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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAY 05 2003

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
STATE OIL COMPANY, an Illinois corporation)
WILLIAM ANEST, an individual f/d/b/a)
S&S Petroleum Products,)
PETER ANEST, an individual f/d/b/a)
S&S Petroleum Products,)
CHARLES ABRAHAM, an individual)
JOSEPHINE ABRAHAM, an individual and)
MILLSTREAM SERVICE, INC., an Illinois)
corporation,)
)
Respondents.)

PCB 97-103
(Water and Land
Enforcement)

**RESPONDENTS / WILLIAM ANEST, PETER ANEST, and STATE OIL COMPANY
RESPONSE IN OPPOSITION TO COMPLAINANT'S
MOTION TO MODIFY THE BOARD'S MARCH 20, 2003 ORDER**

Pursuant to 35 Illinois Administrative Code §101.520, Respondents, William Anest, Peter Anest, and State Oil Company ("Anest Respondents") submit this response in opposition to Complainant's Motion to Modify the Board's Order of March 20, 2003 ("Complainant's Motion" or the "Motion"). In that Motion, the Complainant asks the Board to "modify" its March 20, 2003 Order (the "Order") to require that the Respondents remediate the Site and obtain a No Further Remediation Letter within 270 days of the date of the Order. Complainant's Motion should be denied for several independent reasons:

1. The March 20, 2003 Order correctly notes that, during the hearing of this matter, the Complainant failed to present *any* evidence concerning the current environmental conditions at the Site. Order, p. 20. In fact, as the Board further noted, the Illinois Environmental Protection Agency has not even been at the Site since 1996. *Id.* Given that there is absolutely no evidence concerning the current conditions at the Site – or what work and time would be required (if any) to remediate the Site – it is not possible for the Board to rationally determine what would be a “reasonable time frame” within which the Respondents should be able to obtain a No Further Action Letter for the Site.

Board decisions must be based upon evidence, not speculation or argument by counsel. There is no evidence in the record of this case which could even arguably support an order requiring the Respondents to obtain a No Further Remediation Letter within a specific period of time. Consequently, if the Board were to modify its Order to require the Respondents to obtain a No Further Remediation Letter within 270 days, the modified Order would have no factual basis and thus be arbitrary, capricious, and improper.¹

¹ Complainant’s failure to offer evidence concerning the conditions at the Site is perhaps understandable, given that Complainant never asked the Board to order remediation of the Site. *See* Complainant’s Post-Hearing Brief, filed 12/6/2002, pp. 13-14; Order, p. 20. The Complainant asked only for an “investigation” of the Site, and that request first appeared in Complainant’s reply brief. Order, p. 20.

This concern is particularly applicable here, given the history of this Site. As the Board is aware from the hearing in this case, the IEPA did not do any exploration, evaluation or engineering before proceeding with their activities at the Site. The only investigatory work completed on the Site to date was completed by the Abraham Respondents some years ago. A current investigation of Site conditions must be undertaken before any remedial planning is even possible.

The Complainant's Motion should therefore be denied because it requests relief that the Board legally cannot, on the record, grant.

2. The 270-day limit requested by Complainant in its Motion is also arbitrarily short. The records of the IEPA demonstrate that many underground storage tank sites remain open for far more than 270 days. *See, e.g.,* Attachment 1 (selected IEPA Underground Tank Program Sites). Although (as noted above) there is no basis in the record to compare the sites listed on Attachment 1 with the Site at issue in this case, it is clear from Attachment 1 that many underground storage tank sites in Illinois remain open for years.

Complainant's Motion should therefore be denied because it asks the Board to impose a deadline that is, based upon IEPA's own records, arbitrarily short and unrealistic.

3. Complainant's Motion also seeks to impose a 270-day deadline to secure a No Further Remediation Letter even though the Board was fully aware of the possibility of imposing a deadline, but decided not to impose any deadline in its Order. In Board Member Marovitz's Dissenting Opinion, he expressed his view that the Board should have set a specific deadline for completion of work at the Site. The Board as a whole declined to adopt such a position. In the absence of any new evidence, it would be inconsistent for the Board to now reverse itself. Complainant's Motion should therefore be denied because it asks the Board to reverse a considered decision without offering any reason for the Board to do so.

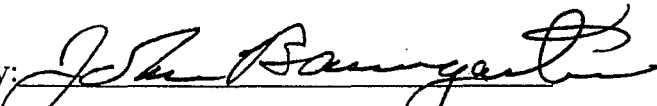
4. Complainant's Motion also overlooks the fact that much of the timing of the completion of remedial work at the Site is in the control of IEPA. It is IEPA who must approve investigatory plans, review results, and approve remedial engineering proposals. It is also an IEPA decision as to when and if a No Further Remediation Letter will be issued for the Site. There are no deadlines in the underground tank program requiring the IEPA to complete reviews and make decisions within a specific time frame. The fact that IEPA is in control of timing here is particularly significant given the fact that it took the Agency over five years to make a LUST Fund eligibility determination in this matter, even though the Abrahams were ready and willing to undertake the remediation. *See* Order, p. 18 ("The Board does not fault the Abrahams ... for failing to remediate the Site between 1992 and 1997 while their LUST application

stagnated with the Agency.") Complainant's Motion should therefore be denied because it would impose a deadline on the Respondents alone, even though Respondents' ability to meet that deadline is largely in the hands of the IEPA.

5. Complainant also asserts that an amendment of the March 20, 2003 Order is needed to terminate the litigation. That is untrue; even Complainant acknowledges that if the 270-day deadline is insufficient, the Respondents would have to return to the Board and seek additional time. Such an approach is, practically, no different than what exists under the March 20, 2003 Order as it now reads. If the Respondents are not proceeding diligently, Complainant may return to the Board to enforce its existing Order.

WHEREFORE the Anest Respondents hereby ask the Board to deny Complainant's Motion.

DATE: 2 May, 2003

By: 
Attorneys for Respondents William Anest, Peter Anest, and State Oil Company

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IEPA UNDERGROUND STORAGE TANK PROGRAM

IEMA Number	City/Town	IEMA Release Report Date	Status	Time Open	Comments
20000035	Hillside	1/7/2000	Still open as of 1/30/03	1118 days from last entry in IEPA database: 1202 days as of 4/24/03	Matter remains open - no No Further Remediation Letter has been issued to date
20000063	Glen Ellyn	1/12/2000	Still open as of 3/20/03	1163 days as of last entry in IEPA database: 1197 days as of 4/24/03	Extension was requested as of 3/20/03
20000075	Lansing	1/13/2000	NFR 3/12/02	789 days for an NFR to issue	
2000108	West Frankfurt	1/19/2000	NFR 1/4/02	715 days for NFR to issue	
20000500	Waukegan	3/22/2000	Still open as of 3/20/03	1093 days from last entry in IEPA database: 1127 days as of 4/24/03	
20000804	Charleston	5/2/2000	Still open as of 4/1/03	1066 days from last entry in IEPA database: 1088 days as of 4/24/03	
20001016	Belleville	5/31/2000	Still open as of 4/10/03	1044 days as of last entry in IEPA database: 1058 days as of 4/24/03	
20011907	O'Fallon	11/16/2001	Still open as of 2/14/02	88 days as of last entry in IEPA database: 522 days as of 4/24/03	45 Day Report Addendum received on 2/14/02
20020557	Calumet city	4/23/2002	Still open as of 12/27/02	243 days as of last entry in IEPA database: 387 days as of 4/24/03	
880071	West Frankfurt	Not noted	Still open- 45 Day Report submitted 7/30/92		No project manager assigned- last action was 8/9/93 review letter

IEPA UNDERGROUND STORAGE TANK PROGRAM

913428	Roselle	1/25/1991	Still open	3928 days as of last entry in IEPA database: 4499 days as of 4/24/03	Review letter sent 11/8/01
20000104	Chicago	1/19/2000	Still open	1190 days of as 4/24/03	
20000222	Pesotum	2/9/2000	Still open	140 days as of last entry in IEPA database: 1108 days as of 4/24/03	Review letter sent 6/29/00
20000409	Burbank	3/9/2000	Still open	1140 days as of 4/24/03	No project manager assigned
200001390	McLeansboro	7/24/2000	Still open	1000 days as of 4/24/03	No project manager assigned
20000272	Chicago	2/17/2000	Still open	57 days as of last entry in IEPA database: 1162 days as of 4/24/03	4/14/00 45 Day Report Selection Letter sent
20000482	Peoria	3/20/2000	Still open	192 days as of last entry in IEPA database: 1129 days as of 4/24/03	Review letter sent 10/2/00
200001545	Belleville	8/14/2000	Still open	959 days as of last entry in IEPA database: 980 days as of 4/24/03	Miscellaneous correspondence noted on 4/3/03
20001592	Park Ridge	8/21/2000	Still open	770 days as of last entry in IEPA database: 973 days as of 4/24/03	Miscellaneous correspondence noted on 10/1/02
860311	Des Plaines	3/11/1986	Still open	6248 days thus far as of 4/24/03	Corrective Action Completion Report submitted 1/3/00: miscellaneous correspondence 12/10/02
860418B	Glenview	4/18/1986	Still open	6211 days thus far as of 4/24/03	Free Product Removal Report 3/31/03: approval of plan 4/15/03

IEPA UNDERGROUND STORAGE TANK PROGRAM

922768	Des Plaines	10/1/1992	Still open	4033 days thus far as of 4/24/03	Miscellaneous correspondence 12/10/02
932045	Urbana	7/30/1993	NFR 12/13/01	3053 days to issuance of NFR	
20011779	Chicago	10/23/2001	NFR 8/22/02	299 days to issuance of NFR	
900378	Wheeling	2/8/1990	Still open	4821 days thus far as of 4/24/03	Groundwater Monitoring Report 1/4/00
902304	Mt. Prospect	8/13/1990	NFR 5/19/95	1736 days to issuance of NFR	
902305	Chicago	8/13/1990	NFR 1/3/01	3288 days to issuance of NFR	