

ILLINOIS POLLUTION CONTROL BOARD  
October 21, 2004

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):

On September 28, 2004, Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents) filed a response to and motion to stay and/or extend the time to respond to the petition for attorney fees and costs. On October 12, 2004, the People of the State of Illinois (People) filed a response to the motion. For the reasons discussed below, the Board grants the motion in part. The Board stays the \$153,000 in penalties ordered in the Board's September 2, 2004 order, but denies the additional relief requested by respondents.

**BACKGROUND**

On September 2, 2004, the Board entered an opinion and order in this case that found respondents had violated the Illinois Environmental Protection Act (Act), 415 ILCS 5/100 *et seq.* (2002), and Board regulations in their operation of an asphalt plant in Skokie, Cook County. *See People v. Skokie Valley Asphalt*, PCB 96-98 (Sept. 2, 2004). In that order, the Board found that respondents violated the Act by causing, threatening, or allowing water pollution, and the Board's water pollution regulations by not timely applying for renewal of the site's National Pollutant Discharge Elimination System (NPDES) permit, by failing to comply with reporting requirements of the site's NPDES permit, and by exceeding the effluent limits of the site's NPDES permit. After consideration of the factors of Sections 33 (c) and 42(h) of the Act, the Board ordered respondents to pay a civil penalty of \$153,000 by October 18, 2004.

The Board further found that the People were entitled to attorney fees under Section 42(f) of the Act because the violations were "willful, knowing or repeated" violations. But, the Board reserved ruling on the amount of the fees and costs payable, allowing 21 days for the People to file a proper fee request, and 14 days for any response by respondents. The People filed a petition for attorney fees and costs on September 17, 2004.

## MOTION TO STAY

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. Specifically, the respondents assert that the September 2, 2004 Board order does not state whether or not it is a final opinion and order, and that the parties have been prejudiced in their rights to move for reconsideration or appeal of the order. Mot. at 1-2. The respondents assert they are entitled to an evidentiary hearing on the People's petition for fees and costs, and raise a number of issues regarding the petition that should be addressed at a hearing. Mot. at 2-5.

The People object to the portion of the motion seeking a stay or extension of time. Resp. at 2. The People contend that the respondents have filed their response and objections, and that there is no need to stay or extend the time to decide the fee petition. Resp. at 21. The People note that the Board has the People's affidavits, is familiar with the reasonable hourly rates charged by attorneys practicing environmental law, and the length and complexities of the litigation in this case. *Id.* The People also provide detailed arguments regarding the need for additional discovery, respondents' allegation of perjury, the fees of Assistant Attorney General Sternstein, and the hourly rate sought by the People. Resp. at 6-19.

Initially, the Board takes notice that the respondents have filed a petition for review with the State of Illinois' Second District Appellate Court. See Skokie Valley et al. v. Illinois Pollution Control Board, et al., No. 04-0977 (filed Sept. 28, 2004); 35 Ill. Adm. Code 101.630 (matters of which the Board may take official notice). The Board may not consider a motion to reconsider or modify the order being appealed. People v. State Oil Company, PCB 97-103, May 15, 2003 citing Watts v. IEPA, PCB 01-139 (Jun. 6, 2002). The appellate court has found that appellate court jurisdiction attaches when an appeal of a Board decision is properly made, thus depriving the Board of jurisdiction to modify its order. See Cain v. Sukkar, 167 Ill. App. 3rd. 941 (4th Dist. 1988). Thus, the Board no longer has jurisdiction of this case. The Board cannot rule on the petition seeking attorney fees and the accompanying issues unless it regains jurisdiction.

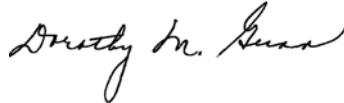
The Board may, however, consider that portion of the motion seeking to stay the payment of penalty. See, e.g., IEPA v. Pielet Bros. Trading, Inc., PCB 80-185 (Feb. 4, 1982) (granting motion for stay of order's provision requiring penalty payment, but denying motion for stay of order's provision requiring respondent to cease and desist from violations), *aff'd sub nom* Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982).

The Board's procedural rules provide for motions to stay. 35 Ill. Adm. Code 101.514. The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." See People v. State Oil Co., PCB 97-103 (May 15, 2003) (granting motion for stay after petition for review filed with Appellate Court), *aff'd sub nom* State Oil Co. v. PCB, 2004 Ill. App. Lexis 968 (2nd Dist., Aug. 18, 2004). In light of the pending appeal, the Board grants the respondents' motion to stay the payment of the penalty imposed in the September 2, 2004 opinion and order.

The respondents also ask the Board to clarify whether the September 2, 2004 order is a final and appealable order of the Board. Mot. at 6. The Board's procedural rules provide that a final order is one that "terminates the proceeding leaving nothing further to litigate or decide and that is appealable to an appellate court pursuant to Section 41 of this Act." 35 Ill. Adm. Code 101.202. Inasmuch as the issue of costs and attorney fees is outstanding, the Board considers its September 2, 2004 order not final or appealable.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 21, 2004, by a vote of 5-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board