ILLINOIS POLLUTION CONTROL BOARD
April 4, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-103
	)	(Enforcement – Land, Water)
STATE OIL COMPANY, WILLIAM ANEST f/d/b/a S&S PETROLEUM PRODUCTS, PETER ANEST f/d/b/a S&S PETROLEUM CHARLES ABRAHAM, JOSEPHINE ABRAHAM and MILLSTREAM SERVICE, INC.,	)	
	)	
Respondents.	)	

CHARLES ABRAHAM, JOSEPHINE ABRAHAM and MILLSTREAM SERVICE, INC.,	)	
	)	
Cross-Complainants,	)	
	)	
v.	)	PCB 97-103
	)	(Enforcement – Land, Water)
WILLIAM ANEST and PETER ANEST,	)	(Cross-Complaint)
	)	
Cross-Respondents.	)	

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on four separate motions for summary judgment. Pursuant to a schedule entered by the hearing officer, each motion was fully briefed and includes responses and replies.

This case involves a site in McHenry, McHenry County. The People of the State of Illinois allege that all respondents caused or allowed water pollution in violation of Section 12(a) of the Environmental Protection Act (Act).[1] 415 ILCS 5/12(a) (2000). The People also seek to

1 William Anest f/d/b/a S&S Petroleum Products and Peter Anest f/d/b/a S&S Petroleum will be referenced collectively as 'the Anests'; State Oil Company will be referenced as 'State Oil'; Charles Abraham and Josephine Abraham will be referenced as 'the Abrahams'; Millstream Service, Inc. will be referenced as 'Millstream'; the People of the State of Illinois will be referenced as 'People'.

recover from respondents the Abrahams and Millstream over $150,000 the People expended to remediate contamination from underground storage tanks at the site. The People seek these costs under Section 57.12(a) of the Act. 415 ICLS 5/57.12(a) (2000).

On March 6, 1997, the Abrahams and Millstream filed a cross-complaint against the Anests. The cross-complaint alleges that, based on prior fraudulent activities, the Anests should be held liable to the Abrahams and Millstream for any costs or penalties assessed under count II of the People's complaint.

PROCEDURAL HISTORY

The People's complaint has two counts. In the first count, the People ask the Board to issue an order that: (1) finds that State Oil, the Anests, the Abrahams, and Millstream have violated Section 12(a) of the Act; (2) enjoins the respondents from further violation; (3) orders the respondents to perform specific remedial activity; (4) imposes a civil penalty; and (5) finds the respondents liable for attorneys fees and costs. Comp. at 8. The second count is a cost recovery action brought pursuant to Section 57.12(a) of the Act (415 ICLS 5/57.12(a)(2000)) against the Abrahams and Millstream.

The cross-complaint has three counts. The first alleges that the Anests are responsible for the open dumping of a waste (gasoline) resulting in a violation of Section 21(a) of the Act. 415 ICLS 5/21(a)(2000). The second count alleges that the Anests violated 415 ILCS 5/21(d)(2) by allowing gasoline and waste oil to discharge at the site and thereby violating applicable statutory and regulatory reporting and response requirements under 35 Ill. Adm. Code 732.200. The third count alleges that the Anests violated Sections 12(d) and (f) of the Act. 415 ILCS 5/12(d)(f)(2000). After each count, the Abrahams and Millstream pray that the Board find the Anests in violation of the Act, that the Board issue an order requiring the Anests to remediate the site, and that the Anests be found liable to the Abrahams and Millstream if the Abrahams and Millstream are found liable on either count of the People's complaint.

As stated previously, four motions for summary judgment are pending before the Board. On November 26, 2001, the Anests filed a motion for summary judgment on the cross-complainant against the Abrahams and Millstream. The Abrahams and Millstream filed a response to the motion on December 31, 2001. The People filed a response to the motion on December 27, 2001. The Anests filed a reply on January 17, 2002.

On November 27, 2001, the People filed a motion for partial summary judgment against State Oil and the Anests. On December 24, 2001, State Oil and the Anests filed a response to the motion. The People filed a reply to the response on January 17, 2002.

On November 27, 2001, the People filed a motion for partial summary judgment against the Abrahams and Millstream (the People's second motion). The Abrahams and Millstream filed a response to the motion on December 31, 2001. The People filed a reply to the response on January 17, 2002.

On November 27, 2001, the Abrahams and Millstream filed a motion for summary judgment on count II of the People's complaint. The People filed a response to the motion on December 27, 2001. The Abrahams and Millstream filed a reply to the response on January 17, 2002.

UNCONTESTED FACTS

State Oil and the Anests have owned the site since approximately 1974. The site was operated by State Oil from April 3, 1984 to August, 1985. State Oil resp. to People's request to admit Nos. 1,5. Gasoline was discovered leaking into Boone Creek near to where the creek flowed past the site in late 1983 or early 1984. Around that time, gasoline was observed by State Oil or an employee of State Oil on the surface of the creek adjacent to the site. State Oil resp. to Millstream req. to admit No. 5.

On December 5, 1984, Rich Barnes, an employee of State Oil, informed the Illinois Environmental Protection Agency (Agency) that gasoline was seeping from the site onto the banks of Boone Creek and then entering the creek. Req. 10 and Req. 3. Agency inspectors visited the site in December of 1984, but did not require any specific remedial actions to be undertaken at that time. Req. 10-12. Gasoline leaked intermittently onto Boone Creek until April, 1985. Req. 18. In May of 1985, the Agency inspected Boone Creek where it flowed past the site and did not see any gasoline leaking into the creek.

On or about August 15, 1985, the Anests entered into an installment contract to sell the site to the Abrahams. The Abrahams and Millstream took possession of the site on August 15, 1985. The Abrahams are the current owners of the site and the underground storage tanks (USTs) on the site. The Abrahams as well as Millstream are all current operators of the site.

Gasoline continued to seep from the site onto Boone Creek in February 1986, causing Rich Barnes to order absorbent pads placed on the banks of the creek and absorbent booms placed on the surface of the creek to collect gasoline. In 1989, the Agency or its contractors excavated a trench, removed soil and filled the trench with gravel. The Agency conducted construction activities at the site.

In 1990, the Abrahams filed a civil action (case number 90-L-354) against the Anests in the Circuit Court of McHenry County. The action has two counts: the first alleges that the Anests breached warranties contained in the contracts relating to the sale of the site; the second alleges that fraudulent representations were made by the Anests who also failed to inform the Abrahams of conditions about which they were entitled to be informed. The jury found for the Abrahams on both counts and awarded the Abrahams $128,403 on or about April 1994. The decision was upheld by an appellate court in a rule 23 order with appeal number 2-94-1062 on June 26, 1995. Both the jury and the appellate court indicate that the amount awarded the Abrahams reflects the total sum spent by them to mitigate the release of gasoline from the gas station's premises into the nearby creek. *See* Ex. 1 of Millstream's motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

MOTIONS

The Board next addresses each party's motion for summary judgment separately. The Board will summarize the arguments pertaining to each motion, as well as the respective responses and replies before deciding the motion.

Anests' Motion for Summary Judgment

The Anests' Motion

In their motion and accompanying memorandum in support thereof, the Anests assert that they cannot have caused the Abrahams and Millstream to incur penalties, and that summary judgment should be awarded in favor of the Anests to the extent that any prayer for reimbursement of penalties assessed against the Abrahams and Millstream are referenced in the cross-complaint. Anests' mem. at 2.[2] The Anests argue that any award to the People under Section 57.12 of the Act is limited to the remediation of releases proximately caused by the respondent's act or omission, and that such award cannot go beyond the respondent's proportionate degree of responsibility for the costs of the remediation. *Id*.

The Anests next assert that the regulations referenced in count II of the cross-complaint did not exist at the time the site was purchased by the Abrahams and Millstream, and that because no orders were issued to the Anests and the regulation was not in existence before the site was sold, that count II should be dismissed. Anests' mem. at 3.

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2 The Anests' motion for summary judgment will be cited as "Anests' mot. at __."; the Anests' memorandum in support of their motion for summary judgment will be cited as "Anests' mem. at __."; the Abrahams and Millstream's response to the Anests motion for summary judgment will be cited as "Millstream resp. at __."; the People's response to the Anests' motion for summary judgment will be cited as "People's resp. at __."; the Anests' reply will be cited as "Anests' reply at __."

The Anests maintain that they had control of the site starting April 1984, and that prior to that time the station was leased to a tenant. Anests' mem. at 4. The Anests further maintain that after August 15, 1985 (when the Anests and the Abrhams entered into an installment contract for sale of the site) they did not have control of the site. *Id*. The Anests conclude that because no evidence indicates that any storage tank located at the site was leaking between April 1984 and August 1985, no liability can ensue and summary judgment should be granted those parts of the cross-complaint alleging violations of Section 12(d), 21(a) and(d)(2) of the Act. 415 ILCS 12(d), 21(a), 21(d)(2) (2000).

Finally, the Anests assert that the McHenry County judgment is of no value in this proceeding. Anests' mem. at 6. The Anests argue that because it is impossible to be certain about the actual basis for the McHenry Court judgment, that collateral estoppel cannot apply. Anests' mem. at 7.

The Abrahams and Millstream's Response

The Abrahams and Millstream assert that no part of the Anests' motion establishes that the Anests are entitled to summary judgment as a matter of law based upon undisputed material facts as to any portion of the cross-complaint and that the motion must be denied in its entirety. Millstream's resp. at 3. The Abrahams and Millstream note that it is the Anests' actions that have placed the Abrahams and Millstream in a position where they may incur penalties, that this is a clear causal link between the Anests' violations of the Act and the penalties that may be imposed upon the Abrahams and Millstream, and that the Board would, thus, be justified in finding that penalties imposed on the Abrahams and Millstream should be paid by the Anests. Millstream's resp. at 5.

The Abrahams and Millstream argue that substantial uncertainty exists concerning proportionate share liability and its application to this case, and that the People may argue it can recover all of its costs from the Abrahams and Millstream because they owned the site when the costs were incurred. Millstream's resp. at 6. The Abrahams and Millstream contend that until the Board resolves the application of the proportionate share liability statute in this case, the Anests' motion must be denied.

The Abrahams and Millstream next address the Anests' argument concerning the application of recently promulgated regulations. The Abrahams and Millstream assert that waste remaining in the ground is an on-going environmental problem and that post-disposal regulations may properly address the continuing violation even if the moment of disposal pre-dated the regulations. Millstream's resp. at 7. The Abrahams and Millstream further argue that a property owner's responsibility for a release does not necessarily end when he sells the property, and that the Agency did issue an order to State Oil requiring remedial activities at the site. This, finish the Abrahams and Millstream, is sufficient to create a contested issue of material fact. Millstream's resp. at 8.

The Abrahams and Millstream urge that the mere fact that the Anests leased the property is not proof of a lack of control to prevent liability, and that the extent and duration of control

remains a contested issue of material fact. Millstream's resp. at 9. Finally, the Abrahams and Millstream address estoppel, contending that the judgment in the civil litigation required the Anests to pay the Abrahams for all the costs incurred up to that date in connection with the site's contamination issues. Millstream's resp. at 10. But, contends the Abrahams and Millstream, the preclusive use of the judgment will not come into play until the People can show that one of the respondents have responsibility for the alleged release. *Id*. For all these reasons, the Abrahams and Millstream asks that the Anests' motion be denied in total.

People's Response

The People note that the Anests' motion only seeks judgment against the cross-complainants, but request that the motion be denied to the extent that any judgment for the Anests is contrary to a finding of violation of Section 12(a) of the Act. 415 ILCS 5/12(a) (2000). The People maintain that ample evidence exists that during their ownership or operation of the site the Anests caused or allowed the discharge of gasoline into the environment causing water pollution and violating Section 12(a) of the Act. People's resp. at 2.

The Anests' Reply

In their reply, the Anests assert that a mere violation of the Act on the part of the Anests will not generate the liability that the Abrahams and Millstream are seeking. Instead, the Abrahams and Millstream must show that there was a release from the tanks during the time the Anests controlled the site. Anests' reply at 2. The Anests reiterate that for estoppel to apply, a finding of a specific, material and controlling fact in the former case must have been made. *Id*. The Anests contend that estoppel will not apply because the timing of the release was immaterial in the McHenry case, but is the central question here. Anests' reply at 3. The Anests maintain that in the instant case, the Abrahams and Millstream must prove specifics connected with the Act. Anests' reply at 5.

The Anests argue that Section 42(h) of the Act provides the basis for the imposition of penalties and must be the sole factor in determining whether a penalty should be imposed on the Abrahams and Millstream, not the actions of the Anests. Anests' reply at 3. The Anests next maintain that the People cannot base its action on liability as an owner because under Section 58.9 of the Act, the action can only be based on a person's act or omission. Ownership, contend the Anests, is neither an act nor omission. Anests' reply at 4.

Finally, the Anests assert that the only regulations or standards that the Abrahams and Millstream identify in the cross complaint are regulations adopted after the events alleged that the Anests could not have violated because they did not exist when the Anests owned the site. Anests' reply at 5.

Discussion

The Anests' motion for summary judgment on the cross-complaint is denied. The primary issue in this motion is whether or not the Board has the authority to hold the Anests liable as requested in the cross-complaint. The cross-complaint requests that the Board issue an

order finding the Anests jointly and severally liable to the Abrahams and Millstream in the event that they are found liable on either count of the People's complaint. As noted, the People's complaint has two counts; the first seeking a violation of 12(a) of the Act, and the second being a cost recovery action brought pursuant to Section 57.12(a) of the Act (415 ICLS 5/57.12(a)(2000)) against the Abrahams and Millstream.

The cross-complaint has three counts. After each count, the Abrahams and Millstream pray that the Board find the Anests in violation of the Act, that the Board issue an order requiring the Anests to remediate the site, and that the Anests be found liable to the Abrahams and Millstream if they are found liable on either count of the People's complaint.

On May 18, 2000, the Board issued an order denying the Anests' motion to strike the second amended cross-complaint. In that order, the Board found that the cross-complaint was valid. In so doing, the Board referred to a line of cases allowing the Board to direct a respondent to pay cleanup costs incurred by another party. *See* Dayton Hudson Corp. v. Cardinal Industries, Inc., PCB 97-134 (Aug. 21, 1997), slip op. at 5-7, and cases cited therein. The Anests have not raised any arguments since that decision regarding this issue to cause the Board to reach a different decision here.

The Anests have argued that no evidence exists that the USTs on the site were leaking during the time the Anests had control over the site. But, it is clear that gasoline was entering Boone Creek during the time the site was owned by State Oil and the Anests, and operated by State Oil. In addition, the Abrahams and Millstream have alleged that a release of gasoline from the USTs on site occurred during the time the Anests controlled the site. A genuine issue of material fact does exist as to when the USTs were leaking, and the motion for summary judgment cannot be granted.

Again, summary judgment is a drastic means of disposing of litigation and should be granted only when the movant's right to the relief is free from doubt. Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370. Here, the Anests have not shown a clear right to relief. Accordingly, the Anests' motion for summary judgment is denied.

The Board notes that, although raised by both parties, the issues surrounding the McHenry County judgment do not impact the disposition of the Anests' motion for summary judgment. Accordingly, the Board will not provide an advisory opinion on whether collateral estoppel applies based on that judgment.

Although the Anests' motion for summary judgment is denied, as a result of their motion, two items were raised that need Board clarification prior to hearing. First, the Board has never decided that penalties are an item that can be reimbursed as cleanup costs. The Dayton Hudson line of cases addresses only remedial costs and specifically exempts other expenses such as witness fees. The Board cannot issue an order directing the Anests to pay for any penalty imposed on the Abrahams and Millstream as a result of the People's complaint. To the extent that any portion of the cross-complaint seeks reimbursement of penalties, it is stricken.

Second, the Anests argue that the regulations on which count II of the cross-complaint is based were not in existence before they sold the site, and request that the count be dismissed. This argument is not a proper basis for a motion for summary judgment. Accordingly, the Board will not consider this argument at this time. The Anests may, of course, address this issue at hearing.

People's Motion for Summary Judgment Against State Oil and the Anests

People's Motion

The People first contend that water pollution occurs whenever contamination is likely to render water unusable, and that no need to show actual harm exists, only that harm would occur if the contaminated water were to be used. People's first mot. at 3.[3] The People argue that knowledge is not an element of a Section 12(a) violation, and that the People must only show that the alleged polluter had control or the capability to control the premises where the pollution occurred. People's first mot. at 4.

The People assert that State Oil and the Anests had control over the tanks and their contents during their ownership and operation of the site, that they made attempts to control the gasoline in December of 1984, and that in February of 1986 gasoline was still entering Boone Creek. People's first mot. at 5.

The People contend that no genuine issue of any material fact exists that during the ownership or operation of the site by State Oil and the Anests, they caused or allowed the discharge of gasoline into the environment thereby causing water pollution. *Id*. The People request that summary judgment against State Oil and the Anests be granted and that said respondents be found liable for penalties for violating Section 12(a) of the Act.

State Oil and the Anest's Response

State Oil and the Anests state they only admitted they operated the site until August 1985. State Oil's resp. at 2. State Oil and the Anests note that the evidence indicates that the People's witness has no recollection of the amount of gasoline that entered the creek or the area that it covered. *Id*. State Oil and the Anests further contend that this witness's testimony is an opinion that was not disclosed in response to an interrogatory and that courts are adamant in refusing to permit opinions from an undisclosed opinion witness. State Oil's resp. at 3. State Oil and the Anests argue that the testimony should not be accepted as the basis for a summary judgment motion.

According to State Oil and the Anests, the People must show that State Oil had the capability of control over the pollution or were in control of the premises where the pollution occurred in order for a violation to be found. *Id*. State Oil's resp. at 6. State Oil and the Anests

[3] The People's motion for summary judgment against State Oil and the Anests will be cited as "People's first mot. at __."; The response filed by State Oil and the Anests will be cited as "State Oil resp. at __."; the People's reply will be cited as People's reply at __."

maintain that they were not in possession or control of the station during the times referred to in the People's motion - late 1983 through early 1984, and February, 1986 – and contend that the only relevant remaining fact is that on December 5, 1984 an employee of respondent reported gasoline seeping from the site into the banks of Boone Creek. State Oil's resp. at 3. State Oil and the Anests state that this fact, standing alone, is not sufficient to support the granting of a summary judgment motion. State Oil's resp. at 4. State Oil and the Anests argue that the mere existence of a discharge does not establish a violation and that the People must present evidence showing the quantity and concentration of the contaminant. State Oil's resp. at 5.

State Oil and the Anests also contend that the notice requirements of the Act were not followed. Specifically, they argue that no contention is present that the notice required in Section 31 was ever sent and that, therefore, no action under Section 31 may be brought. State Oil's resp. at 5.

State Oil and the Anests next address the penalty request, and postulate that the General Assembly did not intend that the Board should impose a monetary fine in every case of a violation of the Act. State Oil's resp. at 6. State Oil and the Anests cite Park Crematory v. Pollution Control Board, 264 Ill. App. 3d 498, 637 N.E.2d 520 for the proposition that a discharge alone does not provide the basis for imposition of a penalty. *Id*.

State Oil and the Anests attack the importance of the McHenry County judgment and argue that collateral estoppel cannot be applied on pure speculation as to what the trial court found. In order for a former judgment to operate as an estoppel, assert State Oil and the Anests, there must have been a finding of a specific, material and controlling fact in the former case, and it must conclusively appear that the issue of fact was so in issue that the court rendering the judgment necessarily determined it. State Oil's resp. at 8 citing Lange v. Coca-Cola Bottling Co. of Chicago, Inc., 44, Ill.2d 73, 75, 254 N.E.2d 467 (1969).

Finally, State Oil and the Anests conclude that the Board has been presented with insufficient factual information to even determine that there has been a violation much less that a penalty should be imposed. State Oil's resp. at 9. State Oil and the Anests assert that the only fact presented is the discharge and that because no information concerning the extent or degree of the discharge exists, the motion should be denied.

People's Reply

In reply, the People assert that it is not State Oil and the Anest's position to decide what is and is not relevant. The People maintain that State Oil and the Anests have owned the site since 1974, operated the site from April 1984 to August 1985, and continued to have services performed at the site as late as February 1986. People's reply at 2. The People claim that State Oil and the Anests did, in fact, control the site in May 1985 as referenced in their motion.

The People maintain that the McHenry judgment is not attached for the purpose of issue preclusion, but for the Board to take judicial notice of the prior proceeding and weigh the facts set forth in that opinion. People's Reply at 2. At this point, state the People, only a finding of

liability is being sought and the People acknowledge that a subsequent proceeding would be necessary for the Board to determine a specific penalty. *Id.*

The People contend that a complaint need not be brought pursuant to Section 31 of the Act in all instances, and that the Illinois Attorney General is permitted to bring complaints on his own motion. *Id.* The People state that the instant complaint alleges that it is brought by the Attorney General on his own motion. Finally, the People assert that State Oil and the Anests have admitted ownership and control during the period the release occurred and that it is undisputed that a visible sheen of gasoline was present on Boone Creek from the site in December 1984. People's reply at 3.

Discussion

The People's motion for summary judgment against State Oil and the Anests is granted. However, before the Board discusses the substance of the motion, a preliminary matter must be addressed. Although not properly a part of the motion for summary judgment, in their response, State Oil and the Anests argue that the People cannot bring this action because the notice requirements of Section 31 were not followed. Section 31 was amended in 1996, and the amendment became effective on August 1 of that year. *See* 415 ILCS 5/31 (2000). Compliance with this section is now a precondition to Agency referral of a case to the Attorney General for enforcement. *Id.*

Specifically, Section 31(a) requires that within 180 days of becoming aware of a potential violation, the Agency must serve the alleged violator with a written notice containing specific information about the potential violation. 415 ILCS 5/31(a) (2000).

The Board has addressed this situation before. *See* People v. John Crane, PCB 01-76 (May 17, 2001). The Board has repeatedly held that the Section 31 notice requirements should be applied only prospectively. *See* People v. Eagle-Pitcer-Boge, PCB 99-152 (July 22, 1999). The Board has found that applying the Section 31 notice requirements when the violations were initially observed prior to August 1, 1996, would result in the retroactive application of Section 31. *Id.* In the instant case, the Agency first became aware of potential violations well before the effective date of Section 31 – as early as December 1984. Requiring the Agency to provide 180 days notice for violations first noted prior to the effective date of the amended Section 31 would result in an unreasonable and unworkable interpretation of Section 31. Accordingly, the Board finds that Section 31 is not a bar to this complaint.

In their motion, the People allege that State Oil and the Anests violated Section 12(a) of the Act, which states:

> No person shall cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (2000).

To determine whether respondent violated Section 12(a) of the Act, consideration of three terms in Section 12(a) is particularly important. First, "contaminant" is defined in Section 3.06 of the Act as:

> Any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source. 415 ILCS 5/3.06 (2000).

Second, "water pollution" is defined in Section 3.55 of the Act as:

> Such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish or other aquatic life. 415 ILCS 5/3.55 (2000).

Additionally, "waters" as defined in Section 3.56 of the Act means:

> All accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State. 415 ILCS 5/3.56 (2000).

Given these definitions, the Board must determine whether a genuine issue of material facts exists that State Oil and the Anests violated Section 12(a) of the Act. Section 12(a) can be broken down into four main elements. A respondent must (1) cause, threaten, or allow a discharge of (2) a contaminant (3) into the environment (4) so as to cause or tend to cause water pollution. The Board finds that the People sufficiently proved each element for the reasons expressed below.

It is uncontested that State Oil and the Anests owned the site since approximately 1974, operated the site from April 1984 to August 1985, and that the gasoline was discovered leaking onto Boone Creek in late 1983 or early 1984. Also uncontested is that on December 5, 1984, an employee of State Oil informed the Agency that gasoline was seeping from the site onto the banks of Boone Creek and then entering the creek – this fact is acknowledged by State Oil and the Anests in their response to the motion for summary judgment. *See* State Oil's resp. to People's first mot. at 3.

The Board finds that Boone Creek is a "water of the State," defined by the Act as "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State. 415 ILCS 5/3.56 (2000). Thus, it is undisputed that a contaminant was discharged into Boone Creek

during the timeframe State Oil and the Anests owned and operated the site, and that State Oil and the Anests "caused, threatened, or allowed" a discharge of contaminants into Boone Creek.

The People must also show that State Oil and the Anests had the capability of control over the pollution or were in control of the premises where the pollution occurred. The owner of the source of pollution causes or allows the pollution within the meaning Section 12(a) and is responsible for that pollution unless the facts establish that the owner either lacked the capability to control the source or had undertaken extensive precautions to prevent vandalism or other intervening causes. Davinroy, 618 N.E.2d at 1287. The uncontested facts make clear that State Oil and the Anests not only owned the site while gasoline was seeping into Boone Creek, but were also admittedly operating the site at that time. This incident alone provides sufficient indicia of control for the purpose of Section 12(a).

The Board must next address whether or not the discharge caused or tended to cause water pollution. Two items of evidence currently before the Board address this issue:1) the testimony contained in the deposition transcript of Edward O. Osowski, an employee of the Agency in the office of emergency management, attached as exhibit D to the motion for summary judgment, and 2) an incident control sheet attached as an exhibit to the deposition. Osowski referenced seeing the gasoline entering Boone Creek during his site visit in December, 1984. In his deposition, Osowski testified that the gasoline resulted in an aquatic toxicity violating the water act. People's first mot., ex. D. at 28

The Board finds that State Oil and the Anests discharged gasoline into Boone Creek that was likely to create a nuisance or render such waters harmful or detrimental or injurious and result in water pollution as defined by the Act. *See* 415 ILCS 5/3.55 (2000). Accordingly, the Board finds that no genuine issue of material fact exists that State Oil and the Anests violated Section 12(a) of the Act (415 ILCS 5/12(a) (2000)) by causing, allowing, or threatening the discharge of contaminants, in the form of gasoline into Boone Creek so as to cause or tend to cause water pollution. Thus, the People's motion for summary judgment is granted.

People's Motion for Summary Judgment Against the Abrahams and Millstream

The People's Motion

Initially, the People note that this motion for summary judgment is limited to the Abrahams and Millstream and the alleged 12(a) violation during their ownership and operation of the site as well as for the costs incurred by the Agency in performing remedial activities at the site. People's second mot. at 2.[4] The People first contend that the water pollution occurs whenever contamination is likely to render water unusable, and that no need to show actual harm exists, only that harm would occur if the contaminated water were to be used. People's second mot. at 3.

[4] The People's motion for summary judgment against the Abrahams and Millstream will be cited as "People's second mot. at __."; the response filed by the Abrahams and Millstream will be cited as "Millstream's resp. at __."; the People's reply will be cited as "People's reply at __."

As uncontested facts, the People assert that the Abrahams and Millstream admit they took possession of the site on August 15, 1985; that the Abrahams admitted that they are the owners of the site and the USTs on the site; and that Millstream admitted it is the operator of the site. People's second mot. at 5.

The People further allege as uncontested facts that the Abrahams and Millstream admitted that in 1989 the Agency excavated a trench at the site and filed the trench with gravel; that gasoline continued to seep on the surface of the creek adjacent to the site after the Abrahams and Millstream became owners and Millstream became the operator; and that the Agency conducted construction activities at the site to address the concern of harm to the river by the petroleum. People's second mot. at 6.

The People assert that it is uncontested that gasoline continued to seep into the creek from the banks of the creek adjacent to the site during the ownership and operation of the site by the Abrahams and Millstream. People's second mot. at 6. The People allege that gasoline was observed on the creek adjacent to the site, thus causing or tending to cause water pollution in Illinois and violating Section 12(a) of the Act. *Id.*

The People contend that no genuine issue of material facts exists that the People hired and paid contractors to perform corrective action work at the site during he ownership and operation of the Abrahams and Millstream, and that pursuant to Section 57.12 of the Act the Abrahams and Millstream are liable for the costs of investigative, preventive, corrective and enforcement actions resulting. People's second mot. at 7.

The Abrahams and Millstream's Response

The Abrahams and Millstream assert that the People did not present facts sufficient to prove a violation of Section 12(a) because no attempt to show that the quantity and concentration of the gasoline was likely to create a nuisance or render the waters harmful, detrimental or injurious was made. They cites to Environmental Site Developers v. White & Brewer Trucking, Inc., PCB 96-180 (Nov. 20, 1997) for this proposition. Millstream's resp. at 3-4.

The Abrahams and Millstream next contend that the motion must be denied because there is no proof that the Abrahams and Millstream were in possession of the premises at the time that the discharge occurred and were, thus, able to control the discharge. Millstream's resp. at 4. The Abrahams and Millstream argue that Section 12(a) requires that to prove a 12(a) violation, the alleged violator must be able to control the discharge of contaminants. *Id.* The fact, continues the Abrahams and Millstream, that a subsequent seepage of gasoline into the creek occurred during their involvement with the site does not prove that they were in possession or control of the site at the time the gasoline was discharged into the environment, because the gasoline could, in fact, have been in the ground as a result of releases occurring in the years prior to their involvement with the site. Millstream's resp. at 5.

Next, the Abrahams and Millstream note that penalties are not mandatory in this instance, and that the Board may find that no penalties are warranted after a consideration of the 42(h) factors. Millstream's resp. at 6. According to the Abrahams and Millstream, the People have not

presented any evidence that penalties are warranted in this case and that the motion for summary judgment must be denied insofar as it requests a finding that the Abrahams and Millstream are liable for penalties. *Id*. Regardless, the argument continues, any penalties that are requested would be a direct result of fraud and breach of contract by the Anests, who owned the site prior to the Abrahams and Millstream. *Id*.

The Abrahams and Millstream next address count II of the complaint. They assert that even though not solely responsible for the alleged contamination at the site, the People have sued only the Abrahams and Millstream in count II of the complaint, and that this is not allowed under the proportionate liability statute that prohibits the People form seeking recovery from a person in excess of that person's proportionate liability. Millstream's resp. at 7. The Abrahams and Millstream argue that without control over the release, no liability under Section 57.2 of the Act (415 ILCS 5/57.2 (2000)) may exist. Millstream's resp. at 8.

The Abrahams and Millstream stress that the People have presented no evidence in the form of testimony or affidavit setting forth the costs allegedly incurred by the Agency at the site, and that no witness has admitted to compiling cost figures. Millstream's resp. at 9. The Abrahams and Millstream contend that the lack of evidence concerning costs and the propriety of work giving rise to the costs are contested issues of material fact and that summary judgment must, therefore, be denied. Millstream's resp. at 10.

Finally, the Abrahams and Millstream assert that the People delayed filing of its action for costs for more than seven years after the majority of the costs were incurred, and that this creates a triable defense of laches as pled by the Abrahams and Millstream and acknowledged by the Board in a May 18, 2000 order denying the People's motion to strike. Millstream's resp. at 11.

People's Reply

In reply, the People address three arguments regarding count I of the complaint. First, they note that a specific penalty amount is not being sought at this time, and that they have moved the Board for an order finding that the Abrahams and Millstream have violated Section 12(a) of the Act while reserving the question of penalties for a separate proceeding. People's second reply at 1-2. The People next argue that the Abrahams and Millstream have created an artificial and irrelevant distinction between the discharge of the gasoline into the ground and the discharge of the gasoline into Boone Creek. People's reply at 2. The essential fact, assert the People, is that the Abrahams and Millstream had the ability to control the gasoline from entering Boone Creek, but chose not to as it was easier to blame someone else. *Id.* The People next point to the deposition of Stephen Colantino, a Program Manager for the Agency's Bureau of Land. The deposition is attached as exhibit E of the motion for summary judgment. In the deposition, Colantino testifies to the injury to the environment due to the gasoline entering Boone Creek. *Id*.

The People next address arguments made in the response pertaining to count II of the complaint. First, the People assert that the proportionate share liability statute does not apply because the Abrahams and Millstream are subject to the State underground storage tank laws. People's second reply at 3. The People contend that liability under Section 57.12 of the Act is

based on ownership or operation, that the Abrahams and Millstream qualify as both, and that they made the conscious decision not to act. *Id.* Further, the People allege that the motion for summary judgment is only meant to establish liability for the costs on the part of the Abrahams and Millstream, and that the argument that the lack of costs in the motion are grounds to deny it is not persuasive. *Id.* The People conclude that no genuine issue of fact on the liability of the costs is in issue and that summary judgment is appropriate. Peoples' second reply at 4.

Discussion

The People's motion for summary judgment against the Abrahams and Millstream is granted in part and denied in part. The Board first considers the alleged violation of Section 12(a). Using the definitions referenced in the previous section, the Board must determine whether a genuine issue of material facts exists as to whether the Abrahams and Millstream violated Section 12(a) of the Act. As before, Section 12(a) can be broken down into four main elements. A respondent must (1) cause, threaten, or allow a discharge of (2) a contaminant (3) into the environment (4) so as to cause or tend to cause water pollution. The Board finds that the People sufficiently proved each element for the reasons expressed below.

It is uncontested that the Abrahams and Millstream took possession of the site on August 15, 1985, that the Abrahams are the owners of the site and the USTs on the site, and that Millstream is the operator of the site. Also uncontested is that gasoline continued to seep from the site entering Boone Creek during the Abrahams and Millstream's tenure. Once again, it is undisputed that a contaminant was entering Boone Creek during the timeframe that the Abrahams and Millstream owned and operated the site.

The Board has determined that Boone Creek is a water of the State as defined by the Act. *See* 415 ILCS 5/3.56 (2000). Thus, it is undisputed that a discharge of a contaminant was entering Boone Creek during the timeframe the Abrahams and Millstream owned and operated the site, and that the Abrahams and Millstram "caused, threatened, or allowed" a discharge of contaminants into Boone Creek.

The Abrahams and Millstream argue that seepage during the time they were involved with the site could have been gasoline that was in the ground as a result of a prior release. The Board is not convinced. The fact remains that the Abrahams and Millstream were in control of the site while a contaminant from the site was entering a water of the State. As before, the Board must next address whether or not the discharge caused or tended to cause water pollution, and specifically whether the quantity and concentration of the gasoline was likely to create a nuisance of render the waters harmful, detrimental or injurious.

In their reply, the People refer to the testimony of Colantino as proving a violation of Section 12(a). People's second reply at 3. The testimony of Colantino addresses the issue of environmental impact. Colantino states that the release was an immediate and significant risk of harm to human life and health and the environment. Colantino Dep. test. at 62. When asked for the basis of this opinion, Colantino cited the volume of the product, the recreational use of the river, and the concerns of the local fire department from a fire and safety position, and the Agency's emergency response office's significant concerns over the health and safety aspects of

the situation. *Id*. Colantino further testified that field monitoring was conducted and indicated that noticeable levels of volatiles were present. Colantino Dep. test. at 63.

The Board finds that the Abrahams and Millstream discharged gasoline into Boone Creek that was likely to create a nuisance or render such waters harmful or detrimental or injurious and result in water pollution as defined by the Act. *See* 415 ILCS 5/3.55 (2000). Accordingly, the Board finds that no genuine issue of material fact exists that the Abrahams and Millstream violated Section 12(a) of the Act (415 ILCS 5/12(a) (2000)) by causing, allowing, or threatening the discharge of contaminants, in the form of gasoline, into Boone Creek so as to cause or tend to cause water pollution. The People's right to relief is clear. Thus, the People's motion for summary judgment is granted in this regard.

The Board next turns to count II of the People's complaint. The regulations pertaining to the charges against the Abrahams and Millstream place responsibility on the owner or operator of the USTs. Specifically, Section 57.12 provides:

> Notwithstanding any other provision or rule of law, the owner or operator, or both of an underground storage tank shall be liable for all costs of investigation, preventative action, corrective action and enforcement action incurred by the State of Illinois resulting form an underground storage tank. 415 ILCS 5/57/12 (2000).

Section 57.2 of the Act, 415 ILCS 5/57.2 (2000)) provides definitions of corrective action, owner and operator. The Abrahams and Millstream do not contest that the actions in question were corrective action or that it does not qualify as operator, and the Abrahams and Millstream do not contest that they are the owners of the site.

The Abrahams and Millstream make a number of arguments as to why a motion for summary judgment on count II is not appropriate. First, they contend that count II of the People's complaint is a violation of the proportionate share liability statute. Section 58.1(a)(2) excludes from proportionate share liability a site "subject to federal or State underground storage tank laws." Further, the Board's rules implementing the proportionate share liability program codify this exclusion. *See* 35 Ill. Adm. Code 741.105(f)(5). Thus, the People's action under Section 57.12 is excluded from proportionate share liability, and Section 58.9 of the Act therefore does not limit respondents' liabilities.

Next, the Abrahams and Millstream argue that the People have not presented sufficient evidence setting forth the costs allegedly incurred by the Agency in this matter. In reply, the People assert that they are only seeking to establish liability for the costs on the part of the Arbrahams and Millstream. As the People are seeking only liability and reserving the amount of the costs for hearing, this argument is moot.

Finally, the Abrahams and Millstream argue that a triable defense of laches creating a genuine issue of material fact exists. As noted in the Board's order of May 18, 2000, the State is not immune from application of laches in exercise of its governmental functions under

compelling circumstances. People v. State Oil, slip op. at 4, citing Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966).

The Abrahams and Millstream assert that by waiting more than seven years after the majority of costs were incurred to file its action, the People have prejudiced them in that they were unable to recover that amount in their action against the Anests. While not necessarily agreeing with this statement, the Board finds that a genuine issue of material fact concerning the affirmative defense of laches exists The issue of when the costs sought by the People were incurred remains unclear. Until the Board can ascertain the dates of these costs, it cannot properly determine whether compelling circumstances are present in this matter so that the affirmative defense of laches may lie. Accordingly, the People's second motion is denied in this regard.

The Abrahams and Millstream's Motion for Summary Judgment Against the People on Count II

The Abrahams and Millstream's Motion

The Abrahams and Millstream argue that the People's right to bring a cost recovery action such as that brought in count II is limited and constrained by Section 58.9 of the Act. 415 ILCS 5/58.9 (2000). Millstream's mot. at 2.[5] The Abrahams and Millstream contend that the People violated the aforementioned limits and constraints by filing a cost recovery action solely against the Abrahams and Millstream even though the undisputed facts show that the costs at issue were proximately caused or contributed to by other persons. Millstream's mot. at 3.

No genuine issue of fact exists, assert the Abrahams and Millstream, that the Anests and State Oil are at least partially responsible for the contamination and the costs incurred at the site, and that the releases that occurred during the Anests' tenure contributed to the costs of addressing the contamination at the site. Millstream's mot. at 7. The Abrahams and Millstream note that the McHenry County judgmentmakes the responsibility of the Anests clear in that the jury in that case awarded the Abrahams and Millstream the total sum spent by them to mitigate the release of gasoline from the gas station's premises into the nearby creek. Millstream's mot. at 8.

Finally, the Abrahams and Millstream assert that Section 58.9 of the Act does not allow the People to maintain the cost recovery claim contained in count II and that, given the facts of this case, count II cannot be brought. Millstream's mot. at 9.

[5] The Abrahams and Millstream's motion for summary judgment on Count II of the People's complaint will be cited as "Millstream mot. at __."; the People's response will be cited as "People's resp. at __."; the reply filed by the Abrahams and Millstream will be cited as "Millstream's reply at __."

Peoples' Response

In response, the People argue that Section 58.9 is not applicable to this proceeding because the complaint was brought under Section 57.12(a). People's resp. at 2. The People also assert that because Section 58.9 has an effective date of July 1, 1996, it does not apply to costs in this case occurring through December 31, 1995. *Id*. Further, the People contend that the Abrahams and Millstream have admitted both ownership and operation of the USTs at the site during the time period that remedial activities were performed. *Id.* Finally, the People state that the allegations of count I set out facts that State Oil caused or allowed water pollution but that nothing further from those allegations should be inferred. People's resp. at 3.

The Abrahams and Millstream's Reply

In reply, the Abrahams and Millstream state that their motion for summary judgment is based on two uncontested facts: one, that other persons (the Anests) are responsible for the release at issue; and two, that the People have, nonetheless, sued only the Abrahams and Millstream to recover all the costs that the State of Illinois incurred in addressing the release. Millstream's reply at 2. The Abrahams and Millstream reiterate that cost-recovery actions seeking to impose a disproportionate share of remedial costs on a person are expressly prohibited by Section 58.9 of the Act, and that the People do not dispute that Section 58.9, if applied to this case, would bar the action. *Id.*

The Abrahams and Millstream assert that adjudicative bodies like the Board are required to enforce the plain language of a statute as written, and that the plain language of Section 58.9 applied to this case mandates that the summary judgment motion must be granted. Millstream's reply at 3-4.

Next, the Abrahams and Millstream argue that Section 58.9 does not attempt to regulate or limit the costs that may or may not be recovered to costs incurred at certain times. Millstream's reply at 6. They continue that this action was filed well after the effective date of Section 58.9, and that this action is subject to the prohibition contained therein. *Id.* Finally, the Abrahams and Millstream contend that Section 58.9 expressly provides that it controls over any and all other provisions of the Act because it contains the provision that 'notwithstanding any other provisions of this Act to the contrary' in its first line. Millstream's reply at 7, citing 415 ILCS 58.9(a)(1) (2000).

Discussion

The motion for summary judgment against the People on count II is denied. As previously discussed, the Abrahams and Millstream's site is excluded under Section 58.1(a)(2) from proportionate share liability because it is a site subject to federal or State underground storage tank laws.

The Abrahams and Millstream's motion relies entirely upon the applicability of proportionate share liability to the site in question. As this is the only argument made in the motion, no further discussion is necessary and the motion is denied in total.

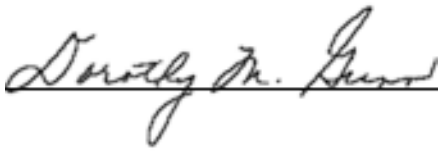
CONCLUSION

The Board denies the Anests' motion for summary judgment against the Abrahams on their cross-complaint, but strikes count II of the cross-complaint and any portion of the cross-complaint that seeks reimbursement of penalties. The Board grants the People's motion for partial summary judgment against State Oil and the Anests. The Board grants the People's motion for summary judgment against the Abrahams and Millstream in part and denies it in part. Specifically, the motion for summary judgment is granted as to count I of the People's complaint that alleges a violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2000)), but denied as to count II of the People's complaint seeking reimbursement for costs incurred by the State pursuant to Section 57.12 of the Act. 415 ILCS 5/57.12 (2000). Finally, the Board denies the motion for summary judgment filed by the Abrahams and Millstream against the People on count II of the People's complaint.

The People's motions for summary judgment sought only a finding of liability. Accordingly, issues involving penalty determinations for the found violations of Section 12(a) must be addressed at hearing, as must all other remaining issues. The parties are directed to hearing as expeditiously as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 4, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control