BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General 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.,	)	PCB 96-98 (Enforcement – RCRA)
Respondents.	)	

NOTICE OF MOTION

TO: Mr. David S. O'Neill, Esq.
Mr. Michael B. Jawgiel, Esq.
5487 North Milwaukee Avenue
Chicago, Illinois 60630-1249

Ms. Carol Webb, Hearing Officer
Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that today I caused to be filed **Complainant's Motion to Deny Respondents' Appeal of Hearing Officer's February 8, 2006 Order** with the Office of the Clerk of the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN, Attorney General
of the State of Illinois

BY: _____

MICHAEL C. PARTEE
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Environmental Bureau/North
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
v.	)	
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Respondents.	)	

COMPLAINANT'S MOTION TO DENY RESPONDENTS' APPEAL OF HEARING OFFICER'S FEBRUARY 8, 2006 ORDER

Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People"), by LISA MADIGAN, Attorney General of the State of Illinois, hereby moves the Board to deny Respondents', SKOKIE VALLEY ASPHALT CO., INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK, Appeal of Hearing Officer's February 8, 2006 Order. In support of their motion, the People state as follows:

RELEVANT PROCEDURAL HISTORY

1. On September 2, 2004, after a hearing on all issues, the Board entered an order finding willful, knowing or repeated violations, assessing a $153,000 civil penalty, and assessing the People's attorneys' fees and costs against the Respondents. The Board further directed the People to file a petition for attorneys' fees and costs.

2. Respondents then appealed the Board's September 2, 2004 Order to the Illinois Appellate Court.

3. On September 17, 2004, the People filed a verified petition for attorneys' fees and costs.

4. On September 28, 2004, Respondents filed their "Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs" ("Initial Response"). In their Initial Response, Respondents disputed the People's attorneys' fees and costs and Respondents also made unsupported, factual allegations regarding their own attorneys' fees and costs, the following of which are two examples:

a. "It is hard to justify a claim for attorneys' fees and cost [*sic*] by the Illinois Attorney General's office that is approximately ten times the amount that three Respondents combined paid to defend themselves against frivolous claims" (Initial Response at ¶ 17); and

b. "It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though the Respondents' attorneys [*sic*] fees include costs." (*Id.*)

5. On October 21, 2004, the Board stayed the Respondents' payment of the $153,000 civil penalty pending resolution of the Respondents' dispute of the People's attorneys' fees and costs.

6. On November 18, 2004, the Illinois Appellate Court dismissed Respondents' appeal of the Board's September 2, 2004 Order.

7. On December 16, 2004, the Board ruled that the stay of Respondents' $153,000 civil penalty payment would remain in effect until Respondents' dispute of the People's attorneys' fees and costs was resolved through a final Board Order. The Board also established a briefing schedule (without discovery) to resolve this dispute.

8. On January 10, 2005, Respondents moved the Board for a discovery schedule and hearing on the People's verified petition for attorneys' fees and costs.

9. On April 7, 2005, the Board authorized discovery, subject to the following express limitations (underlines added):

a. Discovery shall be "limited." (Apr. 7, 2005 Order at 1);

b. "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." (Apr. 7, 2005 Order at 3-4);

c. "To further focus the discovery process, . . . the Board will not award attorney fees for the time he [AAG Sternstein] 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." (Apr. 7, 2005 Order at 4); and

d. "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." (Apr. 7, 2005 Order at 4).

10. On April 25, 2005, despite the narrow issue before the Board, Respondents served the People with voluminous discovery requests, including 43 Requests to Admit Facts, 50 Interrogatories including subparts, 24 Document Requests and two deposition notices. Respondents' discovery requests not only addressed AAG Sternstein's fees and costs, which were previously disallowed and were not to be addressed pursuant to the Board's April 7, 2005 Order, but Respondents' discovery requests also contained unfounded, personal attacks on the People's counsel and sought inappropriate information regarding the People's counsels' take home pay.

11. Also on April 25, 2005, the People served Respondents with 11 Interrogatories, 7 Document Requests and two deposition notices relating to Respondents' allegations outlined in Paragraph 4 above.

12. On May 18, 2005, Respondents filed a motion to strike the People's discovery requests.

13. On May 24, 2005, the People timely answered Respondents' voluminous discovery requests. As part of the People's answers, the People provided Respondents with all attorney time records, receipts for costs and *curriculum vitae* for AAGs involved in this case, subject to certain, substantiated objections.

14. On May 24 and June 14, 2005, the People's counsel wrote to Respondents' counsel pursuant to Rule 201(k) in a full and good faith attempt to informally resolve any potential disputes regarding Respondents' discovery requests. Respondents' counsel did not respond to either Rule 201(k) letter.

15. July 6, 2005, Respondents filed motions to strike the People's May 24, 2004 Rule 201(k) letter, the People June 14, 2005 Rule 201(k) letter and the People's discovery answers (three motions to strike in all).

16. On July 20, 2005, the People responded to Respondents' July 6, 2005 motions to strike and the People moved for a protective order requiring the Respondents to comply with Rule 201(k) prior to seeking further Board intervention regarding discovery disputes.

17. On August 15, 2005, Respondents also filed a motion to strike the People's July 20, 2005 motion for a protective order.

18. On November 17, 2005, the Board denied Respondents' first through fourth motions to strike and accepted, but denied, the People's motion for a protective order. The Board ruled 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." (Nov. 17, 2005 Order at 3.) "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." (*Id.*) The Board directed Respondents to answer the People's discovery requests by December 3, 2005. (*Id.* at 9.) Regarding the People's motion for a protective order, the Board held that, "[w]hile 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." (*Id.* at 8.) The Board also directed the Hearing Officer to hold a status conference, establish a discovery schedule, rule on the People's objections to discovery and rule on any objections by Respondents to the People's discovery. (*Id.* at 9.)

19. Respondents did not appeal the Board's November 17, 2005 Order.

20. On December 5, 2005, Respondents answered the People's discovery requests. With one minor exception, the Respondents' answers consisted entirely of improper objections. Respondents provided no documents whatsoever in answer to the People's discovery requests.

21. On December 14, 2005, Respondents filed a motion to quash the People's deposition notices.

22. On December 15, 2005, the People's counsel again wrote to Respondents' counsel pursuant to Rule 201(k) in another full and good faith attempt to informally resolve any dispute regarding Respondents' improper objections to the People's discovery. Respondents' counsel did not respond to this Rule 201(k) letter.

23. On December 28, 2005, the People filed a response to Respondents' motion to quash and the People again moved for a protective order requiring the Respondents to comply

with Rule 201(k) prior to seeking further Board intervention regarding discovery disputes ("second motion for protective order").

24. On January 9, 2006, Respondents filed their fifth and sixth motions to strike: a motion strike the People's second motion for protective order and a motion to strike the People's reply instanter to Respondents' response to the People's discovery objections.

25. On February 8, 2006, the Hearing Officer denied both Respondents' motion to quash and Respondents' motion to strike the People's second motion for protective order. (February 8, 2006 Order at 1.) The Hearing Officer granted the People's second motion for protective order and directed counsel to participate in a full and good faith conference regarding further discovery disputes prior to seeking Board intervention. (*Id.*) The Hearing Officer further ordered that, "[i]n any motion, objection, or other filing related to any discovery problem, respondents' attorneys must relate the measures taken to resolve the problem with complainant's attorneys before the filing of the motion." (*Id.*) As directed by the Board, the Hearing Officer also scheduled a status conference (held on March 9, 2006) and ruled on Respondents' objections to the People's discovery requests. Regarding Respondents' discovery responses and objections, the Hearing Officer found that these responses and objections (consisting entirely of objections, except for a single, perfunctory answer) "violate the spirit of the Board's [November 17, 2005] Order" and pointed out that Respondents "have provided no argument or case law to defend" their discovery objections. (*Id.*)

26. On February 16, 2006, the People's counsel wrote a fourth Rule 201(k) letter to Respondents' counsel regarding discovery. A copy of the People's February 16, 2006 Rule 201(k) letter appears as Exhibit A hereto. Respondents' counsel also did not respond to this Rule 201(k) letter.

27. The record establishes that, during the entire course of the relevant procedural history (and perhaps longer), Respondents' counsel has refused to attempt to informally resolve any discovery dispute in this matter, despite four written invitations to do so by the People's counsel. Without even attempting to informally resolve any discovery dispute prior to seeking Board intervention, Respondents cannot assert that their barrage of motions were designed to further a speedy and ultimate resolution of this case, as required by the Board's April 7, 2005 Order.

28. The record also establishes that Respondents and their counsel have abused this proceeding through litigious conduct and unfounded *ad hominem* attacks on the People's counsel. One and a half years after commencement of this phase of the proceeding, Respondents have not yet identified a single hour of attorney time or a single cost that was improperly requested in the People's verified petition for fees and costs.

29. Most recently, on February 23, 2005, without a written motion and Board authority, Respondents filed an interlocutory "Appeal" of the Hearing Officer's February 8, 2006 Order.

30. It is not until the final paragraph of the Appeal that Respondents' clearly identify what it is being appealed. (*See* Appeal at 9.) Respondents appeal the Hearing Officer's (a) denial of Respondents' December 14, 2005 motion to quash, (b) denial of Respondents' January 9, 2006 motion strike the People's December 28, 2005 second motion for protective order[1] and (c) granting of the People's December 28, 2005 second motion for protective order.

[1] Respondents' Appeal actually states that they are appealing, in part, the Hearing Officer's denial of "Respondents' Motion to Strike In Part Complainant's Second Motion to Quash Deposition Notices and Response to Complainant's Second Motion for Protective Order of January 9, 2006." (*See* Appeal at 9.) While Respondents' motions have become difficult to decipher, no such motion exists and the People assume that this is intended to refer to Respondents' January 9, 2006 motion strike the People's December 28, 2005 second motion for protective order.

31. For the reasons set forth below, Respondents' Appeal violates the procedural rule for taking an interlocutory appeal of the Hearing Officer's Order and should be denied on this ground. Respondents' Appeal is also substantively insufficient because it fails to present sufficient cause to overturn the Hearing Officer's Order and should be denied on this ground, as well.

APPLICABLE PROCEDURE AND LEGAL STANDARD FOR APPEALING A HEARING OFFICER'S ORDER

32. Respondents' Appeal does not state the procedure for taking an interlocutory appeal of the Hearing Officer's Order. Rule 101.518 of the Board's Procedural Rules (Motions for Interlocutory Appeal from Hearing Officer Orders), provides that "[i]nterlocutory appeals from a ruling of the hearing officer may be taken to the Board. The Board may consider an interlocutory appeal upon the filing of a written motion." 35 Ill. Adm. Code 101.518 (underline added); *see also People v. Poland*, PCB 98-148, 2001 WL 179835, at *1 (Feb. 15, 2001) (A motion to allow interlocutory appeal is necessary to satisfy the procedural requirement under Section 101.518).

33. If a motion for interlocutory appeal of a hearing officer's order is determined to be procedurally sufficient, the Board can still deny the motion where it presents insufficient cause to overturn the hearing officer's order. *See e.g., Zarlenga v. Partnership Concepts*, PCB 92-178, 1994 WL 42404, at *1 (Feb. 3, 1994).

THE BOARD SHOULD DENY RESPONDENTS' APPEAL ON BOTH PROCEDURAL AND SUBSTANTIVE GROUNDS

34. For the reasons set forth below, Respondents' Appeal does not comply with Rule 101.518 and should be denied on this procedural ground. Respondents' Appeal also fails to present sufficient cause to overturn the Hearing Officer's Order and should be denied on this ground, as well.

Respondents' Appeal Does Not Comply With Rule 101.518 and Should Be Denied On This Procedural Ground

35. Respondents' Appeal does not comply with Rule 101.518 because Respondents failed to file a written motion for interlocutory appeal of the Hearing Officer's Order and failed to obtain Board authorization for such an appeal (under the Rule 101.518, even upon written motion, the Board is not required to consider an interlocutory appeal, but it "may").

36. Respondents do not have unilateral appeal authority under Rule 101.518. By not complying with the written motion requirement under Rule 101.518, Respondents also prevent the People from responding to a written motion.

37. Further, it is not as if Respondents simply erred in the title of their Appeal and it was, in fact, intended as a motion for appeal pursuant to Rule 101.518. Nowhere in the body of Respondents' Appeal do they seek leave to appeal or even use the word "motion."

38. For these reasons, Respondents' Appeal should be denied on procedural grounds.

Respondents' Appeal is also Substantively Insufficient and Should be Denied On This Ground

39. Respondents Appeal is also substantively insufficient and should be denied on this ground, as well.

40. Respondents identify three bases for their Appeal: (a) the Board's November 17, 2005 Order, (b) the requirement to comply with Illinois Supreme Court Rules 201(b) and 213(d),

and (c) the requirement to comply with Illinois Supreme Court Rules 3.7(a) and (b). (Appeal at 3, 5 and 6.)

The Board's November 17, 2005 Order

41. As their first basis for appeal, Respondents argue that the Hearing Officer "mistakenly" denied their motion to quash and granted the People's second motion for protective order. (Appeal at 4.) The gist of Respondents' argument is that "Complainant made no attempt to act professionally and with civility to comply with the requirements of Supreme Court Rule 201(k)" and that the Hearing Officer misinterpreted the Board's November 17, 2005 Order. (*Id.*)

42. However, the record is inescapable and it establishes that the People initiated four, written Rule 201(k) conferences with Respondents on May 24, 2005, June 14, 2005, December 15, 2005 and February 16, 2006. While this correspondence speaks for itself and are a matter of record, these conferences were initiated in a full and good faith attempt to informally resolve differences with Respondents. Respondents refused to respond to any of these letters and failed to initiate any Rule 201(k) conference of their own.

43. It is also inescapable that the Hearing Officer would have considered in her ruling the fact that Respondents were inconsistent in their own position on the need for a protective order. (*See* Respondents' January 9, 2006 motion to strike the People's December 28, 2005 second motion for protective order at 4 ("If a protective order where [*sic*] to be issued, it would need to apply to both parties"); *see also* The People's January 19, 2006 response to Respondents' motion to strike the People's second motion for protective order.)

44. As to the Board's November 17, 2005 Order, Respondents' persist in their incorrect argument that the People cannot conduct discovery into allegations regarding Respondents' own fees and costs relative to the People's fees and costs. (Appeal at 4.)

Respondents continue to ignore key language in the Order to the contrary. Again, the Board ruled that "[t]o allow the respondent to conduct discovery 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 in the best interests of administrative justice." (Nov. 17, 2005 Order at 3.) Obviously, the People would not conduct discovery into their own fees and costs. The only plausible reading of the Board's Order on this issue is that the People are entitled to inquire about Respondents' allegations regarding their own attorneys' fees and costs.

45. Therefore, Respondents' first basis for appeal does not present any cause to overturn the Hearing Officer's Order.

The Requirement to Comply With Illinois Supreme Court Rules 201(b) and 213(d)

46. As their second basis for appeal, Respondents apparently argue that the Hearing Officer erred in denying their motion to quash and granting the People's second motion for protective order because it was the People's burden under Supreme Court Rules 201(b) and 213(d) to show that the information sought through the People's discovery requests is admissible or calculated to lead to admissible information. (Appeal at 5.) However, Respondents' second basis for appeal is, again, directly contradicted by the record.

47. However, Respondents still fail to argue their objections on the merits.

48. Instead, Respondents complain that, under Supreme Court Rule 213(d), they were entitled to a ruling on their discovery objections, which they got.

49. Respondents complain that the Hearing Officer erred because it was the People's burden to show that the requested discovery is admissible or calculated to lead to admissible information, which the People did.

50. Lastly, Respondents complain that, although they provided no argument or authority in support of their discovery objections, the Hearing Officer should have explained why Respondents' argument was not compelling, which the Hearing Officer did.

51. For these reasons, Respondents' second basis for appeal does not present any cause to overturn the Hearing Officer's Order.

The Requirement to Comply with Illinois Supreme Court Rules 3.7(a) and (b)

52. As their third basis for appeal, Respondents now contend that the Hearing Officer erred in denying Respondents' motion to quash and granting the People's second motion for protective order because Supreme Court Rules 3.7(a) and (b) prohibit a lawyer from representing a client in a matter where the lawyer may be called to testify. (Appeal at 6.) Respondents now also cite to a number of cases in support of their argument. (*Id.* at 7-8.)

53. In denying the Respondents' motions, the Hearing Officer was entirely correct when she pointed out that "respondents have provided no argument or case law to defend their assertion that information would not be admissible, or lead to admissible information admissible at hearing, or that it would violate the attorney-client privilege." (Feb. 8, 2006 Order at 1.) None of the authority now cited by Respondents in support of their third basis for appeal was included in their motion to quash or their motion to strike the People's second motion for protective order and, therefore, this new argument is not part of the record on appeal. Respondents are essentially "sandbagging" the Hearing Officer with this new argument and authority.

54. Further, it is not the purpose of an appeal to allow litigants to stand mute and lose at hearing, and then frantically invent arguments to show that the hearing officer erred in its ruling. This proceeding has already suffered from far too many delays, and the interests of

finality, efficiency and fairness require that the Board not consider such late argument, no matter what the contents thereof may be.

55. If the Board considers these new arguments, the Board should be aware that Supreme Court Rules 3.7(a) and (b), as well as all of the case law cited by Respondents, is irrelevant in a dispute over a fee petition.

56. As more fully set forth in the People's December 28, 2005 response to Respondents' motion to quash (Exhibit B hereto), the motion to quash baldly asserted that the People's deposition notices were not calculated to lead to admissible evidence. (Response at 4.) No factual basis was provided for the stated objection. Respondents failed to even account for the reciprocal argument as to why they should be allowed to depose the People's attorneys. Respondents now fail to explain how Supreme Court Rules 3.7(a) and (b) also would not prevent Respondents from deposing the People's counsel.

57. More to the point, the requested depositions are clearly relevant and Respondents made no relevancy objection. Illinois case law is legion that the concept of relevancy in discovery is broader than relevancy for admission of evidence at trial. *See.Bauter v. Reding*, 68 Ill.App.3d 171, 175, 385 N.E.2d 886, 890 (Ill. App. 3d Dist. 1979) (citing *Krupp v. Chicago Transit Auth.*, 8 Ill.2d 37, 41, 32 N.E.2d 532, 535 (Ill. 1956)).

58. Respondents' motion to quash also baldly asserted, without any factual grounds, that depositions of Respondents' attorneys would violate the attorney-client privilege between the Respondents and their attorneys. (Response at 4.) However, as the People also stated in their December 28, 2005 response to the motion to quash, there is no privilege available as to attorney's fees and costs when the very issue in dispute is the appropriate amount of attorney's fees and costs. *See, e.g., LaHood v. Couri,* 236 Ill.App.3d 641, 649, 603 N.E.2d 1165, 1171 (3d

Dist. 1992). Further, even if such a privilege existed, Respondents waived it by making allegations regarding the amount of their own attorneys' fees and costs and by previously requesting (and obtaining) the same information from the People.

59. Lastly, Respondents failed to explain how the People's deposition notices are inconsistent with the Board's April 7, 2005 Order or November 17, 2005 Order, which clarified that the People will be allowed the same opportunity to conduct discovery similar to that served by Respondents. (Board's Nov. 17, 2005 Order at 3.)

60. For these reasons, Respondents' third and last basis for appeal does not present any cause to overturn the Hearing Officer's Order.

CONCLUSION

61. The Board should deny Respondents' Appeal on both procedural and substantive grounds and should affirm the Hearing Officer's February 8, 2006 Order. Respondents' have violated the letter and spirit of the Board's November 17, 2005 Order and the rules of discovery.

WHEREFORE, the People respectfully request that the Board deny Respondents' Appeal and affirm the Hearing Officers' February 8, 2006 Order, and for any further relief that is fair and just under the circumstances.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney General
of the State of Illinois

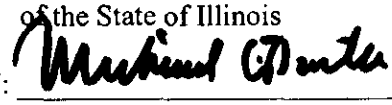
BY: 

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EXHIBIT A

TO COMPLAINANT'S MOTION TO DENY RESPONDENTS' APPEAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 16, 2006

Sent Via First Class Mail
and Facsimile (773.792.8358)

Mr. David S. O'Neill, Esq.
5487 North Milwaukee Avenue
Chicago, Illinois 60630-1249

Re: People v. Skokie Valley Asphalt Co., Inc., *et al.*, PCB 96-98

Dear Mr. O'Neill:

The purpose of this letter is to initiate another conference in the spirit of Illinois Supreme Court Rule 201(k) to informally resolve potential disputes over Respondents' answers to Complainant's interrogatories and document requests. We previously wrote you on December 15, 2005, and fully explained our position on the potential dispute involving Respondents' aforementioned discovery answers. A copy of our December 15, 2005 Rule 201(k) letter is attached for reference.

Regarding this same potential dispute, on February 8, 2006, the Hearing Officer issued an Order finding that Respondents' "discovery responses violate the spirit of the Board's [November 17, 2005] Order." The Hearing Officer denied Respondents' latest motions to strike, granted the State's motion for protective order, and ordered you to participate in a full and good faith conference with us regarding discovery disputes. The February 8, 2006 Order further provides that we are to "make every effort to get through the discovery process with no further involvement of the Board or hearing officer," and in all future filings "related to any discovery problem, respondents' attorneys must relate the measures taken to resolve the problem with complainant's attorneys before the filing of the motion."

We will continue to make every effort to informally resolve discovery disputes with you. To that end, we again ask you to immediately respond to our December 15, 2005 Rule 201(k) letter as requested therein.

500 South Second Street, Springfield, Illinois 62706 • (217) 782-1090 • TTY: (217) 785-2771 • Fax: (217) 782-7046
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Sincerely,

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cc: Carol Webb, Hearing Officer *(Via First Class Mail)*
Michael B. Jawgiel, Esq. *(Via First Class Mail)*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 15, 2005

Sent Via First Class Mail
and Facsimile (773.792.8358)

Mr. David S. O'Neill, Esq.
5487 North Milwaukee Avenue
Chicago, Illinois 60630-1249

Re: People v. Skokie Valley Asphalt Co., Inc., *et al.*, PCB 96-98

Dear Mr. O'Neill:

The purpose of this letter is to initiate a conference in the spirit of Illinois Supreme Court Rule 201(k) to informally resolve potential disputes over Respondents' answers to Complainant's interrogatories and document requests prior to seeking Board intervention. These written discovery requests were served on Respondents on April 25, 2005, and were answered on December 5, 2005. The following is a full explanation of our position on each potential dispute. Please respond to this letter as requested within 14 days by providing the requested discovery or explaining your position so that we can make a fully informed and joint decision whether it is absolutely necessary to seek Board intervention regarding these potential disputes. On a related note, regarding Respondents' written discovery requests to Complainant, the Board granted Respondents until December 3, 2005, to provide additional responses to Complainant's discovery objections. As of today, I have not heard from you and assume that any potential differences over Complainant's answers are resolved.

Respondents' Answers to Complainant's Interrogatories

Complainant served Respondents with 11 interrogatories requesting information regarding Respondents' hearing plans (*e.g.*, the identity of any witnesses to be called at hearing) and attorneys' fees and costs. The Respondents each elected to answer the interrogatories separately, but their answers are all the same, with the exception of Skokie Valley Asphalt's ("SVA") answer to Interrogatory #1.

In answer to Interrogatory #1, which requests the identity of the individual answering the interrogatories, SVA answered that it "is no longer a legal entity under the laws of the State of Illinois" and "Therefore, [it] is incapable of responding to these interrogatories." However, SVA is one of the Respondents that moved to stay Complainant's fee petition in the first place. More

significantly, SVA is also one of the Respondents that served discovery requests on Complainant. Rhetorically, how can SVA oppose Complainant's fee petition and serve discovery, but cannot answer discovery? In addition, under Illinois law, a corporation can be sued (and must have a registered agent for a period of five years) even after dissolution. Given the circumstances, SVA's answer to Interrogatory #1 is unacceptable. In order to informally resolve this dispute, we require SVA to answer Interrogatory #1 within 14 days of this letter.

In answer to Interrogatory #2, the Respondents listed me as a potential witness at hearing. I am the attorney representing Complainant at hearing. Further, none of my fees and costs is included in Complainant's fee petition. Thus, I will not be testifying at the hearing. In order to informally resolve this potential dispute, please contact me within 14 days of this letter if you disagree. If you disagree, we will obviously need to seek a protective order. If we do not hear from you within 14 days, we will reasonably assume that you agree with our position.

In answer to Interrogatory #3, which requests information regarding any opinion witness to be called by Respondents at hearing, Respondents identified Deborah A. Stonich, but did not provide any other requested information because she apparently has not completed her case assessment. However, it is not necessary to wait for her case assessment in order to provide information regarding her qualifications and previous opinion testimony, as specifically requested in subparts (b) and (d) of Interrogatory #3. In order to informally resolve this dispute, we require Respondents to answer Interrogatory #3(b) and (d) within 14 days of this letter.

In answer to Interrogatory #4, Respondents provided none of the requested information. Instead, Respondents all objected on the same grounds and as follows:

> Objection. This interrogatory is not calculated to be to [*sic*] admissible evidence at the time of the hearing. Furthermore, this interrogatory asks for irrelevant information and violates the attorney-client privilege between the Respondent and the Respondent's attorneys. The Respondent has not placed his attorney's fees or its expenses at issue in this matter.

First, absent some direction from the Board, the objections based upon admissibility and relevance are not grounds to withhold information (or documents as discussed below). Respondents' attorneys' fees and costs were, in fact, placed at issue through their "Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs," which contains numerous and specific factual allegations regarding the Respondents' attorneys' fees and costs. (See, *e.g.*, Initial Response at ¶ 17 ("It is hard to justify a claim for attorneys' fees and cost [*sic*] by the Illinois Attorney General's office that is approximately ten times the amount that three Respondents combined paid to defend themselves against frivolous claims" and "It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though the Respondents' attorneys [*sic*] fees include costs").) In opposing Complainant's Petition for Attorneys' Fees and Costs, Respondents drew a direct comparison between the parties' attorneys'

fees and costs, yet Respondents now refuse to disclose their own attorneys' fees and costs.

Second, regarding the attorney-client privilege asserted, our interrogatories contain an entire section, Section II, titled "Claims of Privilege," wherein we specifically requested that Respondents identify the "statute, rule or decision which is claimed to give rise to the privilege or the reason for its unavailability." Respondents did not object to this instruction or provide us with the legal basis for the asserted privilege. Frankly, our research indicates that attorneys' fees and costs are not privileged in a dispute over attorneys' fees and costs. Furthermore, and even if there was such a privilege, Respondents waived it by previously requesting (and obtaining) the very same information from Complainant.

Third, the Board ruled that "... the People must be allowed to conduct discovery on the reasonableness of the attorney fees and costs." (Order at 3 (Nov. 17, 2005).) "To allow the respondent to conduct discovery 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."

For all of these reasons, in order to informally resolve this dispute over Interrogatory #4, we require Respondents to provide the requested information within 14 days of this letter.

In answer to Interrogatories #5 through #11, Respondents again provided none of the requested information and repeated their previous objection to Interrogatory #4. As with Interrogatory #4, in order to informally resolve this dispute, we require Respondents to provide the requested information within 14 days of this letter.

Respondents' Answers to Complainant's Document Requests

Through seven document requests, Complainant requested documents relevant to Respondents' attorneys' fees and costs. In answer to our document requests, Respondents did not produce any documents whatsoever. Instead, the Respondents stated the following objection to each document request:

> Objection. This interrogatory is not calculated to be admissible evidence at the time of the hearing. Furthermore, this interrogatory asks for irrelevant information and violates the attorney-client privilege between the Respondent and the Respondent's attorneys. The attorneys for the Respondent has not placed his or, in the case of Skokie Valley Asphalt Company, Inc., its attorney's fees at issue nor has the Respondent placed his or, in the case of Skokie Valley Asphalt Company, Inc., its expenses at issue in this matter.

For all of the same reasons that Respondents' answers to Interrogatories #4 through #11 are unacceptable, Respondents' answers to all document requests are unacceptable. Again, these reasons include that the Board has already ruled that Complainant is entitled to conduct discovery

on this issue. Also, we are not aware of any legal basis to assert a privilege under the circumstances, but regardless, Respondents clearly waived any privilege by previously requesting (and obtaining) the very same information from Complainant. Further, pursuant to specific instructions in Complainant's discovery requests (See Instruction 2 in our Interrogatories), Respondents were asked to provide a detailed privilege log for withheld documents. We did not receive any privilege log. Essentially, Respondents have refused to disclose any documents and, at the same time, failed to adequately assert and define the basis for their refusal.

In order to informally resolve this dispute, we require Respondents to produce the requested documents within 14 days of this letter.

Again, please respond to this letter within 14 days. Please contact me with any questions in the interim.

Sincerely,

Michael C. Partee
Assistant Attorney General
Environmental Bureau
188 West Randolph Street, Suite 2001
Chicago, Illinois 60601
Tel: (312)814-2069
Fax: (312)814-2347
E-Mail: mpartee@atg.state.il.us

cc: Carol Webb, Hearing Officer *(Via First Class Mail)*
Michael B. Jawgiel, Esq. *(Via First Class Mail)*

ILLINOIS POLLUTION CONTROL BOARD
February 8, 2006

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-98
	)	(Enforcement - Water)
SKOKIE VALLEY ASPHALT, INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK,	)	
	)	
Respondents.	)	

HEARING OFFICER ORDER

On December 14, 2005, respondent filed a motion to quash complainant's deposition notices to respondent regarding complainant's fee petition. On December 28, 2005, complainant filed a second motion for protective order and a response to respondent's motion to quash. On January 9, 2006, respondents filed a motion to strike complainant's motion for protective order, and a response to that order. On January 19, 2006, complainant filed a response to the motion to strike. For the following reasons, the hearing officer denies respondent's motion to quash, denies respondent's motion to strike the motion for protective order, and grants complainant's motion for protective order.

Respondents' motion to quash asserts that depositions of respondents' attorneys will not lead to admissible evidence at hearing on the issue of complainant's fees and costs, and that deposing respondents' attorneys will violate the attorney-client privilege. Respondents further assert that the depositions are inconsistent with the Board's April 7, 2005 order calling for limited discovery.

The hearing officer first notes that the Board's order issued on November 17, 2005 ruled that it would not be fair to allow respondents to conduct discovery on the reasonableness of attorney fees without allowing complainant to conduct similar discovery. The Board ordered respondents to respond to complainant's discovery requests by December 3, 2005. On December 5, 2005, respondents filed their responses to complainant's discovery requests, but in response to each interrogatory (except for the most perfunctory), respondents objected and provided no answer. These discovery responses violate the spirit of the Board's order. Furthermore, respondents have provided no argument or case law to defend their assertion that the information would not be admissible, or lead to information admissible at hearing, or that it would violate the attorney-client privilege. The motion to quash is denied.

Complainant's motion for protective order asks that respondents' attorneys be required to participate in a full and good faith conference with complainant's attorneys regarding any further discovery dispute prior to seeking Board intervention. Respondents' motion to strike offered no

compelling argument on which to grant that motion, thus the motion to strike is denied. The parties are directed to make every effort to get through the discovery process with no further involvement from the Board or the hearing officer. Accordingly, the hearing officer grants the motion for protective order. In any motion, objection, or other filing related to any discovery problem, respondents' attorneys must relate the measures taken to resolve the problem with complainant's attorneys before the filing of the motion.

The Board's November 17, 2005 order directs the hearing officer to schedule a status conference to set a detailed discovery schedule. The parties are directed to meet before the next status conference to determine a detailed discovery schedule to propose to the hearing officer at the next status conference.

The parties are directed to participate in a telephone status conference with the hearing officer at 2:00 p.m. on March 9, 2006. Complainant is directed to initiate the call.

IT IS SO ORDERED.

Carol Webb

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
217/524-8509
webbc@ipcb.state.il.us

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on February 8, 2006 to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on February 8, 2006:

Dorothy M. Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

Carol Webb

Carol Sudman
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
217/524-8509
webbc@ipcb.state.il.us

PCB 1996-098
David S. O'Neill, Esq.
5487 North Milwaukee Avenue
Chicago, IL 60630-1249

PCB 1996-098
Bernard J. Murphy
Office of the Attorney General
Environmental Bureau
188 West Randolph, 20th Floor
Chicago, IL 60601

PCB 1996-098
Michael C. Partee
Office of the Attorney General
Environmental Bureau
188 West Randolph, 20th Floor
Chicago, IL 60601

PCB 1996-098
Mitchell L. Cohen
Office of the Attorney General
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Michael B. Jawgiel, PC
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Page : 001
Date & Time: Feb-16-06 02:35pm
Line 1 : +3128142347
Machine ID : IAGO-ENVIRONMENTAL BUREAU

Job number	:	424
Date	:	Feb-16 02:29pm
To	:	☎917737928358
Number of pages	:	011
Start time	:	Feb-16 02:29pm
End time	:	Feb-16 02:35pm
Pages sent	:	011
Status	:	OK

Job number : 424 *** SEND SUCCESSFUL ***

OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Lisa Madigan
Attorney General

ENVIRONMENTAL ENFORCEMENT/ASBESTOS LITIGATION DIVISION

ATTENTION:	David S. O'Neill
PHONE:	773-792-1333
FAX:	773-792-8358
FROM:	Michael C. Partee, Assistant Attorney General
PHONE:	312-814-2069
FAX:	312-814-2347
DATE:	February 16, 2006
NUMBER OF PAGES:	11 (including cover)
COMMENTS:	**Please see the following Rule 201(k) letter regarding discovery in People v. Skokie Valley Asphalt, *et al.***

NOTICE

THIS IS A FAX TRANSMISSION OF ATTORNEY PRIVILEGED AND/OR CONFIDENTIAL INFORMATION. IT IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY THE SENDER AT THE ABOVE TELEPHONE NUMBER AND DESTROY THIS TRANSMITTAL.

IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY RETENTION OR DISSEMINATION OF THIS INFORMATION IS STRICTLY PROHIBITED.

EXHIBIT B

TO COMPLAINANT'S MOTION TO DENY RESPONDENTS' APPEAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General 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.,	)	PCB 96-98 (Enforcement – RCRA)
Respondents.	)	

COMPLAINANT'S SECOND MOTION FOR PROTECTIVE ORDER AND RESPONSE TO RESPONDENTS' MOTION TO QUASH DEPOSITION NOTICES

Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People"), by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to Respondents', SKOKIE VALLEY ASPHALT CO., INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK, Motion to Quash Complainant's Deposition Notices ("Motion to Quash"). The People also hereby move for a protective order requiring Respondents' attorney(s) to participate in a full and good faith conference with the People's attorney regarding any future discovery dispute prior to seeking Board intervention. In support of their combined response and motion, the People state as follows:

RELEVANT PROCEDURAL HISTORY

1. On September 28, 2004, Respondents filed a pleading, titled "Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys'

Fees and Costs" ("Initial Response"). In their Initial Response, Respondents made unsupported, factual allegations regarding their own attorneys' fees and costs, the following of which are two examples:

> "It is hard to justify a claim for attorneys' fees and cost [*sic*] by the Illinois Attorney General's office that is approximately ten times the amount that three Respondents combined paid to defend themselves against frivolous claims" (Initial Response at ¶ 17); and
>
> "It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though the Respondents' attorneys [*sic*] fees include costs." (*Id.*)

2. On April 25, 2005, the People served Respondents with limited interrogatories, document requests and deposition notices aimed at discovering the factual basis for the above allegations.

3. On December 5, 2005, pursuant to Board Order, Respondents provided their answers and objections to the People's interrogatories and document requests. Respondents' answers and objections consist almost entirely of inappropriate objections.

4. Therefore, on December 15, 2005, the People sent Respondents yet another detailed letter in the spirit of Illinois Supreme Court Rule 201(k) to attempt to informally resolve any potential discovery dispute before seeking Board intervention. (Exhibit A.)

5. Respondents have not yet responded to the People's December 15, 2005 Rule 201(k) letter, and it appears that they are unlikely to do so.

6. Nevertheless, neither Respondents' December 5, 2005 discovery answers and objections, nor the People's December 15, 2005 Rule 201(k) letter, address the People's deposition notices. Toward orderly discovery, it was the People's implicit understanding that depositions would not occur until written discovery was adequately answered, which has yet to

occur as set forth in the People's December 15, 2005 Rule 201(k) letter.

7. However, on December 14, 2005, without any informal attempt to resolve differences, Respondents filed their Motion to Quash.

REPONDENTS' MOTION TO QUASH SHOULD BE DENIED AND A PROTECTIVE ORDER SHOULD BE ENTERED REQUIRING A FULL AND GOOD FAITH ATTEMPT TO INFORMALLY RESOLVE ANY FUTURE DISCOVERY DISPUTE PRIOR TO SEEKING BOARD INTERVENTION

8. The stated basis for the Motion to Quash is as follows:

MOTION TO QUASH

(6) The Respondents have not placed their attorneys' fees at issue in this matter.

(7) The Respondents have not placed their expenses at issue in this matter.

(8) The Complainant's deposition of Respondents' attorneys will not allow for the discovery of information calculated to be admissible at the time of the hearing on the issue of the reasonableness of the Complainant's attorneys' fees and costs.

(9) The Complainant's deposition of Respondents' attorneys will violate the attorney-client privilege between the Respondents and the Respondents' attorneys.

(10) Allowing the Complainant to take the deposition of Respondents' attorneys is inconsistent with the Board's Order of April 7, 2005 which called for limited discovery on the subject of the reasonableness of attorneys' fees and costs. Order of April 7, 2005 at 3.

9. Procedurally, the Motion to Quash is premature and unwarranted. The Respondents have not yet adequately answered the People's discovery requests, yet seek to quash deposition notices before the People are even afforded the opportunity to review adequate and complete written discovery answers.

10. Substantively, the Motion to Quash is undeveloped, conclusory, without any authority, and does not set forth an adequate basis for the Board to grant the relief requested.

11. Paragraphs 6 and 7 of the Motion to Quash are flatly contradicted by Respondents' prior allegations in their Initial Response, where they clearly placed their attorneys' fees and costs at issue by going so far as to reference certain, as yet undisclosed, calculated comparisons between the parties' attorneys' fees and costs.

12. Paragraphs 8 through 10 of the Motion to Quash are insufficient on several grounds and also fail to provide a basis for the relief requested.

13. More specifically, Paragraph 8 of the Motion to Quash baldly asserts that the People's deposition notices are not calculated to lead to admissible evidence. No factual basis is provided for the stated objection and the objection fails for this reason. Respondents fail to even account for the reciprocal argument as to why they should be allowed to depose the People's attorneys. Further, the depositions are clearly relevant and Respondents make no relevancy objection. Illinois case law is legion that the concept of relevancy in discovery is broader than relevancy for admission of evidence at trial. *See Bauter v. Reding*, 68 Ill.App.3d 171, 175, 385 N.E.2d 886, 890 (Ill. App. 3d Dist. 1979) (citing *Krupp v. Chicago Transit Auth.*, 8 Ill.2d 37, 41, 32 N.E.2d 532, 535 (Ill. 1956)).

14. Paragraph 9 of the Motion to Quash baldly asserts, without any factual grounds, that depositions of Respondents' attorneys will violate the attorney-client privilege between the Respondents and their attorneys. However, there is no privilege available as to attorney's fees and costs when the very issue in dispute is the appropriate amount of attorney's fees and costs. *See, e.g., LaHood v. Couri*, 236 Ill.App.3d 641, 649, 603 N.E.2d 1165, 1171 (3d Dist. 1992). Further, assuming *arguendo* that such a privilege existed, Respondents waived it by making allegations regarding the amount of their attorneys' fees and costs and by requesting and

obtaining the same information from the People.

15. Last, Paragraph 10 of the Motion to Quash incorrectly asserts that allowing the People to take depositions of Respondents' attorneys "is inconsistent with the Board's Order of April 7, 2005 which called for limited discovery on the subject of the reasonableness of attorneys' fees and costs." Again, this is a premature argument because Respondents have not yet even furnished adequate answers to the People's written discovery requests. Nevertheless, Respondents fail to explain how the People's deposition notices are inconsistent with the Board's April 7, 2005 Order. Further, the April 7, 2005 Order was clarified by the Board's November 17, 2005 Order, wherein the Board stated that the People will be allowed the same opportunity to conduct discovery similar to that served by Respondents. (Board's Order at 3 (Nov. 17, 2005).)

16. Respondents' Motion to Quash is frivolous and achieves nothing more than to further delay of this proceeding and increase litigation costs. The Motion to Quash may have been entirely avoided if Respondents' attorney(s) made a full and good faith attempt to informally resolve this apparent discovery dispute prior to once again seeking Board intervention.

17. As noted in the committee comments to Rule 201(k), many discovery differences could be eliminated if the attorneys responsible for trying the case were involved in attempts to resolve discovery differences. "Counsel responsible for trying the trial of a case are required to have or attempt a personal consultation before a motion with respect to discovery is initiated." (Committee Comments on Rule 201(k).)

18. A full and good faith attempt by counsel to informally resolve discovery disputes is a necessary part of the discovery process.

19. In order to avoid any further, needless Board intervention regarding discovery disputes, the Hearing Officer or the Board should issue a protective order pursuant to Rule

101.616(d) of the Board's Procedural Rules requiring counsel to engage in a full and good faith attempt to informally resolve any future discovery dispute prior to seeking Board intervention.

20. Furthermore, the Board has already held that this is not a one-sided proceeding. (*See* Board Order at 3 (Nov. 17, 2005) ("To allow the respondent to conduct discovery on this matter and not allow the People the opportunity to conduct similar discovery would place the People on unequal footing . . .").) Therefore, People respectfully request that, if Respondents continue to fail to cooperate in conducting discovery that they themselves initiated, this phase of the proceeding should end immediately and the People's fee petition should be granted.

WHEREFORE, the People respectfully request that the Board deny Respondents' Motion to Quash, that the Board enter a protective order requiring counsel to engage in a full and good faith attempt to informally resolve any future discovery dispute prior to seeking Board intervention, and for any further relief that is fair and just under the circumstances.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney General
of the State of Illinois

BY: 

MICHAEL C. PARTEE
Assistant Attorney General
Environmental Bureau/North
188 West Randolph, Suite 2001
Chicago, Illinois 60601
Tel: (312)814-2069
Fax: (312)814-2347

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 15, 2005

Sent Via First Class Mail
and Facsimile (773.792.8358)

Mr. David S. O'Neill, Esq.
5487 North Milwaukee Avenue
Chicago, Illinois 60630-1249

Re: People v. Skokie Valley Asphalt Co., Inc., *et al.*, PCB 96-98

Dear Mr. O'Neill:

The purpose of this letter is to initiate a conference in the spirit of Illinois Supreme Court Rule 201(k) to informally resolve potential disputes over Respondents' answers to Complainant's interrogatories and document requests prior to seeking Board intervention. These written discovery requests were served on Respondents on April 25, 2005, and were answered on December 5, 2005. The following is a full explanation of our position on each potential dispute. Please respond to this letter as requested within 14 days by providing the requested discovery or explaining your position so that we can make a fully informed and joint decision whether it is absolutely necessary to seek Board intervention regarding these potential disputes. On a related note, regarding Respondents' written discovery requests to Complainant, the Board granted Respondents until December 3, 2005, to provide additional responses to Complainant's discovery objections. As of today, I have not heard from you and assume that any potential differences over Complainant's answers are resolved.

Respondents' Answers to Complainant's Interrogatories

Complainant served Respondents with 11 interrogatories requesting information regarding Respondents' hearing plans (*e.g.*, the identity of any witnesses to be called at hearing) and attorneys' fees and costs. The Respondents each elected to answer the interrogatories separately, but their answers are all the same, with the exception of Skokie Valley Asphalt's ("SVA") answer to Interrogatory #1.

In answer to Interrogatory #1, which requests the identity of the individual answering the interrogatories, SVA answered that it "is no longer a legal entity under the laws of the State of Illinois" and "Therefore, [it] is incapable of responding to these interrogatories." However, SVA is one of the Respondents that moved to stay Complainant's fee petition in the first place. More

EXHIBIT
A

500 South Second Street, Springfield, Illinois 62706 • (217) 782-1090 • TTY: (217) 785-2771 • Fax: (217) 78
100 West Randolph Street, Chicago, Illinois 60601 • (312) 814-3000 • TTY: (312) 814-3374 • Fax: (312) 81
1001 East Main, Carbondale, Illinois 62901 • (618) 529-6400 • TTY: (618) 529-6403 • Fax: (618) 529-6

significantly, SVA is also one of the Respondents that served discovery requests on Complainant. Rhetorically, how can SVA oppose Complainant's fee petition and serve discovery, but cannot answer discovery? In addition, under Illinois law, a corporation can be sued (and must have a registered agent for a period of five years) even after dissolution. Given the circumstances, SVA's answer to Interrogatory #1 is unacceptable. In order to informally resolve this dispute, we require SVA to answer Interrogatory #1 within 14 days of this letter.

In answer to Interrogatory #2, the Respondents listed me as a potential witness at hearing. I am the attorney representing Complainant at hearing. Further, none of my fees and costs is included in Complainant's fee petition. Thus, I will not be testifying at the hearing. In order to informally resolve this potential dispute, please contact me within 14 days of this letter if you disagree. If you disagree, we will obviously need to seek a protective order. If we do not hear from you within 14 days, we will reasonably assume that you agree with our position.

In answer to Interrogatory #3, which requests information regarding any opinion witness to be called by Respondents at hearing, Respondents identified Deborah A. Stonich, but did not provide any other requested information because she apparently has not completed her case assessment. However, it is not necessary to wait for her case assessment in order to provide information regarding her qualifications and previous opinion testimony, as specifically requested in subparts (b) and (d) of Interrogatory #3. In order to informally resolve this dispute, we require Respondents to answer Interrogatory #3(b) and (d) within 14 days of this letter.

In answer to Interrogatory #4, Respondents provided none of the requested information. Instead, Respondents all objected on the same grounds and as follows:

> Objection. This interrogatory is not calculated to be to [*sic*] admissible evidence at the time of the hearing. Furthermore, this interrogatory asks for irrelevant information and violates the attorney-client privilege between the Respondent and the Respondent's attorneys. The Respondent has not placed his attorney's fees or its expenses at issue in this matter.

First, absent some direction from the Board, the objections based upon admissibility and relevance are not grounds to withhold information (or documents as discussed below). Respondents' attorneys' fees and costs were, in fact, placed at issue through their "Initial Response to and Motion to Stay and/or Extend Time to Respond to Complainant's Petition for Attorneys' Fees and Costs," which contains numerous and specific factual allegations regarding the Respondents' attorneys' fees and costs. (See, *e.g.*, Initial Response at ¶ 17 ("It is hard to justify a claim for attorneys' fees and cost [*sic*] by the Illinois Attorney General's office that is approximately ten times the amount that three Respondents combined paid to defend themselves against frivolous claims" and "It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though the Respondents' attorneys [*sic*] fees include costs").) In opposing Complainant's Petition for Attorneys' Fees and Costs, Respondents drew a direct comparison between the parties' attorneys'

fees and costs, yet Respondents now refuse to disclose their own attorneys' fees and costs.

Second, regarding the attorney-client privilege asserted, our interrogatories contain an entire section, Section II, titled "Claims of Privilege," wherein we specifically requested that Respondents identify the "statute, rule or decision which is claimed to give rise to the privilege or the reason for its unavailability." Respondents did not object to this instruction or provide us with the legal basis for the asserted privilege. Frankly, our research indicates that attorneys' fees and costs are not privileged in a dispute over attorneys' fees and costs. Furthermore, and even if there was such a privilege, Respondents waived it by previously requesting (and obtaining) the very same information from Complainant.

Third, the Board ruled that "... the People must be allowed to conduct discovery on the reasonableness of the attorney fees and costs." (Order at 3 (Nov. 17, 2005).) "To allow the respondent to conduct discovery 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."

For all of these reasons, in order to informally resolve this dispute over Interrogatory #4, we require Respondents to provide the requested information within 14 days of this letter.

In answer to Interrogatories #5 through #11, Respondents again provided none of the requested information and repeated their previous objection to Interrogatory #4. As with Interrogatory #4, in order to informally resolve this dispute, we require Respondents to provide the requested information within 14 days of this letter.

Respondents' Answers to Complainant's Document Requests

Through seven document requests, Complainant requested documents relevant to Respondents' attorneys' fees and costs. In answer to our document requests, Respondents did not produce any documents whatsoever. Instead, the Respondents stated the following objection to each document request:

> Objection. This interrogatory is not calculated to be admissible evidence at the time of the hearing. Furthermore, this interrogatory asks for irrelevant information and violates the attorney-client privilege between the Respondent and the Respondent's attorneys. The attorneys for the Respondent has not placed his or, in the case of Skokie Valley Asphalt Company, Inc., its attorney's fees at issue nor has the Respondent placed his or, in the case of Skokie Valley Asphalt Company, Inc., its expenses at issue in this matter.

For all of the same reasons that Respondents' answers to Interrogatories #4 through #11 are unacceptable, Respondents' answers to all document requests are unacceptable. Again, these reasons include that the Board has already ruled that Complainant is entitled to conduct discovery

on this issue. Also, we are not aware of any legal basis to assert a privilege under the circumstances, but regardless, Respondents clearly waived any privilege by previously requesting (and obtaining) the very same information from Complainant. Further, pursuant to specific instructions in Complainant's discovery requests (See Instruction 2 in our Interrogatories), Respondents were asked to provide a detailed privilege log for withheld documents. We did not receive any privilege log. Essentially, Respondents have refused to disclose any documents and, at the same time, failed to adequately assert and define the basis for their refusal.

In order to informally resolve this dispute, we require Respondents to produce the requested documents within 14 days of this letter.

Again, please respond to this letter within 14 days. Please contact me with any questions in the interim.

Sincerely,

Michael C. Partee
Assistant Attorney General
Environmental Bureau
188 West Randolph Street, Suite 2001
Chicago, Illinois 60601
Tel: (312)814-2069
Fax: (312)814-2347
E-Mail: mpartee@atg.state.il.us

cc: Carol Webb, Hearing Officer *(Via First Class Mail)*
Michael B. Jawgiel, Esq. *(Via First Class Mail)*

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Page : 001
Date & Time: Dec-15-05 11:14am
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Job number	:	714
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Start time	:	Dec-15 11:11am
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OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Lisa Madigan
Attorney General

ENVIRONMENTAL ENFORCEMENT/ASBESTOS LITIGATION DIVISION

ATTENTION:	David S. O'Neill
PHONE:	773-792-1333
FAX:	773-792-8358
FROM:	Michael C. Partee, Assistant Attorney General
PHONE:	312-814-2069
FAX:	312-814-2347
DATE:	December 15, 2005
NUMBER OF PAGES:	5 (including cover)
COMMENTS:	Please see the following letter in the People v. Skokie Valley Asphalt, et al., matter.

NOTICE

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IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY RETENTION OR DISSEMINATION OF THIS INFORMATION IS STRICTLY PROHIBITED.

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the **Notice of Motion** and **Complainant's Motion to Deny Respondents' Appeal of Hearing Officer's February 8, 2006 Order**, were sent by First Class Mail, postage prepaid, to the persons listed on the Notice of Filing on March 10, 2006.

BY: _____
MICHAEL C. PARTEE

It is hereby certified that the foregoing were electronically filed with the Clerk of the Board on March 10, 2006:

Pollution Control Board, Attn: Clerk
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

BY: _____
MICHAEL C. PARTEE