BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENTS' CLOSING ARGUMENT AND POST TRIAL BRIEF

The Respondents, Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Richard J. Frederick, by and through their attorney, David S. O'Neill, herein present their Closing Argument and Post-Trial Brief pursuant to the Hearing Officer Order of the Illinois Pollution Control Board of October 31, 2003. In support of its position, the Respondents state as follows:

FACTUAL BACKGROUND

Skokie Valley Asphalt Co, Inc. (SVA) was an Illinois corporation with offices at 768 S. Lake St., Grayslake, Lake County, Illinois at all times relevant to the alleged violations that are the subject of this Complaint (Trial at 278). East of SVA's site in Grayslake is the Avon-Fremont Drainage Ditch. The ditch flows to the north through the city of Grayslake and into Third Lake (Trial at 145-146, 353). The land between SVA's facility and the Avon-Fremont Ditch is actively-farmed fields (Trial at 340,341). Nearby businesses included Mitch's

Landscaping to the west (Trial at 221). There is also a large landfill in the vicinity. Further away there are other industries (Trial at 340).

SVA was a paving contractor and a trucking and material storage business (Trial at 277, 278, 437). The Grayslake location housed the estimating department, the office and all the people who did billing. The site included a maintenance garage were they worked on various equipment and trucks. Some asphalt liquid and asphalt primer coats were stored at the site. Previously, an asphalt company had been operated at the site by other owners. (Trial at 277, 278).

During this period, Edwin L. Frederick, Jr. was the President of SVA (Trial at 433). His brother, Richard J. Frederick, was the Vice President (Trial at 278). Each of the brothers owned fifty percent of SVA and were the only shareholders of SVA (Trial at 278).

Richard Frederick's duties for the company included construction management. He was responsible for scheduling of all jobs, estimating, budgeting, dealing with superintendents and foremen, hiring and controlling all employees, union contracts, personnel issues, subcontractors, outside shops, equipment purchasing and repair and review of equipment (Trial at 279,280). He also was in charge of safety and traffic matters at the job sites, approving contract matters and approving the payment of invoices (Trial at 280,281).

Edwin Frederick was President of SVA. Most of his duties related to financial matters and estimating. He was responsible for estimating, insurance issues and banking matters. (Trial at 281). He did work as liaison with the banks and suppliers, purchased materials, managed payroll and reviewed accounts receivable and accounts payable. His duties involved job- site meetings, reviewing job-site work, consultation with foremen and engineers, liaison with government officials and customers (Trial at 282).

The Fredericks were not responsible for all day-to-day operations of SVA (Trial at 437).

The Fredericks shared control of the operation of the company with other foreman and superintendents (Trial at 278, 437). Edwin and Richard Frederick made major management decisions and decisions on spending large amounts of money on behalf of SVA. Other decisions were made by other management people (Trial at 439).

In 1998, the assets of SVA were sold to Curran Contracting (Trial at 435). The sale included the assets including land, buildings, plants, trucks, construction equipment and inventory (Trial at 475). This sale included all of the records of SVA. In 2000, Curran disposed of all of SVA's records (Trial at 319,321). Consequently, many of the records concerning the activities of SVA, Edwin Frederick and Richard Frederick with respect to operations, environmental concerns and responses and the history of the SVA site are not available.

The Illinois Environmental Protection Agency (IEPA) issued an NPDES permit to SVA in April of 1986 to allow SVA to discharge storm water into Grays Lake through a storm water sewer (Trial at 137,221). The permit was issued solely to SVA and not to Edwin Frederick or Richard Frederick either individually or jointly with SVA (Trial at 70).

One of the conditions of the permit stated that SVA was required to submit Discharge Monitoring Reports (DMR) to the IEPA on a monthly basis.(Trial at 283). To comply with the DMR requirement, SVA's dispatchers would have one of the laborers take a water sample from the discharge pipe that was the representative sampling point. The sample was delivered to the North Shore Sanitary District where it was tested for the parameters specified in the NPDES permit (Trial at 23).

The test results were mailed back to SVA and the test result data was used to complete the IEPA DMR report. The reports were usually completed by Bob Christiansen – an SVA Dispatcher (Trial at 284,285). The reports were usually signed by Richard Frederick as an officer

of the company (Trial at 286,313). Richard reviewed the data supplied in the DMRs (Trial at 284,285), but Richard Frederick had no way to determine if the information submitted in the report was accurate (Trial at 286). Further, the certification on the DMR form does not require the signatory to verify the information; it just asks them to certify that they are " familiar with the information contained in this report and that to the best of my knowledge and belief such information is true complete and accurate" (Trial at 74, 75).

Throughout the entire period of the NPDES permit for the SVA site, there were no violations for oil, grease or pH (Trial at 284,285). There were a few violations for total suspended solids. These violations resulted as a result of intense storm events that caused dirt from neighboring farm fields to wash into SVA's retention pond (Trial at 285).

The DMR forms that are submitted by NPDES permit holders like SVA are received and tract by the IEPA Division of Water Pollution Control Compliance Assurance Section (Trial at 33). At the time that SVA was submitting DMRs, the IEPA was receiving a lot of DMR forms. Errors occurred in handling the large volumes of DMRs in areas like failing to date stamp all of the DMRs received (Trial at 36). There was no formal quality assurance procedure instituted by the IEPA at that time to determine whether or not the people who were actually logging the information were doing so correctly (Trial at 65). There were situations in the IEPA Division of Water Pollution Control Compliance Assurance Section were reports were mislogged (Trial at 66).

In the late 1980's and the early 1990's, DMRs were recorded by the IEPA Division of Water Control Compliance Assurance Section in a DMR Submission record. A DMR submission record is a logbook of a list of NPDES permit numbers where the date of DMR submissions are recorded. The procedure was abandoned by the IEPA in 1997 and replaced by

an electronic log in system (Trial at 48).

The DMR submission records that included the NPDES permit held by SVA failed to record the fact that DMRs had been submitted by SVA during some months covered by the permit (Trial at 50-53). While there was no indiction that any one at IEPA checked to determine that the recordings were accurate (Trial at 66), the lack of a record of submission created an assumption that the reports were not submitted.

The people at IEPA who handled DMRs were not necessarily supposed to report failures to files DMRs and IEPA's records do not indicate that SVA was ever notified that the IEPA had no record of SVA's DMRs for some months (Trial at 68,69). SVA had no way of knowing that IEPA did not have a record of their submittals of DMRs. When SVA was made aware of the fact that the IEPA did not have a record of receiving all of the DMRs that SVA was required to submit, SVA submitted copies of the lab analysis reports of its outfall samples that were prepared by Northshore Sanitary District and copies of some of the missing DMRs to the Illinois Attorney General's Office (Trial at 317,318). This activity took place in the mid-1990's (Trial at 318, 478-486). Based on this submittal of information that indicated that the required samples were taken, tested and reported to the IEPA, SVA was lead to believe that the issue regarding the failure to submit DMRs was resolved (Trial at 322, Respondents' Exhibit 1,2,3 and 4).

The DMR report originally submitted by SVA for the month of February 1991, contained the same data as the report submitted by SVA for the month of January, 1991 (Trial at 40). During this period, Bob Christiansen – the SVA employee responsible for collecting data for and completing and submitting SVA reports – was out of work because of a heart attack. (Trial at 292). The person at SVA who submitted the DMR in February of 1991 used the data from the test of the sample taken in the month of January of 1991 instead of the data from the test of the

sample taken in February 1991 when completing the DMR report (Trial at 292). When SVA realized this mistake, a corrected DMR report for February of 1991 was submitted (Trial at 485).

SVA's NPDES permit that was issued in SVA in April of 1986, expired in March of 1991 (Trial at 41). Under the permit conditions, SVA was required to reapply for a permit 180 days prior to the expiration of their existing permit (Trial at 41). However, prior to the time that SVA would have been required to reapply for an NPDES permit they were advised both by the Illinois Environmental Protection Agency and by their consultants with expertise in NPDES requirements that they did not need a NPDES permit for SVA site in Grayslake (Trial at 322). SVA was of the opinion that their site would be covered by a blanket permit that was being granted to the Illinois Asphalt Paving Association, the Illinois Truckers' Association or some other trade association that covered SVA operations (Trial at 322). Their competitors and people SVA dealt with in trade associations were receiving permits under blanket permit (Trial at 322). SVA discussed the idea with a representative of IEPA in Springfield and SVA was lead to believe that they would be covered by a blanket permit for NPDES (Trial at 322). As a result, SVA did not think it was required to reapply for an individual NPDES permit for its site and consequently did not submit the application when it was due (Trial at 324-325).

In Illinois, there is a general permit for storm water discharges off of industrial properties that require no monitoring and no submittal of DMRs. The site owner or operator is simply required to develop a storm water pollution prevention plan to assure that the facility maximizes its efforts to minimize any impact in its storm water runoff (Trial at 416, 417). SVA should have qualified for this type of permit.

It is very questionable that SVA was required to reapply for an NPDES permit. The only expert testimony offered at trial was that an individual permit was not required for the site. (Trial

at 416, 417). However, SVA did submit the application for renewal of its permit (Trial at 458). They sent a letter to the IEPA requesting an extension of the deadline for filing the NPDES application and then submitted the application on June 5, 1991 (Trial at 42). To this date, the IEPA has not reviewed SVA's NPDES application and has not issued a permit for the site (Trial at 44).

A farm drainage tile ran through SVA's property toward the Avon-Fremont Drainage Ditch. The outfall from the farm drainage tile drains into the Avon-Fremont Drainage Ditch due east of the SVA site.(Trial at 222,223) It was never determined how many drain tiles beyond the SVA site fed into the farm tile in that area. (Trial at 241). Under its NPDES permit, SVA was allowed to discharge storm water into Grays Lake through a storm sewer. (Trial at 221).

From December of 1994 to April of 1995 there was a discharge into the Avon-Fremont Ditch east of the SVA site (Trial at 221,359). The IEPA, USEPA and others failed to determine the source of the discharge. (Trial at 234-238). During this period, the Respondents were doing excavation work on their property and discovered a drain tile (Trial at 340). They contacted the environmental consulting firm of Huff and Huff and discussed this matter with Jim Huff.(Trial at 341). They suspected that the drain tile was related to the discharge to the Avon Ditch (Trial at 341).

On the advise of and with the assistance of its consulting engineer –Jim Huff of Huff and Huff, Inc. – SVA plugged the drain tile, reported the release to the National Response Center as required under 40 CFR 112 and worked with its engineer and other SVA employees and outside contractors to address the problem on a voluntary basis (Trial at 340, 341). No releases have taken place since SVA began it voluntary effort (Trial at 348). Upon discovery of the drainage tile, SVA took the lead in addressing the problems on the Avon Ditch and connected bodies on a

voluntary basis (Trial at 347-351). Although, SVA was sold and no longer exists as an entity, Edwin Frederick and Richard Frederick continue to fund the effort to eliminate any potential source of a release (Trial at 368).

LACHES

"Laches is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party." Riverview FS, Inc. V. Illinois Environmental Protection Agency, PCB 97-226 at 1 (May 3, 2001 citing Tully v. Illinois, 143 Ill. 2d 425, 432, 574 N.E. 2d 659, 662 (1991). "There are two principal elements of laches: lack of due diligence by a party asserting a claim and prejudice to the opposing party." People v. Royster-Clark, Inc., PCB 02-8 at 6 (January 24, 2002) citing Van Milligan v. Board of Fire and Police Commission, 158 ILL.2d at 89, 630 N.E.2d at 833. In the case before the Board, it is unquestionable that the Complainant has not been diligent in bringing its allegation against the Respondents Edwin L. Frederick and Richard J. Frederick.

The allegations that are the basis for the Complaint date back eighteen (18) years to 1986 and even the most recent allegations under the amended complaints occurred over nine (9) years ago in 1995. On or about November 3, 1995, the Complainant's filed a complaint in the above captioned matter against the Respondent, Skokie Valley Asphalt, Inc. In the complaint, the Complainant alleges violations dating from May of 1986 to March 1, 1991. On or about December 29, 1997, the Complainant's filed a First Amended Complaint in the above captioned matter. In the First Amended Complaint, no additional Respondents were named. The First Amended Compliant included an additional count alleging water pollution under Section 12(a) of the Act, 415 ILCS 5/12 (a) (1996) for actions that allegedly occurred from December 23, 1994 through April 18, 1995. On January 21, 2000, Respondent, Skokie Valley Asphalt Co., Inc.

served its response to the Complainant's First Set of Interrogatories and its Response to the Complainant's First Request for Production of Documents.

By order of the Board Hearing Officer, all discovery in this matter was ordered to be completed by October 20, 2000. (Hearing Officer Order of April 7, 2000.) The Respondent complied with this discovery schedule. On September 6, 2001, the Complainant requested an additional discovery schedule. Over the objections of the Respondents, the Board Hearing Officer extended the discovery schedule and ordered that all discovery be closed by February 1, 2002 (Hearing Officer Order of April 7, 2000). Again the Respondent complied with the discovery schedule. No additional information concerning the liability of the Respondent or other parties was requested or proffered during this additional discovery period.

On July 26, 2002, the Complainant's filed a Second Amended Complaint. In the Second Amended Complaint, the Complainant's named Edwin L. Frederick Jr., individually and as owner and President of Skokie Valley Asphalt Co., Inc., and the Respondent Richard J. Frederick, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc. as additional Respondents.

On December 20, 2002, the Respondents filed their Answer and Affirmative Defense to Complainant's Second Amended Complaint. In their Answer and Affirmative Defense to Complainant's Second Amended Complaint, the Respondents state an affirmative defense that the Complainant should not be allowed to amend its Complaint to include Edwin L. Frederick Jr., .individually and as owner and President of Skokie Valley Asphalt Co., Inc., and the Respondent Richard J. Frederick, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc. under the doctrine of laches and equitable estoppel. (Respondents' Answer of

December 20, 2002 at 8.)

The Complainant was aware of the roles of Respondents Edwin L. Frederick and Richard J. Frederick in the alleged violations prior to the filing of the original complaint in 1995 and all discovery pertinent to the parties involved in this matter was completed in the year 2000. No new information or additional allegations involving Respondents Edwin L. Frederick and Richard J. Frederick has been introduced by the Complainant to justify the untimely addition of these parties. The untimely addition of these parties is solely the result of a lack of due diligence by the Complainant.

As a direct result of the Complainant's lack of due diligence, the Respondents Richard Frederick and Edwin Frederick have been prejudiced in their ability to produce records, recall witnesses and remember events relevant to their defense in this matter. In 1998, during the period of the Complainant's lack of due diligence, the assets of the Respondent SVA were sold to a third party (Trial at 435,475). These assets included all of the records of SVA including records on NPDES permits, responsibilities of employees including Edwin Frederick and Richard Frederick, records on DMR submittals, records on past operations at the plant, records on environmental issues and other matters involved in this Complaint. Subsequent to acquiring the assets of SVA, the new owners decided they had no need for the records of SVA and disposed of the records.

Edwin and Richard Frederick had no control over the new owners decision to dispose of these records and also had no reason to suspect that these records would be of value to them. This litigation had started two years earlier and the Fredericks were not named Respondents. There was no knew information divulged through discovery that would lead a reasonable person

to suspect that they would be named as Respondents. Therefore, they made no attempt to retain any of SVA's records. For similar reasons, the did not retain any of their personal records relevant to SVA beyond the periods these records would have been required for other purposes.

Laches is based on the notion that courts will not readily come to the aid of a party who has "slept on his rights to the detriment of the opposing party." Riverview FS, Inc. v. Illinois Environmental Protection Agency, PCB 97-226 at 5 (May 3, 2001) citing Tully, 143 Ill. 2d 425, 432, 574 N.E. 2d 659, 662 (1991). In this matter, the Complainant's lack of due diligence has in fact resulted in a detriment to the Respondents Edwin L. Frederick and Richard J. Frederick and the Board should not come to the aid of the Complainants in what appears to be nothing more than a back door effort to reopen discovery and to increase the Respondents expense and aggravation in defending themselves and their company.

In Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966), the Illinois Supreme Court established the standard for applying laches to the state. In that case, the court stated:

> It is, of course, elementary that ordinary limitations statutes and principles of laches and estoppel do not apply to public bodies under usual circumstances, and the reluctance of courts to hold government bodies estopped to assert their claims is particularly apparent when the governmental unit is the State. There are sound basis for such policy. *** [A]pplication of laches or estoppel doctrines may impair the functioning of the state in the discharge of its government function, and [] valuable public interests may be jeopardized or lost by its negligence, mistakes or inattention of public officials.
>
> But it seems equally true that the reluctance to apply equitable principles against the State does not amount to absolute immunity of the State from laches and estoppel under all circumstances. The immunity is a qualified one and the qualifications are variously stated. It is sometimes said laches and estoppel will not be applied against the state in its governmental, public or sovereign capacity,

> and it cannot be estopped from its exercise of its police powers or in its power of taxation or the collection of revenue.

It has, however, been stated with frequency that the State may be estopped when acting in a proprietary, as distinguished from its sovereign or governmental, capacity and even, under more compelling circumstances, when acting in its governmental capacity.

Therefore, laches can be applied to the state under "compelling circumstances", even when the state is acting in a governmental capacity. People v. State Oil Company, William Anest et. al. PCB 97-103 (May 18, 2000) citing Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966).

In the present case, it is not apparent that the State's ability to discharge its government function is impaired or that any valuable public interest is jeopardized or lost if the doctrines of laches and equitable estoppel are imposed to disallow the naming of additional Respondents. The granting of this motion to dismiss will not act as impairment of the State's right to discharge its government function and protect public interests because the State will still be able to protect the public interest and perform its government function by enforcing against the remaining party – Skokie Valley Asphalt Inc. Dismissing the Respondents under the doctrine of laches will allow the Respondents the protection against undue prejudice and the Claimants efforts to use administrative proceedings to increase the cost and effort to the Respondents of defending themselves in this matter, without jeopardizing the State's ability to pursue its case against the Respondent it selected as the culpable party at the time it was in possession of all discovery material, had full knowledge of all of the parties involved, knew the roles each party played in the matter and was fully informed of all other facts of the case.

There is nothing in the record to ensure that the Claimant's unjustifiable delay in naming the additional Respondents was solely the result of a lack of due diligence, negligence, mistake or inattention. The Respondents offer that the amending of the complaint to include additional Respondent without adding allegations was an attempt to extend discovery in this matter, increase the Respondents' cost and effort in countering the Claimant's procedural maneuvering and further delay the hearing and final determination by the Board.

The Board needs to release the Respondents, Richard J. Frederick and Edwin L. Frederick from liability in this matter not only to protect the Respondents against the prejudice that has resulted from the unreasonable delay of the Claimants in naming additional Respondents but also to protect the Board from becoming a harbinger for indifferent or intentionally manipulative prosecution. Under the standard established in the Hickey decision, "compelling circumstances" must exist for the Board to invoke laches and equitable estoppel against the state when the state is acting in its governmental capacity. People v. State Oil Company, William Anest et. al. PCB 97-103 (May 18, 2000) citing Hickey. The "compelling circumstances" in this matter, include the fact that the Respondents' were unable to fully defend themselves against charges of alleged incidents that occurred up to seventeen (17) years ago, five (5) years after the Respondents terminated their employment with the entity involved in the matter and three (3) years after discovery related to the liability of the parties was completed. The "compelling circumstances" include the fact that a party in the position of the Respondents should have every right to rely on the representations and actions of the State to conclude that it will not be required to defend themselves against allegations raised well after their retirement and after it had justifiably determined that it had completed its responses to discovery requests.

For the Board to find that "compelling circumstances" are not established by the fact pattern in this matter, the Board would need to find that the term "compelling circumstances" has no meaning and that laches can never be applied against the State. Such a ruling would be contrary to the decisions of the Illinois Supreme Court on the issue. The Illinois Supreme Court has also stated that "mere nonaction of governmental officers is not sufficient to work an estoppel ... there must be some positive acts by the officials which may have induced the actions of the adverse parties" Id. See also Van Milligan v. Board of Fire and Police Commissioners, 158 Ill 2d 85, 630 N.E. 2d 830 (1994); People v. ESG Watts (February 5, 1998), PCB 96-107 at 7; People v. Bigelow Group Inc. (January 8, 1998), PCB 97-217, at 2.

In the case before the Board, the filing of the First Amended Complaint on December 29, 1997 without naming the Respondents as additional parties, the failure of the State to name the Respondents as parties after requesting and receiving all information concerning all of the parties involved after the discovery period that ended on October 20, 2000 and the fact that the Claimants requested a second discovery period without making a request of the Claimants for additional information regarding the parties, all were positive acts by the officials which induced the Respondents to take actions which have prejudiced the Respondents ability to properly defend themselves in this matter.

Wherefore, the Respondent respectfully requests that the Board dismiss the Respondent Edwin L. Frederick Jr.,.individually and as owner and President of Skokie Valley Asphalt Co., Inc., and the Respondent Richard J. Frederick, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc. under the doctrines of laches and equitable estoppel.

LEGAL STANDARD OF LIABILITY

Because the Illinois Attorney General's Office introduced this action against the Respondents, it has the burden of proof in this case. (415 ILCS 5/31 (e) (2002). The Illinois Attorney General's Office needs to show by a "preponderance of the evidence" that the violations did occur and the individual Respondents were the parties responsible for causing the violation.

The Complainants named Richard Frederick and Edwin Frederick, both individually and as officers of SVA. The burden of proof for individuals would be the afore stated "preponderance of the evidence" standard. However, to hold the Fredericks responsible as corporate officers, the Complainant must meet the standard of proof established by Illinois law for corporate officers in environmental enforcement cases.

The standard for the burden of proof for corporate officer in Illinois environmental enforcement actions is established People v. C.J.R. Processing, Inc et. al. 269 Ill. App. 3d 1013, 647 N.E. 2d 1035 (3d Dist. 1995). The C. J. R. Court held that a corporate officer can only be held liable for his company's environmental violations if he was personally involved in or actively participated in a violation of the Act, or if he had the ability or the authority to control the acts or omissions that gave rise to the violation (Id. at 1018).

The Complainant presented insufficient evidence at trial to hold either Richard Frederick or Edwin Frederick liable under any of the Counts. In fact, the Fredericks can not he held liable of the violations of the Counts related to failure to comply with the terms of the NPDES permit because they were not the permit holders and had no duty to comply with the permit requirements. Similarly, they were not owners of the property and can not be held liable, as individuals for any release from the property. For either Richard or Edwin Frederick to be held liable in this matter, the standard established in People v. C.J.R. Processing, Inc et. al. that the

officer was personally involved in or actively participated in a violation of the Act, or if he had the ability or the authority to control the acts or omissions that gave rise to the violation must be established. The application of this standard to the evidence presented in this case does not support an argument by the Complainants that Richard and Edwin Frederick were responsible for the violation, even if it is shown that a violation occurred.

ANALYSIS OF THE CULPABILITY OF THE RESPONDENTS

COUNT I

The Complainant maintains that the Respondents, SVA, Edwin L. Frederick, Jr. and Richard J. Frederick, violated Section 12(f) of the Act, 415 ILCS 5/12(f)2002 by failing to comply with NPDES Permit. The Complainant's contention that the Respondents, Edwin L. Frederick, Jr. and Richard Frederick, violated the requirements of the NPDES Permit that the IEPA issued to SVA are frivolous and contradict the testimony provided by the witnesses in support of the case presented by the IEPA. Mr. Michael Garretson, the acting manager of the Compliance Assurance Section of the Illinois Environmental Protection Agency, testified that SVA was the responsible party for reporting the DMRs under the NPDES Permit (Trial at 70). The NPDES Permit requires the permitee to submit the DMR. (Trial at 74). Mr. Garretson had no information which would lead him to believe that the Respondent, Edwin L. Frederick, Jr., actually participated in any aspect of the DMRs submitted by SVA (Trial at 69). The certification on the DMR, signed by the Respondent, Richard Frederick, in his capacity as Vice-President of SVA, merely requires the signator to attest to the best of his knowledge and belief that the information provided in the DMR is true, complete and accurate. (See Complainant's Exhibit 3). The certification does not require this signator to verify the information contained in

the DMR. The DMR merely requests that the signator report to the best of his knowledge (Trial at 75). The Complainant has failed to present any evidence in support of its allegations that the Respondents, Edwin L. Frederick, Jr. and Richard Frederick, were individually responsible for submitting the DMRs under the permit that the IEPA issued to SVA. The Complainant's Closing Argument and Post Trial Brief lumps the Respondents together and fails to make the differentiation between the Respondents based on their responsibilities under the NPDES Permit. (Section B of the Closing Argument and Post Trial Brief of the Complainant). The Complainant's Closing Argument and Post Trial Brief ignores the testimony of Mr. Michael Garretson and exemplifies a theme that runs throughout the Complainant's case, namely a perpetual failure to meet its burden of proof and to provide sufficient evidence in support of its allegations.

According to Mr. Michael Garretson, the purpose behind the DMRs is to send out a compliance letter if a DMR is not in compliance and to gain compliance from the permitee as soon as possible. (Trial at 87). The individual from the IEPA who reviews the DMR submitted would send out a compliance letter, if the individual reviewing the report thought something was suspicious about a report or a series of reports submitted by permitee. (Trial at 89). Mr. Garretson could not find the log books of the DMRs submitted by SVA from the years 1994 and 1995 (Trial at 49). Between the late 80's and early 90's, Mr. Michael Garretson was not aware of the Illinois EPA suspecting that SVA had submitted suspicious DMRs (Trial at 89). Mr. Garretson did not look for reports or other communications from SVA correcting its DMRs (See Trial at 91). At the direction of the Attorney General's office, Mr. Garretson gathered the information regarding the DMRs submitted by SVA (Trial at 95-97). Under the NPDES Permit,

SVA was only required to maintain its DMRs for three years from the effective date of the permit (Trial at 103-106). The Complainant has submitted only two compliance letters sent from the Illinois EPA to SVA dated October 31, 1988 and January 5, 1990 (See Complainant's Exhibit 19). In response to the October 31, 1988 compliance letter of the IEPA, SVA responded on November 9, 1988 stating that it was unaware that it was obligated to submit DMRs as long as SVA was not discharging into the area. In addition, SVA explained that it was unable up to a few months prior to the letter to obtain a new easement to replace the existing tile and was not able to discharge into the area. SVA indicated that it would submit reports as required. (See SVA letter dated November 9, 1988 presented in complainant's Exhibit 19).

In response to the letter of the Illinois EPA dated January 5, 1990, SVA sent a letter apologizing for its oversight in submitting the DMR and explained that a newly hired employee was assigned the task of taking the sampling, but forgot to do so. SVA explained its corrective measures and stated that the sample from January 1990 had already been taken to the lab (See SVA letter dated January 17, 1990 presenting in complainant's Exhibit 19). The complainant has not presented any evidence at the IEPA issued additional compliance letters to SVA regarding suspicious or missing DMRs. It can be reasonably deducted, based on the testimony of Mr. Michael Garretson, that the other alleged incidences of which the complainant alleges SVA failed to comply with the requirements of the NPDES Permit by timely filing DMRs, were determined by IEPA to be insignificant and did not merit even a compliance letter. The Attorney General's Office has also manipulated the evidence by failing to request Mr. Michael Garretson to search for DMRs submitted by SVA correcting the allegedly duplicative DMRs submitted by SVA although the Attorney General's Office was well aware that SVA had

affirmatively stated it timely submitted corrective DMRs once this situation was discovered by SVA. That SVA had affirmatively stated in its pleadings that it had submitted DMRs in correction of the duplicative DMR once SVA became aware of it. However, SVA was unable to support its position with documentation on account of the complainants failure to bring the present cause of action in a timely manner.

Further, the IEPA has historically mislogged information submitted in the DMRs, misplaced reports, misfiled reports, sent reports to the wrong individuals and sent documents to the wrong regions (See Trial at 66 and 197). At no point in time did the representative of the IEPA who was responsible for verifying the information contained in the DMR submitted by SVA, namely Mr. Christopher Kallis, Ever notify SVA that the information contained in its DMRs was inaccurate or suspicious. (See Trial at 195). The Complainant has failed to present any evidence that Mr. Kallis notified SVA that the information contained in its DMRs was suspicious, unusually elevated for the type of industry and region or inaccurate in anyway. The representative of the IEPA, Ms. Jan Hopper, whose responsibility was to review the DMRs submitted by SVA and compare the information in the report to the NPDES Permit to determine if a violation had occurred was not even called as a witness by the Complainant. (Trial at 67). If Ms. Hopper did not receive a DMR report from a NPDES permitee, she was not suppose to report the missing DMR or take corrective action unless a pattern of non-submission occurred. The IEPA, would only issue a compliance inquiry letter to the permittee once a pattern of non-submission occurred. (Trial at 68). Only the Attorney General has made an issue of the DMRs and the compliance requirements of the NPDES permit of SVA. The IEPA, the governmental entity in charge of administering, reviewing and determining compliance of the NPDES permit

and the DMRs, through its actions, has accepted the DMRs of SVA and the determined SVA's DMRs and pattern so submitting DMRs substantially complied with the NPDES permit. The Complainant has presented no evidence to support that the Illinois EPA at the time of receiving the DMRs of SVA thought that the levels of TSS reported in the DMRs were significant or merited corrective action on either the IEPA or SVA. On the contrary, Mr. Michael Garretson, the Complainant's expert on the requirements under the NPDES permit and the interpretation of DMRs, opined that numerous factors that are temporary and beyond the control of the permitee, can effect the levels of TSS reported in a DMR, including excessive rain (Trial at 78). SVA substantially complied with its NPDES permit although it was under significantly more stringent requirements regarding effluent limit levels than other industrial facilities across the United States (Trial at 414-415).

COUNT II

The Complainant alleges that SVA failed to renew its NPDES permit in a timely manner. The arguments presented in Count I above regarding the requirements of the Respondent's, Edwin L. Frederick, Jr. and Richard Frederick, under the NPDES Permit are applicable to Count II. The permitee under the NPDES permit was SVA. The Respondents, Edwin L. Frederick, Jr. and Richard Frederick, had no obligation individually to renew the NPDES permit. A violation of Section 309.102 (a) of the Illinois Pollution Control Board Water Pollution Regulations, 35 Ill. Adm. Code 309.102 (a), if any, would be limited to the actions of SVA and would not apply to the Respondents Edwin L. Frederick, Jr. and Richard Frederick.

The actions of SVA were not malicious and were based upon a reasonable interpretation of its obligations under the Act. Complainant's Exhibit 19, in particular the SVA

letter dated April 22, 1991 as well as the SVA letter dated May 7, 1991 clearly shows that SVA upon advise of its retained civil engineer were diligently attempting to determine whether SVA was required to renew its NPDES permit. Once advised by its environmental engineering consultant that a NPDES permit may be required under the amended Act, SVA requested a reasonable extension of three weeks to file its application. The Complainant has not provided any evidence that the requests for an extension of time for SVA to file an application was rejected by the IEPA. To this date, whether SVA was required to renew its NPDES permit in 1991, is questionable. According to the only expert testimony on this issue, SVA wais eligible for a General Storm Water Permit instead of an individual Storm Water Permit and was not required to file DMRs (Trial at 416-417).

COUNT III

The allegations of the Complainant that SVA failed to take water discharge samples at a point representative of the discharge before it entered the stream is based on pure speculation and conjecture. The Complainant has not provided any testimony through its witnesses that the levels of TSS reported in the DMRs submitted by SVA were unusual or aberrant when compared to other similar industries in the same region. Although Mr. Kallis was the responsible field representative of the IEPA to determine whether SVA's DMRs were accurate, he did not testify that he ever took samples and compared them to the test results reported in SVAs DMRs. The Complainant relies solely on Mr. Kallis' opinion expressed in his report dated August 9, 2001 that referenced an inspection visit on May 21, 1991 where Mr. Kallis concluded that SVA did not have a representative sampling point because he left the premises when "tempers flared" and there was some hostility on the part of Edwin L. Frederick, Jr. and

Richard Frederick. Mr. Kallis thought they wanted him to go so he just left to avoid a confrontation (Trial at 38-42). However, the last time Mr. Kallis took samples of the discharge water was in 1992, SVA had an accessible representative sampling point. (Trial at 192). Mr. Kallis did not know how long the accessible representative sampling point had been in existence, but believed the point may not have been present in 1987 (Trial at 192-193). Complainant has not established that the representative discharge point observed by Mr. Kallis in early 1992 was not present since the issuance of the NPDES Permit to SVA. Since the alleged incident by Mr. Kallis he has never experienced any further hostilities although he has been out to the SVA site more than five times and took samples during those other visits (Trial at 164-166).

The Complainant's allegation that SVA failed to take water discharge samples at a point representative of the discharge before the water entered the stream has not been supported by any reliable evidence whether factual or opinion. It is curious that IEPA first inspected the SVA site for a representative discharge point nearly six years after the NPDES permit was issued to SVA. The statement by the Complainant that the Respondents "did not maintain an accessible affluent sampling point for the discharge from the SVA lagoon therefore, did not and could not take samples representative of the discharge" is based on the speculation of Mr. Kallis regarding when the SVA established the representative discharge point.

COUNT IV

The Complainant has failed to provide any evidence thatthe SVA facility was the source of the oily substance found in the Avon-Fremont drainage ditch. Further, the Complainant's allegations that the Respondents, Edwin L. Frederick, Jr. and Richard Frederick,

were responsible for the presence of an oily substance on the Avon-Fremont Drainage Ditch are baseless.

The Complainant relies upon pure speculation and conjecture to support allegations that the Respondents were responsible for the presence of an oily substance on the Avon-Fremont Drainage Ditch. Mr. Kallis, who inspected the SVA facility on March 22, 1995 and walked all over the property as well as looked into a manhole located on the property of SVA did not find any evidence that the contamination was coming from the SVA facility (Trial at 158). Although Mr. Kallis inspected SVA's property in March of 1995 he did not take any samples of materials he saw at the SVA site to analyze them and compare those samples with samples from the drainage ditch (Trial at 176). Mr. Kallis readily admits that his opinion that SVA was the source of the contamination in the Avon-Fremont Drainage Ditch was pure speculation. (Trial at 176). He was not aware of any entity taking samples from SVA after the contamination of the Avon-Fremont Drainage Ditch was discovered to compare the samples from SVA with the material found in the drainage ditch (Trial at 177). Mr. Kallis stated that he was aware other drain tiles contributed to the farm tile that was emitting the oily substance into the Avon-Fremont Drainage Ditch (Trial at 177), but he never looked into the sources of those contributory drain tiles (Trial at 178). Mr. Kallis admitted that the oily substance coming from the farm tile could have come from sources other than the SVA site. (Trial at 178). Mr. Kallis could even state whether the oily substance he collected from the Avon-Fremont Drainage Ditch was gasoline, a gasoline based product, motor oil, diesel fuel or any other product (Trial at 180).

Further, Mr. Kallis testified that he had no information that Edwin L. Frederick, Jr. or anyone at Edwin L. Frederick, Jr.'s direction placed the oily substance in the farm tile

which trained into the Avon-Fremont Drainage Ditch (Trial 182). Mr. Kallis also had no information whatsoever that Richard Frederick or anyone at Richard Frederick's direction place an oily substance in the farm tile which drained into the Avon-Fremont drainage ditch. (Trial at 182). Mr. Kallis had no information which would lead anyone to believe that anyone from SVA actually placed the oily substance in the farm tile that drained into the Avon-Fremont Drainage Ditch. (Trial at 183).

The opinion of Mr. Christopher Kallis and Mr. Don Klopke, representatives of the IEPA, relied heavily on the report of Ms. Betty Lavis of the United States Environmental Protection Agency (USEPA) dated May 3, 1995 presented as Exhibit 25 (Trial at 184 and 227 respectively). The pertinent section of Ms. Lavis' report appears in the second paragraph under section III on page 2 wherein she states that she met the owners at the site who said they found a leak and would address the problem. Based on this statement Mr. Kallis and Mr. Klopke through the conclusion that a leaky underground storage tank on the SVA property was the source of the oily contamination found in the Avon-Fremont Drainage Ditch. USEPA was also told by the consultant for SVA, Mr. James Huff, in May of 1995 that he thought a leaky underground storage tank on the SVA property the possible source of contamination in the Avon-Fremont Drainage Ditch. (Trial at 425). Mr. Huff's opinion regarding the source of the contamination at that point in time was conveyed to the Respondents, Edwin L. Frederick, Jr. and Richard Frederick. However, when the leaky underground storage tank was removed and soil borings were taken, Mr. Huff changed his opinion and no longer thought that the leaky underground storage tank on the SVA facility was the source of the oily substance found in the Avon-Fremont Drainage Ditch (Trial at 385). Mr. Huff furthered opined that there is a possibility that the oily substance found

in the Avon-Fremont Drainage Ditch may have originated from a former gasoline tank which was removed somewhere in the 1970's (Trial at 386-387). However, the Complainant did not establish whether or not this possible source was most likely the source of the oily substance found in the Avon-Fremont Drainage Ditch. Mr. Klopke who also performed an investigation to determine the source of the oily substance in the Avon-Fremont Drainage Ditch stated that Mitch's Green Thumb Nursery was an equally potential source for the oily substance found in the Avon-Fremont Drainage Ditch. (Trial at 248). However, neither Mr. Huff or Mr. Klopke have any personal knowledge based on empirical evidence such as testing of substances, smell, touch or observation which would lead them to believe that SVA was most likely the source of the oily substance found in the Avon-Fremont Drainage Ditch (Trial at 234, 235 and 238). Mr. Klopke went as far as to state that his sole basis for his opinions regarding the source of the oily substance found in the Avon-Fremont Drainage Ditch was a report authored by the consulting firm Huff & Huff sent to the IEPA on May 1, 1995 (Trial at 24). However, as previously stated, the author of that report, Mr. James Huff, came to the conclusion that the leaky storage tank was not the source of the oily substance found in the Avon-Fremont Drainage Ditch.(after the leaky storage tank was removed and soil testing was conducted around the excavated area)

The Complainant has failed to meet its burden of proof in showing that the oily substance in the Avon-Fremont Drainage Ditch more likely than not came from the SVA facility. An equally probable source , if not more probable source, of the oily contamination exists, namely Mitch's Green Thumb Nursery. The Complainant has failed to show the samples of the oily substance taken from the drain tile matched any substance found on the SVA property. The IEPA did not investigate further, although SVA has been under the intense scrutiny of the IEPA

and USEPA for an extensive period of time, even after witnesses from the IEPA testified that other tiles contributed to the farm tile, whether other sites emitted the oily substance. The Complainant through the IEPA rushed judgment and made it a decision early in the investigation that SVA was the source of the oily substance but failed to substantiate its allegations and assumption with empirical evidence. The Complainant relied on conjecture to support its change.

COUNT V

It is uncontroverted that SVA has been subject to more stringent requirements regarding effluent limit levels then similar industries across the United States and in particular Illinois. (Trial at 414-415). Mr. Garretson of the IEPA admitted in his testimony that as a matter of course the IEPA does not take action if a singular DMR reflects levels higher then allowed under the NPDES permit. (Trail at 80). Even two reports back to back may only possibly lead to action on the part of the IEPA. The decision whether or not to take action was left up to Ms. Hopper and the individuals in the field. (Trail at 80). The Complainant puts forth Exhibits 9-17 as examples of excessive discharge of TSS on the part of SVA. However, the IEPA with respect to the singular monthly reports reflecting elevated TSS levels has admitted that no action has been taken or should be taken regarding those reports. Further, the IEPA with respect to the reports that reflect elevated TSS levels for consecutive months, IEPA has already chosen its remedy and either decided to do nothing or to issue a compliant letter. In light of the numerous environmental factors that are beyond the control of a permitee that influence the level of TSS at any given point, SVA has a commendable record in accurately reporting the levels of TSS, even if elevated. The IEPA did not seek legal action contemporaneous to receiving the DMR from SVA. This charge is clearly an attempt by the Attorney General's office to pad its case with

issues that the Illinois EPA has reviewed and historically considered inconsequential. Mr. Garretson freely admits that he first became aware of the particular levels when he was asked by the Attorney General's office to prepare documentation for this case (Trial at 84). Over ten years have elapsed since SVA submitted the DMRs at issue reflecting elevated TSS levels without the head of the compliance department of the Illinois EPA expressing any concern on his own volition or even becoming aware of the situation until he was approached by the Attorney General's office. The purpose of the DMRs, which is to gain compliance from the permitee as soon as possible (Trial at 87) and not to fine companies like SVA making a good faith effort to comply with the requirements of its NPDES permit has been achieved.

Even more egregious, as discussed above, the NPDES permit was issued to SVA. The entity responsible for complying with the NPDES permit was SVA. The Complainant has not presented any evidence, (as a matter of fact the witnesses called from the Illinois EPA by the Complainant have even supported the fact) that the Respondents, Edwin Frederick and Richard Frederick were not the individuals responsible to report and maintain the requirements of the NPDES permit. On the contrary, the Complainant's witnesses have testified to the contrary. The have admitted to a lack of evidence that the Respondents, Edwin L. Frederick, Jr. and Richard Frederick, personally through their authority violated the requirements of the NPDES permit. The Complainant has not provided any evidence to support its charges against these Respondents.

ANALYSIS OF DAMAGES AND CIVIL PENALTY

The Respondents maintain that no violations of the Act have been shown in this matter. The Respondents Edwin Frederick and Richard Frederick also maintain that no showing of violation

against them should be allowed by the Board because the Respondents unreasonable delay in pursuing the case against them has unreasonably prejudiced their ability to defend themselves. However, even if the Board were to find that a violation has occurred and that the Complainants have proven by a preponderance of the evidence that one or more of the Respondents were responsible for the violation, the Respondents argue that the standard for damages under the five counts brought under this complaint do no justify the imposition of any penalties.

Section 33 of the Act, 415 ILCS 5/33©) (2002) requires the Board to make a determination whether the violations are unreasonable. Section 33 states in pertinent part:

> In making its orders and determinations, the Board shall take into consideration all of the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but no limited to:
>
> 1. The character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people;
>
> 2. The social and economic value of the pollution source;
>
> 3. The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority or location in the area involved;
>
> 4. The technical practicality and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> 5. Any subsequent compliance.

COUNTS IV AND V

Because only Counts IV and V involve "emissions, discharges or deposits", this analysis should only be applied to these Counts. Count IV involves the release of discharge from a drainage tile into the Avon Drainage Ditch. To date it has not been confirmed by a preponderance of the evidence that this accidental release came from the SVA site and if it was

from the SVA site, it was not shown that the discharge was "caused" by any of the Respondents. It definitely was not "caused" by the Respondents Edwin Frederick or Richard Frederick who did not own the site and only became involved in the incident in their attempt to alleviate the problem.

With respect to the character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people, there is no evidence that any such factors exist. The Complainant's witness, Mr. Donald Klopke, who has responded to hundreds of emergency situations of behalf of the IEPA (Trial at 215,216), testified that the damaged caused by the release to the Avon Drainage Ditch were of a temporary nature. He noted the sheen on the water in the ditch that was gone shortly after the incident and the possibility of odor problems while the released materials were exposed. However, he did not testify as to any permanent health concerns or concerns for property damage as a result of this release (Trial at 272,273). In fact, the IEPA Emergency Response Unit, which included Mr. Klopke, considered this release to be of such minor impact that they did not even bother to identify the number of drain tiles that fen into farm tile, what farm tiles fed into the Avon Drainage Ditch (Trial at 241), take samples of the materials in the drainage ditch and attempt to match the released materials to at the SVA site (Trial at 234), investigate the tanks at the SVA site to determine if they were the source of the contamination or even how many tanks were at the site (Trial at 235), fully investigate other potential sources (Trial at 247) or even attempt to identify other sources of the contamination and definitively show what source was responsible for the release to the Avon Drainage Ditch (Trial at 238).

An additional indication of the lack of concern that the IEPA had for this release is the

fact that neither the Emergency Response Unit or any other response group from the IEPA revisited the site after their initial visit on April 19, 1995, even though they had not identified the source of the release and the release to the Avon Drainage Ditch continued (Trial at 255). If the release represented any notable degree of potential injury to, or interference with, the protection of the health, general welfare and physical property of the people, the IEPA surely would have follow through with their duty to rectify the situation. The fact that the IEPA determined that this release was so minor that it did not require any follow up is the clearest indication of the minor impact this incident had regarding interference with, the protection of the health, general welfare and physical property of the people.

Mr. James Huff also testified that actions taken at the request and at the expense of Edwin Frederick and Richard Frederick such as placing oil absorbing booms on the waters to collect the sheen materials were effective in collecting and limiting the spread of the discharge material (Trial at 351,352). The Fredericks continue to take the actions necessary to ensure that discharges to the Avon-Fremont Drainage Ditch are avoided (Trial at 347).

The social and economic value of the pollution source was never questioned in the Complainant's presentation of its case and should be unchallenged here. SVA was an asphalt paving contractor (Trial at 277, 278, 437) with a need for a facility to store materials and equipment. Asphalt pavers are an essential part of our present social structure and economy that is highly dependent on good roads and highway maintenance. Facilities to host companies in the paving business that allow these companies to properly store materials and equipment and to operate their businesses are equally important in value. Therefore, this factor should heavily in favor of the Respondents position that no penalty should be assessed in this matter. This

argument pertains to both Count IV and Count V.

The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority or location in the area involved also was unquestioned in the Complainant's case and supports an argument against any assessment of penalty. The clearest evidence that the source is suited to the area it is located is the fact that local authorities that are in the best position to determine the suitability of a business to an area, have issued to permits to SVA to operate at the site. Prior to SVA being located at the site, a company with similar operations was also allowed to operate their and presently, a company with operations almost identical to SVA's is still in operation at the site. Absent any information presented by the Complainant to indicate that the pollution source in unsuitable to the area in which it is located, including the question of priority or location in the area involved needs to be interpreted as a strong indication that the source was suitable to the area and this factor should weigh strongly in support of the argument that no penalty should be assessed under either Count IV or Count V.

Consideration of the fourth factor under Section 33 – the technical practicality and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source – highlights the unreasonableness of pursuing a penalty in this case against any of the Respondents. With respect to Count IV, the technical practicability and economic reasonableness are not even issues to be considered in mitigation until the source was identified. Regardless of whether there existed a practical technical solution or an economically reasonable solution, none of the Respondents were in a position to take the necessary action to reduce or eliminate the discharge until the source had been identified.

Only after Richard Frederick and Edwin Frederick accidentally discovered the drain tile

that went through the SVA property and after Mr. James Huff theorized that the drain tile was a probable source of the discharge into the Avon Drainage Ditch was it possible to even consider factors of technical practicality and economic reasonableness in reducing or eliminating the discharge. Once the probable source was identified, the consideration of the technical practicality and economic reasonableness not only support an argument that these are mitigating factors but also show that the Respondents acted in good faith to eliminate the discharges.

Both Richard Frederick and Edwin Frederick took all actions necessary and available to reduce and eliminate the discharge as soon as they identified the suspected source. Although neither of these Respondents had a clear responsibility for the discharge because neither was personally involved in or actively participated in the cause of the discharge or had the ability to control the acts or omissions that gave rise to the violation, they authorized action to address the situation. At no point did any of the Respondents attempt to hinder the effort to eliminate the discharge because the remediation action would technically impractical or economically unreasonable. The extent of the technical effort is shown by the fact that Respondents Edwin L. Frederick and Richard J. Frederick continue to employ and pay Mr. James Huff and his firm to identify and remediate possible pollution sources at the SVA site to this date (Trial at 463). The extent of the economic commitment is illustrated by the fact that the Respondents has spent in excess of $150,000 in their effort to eliminate the discharge (Trial at 468).

With respect to Count V, technical practicality and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source are critical factors in understanding the complete unreasonableness of this Count. Testimony by both Mr. Huff and Mr. Kallis confirmed that the violations sited in Count V resulted as a result of

runoff of soil from neighboring farm fields during intense rain events (Trial at 200, 516-517). The Respondents had installed a retention pond to allow the solids to settle before discharge and this activity did reduce the level of TSS in the discharge (Trial at 516-517). However, it is technically impossible and consequently economically unreasonable for the Respondents to control rain events. The unreasonableness of this event is illustrated by the testimony of Mr. Kallis who stated that the state seldom enforced violations that involved accedences of TDS and TSS releases in circumstances similar to those reported by SVA ((Trial at 201), and the testimony of Mr. Huff who pointed out that the IEPA had made a mistake in placing this requirement in a storm water NPDES permit like the one issued to SVA and that the IEPA had corrected their mistake when they issued a draft renewal permit in 1996 (Trial at 518).

The strongest factor to be considered in determining that no fine should be imposed under this count is the subsequent compliance efforts of the Respondents – especially Richard Frederick and Edwin Frederick. The Fredericks acting individually work with IEPA and USEPA on addressing the problems at the Avon Drainage Ditch even before it was known that the source of the contamination was from the SVA site. It was the Respondents Richard Frederick and Edwin Frederick that continue to look for the source of the contamination even after the IEPA Emergency Response Unit had completed their investigation and decided the small release was not worth their continued effort to identify the source. When the Fredericks identified the drain tile on the SVA property, the immediately contacted the engineering consulting firm of Huff and Huff Inc. to ensure the proper course of action. Both the Fredericks and SVA gave Mr. James Huff a free hand to do what ever he thought was right and necessary even going so far as to replace the ineffective booms that USEPA had placed in the waters to collect the discharge with

more expensive, more effective booms paid for by the Respondents.

It was the Respondents who continued to control the problem of the discharge and who continued to eliminate the potential sources of contaminants long after IEPA and USEPA lost interest in the situation. It is Edwin and Richard Frederick who continue this effort even through this time to get closure on all of the potential sources of contaminants identified at a cost of in excess of $150,000.00 to outside contractors and considerable costs on payments to SVA employees. The Complainant's own witness, Mr. Klopke, stated that it is highly unusual that people or companies that are not truly responsible for a release to take responsibility for the environmental problems caused by the release (Trial at 270-271). Yet this type of subsequent compliance effort is exactly what Richard Frederick and Edwin Frederick undertook both on behalf of SVA and then as individual with no duty to perform. This type of compliance effort should not be rewarded with additional penalties to the Respondents because of a release from a source that had been installed by a previous owner of the property, that they were not aware of and that they could not prevent or discover until after the release occurred. As stated in the argument the fourth consideration of Section 33, it is technically impractical to address a source before you are aware of it and it is unreasonable to expect any of the Respondents to undertake any compliance effort until they know what action needs to be taken to comply. Consideration of this fifth factor as well as the other factor delineated in Section 33, clearly indicate that no penalty can be justified under Section 33.

Section 42 of the Act, 415 ILCS 5/42 (from Ch. 111 ½, par. 1042) addresses civil penalties for any person that violates any provision of the Act or any regulation adopted by the Board, or any permit or term or condition thereof or that violates any determination or order of

the Board pursuant to the Act. Paragraph (h) of Section 42 authorizes the Board to consider any matters of record in mitigation or aggravation of penalty. The section states:

(h) In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3) or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

(1) the duration and gravity of the violation;

(2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefit accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;

(4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;

(5) the number, proximity in time, and gravity or previously adjudicated violations of this Act by the Respondent;

(6) whether the respondents self-disclosed in accordance with subsection (I) of this Section, the non-compliance to the Agency; and

(7) whether the respondent has agreed to undertake a "supplemental environmental project" which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the Respondent is not otherwise legally required to perform.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result ion a arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent.

(I) A person who voluntarily self-discloses non-compliance to the Agency, of which the Agency has been unaware, is entitled to a 100% reduction in the portion of he penalty that is not based on the economic benefit of non-compliance if the person can establish the following:

(1) that the non-compliance was discovered through an environmental audit, as defined in Section 52.2 of this Act, and the person waives

the environmental audit privileges as provided in that Section with respect to that non-compliance;

(2) that the non-compliance was disclosed in writing within 30 days of the date on which that person discovered it;

(3) that the non-compliance was discovered and disclosed prior to:

(I) the commencement of an Agency inspection, investigation or request for information;

(ii) notice of a citizen suit;

(iii) the filing of a complaint by a citizen, the Illinois Attorney General, or the State's Attorney of the county in which the violation occurred;

(iv) the reporting of the non-compliance by an employee of the person without that person's knowledge; or

(v) imminent discovery of the non-compliance by the Agency;

(4) that the non-compliance is being corrected and any environmental harm is being remediated in a timely fashion;

(5) that the person agrees to prevent a recurrence of the non-compliance;

(6) that no related non-compliance events have occurred in the past three years at the same facility or in the past 5 years as part of a pattern at multiple facilities owned or operated by the person;

(7) that the non-compliance did not result in serious actual harm or present an imminent and substantial endangerment to human health or he environment or violate the specific terms of any judicial or administrative order or consent agreement;

(8) that the person cooperates as reasonably requested by the Agency after the disclosure; and

(9) that the non-compliance was identified voluntarily and not through a monitoring, sampling, or auditing procedure that is required by statute, rule, permit, judicial or administrative order, or consent agreement.

If a person can establish all of the elements under this subsection except the element set forth in paragraph (1) of this subsection, the person is entitled to a 75% reduction in the portion of the penalty that is not based upon the economic benefit of non-compliance.

The provisions of subsection (I) do not apply to the Counts brought under the Complaint and therefore need not be analyzed. The remainder of Section 42 needs to be applied to all of the

Counts to determine the appropriate damages. However, such an application of the remainder of section 42 would indicate that no penalty should be assessed against any of the Respondents.

The threshold question that needs to be addressed under this section is the economic benefit accrued by the Respondent as a result of the violations. The penalty must be at least as great as the economic benefit, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. In this matter the Complainant was unable to establish that any economic benefit was accrued by any of the Respondents. In fact, no economic benefit was realized by any of the Respondents and a review of the violations and the activities of the Respondents would clearly indicate that no economic benefit could have accrued.

COUNT I

In Count I, the Complainant accused the Respondents of making false statements in the DMRs it submitted to the IEPA under SVA's NPDES permit. SVA was able to show that the mistake was due to a clerical error as a result of an inexperienced employee submitting the wrong month's data. The correct information was subsequently submitted to the IEPA.

Since the required testing and report preparation were performed, SVA did not avoid any expense by submitting the wrong data. In fact, they incurred substantial additional cost in making the required correction and addressing the problem through their lawyers with the Attorney General's Office. There can be no argument that the Respondents received an economic benefit from this mistake.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count I. The duration of the alleged offense was only for one reporting period. The gravity is minor considering it was only a reporting matter that did not

involve any harm to the public health or the environment. The Respondents acted diligently as soon as they were informed that a mistake had been made and they subsequently submitted the proper data. No economic accrued as a result of the delay in compliance. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondents were not in a position to self-disclose the violation because they were not aware of the alleged violation until the IEPA made them aware of the mistake. The Respondents activities with respect to addressing the discharge to the Avon Drainage Ditch and Grays Lake represent a de facto supplemental environmental project because the Respondents – especially Edwin Frederick and Richard Frederick – took actions beyond the actions required to address the discharge from the SVA site. The expenditures for this additional should be credited against any possible penalty.

COUNT II

In Count II, the Complainant maintained the Respondents failed to make timely application for renewal of their NPDES permit. SVA did not apply for the renewal because they were told by IEPA officials and other experts familiar with NPDES permits that they would not be required to have an individual permit for the site. SVA did subsequently apply for the permit even though their remains an issue as to whether or not a permit is required.

Since the required application was subsequently completed and submitted, SVA did not avoid any expense by submitting the wrong data. In fact, they incurred substantial additional cost in trying to clarify this matter and in attempting to get the IEPA to issue the permit. To date, IEPA has not issued a permit renewal. There can be no argument that the Respondents received

an economic benefit from this mistake.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count I. The duration of the alleged offense was only a delay of a few months from the date the application was supposed to be filed and the date it was actually file. This period is much shorter than the number of years it is taking the IEPA to issue the actual NPDES permit. The gravity is minor considering it was only a reporting matter that did not involve any harm to the public health or the environment. SVA continued to control discharges from the site as it had during the period the NPDES permit was in place. The Respondents acted diligently as soon as they realized that there was a question as to whether or not a permit was required and they subsequently submitted the proper application. No economic accrued as a result of the delay in applying. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondents did in fact self - disclose this violation through its inquiries to the state concerning the need to file an application. The Respondents activities with respect to addressing the discharge to the Avon Drainage Ditch and Grays Lake represent a de facto supplemental environmental project because the Respondents – especially Edwin Frederick and Richard Frederick – took actions beyond the actions required to address the discharge from the SVA site. The expenditures for this additional should be credited against any possible penalty.

COUNT III

In Count III, the Complainant falsely accused the Respondents of failure to comply with

sampling and reporting requirements by failing to submit DMRs to the IEPA as required under SVA's NPDES permit. SVA was able to show that they had taken all the required samples, had the samples analyzed and prepared the required DMR reports. This information was submitted to the IEPA and the Attorney General's Office as soon as SVA realized there was an issue involving there compliance with the reporting requirements. Based on the IEPA's previous record of mishandling DMRs and the lax procedures used in handling DMRs, there is a presumption that the DMRs were submitted by lost by IEPA.

Since the required testing and report preparation were performed, SVA did not avoid any expense by submitting the wrong data. In fact, they incurred substantial additional cost in addressing the problem through their lawyers with the Attorney General's Office. There can be no argument that the Respondents received an economic benefit from this mistake.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count I. Even if it were somehow determined that SVA failed to file some of the reports, the duration of the alleged offense only for a few reporting periods through the life of the permit. The gravity is minor considering it was only a reporting matter that did not involve any harm to the public health or the environment. The Respondents acted diligently as soon as they were informed that DMRs were missing and they supplied copies of the report to the IEPA and the Attorney General's Office. No economic accrued as a result of the loss of these reports. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondents were not in a position to self-disclose the violation because they were not aware of the alleged violation until

the IEPA made them aware of the mistake. The Respondents activities with respect to addressing the discharge to the Avon Drainage Ditch and Grays Lake represent a de facto supplemental environmental project because the Respondents – especially Edwin Frederick and Richard Frederick – took actions beyond the actions required to address the discharge from the SVA site. The expenditures for this additional should be credited against any possible penalty.

COUNT IV

In Count IV, the Complainant maintain the Respondents allowed or caused the discharge of an oily substance to the Avon-Fremont Drainage Ditch. None of the Respondents caused or allowed the discharge and none of the Respondents were in a position to prevent the discharge. However, after potential sources of the discharge were identified, the Respondents Richard Frederick and Edwin Frederick took extra ordinary efforts to address the problem. Because of the large expenditures to address the discharge and the elimination of the potential sources, the Respondents did not avoid any expense by allegedly "allowing or causing" the discharge. In fact, they incurred substantial additional cost on a voluntary basis, much of which they were not required to spend in trying to ensure that the releases would stop. There can be no argument that the Respondents received an economic benefit from this activity.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count IV. The duration of the alleged offense was only for a short period and it has not reoccurred since the Respondents took the lead in addressing the problem. This period is much shorter than the number of years the problem would have persisted if the IEPA actions to address the problem had been the only action taken. The gravity is minor considering that all of the witnesses at trial stated that the main problem was a slight petroleum

odor concern and a temporary sheen on a drainage ditch. The incident did not involve any lasting harm to the public health or the environment. SVA continued to control discharges from the site as it had during the period the NPDES permit was in place. The Respondents acted diligently as soon as they identified the potential source of the release and worked with the IEPA and the USEPA even before they thought that the release could possibly be coming from SVA's property. No economic accrued as a result of the release to any of the Respondents. None of the Respondents presently are involved in the ownership or operation of the site, so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondents did in fact self-disclose the potential source of the release immediately upon discovery the source. The Respondents activities with respect to addressing the discharge to the Avon Drainage Ditch and Grays Lake represent a de facto supplemental environmental project because the Respondents – especially Edwin Frederick and Richard Frederick – took actions beyond the actions required to address the discharge from the SVA site. The expenditures for this additional should be credited against any possible penalty.

COUNT V

In Count V, the Complainant accused the Respondents of exceeding the discharge limits established in SVA's NPDES permit. This Count presents petty and vindictive allegations that illustrate the Complainant lack of respect for the Board and the people of the state of Illinois. The Complainant knows that these permit requirements could not be complied with under periods following intense storm events and consequently the Complainants never take action with respect to such accedences except when it elect to harass certain permit holders such as SVA. The fact

that the Complainant would waste the resources of the Board and the Respondents to address such trivial charges in an attempt to cause undue hardship to the Respondents should not be rewarded by the Board.

Since the required testing and report preparation were performed, SVA did not avoid any expense by submitting the wrong data. Regardless of the effort and expenditures made by the Respondents, they would probably not have been able to avoid the accedences. Therefore, they did not avoid any expense by not avoiding the problem. In fact, they incurred substantial additional cost in addressing the problem through their lawyers with the Attorney General's Office. There can be no argument that the Respondents received an economic benefit from this mistake.

Consideration of the other factors delineated in Section 42 also support a finding that no civil penalty is justified under Count V. The duration of the alleged offense was only for a few, isolated reporting periods following intense storm events. The gravity is minor considering it was only a reporting of slightly elevated solid levels that do not result in any harm to the public health or the environment. The Respondents acted diligently as soon as they were aware of the problem by addressing the problem with the consulting environmental engineer but even acting diligently to investigate the problem, there was nothing the Respondents could do to alleviate the potential for slight accedences from the poorly established standard.. No economic accrued as a result of the delay in compliance. None of the Respondents presently possess a NPDES permit so there is no need to impose a monetary penalty to deter further violations. There were no previous adjudicated violation of the Act by any of the Respondents. The Respondent SVA self-disclosed the violations through its DMR reports. The other Respondents were not involved in

the activities involved in this Count V and therefore had no duty to self report. The Respondents activities with respect to addressing the discharge to the Avon Drainage Ditch and Grays Lake represent a de facto supplemental environmental project because the Respondents – especially Edwin Frederick and Richard Frederick – took actions beyond the actions required to address the discharge from the SVA site. The expenditures for this additional should be credited against any possible penalty.

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PEOPLE OF THE STATE OF ILLINOIS
Complainant

v.

SKOKIE VALLEY ASPHALT, CO.,
Respondent

PCB 96-98

Enforcement

NOTICE OF FILING

PLEASE take notice that on March 12, 2004, I Have filed with the Office of the Clerk of the Pollution Control Board the Respondent's Post Trial Brief and Closing Arguments, a copy of which is hereby served upon you.

David S. O'Neill

March 12, 2004

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CERTIFICATE OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that he served a copy of RESPONENT'S POST TRIAL BRIEF AND CLOSING ARGUMENT, mailing a true and correct copy thereof to the below named attorney(s) of record at their respective addresses and depositing the same in the U.S. mail with proper postage prepaid, on MARCH 12, 2004.

To: Mitchell Cohen
Environmental Bureau
Assistant Attorney General
100 W. Randolph, 11th Floor
Chicago, Illinois 60601

David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 12

Day of March, 2004

Linda L Norton
Notary Public

OFFICIAL SEAL
LINDA L NORTON
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/28/07