

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
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MAY 26 2004

STATE OF 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
5487 N. Milwaukee Ave. Hearing Officer
Chicago, IL 60630 Illinois Pollution Control Board
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' POST TRIAL MOTION TO STRIKE AND OBJECTIONS TO COMPLAINANT'S CLOSING ARGUMENT AND REPLY BRIEF**, 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*
MITCHELL L. COHEN
Assistant Attorney General
Environmental Bureau
188 West Randolph, 20th Floor
Chicago, IL 60601
(312) 814-5282

Dated: May 26, 2004

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v.) No. PCB 96-98
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individually and as owner and)
President of Skokie Valley Asphalt)
Co., Inc., and)
RICHARD J. FREDERICK,)
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Respondents.)

**COMPLAINANT'S RESPONSE TO
RESPONDENTS' POST TRIAL MOTION TO STRIKE AND OBJECTIONS TO
COMPLAINANT'S CLOSING ARGUMENT AND REPLY BRIEF**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Sections 101.500 and 101.502 of the Illinois Pollution Control Board Regulations ("Board Regulations"), 35 Ill. Adm. Code 101.500 and 101.502, hereby responds to Respondents' Post Trial Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief ("RMS"), and states as follows:

1. In response to RMS, the People adopt and incorporate "Complainant's Motion to Strike Respondents' Post Trial Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief" attached as Exhibit A and filed this same date.

2. For the reasons stated therein, the People of the State of Illinois believe RMS should not be part of this enforcement case record and should be stricken without the Board's consideration. The People do not want to go to any additional time and expense further responding to the specifics of RMS unless it is necessary based on the ruling on Complainant's Motion to Strike Respondents' Post Trial Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief.

3. The People are filing this Response in accordance with Board Procedural Rule 101.500(d), 35 Ill. Adm. Code 101.500(d).

CONCLUSION

WHEREFORE, Complainant, People of the State of Illinois, requests this Board stay the proceedings on RMS pending Hearing Officer Sudman's ruling on Complainant's Motion to Strike Respondents' Post Trial Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief;

Further, should Hearing Officer Sudman deny Complainant's Motion to Strike Respondents' Post Trial Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief, Complainant respectfully requests 14 days from the date of the Order denying Complainant's Motion to further respond to the specifics contained in RMS and further amend the fee petitions within the People of the State of Illinois' Closing Rebuttal.

Argument and Reply Brief.

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
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(312) 814-5282
(312) 814-3908

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

Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel. LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Sections 101.500 and 101.502 of the Illinois Pollution Control Board Regulations ("Board Regulations"), 35 Ill. Adm. Code 101.500 and 101.502, hereby moves Hearing Officer Sudman to Strike Respondents' Post-Trial Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief ("RMS"). In support of this Motion to Strike RMS, Complainant states as follows:

1. This Motion to Strike RMS is properly before Hearing Officer Sudman since it is " . . . not dispositive of the proceedings." 35 Ill. Adm. Code 101.502.

2. This enforcement case was already tried before Hearing



Officer Sudman October 30 and 31, 2003. See Hearing Transcripts.

3. On October 31, 2003, Hearing Officer Sudman issued the last Order in this enforcement case allowing for Complainant's Closing Argument, Respondents' Closing Argument, Complainant's Rebuttal Argument, and nothing else. Hrg. Tr. at 522.

Complainant, The People of the State of Illinois filed their Closing Rebuttal Argument and Reply Brief April 15, 2004, in accordance with Hearing Officer Sudman's Order.

4. The People of the State of Illinois' Closing Rebuttal Argument and Reply Brief is not a pleading. 735 ILCS 5/2-601, 2-602 and 2-603 (2002). A pleading is "[t]he document containing the factual allegations that each party is required to communicate to the opponent before trial" Black's Law Dictionary.

5. Respondents cannot rely on Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, that allows Respondents to strike, dismiss, or challenge a "pleading" before hearing to strike a Closing Argument after hearing.

6. Respondents file RMS May 17, 2004, over six months after trial.

7. Respondents did not seek leave to file anything after their Closing Argument, the hearing and arguments in this enforcement case are finished, and there is no authority for Respondents to file anything else at this time.

8. Therefore, RMS should be stricken, and this enforcement case should proceed to Final Board Order.

9. If somehow, the People of the State of Illinois's Closing Rebuttal Argument and Reply Brief is considered a pleading such that Respondents can file a Motion to Strike pursuant to Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, six (6) months after hearing, RMS still should be stricken.

10. Complainant, the People of the State of Illinois, filed this enforcement action against Respondents.

11. Complainant has the burden in an enforcement action to show that Respondents violated the Illinois Environmental Protection Act and related rules and regulations. 415 ILCS 5/31(e) (2004).

12. "In an enforcement action, the complainant must prove that the respondent violated the Act or the rules, regulations, permits or terms and conditions by a preponderance of the evidence. People v. Fosnock, PCB 41-1, slip op. at 19 (Sept. 15, 1994)." Village of South Elgin v. Waste Management of Illinois, Inc., PCB 03-106, p. 2 (February 20, 2003).

13. Since Complainant has the burden of proof in this enforcement action, the People of the State of Illinois get the last word.

14. Respondents do not get another chance to argue their

case, which is exactly what RMS does, after Complainant filed their Closing Rebuttal Argument and Reply Brief.

15. RMS not only should be stricken, it should not even be considered, or read by Board.

CONCLUSION

RMS should be stricken. There is no authority to file such a Motion six months after the close of evidence in this enforcement action. Further, RMS should not even be considered since Complainant has the burden of proof and already had filed their Closing Rebuttal Argument and Reply Brief.

WHEREFORE, Complainant, People of the State of Illinois, asks Hearing Officer Sudman for the following relief:

1. Strike RMS such that it is not considered by the Board in this enforcement case;

2. Allow AAGs Cohen and Murphy to amend their fee petitions within the People of the State of Illinois' Closing Rebuttal Argument and Reply Brief, to reflect the following:

AAG Cohen	May, 2004	6 hours	Reviewing Resp.'s Motion to Strike Closing, discussions w/ co-counsel Research & drafting Motion to Strike RMS
AAG Murphy	May, 2004	3 Hours	Reviewing Resp.'s Motion to Strike Closing, discussions w/ co-counsel Reviewing Motion to Strike RMS

and

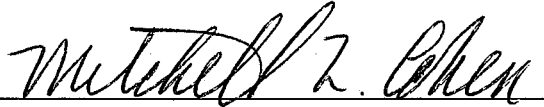
3. Grant such additional relief as the Board deems appropriate and just.

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
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Assistant Attorney General
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CERTIFICATE OF SERVICE

I, MITCHELL L. COHEN, an Assistant Attorney General, do certify that I caused to be mailed this 26th day of May 2004, the foregoing **COMPLAINANT'S RESPONSE TO RESPONDENTS' POST TRIAL MOTION TO STRIKE AND OBJECTIONS TO COMPLAINANT'S CLOSING ARGUMENT AND REPLY BRIEF** 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