addressed by the parties. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 1 (Sept. 2, 2004). On September 28, 2004, the respondents filed a motion to stay or extend the time to respond to the People's petition for attorney fees and costs. Also on September 28, 2004, the respondents filed a petition to review the Board order with the State of Illinois' Second District Appellate Court. *See Skokie Valley Asphalt v. PCB*, No. 04-0977 (2nd Dist. 2004).

On October 18, 2004, the Board issued an order finding that the Board no longer had jurisdiction of the case in light of the pending appeal and could not, therefore, rule on the petition seeking attorney fees and the accompanying issues. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 2 (Oct. 18, 2004). On November 18, 2004, the appellate court dismissed the respondents' petition for review.

On November 19, 2004, the People filed a motion to void the Board's October 21, 2004 order. On December 1, 2004, the respondents filed a response to the People's motion, a motion

to renew their motion to stay or extend time to respond to the petition for attorney fees and costs, as well as a motion to stay payment of penalty. On December 8, 2004, the People filed a response to the respondents' motions. On December 16, 2004, the Board issued an order giving respondents until January 13, 2005, to respond to the People's request for attorney fees and costs. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Dec. 16, 2004). In that order, the Board stated that it will not hold any hearings on the issues of fees and costs, and also continued the stay of the \$153,000 civil penalty.

On April 7, 2005, the Board granted respondents' motions for extension of time and authorized respondents to conduct discovery on the attorney fee issue. The Board continued the stay of the \$153,000 civil penalty imposed in the Board's September 2, 2004 order. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 4 (Apr. 7, 2005).

On April 25, 2005, the respondents filed discovery including interrogatories, a request to produce documents, a request to admit facts, and a notice of deposition. Also on April 25, 2005, the People filed interrogatories, document requests and a notice of deposition. On May 18, 2005, the respondents filed a motion to strike the People's discovery.

On May 24, 2005, the People filed answers and objections to respondents' discovery. On June 1, 2005, the People filed a response to the respondents' motion to strike. On July 6, 2005, the respondents filed a motion to strike letters sent by the People to respondents regarding the ongoing discovery issues. Also on July 6, 2005, the respondents filed a motion to strike the People's objections to the respondents' discovery requests, and a motion to compel the People to respond.

On July 20, 2005, the People filed a motion for a protective order, a response to respondents' motion to strike objection to discovery, a response to the motion to strike letters filed regarding the discovery issues, and a response to the respondents' motion to compel.

On August 15, 2005, the respondents filed a motion to strike the People's motion for a protective order, the People's response to the respondents' motion to strike the People's discovery objections, and the People's response to the motion to compel. The respondents also filed a motion to strike the People's response to the respondents' motion to strike the People's letters regarding discovery. On August 17, 2005, the People filed a response to the respondents' August 15, 2005 motions to strike.

## **MOTIONS**

In attempt to simplify the many pleadings in this matter, the Board will address each motion, along with all related pleadings, individually.

### **Respondents' May 18, 2005 Motion to Strike the People's Discovery**

## **Respondents**

In the motion to strike the People's discovery, the respondents assert that the Board's April 7, 2005 order does not grant the People additional time to conduct discovery, and that the respondents have fully responded to all previous discovery requests. Mot. at 1-2. The respondents contend that the People were not authorized to pursue the discovery filed and served on April 22, 2005. Mot. at 2. The respondents argue that they have no legal obligation to respond to the People's discovery and do not wish to do so on a voluntary basis. *Id.* The respondents ask that the Board strike the People's interrogatories, document requests and deposition notices. *Id.*

## **People**

The People argue that their discovery requests are directly relevant to the numerous factual allegations made by respondents. Resp. at 4. The People contend that the respondents have introduced bald factual allegations in the proceeding concerning the reasonableness of the People's attorney fees and costs in comparison to the respondents' own attorney fees and costs. *Id.* The People argue that, notwithstanding the irrelevance of the allegations, the allegations were made, are not a matter of record, and the People are therefore entitled to full disclosure regarding the factual basis for the allegations. *Id.*

The People note that respondents do not argue that the discovery requests seek privileged or confidential information, but that the motion to strike rests solely on the April 7, 2005 order. Resp. at 5. The People assert that they will be severely prejudiced if respondents do not answer their discovery requests. *Id.* The People assert that they will be unprepared and severely prejudiced at hearing on the reasonableness of the fees and costs petition if denied full disclosure. *Id.* The People also note that the respondents did not comply with Supreme Court Rule 201(k) prior to filing the motion to strike. Resp. at 6.

## **Discussion**

In issuing the April 7, 2005 order, the Board did not implicitly rule that the People are prohibited from conducting discovery with respect to the issues relating to the request for attorney fees and costs. After considering the arguments put forth by the parties, the Board finds that in order to prevent prejudice to the People and in the effort to build a complete record, the People must be allowed to conduct discovery on the reasonableness of the attorney fees and costs. To allow the respondent to conduct discover on this matter and not allow the People the opportunity to conduct similar discovery would place the People on unequal footing, and would not serve the best interests of administrative justice.

Accordingly, the respondents' motion to strike the People's discovery is denied. The respondents are directed to respond to the People's discovery requests within 30 days of the date of this order. The hearing officer will rule on any objections to the People's discovery filed by the respondent. As noted in the April 7, 2005 order, both the discovery and the subsequent hearing must be limited to the issues regarding the reasonableness of the People's attorney fees and costs.

### **Respondents' Motions to Strike People's Letters of May 24, 2005 and June 14, 2005**

The respondents filed separate motions to strike the People's letters of May 24, 2005 and June 14, 2005. The motions are identical except for the date of the letters. The motions will be cited together.

#### **Respondents' Motions to Strike Letters**

The respondents assert that the Board's April 7, 2005 order does not grant the People additional time to conduct discovery. Mots. at 1-2. The respondents contend that on May 24, 2005 and June 14, 2005, the People sent letters to the respondents under the pretense of initiating a discovery conference pursuant to Illinois Supreme Court Rule 201(k). Mots. at 2. The respondents argue that the provisions of Supreme Court Rule 201(k) do not apply because the People were not given leave to conduct discovery. *Id.*

The respondents assert that because the letters to the respondents were copied to Board Hearing Officer Carol Webb, they constitute *ex parte* communications and will have to be made part of the record. Mots. at 2. The respondents contend that unless the letters are stricken, the People will be allowed to enter information into the record that is seeded with false statements, and may result in prejudice to the respondents. Mots. at 2-3.

#### **People's Response**

The People assert that letters were sent on May 24, 2005 and June 14, 2005, to respondents' attorney pursuant to Supreme Court Rule 201(k) in an attempt to informally resolve any differences over respondents' discovery requests. People's Resp1 at 2. The People acknowledge that a copy of each letter was sent to Board Hearing Officer Carol Webb. *Id.*

The People argue that the letters are not *ex parte* communications because they were sent directly to respondents' attorney and were made part of the record. People's Resp1 at 3. The People contend that the motions to strike must be denied. People's Resp1 at 5. The People note that the letters both ask the respondents' attorney to contact the People's attorney with any questions or concerns. *Id.* The People assert that the Board's rules anticipate an informal dispute resolution process between the parties before the hearing officer becomes involved, and that it is appropriate for People's attorney to provide the hearing officer with copies of the letters showing how unreasonable respondents have acted in the discovery phase of this case. People's Resp1 at 6-7.

The People conclude that even if, *arguendo*, the letters were *ex parte* communications, the appropriate remedy would be to make them part of the record rather than strike them. People's Resp1 at 9.

#### **Respondents' Motion to Strike the People's Response**

On August 15, 2005, the respondents filed a motion to strike the People's response to the respondents' motion to strike the letters of May 24, 2005 and June 14, 2005. Mot. to Strike2. In

the motion, the respondents assert that the attachment of letters to the response is not necessary for the arguments presented in the response. Mot. to Strike<sup>2</sup> at 2. The respondents reiterate that allowing the uncontested false statements in the May 24, 2005 and June 14, 2005 letters to appear in the record will prejudice the trier of fact in this matter. Mot. to Strike<sup>2</sup> at 3.

The respondents argue that because these improper materials are part of the People's response to respondents' motions to strike the letters, the People's response to respondents' motion to strike the People's discovery letters must be stricken from the record. Mot. to Strike<sup>2</sup> at 3. Accordingly, the respondents ask that the People's response be stricken. Mot. to Strike<sup>2</sup> at 4.

### **People's Response to the Respondents' Motion to Strike the People's Response**

On August 17, 2005, the People filed a response to the respondents' motion to strike the People's response to the respondents' motion to strike. People's Resp<sup>2</sup>. In the response, the People assert that respondents' fifth motion to strike is the latest in a series of seemingly never-ending motions to strike. People's Resp<sup>2</sup> at 2. The People argue that respondents' fifth motion to strike is nonresponsive to the facts and law set forth in the pleading it seeks to strike. *Id.*

The People assert that the respondents' motion to strike sets forth no new facts or law, and is simply a repetition of previous arguments made without reliance on any legal authority. People's Resp<sup>2</sup> at 3. The People request that the motion to strike be denied. *Id.*

### **Discussion**

The main thrust of respondents' motion is that the submission of the letters constitutes an *ex parte* communication, and that the provisions of the Supreme Court Rule 201(k) discovery process do not apply because the People were not given leave to conduct discovery. As discussed above, the Board has not ruled that the People are prohibited from conducting discovery with respect to the issues relating to the request for attorney fees and costs.

Further, neither the letters nor the act of submitting the letters to the hearing officer are, by definition, *ex parte* communications as they did not take place outside the record of this proceeding. *See* 35 Ill. Adm. Code 101.202. Accordingly, the Board denies both motions to strike the letters, as well as respondents' motion to strike the People's response. The May 24, 2005 letter and the June 14, 2005 letter are accepted into the record.

### **Respondents' Motion to Strike the People's Objections to Discovery, and Associated Pleadings**

### **Respondents' Motion to Strike the People's Objections to Discovery and Motion to Compel**

On July 6, 2005, the respondents filed a motion to strike the People's objections to discovery and motion to compel a response to discovery request. Mot. to Comp. The respondents assert that it filed and served discovery on April 25, 2005, including interrogatories, a document request, a request to admit facts and a notice of deposition. Mot. to Comp. at 2. The

respondents assert that the discovery requests stated that responses should be delivered by May 25, 2005, consistent with the Board order of April 7, 2005, and Supreme Court Rule 213. *Id.* The respondents contend that the People sent objections and failed to respond to certain requests and interrogatories. *Id.* The respondents argue that the People's response is generally evasive and non-responsive. *Id.* The respondents assert the responses can be addressed through a 201(k) conference after the issue of the validity of the objections has been addressed by the Board. *Id.*

The respondents assert that the People did not produce Mitchell Cohen or Bernard Murphy for deposition as properly requested in the notice of deposition. Mot. to Comp. at 2-3.

The respondents argue that the objections presented by the People lack the specificity required of any objection to a request for discovery, and that the People misconstrue the Board's April 7, 2005 order. Mot. to Comp. at 3. The respondents contend that the discovery was prepared and served in accordance with the Board's April 7, 2005 order, and that it is the People's actions that jeopardize the speedy and ultimate resolution of this case. Mot. to Comp. at 4.

The respondents argue that they need to address a number of issues through discovery, including the conduct of the attorneys supervising People's attorney Joel Sternstein, the possibility of *ex parte* communication between the People and Board employees, the level and knowledge of the People's attorneys regarding Sternstein's actions while working on the case, information concerning false affidavits filed by People's attorney Cohen, and information concerning why the People are claiming fees for work Sternstein claimed to have performed. Mot. to Comp. at 4.

The respondents assert that their requests for discovery are designed to discover facts or lead to facts that are required to prepare their response to the People's request for attorney fees. Mot. to Comp. at 5. The respondents contend there is no legal or logical basis for refusing to respond to a discovery request on an argument of privacy, and that the remaining general objections by the People are so poorly argued that they defy response by the respondents. *Id.*

The respondents assert that thorough and timely discovery is consistent with the Board's objective of a speedy and ultimate resolution of this case, and that it is the People's pleadings and responses to reasonable discovery that would be classified as not designed to further a speedy and ultimate resolution of this case. Mot. to Comp. at 6. The respondents argue that the People should be compelled to respond to the discovery requests presented by the respondents. *Id.*

The respondents assert that the People did not produce either Mr. Cohen or Mr. Murphy for deposition as noticed and required under the Illinois Code of Civil Procedure. Mot. to Comp. at 7. The respondents contend that the People unilaterally decided that Mr. Cohen's deposition was untimely scheduled and should not be taken until all written discovery had been completed. *Id.* The respondents argue that the People should be compelled to produce witnesses for deposition, or cooperate with the respondents in scheduling the depositions to allow for the speedy and ultimate resolution of this case. *Id.*

### **People's Response to Motion to Strike and People's Motion for Protective Order**

The People contend that the instant motion is remarkably strident given that respondents brought discovery disputes to the Board without contacting the People's attorney or appearing for the June 9, 2005 status conference. Resp. at 3. The People assert that the blanket relief sought by the respondents, including the striking of all of the People's objections and ordering the People to answer all of the discovery, is supported by rhetoric and misstatements of the law. *Id.*

The People note that respondents' motion does not respond to each of the discovery objections they ask the Board to strike, and violates Supreme Court Rule 201(k) as well as the Board's direction contained in the April 7, 2005 order advising against filing any pleading not designed to further a speedy and ultimate resolution of this case. Resp. at 3-4.

The People argue that the respondents' discovery requests are overly broad and unduly burdensome, as well as insulting, harassing, made in bad faith, irrelevant, and not calculated to lead to relevant information or resolve this dispute in a speedy and final matter. Resp. at 4. The People contend that the respondents' motion does not respond to each of the discovery objections they ask the Board to strike, and provides generalizations for the few objections to which a response is given. Resp. at 3.

The People assert that the motion to compel must be denied and that the Board should issue a protective order against the respondents' abusive discovery tactics. Resp. at 8. The People contend the motion to compel must be denied because the respondents' attorney made no attempt to informally resolve discovery differences prior to seeking a Board intervention. *Id.* The People argue that the motion to compel must be denied because it fails to meet the threshold of addressing each objection to be stricken. Resp. at 9.

### **Respondents' Motion to Strike People's Motion for Protective Order and Response**

On August 15, 2005, the respondents filed a motion to strike the People's motion for protective order and response to the respondents' motion to strike objections, and a motion to compel the People's response to discovery requests. (Mot. to Strike<sup>2</sup>). The respondents assert that the attachment of letters to the response is not necessary for the arguments presented in the response. Mot. to Strike at 2. The respondents reiterate that allowing the uncontested false statements in the May 24, 2005 and June 14, 2005 letters to appear in the record will prejudice the trier of fact in this matter. Mot. to Strike at 3.

The respondents argue that because these improper materials are part of the People's response to respondents' motions to strike the letters, the People's motion for protective order and response to respondents' motion to strike objections to discovery and to the respondents' motion to compel must be stricken from the record. Mot. to Strike at 3. The respondents also argue that the People's motion for protective order and response to respondents' motion to strike objections and to the motion to compel should be stricken because the People's motion for protective order is improperly applied, and improperly presented and argued. *Id.*

The respondents contend that the People have failed to present any argument that a protective order is required to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression. Mot. to Strike at 4. The respondents argue that the People have failed to state with specificity why a protective order is required and how they desire the Board to enforce the order. *Id.* The respondents assert that because the motion for protective order is not properly applied or argued, it is difficult for the respondents to respond to the motion and it will be difficult for the Board to rule on the motion. *Id.* Accordingly, the respondents suggest the motion should be denied, or stricken. Mot. to Strike at 4-5.

### **People's Response to Respondents' Motion to Strike People's Motion for Protective Order and Response**

On August 17, 2005, the People filed a response to the respondents' motion to strike the People's response to the respondents' motion to strike the People's motion for protective order and response. (People's Resp3) In the response, the People assert that respondents' sixth motion to strike is the latest in a series of seemingly never-ending motions to strike. People's Resp2 at 2. The People argue that respondents' sixth motion to strike is nonresponsive to the facts and law set forth in the pleading it seeks to strike. *Id.*

The People assert that the respondents' sixth motion to strike sets forth no new facts or law, and is simply a repetition of previous arguments made without reliance on any legal authority. People's Resp3 at 3. The People request that the motion to strike be denied. *Id.*

### **Discussion**

The respondents' motion to strike the People's objections to discovery is denied. The People are entitled to file discovery objections under Sections 101.618(h) and 101.620(c) of the Board's procedural rules, and raised proper objections thereunder. The Board also denies the respondents' motion to strike the People's motion for protective order and response to the respondents' motion to strike objections. Section 101.616(d) provides the hearing officer with the authority to issue a protective order on her own motion or on the motion of any party. The People have the right to file a motion for protection under that section, and have exercised that right. The People's motion is properly filed, and the respondents' motion to strike is denied.

Further, the Board denies the respondents' motion to strike the People's response to the respondents' motion to strike objections. Section 101.500(d) allows a party to file a response to a motion within in 14 days after service. The People's response is timely, and accepted by the Board.

That said, the Board denies the People's motion for a protection order. While it is evident from a review of the pleadings that the manner in which this case is being litigated has degenerated to the extent that professional civility and decorum is lacking, a protective order does not appear to be the proper remedy at this time. However, both parties are cautioned that professionalism and civility are required when appearing before the Board, and that future offensiveness will not be tolerated.

As to the respondents' motion to compel, the Board agrees with the assertions of the People that the respondent did not adequately respond to the People's objections, or attempt to informally resolve the dispute before seeking Board intervention. In various pleadings, the respondents provide general argument, but do not specifically address the objections made by the People. For example, the respondents argue that a portion of the objections by the People are "so poorly argued that they defy response by the respondents." Mot. to Comp. at 5. Such an assertion does little to assist the Board in reaching a proper determination, and only serves to increase the contentiousness that is evidenced by the many pleadings in this matter.

However, instead of upholding the People's objections to discovery, the Board will allow the respondents 30 days from the date of this order to further respond to each objection. Accordingly, the Board will direct the hearing officer to reserve ruling on the respondents' motion to compel until the time for additional response is lapsed.

In addition, the Board directs the hearing officer to hold a status conference with the parties in order to determine a detailed discovery schedule in an attempt to move this matter forward to ultimate resolution. The discovery schedule should commence with the requirement that respondents file responses to the People's discovery requests and any additional responses to the People's objections to discovery on or before December 3, 2005.

### **CONCLUSION**

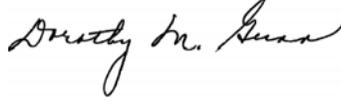
The Board denies the respondents' motion to strike the People's discovery. The respondents are given until December 3, 2005, to respond to the People's discovery requests. The Board denies the respondents' motions to strike letters of May 24, 2005 and June 14, 2005. Both letters are accepted into the record. In so doing, the Board also denies respondents' motion to strike the People's response to the respondents' motion to strike the letters.

The Board denies the respondents' motion to strike the People's objections to discovery, as well as the respondents' motion to strike the People's motion for a protective order and the People's response to the respondents' motion to strike objections. The People's motion for protective order is accepted, but denied. The Board grants the respondents until December 3, 2005, to provide additional responses to the People's discovery objections. The Board directs the hearing officer to address the respondents' motion to compel after the deadline for respondents' additional responses to the People's discovery objections is lapsed.

As noted in the body of this order, the hearing officer is directed to hold a status conference with the parties and set a detailed discovery schedule that includes the requirement that respondents file responses to the People's discovery requests and any additional responses to the People's objections to discovery on or before December 3, 2005. The hearing officer will then rule on the People's objections to discovery, the respondents' motion to compel and any objections to the People's discovery filed by the respondent. Once again, both parties are cautioned that professionalism and civility are required when appearing before the Board. Future offensiveness will not be tolerated, and may result in sanctions.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 17, 2005, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board