

ILLINOIS POLLUTION CONTROL BOARD  
April 7, 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 the issue of attorney fees and costs. For the reasons explained more fully below, the Board grants the respondents' motion for extension of time to allow for limited discovery, and sends this matter to hearing limited solely to 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 (2002)) 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's 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's 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 January 10, 2005, the respondents filed a motion to establish discovery schedule and for extension of time to respond under the Board order of December 16, 2005. On January 18, 2005, the People filed objections to the motion to establish a discovery schedule and the motion for extension of time to respond. On February 15, 2005, the respondents filed a motion to compel response to discovery. Finally, on March 1, 2005, the People filed a response to the motion to compel.

Currently pending before the Board are the People's request for attorney fees and costs, the respondents' motion for extension of time to respond and to establish a discovery schedule the respondents' motion to compel.

### **THE FEE REQUEST**

In their petition for attorney fees and costs, the People request attorney fees in the amount of \$134,250 and costs in the amount of \$3,482.84. The People attached affidavits itemizing the time spent and work performed by Assistant Attorney Generals (AAG) Cohen, Sternstein, and Murphy. The suggested hourly rate is \$150 per hour.

### **MOTIONS**

#### **Respondents' Arguments**

In the motion for extension of time and to establish a discovery schedule, the respondents assert that in its December 16, 2004 order, the Board implicitly ruled that the respondents are entitled to discovery with respect to the issues of the request for attorney fees and costs. Mot1 at 2. The respondents contend that the Board failed to establish a schedule for discovery when it set the deadline of January 13, 2005, for the respondents to respond to the request for attorney fees and costs. *Id.* The respondents argue that they have sent discovery regarding attorney fees and costs to the People that is not due until after the January 13, 2005 deadline for the respondents to respond. *Id.* The respondents contend that the information sought by the discovery is necessary and that the January 13, 2005 deadline needs to be extended so the respondents can have sufficient time to analyze the discovery material and prepare their response. Mot1 at 3. The respondents assert that the People's affidavits are without basis in the hearing record and are based on facts unsupported by sufficient documentation and most likely have been fabricated solely for the purposes of the claim. Mot1 at 3.

The respondents contend that the payment of attorney fees as set forth in the petition would result in an unjustified windfall for the People. Mot1 at 4. The respondents argue that it is hard to justify a claim for fees and costs that is approximately ten times the amount the three respondents combined paid to defend themselves in this matter. *Id.* In their September 28, 2004, response to the petition, the respondents contend that by failing to petition for fees and costs at hearing or in closing briefs, the People have waived their right to such fees and costs and that any petition at this time should be denied by the Board. Resp. at 3.

### **People's Arguments**

In response, the People assert that the Board gave the respondents an additional 28 days, until January 13, 2005, to file any additional response to the petition for attorney fees and costs, but that the respondents chose not to supplement their initial response. Resp1 at 3. The People contend that it has already submitted its evidence for costs and fees and that there is no need for respondents to do any discovery. Resp1 at 4. The People argue that the Board has already ruled that there will not be a hearing on the costs and fees issue. *Id.*

The People assert that the Board's order did not contemplate any discovery given the fact that respondents' additional time to respond was limited to 28 days and that discovery responses are, under the rules, not due before 28 days. Resp1 at 4-5. The People argue that there is no need for discovery and to conduct any at this point in the litigation would cause unnecessary delay in the Board's issuing its final order and needlessly increase the cost of litigation. Resp1 at 5.

### **DISCUSSION**

After reviewing the parties' arguments, the Board finds it appropriate to reconsider and modify its December 16, 2004 order. Among other things, the respondents have alleged that the People's affidavits contain fabrications, and otherwise dispute both the pay rate and the number of hours contained in the People's petition. The Board cannot make a determination on these claims based on the current record.

Thus, the Board will reconsider the December 16, 2005 order stating that no hearings on the issue of attorney fees and costs will be held. In issuing the December 16, 2004 order, the Board did not implicitly rule that the respondents are entitled to discovery with respect to the issues of the request for attorney fees. But, in order to fully consider these allegations, the Board will grant the respondents additional time in order to conduct discovery and participate in a hearing regarding attorney fees and costs. Both the discovery and the hearing must be limited to the issues regarding the reasonableness of the People's attorney fees and costs.

In determining this reasonableness, the Board will be guided by the factors set out in long-established precedent. The Board will consider, among other factors, the nature of the cause and the novelty and difficulty of the questions at issue, the amount and importance of the subject matter, the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the benefits resulting

to the client. *See, e.g., George v. Chicago Transit Authority*, 107 Ill. App. 3d 784, 438 N.E.2d 498 (1st Dist. 1982); *Neville v. Davinroy* (1976) 41 Ill. App. 3d 706, 711, 355 N.E.2d 86, 90.

The content of respondents' discovery requests on this issue have not been filed with the Board, so that the Board today does not comment on the relevance or the propriety of the specific language of the requests. Respondent is directed to file the outstanding discovery requests with the Board on or before April 25, 2005; the People's response must be filed on respondents and served with the Board on or before May 25, 2005.

To further focus the discovery process, however, the Board will address the merits of one of respondents' specific objections to the fee request. As previously stated, the People request attorney fees in the amount of \$134,250 and costs in the amount of \$3,482.84, for time spent and work performed by AAGs Cohen, Sternstein and Murphy. The respondents have raised arguments concerning the fees for AAG Sternstein.

On October 16, 2003, the Board issued an order that disqualified AAG Sternstein from appearing in this proceeding. *See People v. Skokie Valley*, PCB 96-98, slip op. at 5, (Oct. 16, 2003). In that order, the Board stated that while no prejudice or bias resulted from AAG Sternstein's prior Board employment, such employment did constitute personal and substantial participation under 35 Ill. Adm. Code 101.112(b). Because he did not request and receive consent from the applicable parties after disclosure of the participation, AAG Sternstein was disqualified from representing the People in this matter. In light of AAG Sternstein's disqualification, the Board will not award attorney fees for the time he spent working on this case. Although no prejudice resulted from AAG Sternstein's prior employment, the Board finds that awarding attorney fees for any of the work he did in a matter he was barred from participating in would not be appropriate. Accordingly, the parties are not to address this issue in conducting discovery or at the hearing.

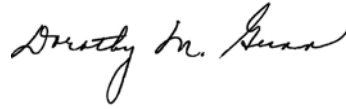
Finally, this matter has been pending before the Board for approximately eight years. Any pleading by either party not designed to further a speedy and ultimate resolution of this case will not be tolerated by the hearing officer or the Board.

### **CONCLUSION**

The Board grants respondents' motions for extension of time and authorizes respondents to conduct discovery on the attorney fee issue. Respondents' are directed to file the discovery requests with the Board on or before April 25, 2005; the People's response must be filed on respondents and served with the Board on or before May 25, 2005. The stay of the \$153,000 civil penalty imposed in the Board's September 2, 2004 order remains in effect. The hearing officer is directed to proceed to hearing as outlined in this order as expeditiously as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 7, 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