

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

JAN 15 2004

STATE OF ILLINOIS  
Pollution Control Board

No. PCB 96-98

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 SKOKIE VALLEY ASPHALT, CO., INC., )  
 EDWIN L. FREDERICK, JR., )  
 individually and as owner and )  
 President of Skokie Valley Asphalt )  
 Co., Inc., and )  
 RICHARD J. FREDERICK, )  
 individually and as owner and )  
 Vice President of )  
 Skokie Valley Asphalt Co., Inc., )  
 )  
 Respondents. )


NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 15, 2004, Complainant filed with the Illinois Pollution Control Board, a Motion for Leave to File Instanter and The People of the State of Illinois' Closing Argument and Post Trial Brief, a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN  
Attorney General  
State of Illinois

BY:   
 MITCHELL L. COHEN  
 Assistant Attorney General  
 Environmental Bureau  
 188 W. Randolph St., 20th Floor  
 Chicago, Illinois 60601  
 (312) 814-5282

SERVICE LIST

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Ms. Carol Sudman  
Hearing Officer  
Illinois Pollution Control Board  
600 S. Second Street, Suite 402  
Springfield, Illinois 62704

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STATE OF ILLINOIS  
Pollution Control Board

MOTION FOR LEAVE TO FILE INSTANTER

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, moves this Board to accept the filing of The People of the State of Illinois' Closing Argument and Post Trial Brief this January 15, 2004. In support of this Motion, counsel for Complainant, Assistant Attorney General Mitchell Cohen, states as follows:

1. I calendared the due date of Complainant's Closing Argument for January 15, 2004, (instead of January 12<sup>th</sup>) thinking the due dates were January 15<sup>th</sup> for Closing, March 15<sup>th</sup> for Respondents' Response, and April 15<sup>th</sup> for Complainant's Reply.

2. While preparing Complainant's Closing for filing the morning of January 15<sup>th</sup>, I checked the trial transcript to confirm that the due date for a Reply was April 15<sup>th</sup>. When I did

so, on page 522 of the trial transcript, I discovered the due date for Complainant's Closing Argument was January 12<sup>th</sup> instead of January 15<sup>th</sup>.

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3. After learning my mistake, I called Hearing Officer Carol Sudman to explain the situation. I also called Respondents' attorney David O'Neill, but was unable to get through before preparing this motion.

Respectfully submitted,

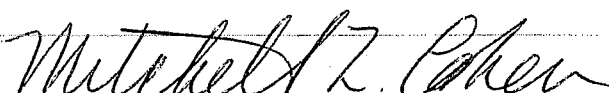
PEOPLE OF THE STATE OF ILLINOIS  
*Ex rel.* LISA MADIGAN, Attorney  
General of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

ROSEMARIE CAZEAU, Chief  
Environmental Bureau

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(312) 814-5282

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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THE PEOPLE OF THE STATE OF ILLINOIS'
CLOSING ARGUMENT AND POST TRIAL BRIEF

Now comes the Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel LISA

MADIGAN, Attorney General of the State of Illinois, and pursuant to Hearing Officer Sudman's
October 31, 2003, Order presents their closing argument and post trial brief.1

The People of the State of Illinois ("People") filed their Second Amended Complaint
against Skokie Valley Asphalt Company, Inc. ("SVA"), Edwin L. Frederick, Jr., and Richard J.
Frederick on July 26, 2002. The Second Amended Complaint alleged five counts against the
Respondents, most of which relate to their National Pollutant Discharge Elimination System

1The People's Closing Argument and Post Trial Brief relies on the record made during the
hearing October 30 and 31, 2003. The record includes the trial transcript and Exhibits admitted
into evidence. The People's Closing Argument and Post Trial Brief does not attempt to address
any issues the People believe are preserved for appeal in the record. The People specifically
reserve the right to raise any issue preserved in the record for Appeal.

("NPDES") permit: Count I. Filing False Reports; Count II. Applying to Renew Their NPDES Permit Late; Count III. Failing to Comply with Sampling and Reporting Requirements; Count IV. Causing or Allowing Water Pollution; and Count V. Violating Effluent Limits. Evidence was presented on all Counts against all Respondents.<sup>2</sup>

### **I. INTRODUCTION**

SVA was an asphalt paving contractor with its main office at 768 South Lake Street, Grayslake, Lake County, Illinois ("site" or "facility").<sup>3</sup> SVA was an Illinois corporation until the business was sold and the corporation dissolved in 1998.<sup>4</sup> Edwin L. Frederick, Jr., also known as Larry, was the President of SVA from approximately 1978 until SVA was sold to Curran Contracting in 1998.<sup>5</sup> His brother, Richard J. Frederick, was the Vice President.<sup>6</sup> Edwin Frederick and Richard Frederick, the Frederick brothers, each owned 50 per cent of SVA, were the only shareholders of SVA, and were the only corporate officers of SVA.<sup>7</sup> SVA operated from the Grayslake site since 1978.<sup>8</sup>

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Before 1978, another asphalt manufacturing company called Liberty Asphalt operated the

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<sup>2</sup> Evidence was presented even though the Board disqualified Assistant Attorney General Joel Sternstein from further appearing in this case on October 16, 2003. The People reserve this issue for appeal.

<sup>3</sup> Tr. at 277, 278.

<sup>4</sup> Tr. at 299, 432

<sup>5</sup> Tr. at 276, 432, 433, 435.

<sup>6</sup> Tr. at 276.

<sup>7</sup> Tr. at 276, 435-437

<sup>8</sup> Tr. at 278.

site.<sup>9</sup> Liberty Asphalt was owned and operated by Edwin and Richard Frederick's parents; and Edwin worked for Liberty Asphalt over 20 years.<sup>10</sup>

From 1978 until 1981 or '82, SVA and the Frederick brothers operated an actual asphalt plant on site.<sup>11</sup> Respondents sold the asphalt plant and had it removed in 1981 or '82.<sup>12</sup> Since selling and removing the asphalt plant, the site was used as an office, maintenance and storage garage for equipment and trucks, and storage for asphalt liquid, asphalt primer coats, and other storage tanks.<sup>13</sup>

East of SVA's site in Grayslake is the Avon-Fremont Drainage Ditch, or the Avon Drainage Ditch, that flows to the north through Grayslake (the town, not the waterbody) into Third Lake.<sup>14</sup> Grays Lake, the body of water, is to the northeast of SVA's site.<sup>15</sup> When SVA had NPDES Permit No. IL 0065005, they were allowed to discharge stormwater under certain conditions into Grays Lake through a storm sewer.<sup>16</sup> The permit did not allow SVA to ever, under any condition, discharge into the Avon-Fremont Drainage Ditch.<sup>17</sup>

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<sup>9</sup> Tr. at 124, 129, 279, 334, 432. Note: At p. 279, the transcript reads "Libertyville" instead of Liberty.

<sup>10</sup> Tr. at 279, 432-433.

<sup>11</sup> Tr. at 279, 294, 296.

<sup>12</sup> Tr. at 279, 294, 296.

<sup>13</sup> Tr. at 134; 278, 438; Comp. Exh. 32, 34, p. 1.

<sup>14</sup> Tr. at 145-146, 221, 223, 353; Comp. Exh. 25; Comp. Exh. 32.

<sup>15</sup> Comp. Exh. 32.

<sup>16</sup> Tr. at 221; Comp. Exh. 1.

<sup>17</sup> Tr. at p. 145; Comp. Exh. 1

From December 1994 through April 1995, there was an oily discharge in the Avon-Fremont Drainage Ditch starting just east of SVA's facility.<sup>18</sup> The land between SVA's facility and the Avon-Fremont Drainage Ditch is farm field.<sup>19</sup> During that time period, there were no other industries or factories or gas stations in the area; the nearest business was a landscaping service company called Mitch's Landscaping, or Mitch's Green Thumb, to the west of SVA.<sup>20</sup> A farm drainage tile ran through SVA's property toward the Avon-Fremont Drainage Ditch.<sup>21</sup> The outfall from the farm drainage tile drains to the Avon-Fremont Drainage Ditch due east of the SVA property.<sup>22</sup> When Respondents saw an oily sheen on the water in the farm drainage tile, they plugged it.<sup>23</sup> After Respondents plugged the drain tile on their property, the oily discharge in the Avon-Fremont Drainage Ditch subsided and stopped.<sup>24</sup>

Long before this 1994/1995 oily discharge in the Avon-Fremont Drainage Ditch,



to the filing of this lawsuit in 1995. The Complaint was later amended to add Respondents Edwin and Richard Frederick and more counts including water pollution. As a result, the People of the State of Illinois ask the Pollution Control Board for the following: finding that Respondents repeatedly violated their NPDES Permit by filing false reports, applying to renew their NPDES permit late, failing to submit required reports, failing to maintain an accessible effluent sampling point, discharging excessive amounts of total suspended solids, and causing or allowing water pollution; ordering Respondents to cease and desist from such further violations of the Illinois Environmental Protection Act ("Act") and Board Regulations, assessing a civil penalty against Respondents, assessing costs and fees in this action against Respondents, and granting such other relief as the Board deems appropriate.

## **II. LEGAL STANDARDS**

### **A. RESPONDENTS AND THE WATERS OF ILLINOIS THEY POLLUTED**

Both the Frederick brothers and SVA are persons as that term is defined in the Act.<sup>26</sup> The Frederick brothers are persons as individuals, and SVA is a person because it was a corporation during the time the violations occurred. Section 3.315 of the Act, 415 ILCS 5/3.315 (2002), defines person as:

any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint-stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent, or assigns.

Each violation alleged against Respondents is alleged against both SVA and the Frederick

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<sup>26</sup> 415 ILCS 5/3.315 (2002).

brothers. In Illinois environmental law, corporate officers can be personally liable for their company's environmental violations.<sup>27</sup> The standard for corporate officer liability in environmental enforcement actions is set forth in People v. C.J.R. et al.<sup>28</sup> The C.J.R. case involved a facility which produced and stored large amounts of waste. As in this case, the People sued both the company and a corporate officer for the violations of the Act and regulations.<sup>29</sup> The C.J.R. Court held that a corporate officer constitutes a "person" under Section 3.26 (now 3.315) of the Act.<sup>30</sup> A corporate officer can be held personally 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 authority to control the acts or omissions that gave rise to the violation.<sup>31</sup> The CJR Court went on to say that the General Assembly intended for the Act to be liberally construed.<sup>32</sup> Any other ". . . interpretation of section 3.26 (now 3.315) would not serve the Act's

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<sup>27</sup> People v. C.J.R. Processing, Inc., et al., 269 Ill. App. 3d 1013, 647 N.E.2d 1035 (3d Dist. 1995).

<sup>28</sup> Id.

<sup>29</sup> Id. at 1014, 647 N.E.2d at 1036.

<sup>30</sup> Id.

<sup>31</sup> Id. at 1018, 647 N.E.2d at 1038. The C.J.R. Court relied upon the Eighth Circuit's decision in United States v. Northeastern Phar. And Chem. Co., Inc., et al., 810 F.2d 726 (8th Cir. 1986). In Northeastern Pharmaceutical, the federal government sought to have a corporation's president and vice-president held personally liable for their company's improper hazardous waste disposal. In holding these corporate officers personally liable, the Eighth Circuit noted, that while the president of the corporation was not involved in the actual day-to-day decisions to transport and dispose of the hazardous waste, he "was the individual in charge of and directly responsible for all of [his company's] operations, including those at the [subject] plant, and he had the ultimate authority to control the disposal of [his company's] hazardous substances." 810 F.2d at 745 (underline added).

<sup>32</sup> Id. at 1037.

express purpose of imposing responsibility upon those who cause harm to the environment.”<sup>33</sup>

Imposition of liability on only the corporation and not upon those responsible individuals would prevent enforcement of the Act from achieving its objective.<sup>34</sup>

In this case, the evidence indicates that both Edwin and Richard Frederick were personally involved in, or actively participated in at least some of the many violations of the Act.<sup>35</sup> Also, they both had the ability and authority to control the acts or omissions that gave rise to the violations.<sup>36</sup> Therefore, both the Frederick brothers are proper Defendants, and all Respondents are liable under Illinois environmental law.<sup>37</sup>

Respondents’ stormwater from the lagoon on their property was allowed to discharge, when their NPDES permit was effective, into Grays Lake via a storm sewer.<sup>38</sup> Respondents were never allowed to discharge into Third Lake via a farm drainage tile and/or the Avon-Fremont

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<sup>33</sup> Id.

<sup>34</sup> Id. at 1038.

<sup>35</sup> Richard Frederick, for example, signed and certified SVA’s DMRs and other letters to the Illinois EPA: Complainant’s Exhibits 2,3, 4, 5, 9,10, 11, 12, 13, 14, 15, 16, 17, and 26. Edwin Frederick, for example, signed and certified SVA’s late NPDES permit renewal application and other letters to the Illinois EPA: Complainant’s Exhibits 6, 7, 28, 29, and 34i. Together, in April, 1995, they finally consult with and retain the services of an environmental engineer and begin addressing SVA’s on-site contamination. Tr. at 335, 347, 462-63.

<sup>36</sup> See, for example, Richard Frederick’s testimony, Tr. pp. 275 - 327; Edwin Frederick’s testimony, Tr. pp. 432 - 503; Complainant’s Exhibits 2,3, 4, 5, 6, 7, 9,10, 11, 12, 13, 14, 15, 16, 17, and 26, 27, 28, and 34i.

<sup>37</sup> 415 ILCS 5/3.315 (2002); People v. C.J.R. Processing, Inc., et al., 269 Ill. App. 3d 1013, 647 N.E.2d 1035 (3d Dist. 1995).

<sup>38</sup> Tr. at 136; Complainant’s Exhibit 1.

Drainage Ditch.<sup>39</sup> Grays Lake, the Avon-Fremont Drainage Ditch, and Third Lake are all waters of the State of Illinois as that term is defined in Section 3.550 of the Act, 415 ILCS 5/3.550

(2002). “Waters” 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.

The Respondents, SVA, Edwin Frederick, and Richard Frederick adversely impacted the waters of Illinois by failing to comply with their NPDES permit and causing or allowing water pollution.

**B.**  
**RESPONDENTS REPEATEDLY VIOLATE**  
**THEIR NPDES PERMIT**

**1. RESPONDENTS FILE FALSE REPORTS WITH THE ILLINOIS EPA**

Count I charges Respondents with failing to comply with their NPDES permit reporting requirements by filing false reports with the Illinois EPA. Since the Illinois EPA issued SVA an NPDES permit, No. IL0065005, Respondents are required to comply with the rules, regulations and conditions related to the permit.<sup>40</sup>

This is explained in the Act. Section 12(f) of the Act, 415 ILCS 5/12(f)(2002), provides as follows:

No person shall:

\* \* \*

f. Cause, threaten or allow the discharge of any contaminant

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<sup>39</sup> Tr. at 145; Complainant’s Exhibit 1.

<sup>40</sup> Complainant’s Exhibit 1.

into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 38(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

The Illinois Pollution Control Board's Water Pollution Regulations also explain Respondents' reporting requirements. Section 305.102(b) of the Board's Water Pollution Regulations, 35 Ill. Adm. Code 305.102(b), provides as follows:

Reporting Requirements

- b. Every holder of an NPDES Permit is required to comply with the monitoring, sampling, recording and reporting requirements set forth in the permit and this chapter.

Respondents' permit explicitly states that they shall not falsify records submitted to the Illinois EPA. ~~Standard Condition No. 19 of NPDES Permit No. IL0065005, Respondents' permit,~~ provides as follows:

The permittee shall not make any false statement, representation or certification in any application, record, report, plan or other document submitted to the Agency or the U.S. EPA, or required to be maintained under the permit.

On April 4, 1986, the Illinois EPA issued to SVA NPDES Permit No. IL0065005 with an effective date of May 4, 1986.<sup>41</sup> This permit allowed SVA to discharge storm water effluent into certain receiving waters of the state listed as Grays Lake via a storm sewer.<sup>42</sup> NPDES Permit No.

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<sup>41</sup> Compl. Exh. 1.

<sup>42</sup> Compl. Exh. 1.

L0065005 required SVA, *inter alia*, to accurately comply with their reporting requirements. Respondents made false statements to the Agency when they submitted Discharge Monitoring Reports (“DMRs”) regarding either the taking of water samples for testing, the test results, or the actual content of its effluent.<sup>43</sup> By violating Standard Condition No. 19 of its NPDES permit, SVA also violated Section 305.102(b) of the Board’s regulations and Section 12(f) of the Act.

## 2. RESPONDENTS FAIL TO RENEW NPDES PERMIT ON TIME

Count II charges Respondents with failing to renew their NPDES permit on time. Their permit expired on March 1, 1991.<sup>44</sup> In order to renew their permit on time and continue discharging, Respondents were required to apply for renewal at least 180 days before expiration.<sup>45</sup>

Discharging into waters of the state without an NPDES permit, or in violation of the conditions of the permit is unlawful. Section 309.102(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.102(a), describes when discharges are unlawful and provides as follows:

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### NPDES Permit Required

- a. Except as in compliance with the provisions of the Act, Board regulations, and the CWA (33 U.S.C. 1251 *et seq.*), and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into waters of the State from a point source or into a well shall be unlawful.

Section 309.104(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code

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<sup>43</sup> Complainant’s Exhibits 2, 3, 4 and 5.

<sup>44</sup> Complainant’s Exhibit 1.

<sup>45</sup> 35 Ill. Adm. Code 309.104(a).

309.104(a), explains when a permittee, like SVA, must apply for their NPDES renewal. It provides as follows:

Renewal

- a) Any permittee who wishes to continue to discharge after the expiration date of his NPDES Permit shall apply for reissuance of the permit not less than 180 days prior to the expiration date of the permit.

Respondents did not apply for reissuance of their NPDES permit until after their permit expired, not 180 days before it expired as required.<sup>46</sup> Respondents were discharging effluent to the waters of the state without an NPDES permit.<sup>47</sup> Respondents thus violated Sections 309.102(a) and 309.104(a) of the Board's water pollution regulations and Section 12(f) of the Act.

**3. RESPONDENTS FAIL TO CORRECTLY SAMPLE THEIR EFFLUENT AND OFTEN FAIL TO REPORT THE CONTENT OF THEIR DISCHARGES**

Count III also relates to Respondents' NPDES permit violations. There are two. First, Respondents are charged with failing to file DMRs as required by their permit. And, second, Respondents are charged with failing to take water discharge samples at a point representative of the discharge before it enters the stream.

As already mentioned above when discussing filing false reports with the Illinois EPA, Section 305.102(b) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 305.102(b), explains that NPDES permit holders must comply with the reporting requirements detailed in their permit. Respondents' permit explains that they must file DMRs with the Illinois EPA by the 15<sup>th</sup>

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<sup>46</sup> Complainant's Exhibit 6.

<sup>47</sup> Complainant's Exhibit 8E.

of the following month.<sup>48</sup> Special Condition No. 4 of SVA's NPDES Permit No. IL0065005 provides:

The permittee shall record monitoring results on Discharge Monitoring Report forms using one such form for each discharge each month. The completed Discharge Monitoring Report form shall be submitted monthly to IEPA, no later than the 15th of the following month, unless otherwise specified by the Agency.

Respondents failed to turn in DMRs for many months in the late 1980s and early 1990s.<sup>49</sup> By repeatedly violating Special Condition 4 of their NPDES permit, Respondents also violated Sections 305.102(b) and 309.102(a) of the Board's Water Pollution Regulations and Section 12(f) of the Act.<sup>50</sup>

In addition to describing when DMRs are due to the Illinois EPA, SVA's permit also describes where sampling should take place so the samples are representative of the effluent discharge. Special Condition No. 1 of SVA's NPDES Permit No. IL0065005 provides as follows:

Samples shall be taken in compliance with the effluent monitoring requirements and shall be taken at a point representative of the discharge, but prior to entry into the receiving stream.

Respondents did not maintain an accessible effluent sampling point for the discharge from the SVA lagoon, and therefore, did not and could not take samples representative of the discharge. By violating Special Condition 1 of their NPDES permit, Respondents also violated Sections 305.102(b) and 309.102(a) of the Board's Water Pollution Regulations and Section 12(f) of the Act.

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<sup>48</sup> Compl. Exh. 1.

<sup>49</sup> Complainant's Exhibit 8.

<sup>50</sup> See also Count II above.



**C.**  
**RESPONDENTS ALSO**  
**CAUSE OR ALLOW WATER POLLUTION**

**1. RESPONDENTS POLLUTE AVON-FREMONT DRAINAGE DITCH.**

Besides repeatedly violating technical requirements of their NPDES permit, Respondents are also charged in Count IV with causing, or allowing water pollution.<sup>51</sup> In late 1994 and early 1995 Respondents caused or allowed the discharge of oily material with a diesel fuel odor and visible surface sheen from their site into the farm drainage tile which discharges to the Avon-Fremont Drainage Ditch.<sup>52</sup> The oily discharge from SVA's property through the farm drainage tile resulted in a diesel fuel odor and a visible surface oil sheen on the Avon-Fremont Drainage Ditch.<sup>53</sup>

Section 12(a) of the Act, 415 ILCS 5/12(a) (2002), prohibits Respondents from discharging oil into waters of the state. It provides as follows:

No person shall:

- 
- a) 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;

Oil is a contaminant. Section 3.165 of the Act, 415 ILCS 5/3.165 (2002), provides the following definition:

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<sup>51</sup> Complainant's Exhibit 34, pp. 14 - 16.

<sup>52</sup> Complainant's Exhibit 34, pp. 14 - 16; Resp. Exh. 6.

<sup>53</sup> Complainant's Exhibit 34, pp. 14 - 16.

"CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

Oil, a contaminant, in Illinois waters is water pollution. Section 3.545 of the Act, 415

ILCS 5/3.545 (2002), provides the following definition:

"WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological, or radioactive properties of any waters of the State, or such discharge of any contaminants 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.

The oily discharge, sheen, and diesel odor are contaminants. Together, the oil, sheen, and odor altered the physical and chemical properties of the waters in the Avon-Fremont Drainage Ditch. The discharge also rendered such waters harmful and injurious.<sup>54</sup> The oily discharge from SVA's property through the farm drainage tile to the Avon-Fremont Drainage Ditch constitutes water pollution.

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The oily discharge, sheen, and odor can also be considered "offensive conditions" and "offensive discharges." Section 302.203 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 302.203, provides, in pertinent part, as follows:

#### Offensive Conditions

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. . .

Section 304.106 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 304.106, provides, in pertinent part, as follows:

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<sup>54</sup> Tr. at 421.

## Section 304.106 Offensive Discharges

In addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels.

By causing or allowing the oily discharge from their site into the farm drainage tile and into the Avon-Fremont Drainage Ditch, Respondents have caused or allowed water pollution in violation of Section 12(a) of the Act and have also violated Sections 302.203 and 304.106 of the Board Water Pollution Regulations.

Respondents water pollution violation was even quantified once. Section 304.124(c) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 304.124(c), provides, in pertinent part, as follows:

- c. Oil may be analytically separated into polar and nonpolar components. If such separation is done, neither of the components may exceed 15 mg/1 (i.e. 15 mg/1 polar materials and 15 mg/1 nonpolar materials).

Section 304.105 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 304.105, provides, in pertinent part, as follows:

### Violation of Water Quality Standards

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard . . . .

In March 1995, during the Avon-Fremont Drainage Ditch oil discharge investigation, the Illinois EPA took a water sample at the ditch of the effluent from the farm drainage tile that ran through Respondents' site and had it tested for oil and grease content.<sup>55</sup> This sample, after

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<sup>55</sup> Tr. at 152.

laboratory analysis, far exceeded the standard allowable concentration of 15 milligrams of oil per liter.<sup>56</sup> Respondents therefore also violated Section 304.105 of the Board's Water Quality Standards.

## **2. RESPONDENTS ALSO DISCHARGE TOO MUCH SEDIMENT FROM THEIR SITE.**

Count V is technically another NPDES permit violation. Respondents repeatedly violate their NPDES permit by exceeding their effluent limits. They discharged excessive amounts of sediment, total suspended solids ("TSS"), from their site.

The Board's water pollution regulations explain that no one can discharge more contaminants than is allowed for in their NPDES permit. Section 304.141(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 304.141(a), provides, in pertinent part, as follows:

### NPDES Effluent Standards

- a. No person to whom an NPDES Permit has been issued may discharge any contaminant in his effluent in excess of the standards and limitations for that contaminant which are set forth in his permit.

Respondents' NPDES Permit No. IL0065005 contains the following effluent limits for total suspended solids ("TSS"):

### TSS Concentration Limits (mg/l)

#### 30 day Average

15.0

#### Daily Maximum

30.0

During the early and mid 1990s Respondents exceeded the TSS concentration limits

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<sup>56</sup> Tr. at 155 - 56; Compl. Exh. 21.

allowed in their NPDES permit many times.<sup>57</sup> In doing so, they violated their NPDES permit and discharged too much sediment into waters of the state.<sup>58</sup> As a result, Respondents violated Section 12(f) of the Act (see Count IV above) and Sections 304.141(a) and 309.102(a) (see Count II above) of the Board's Water Pollution Regulations.

**D.**  
**THE PEOPLE'S BURDEN OF PROOF IS ONLY**  
**PREPONDERANCE OF EVIDENCE**

Complainant, the People of the State of Illinois, brought this environmental enforcement action against the Respondents. Therefore, Complainant has the burden of proof.<sup>59</sup> The familiar term used to describe Complainant's burden of proof is "preponderance of the evidence". In other words, is it more likely than not that Respondents committed violations of the Act, the Board's water pollution regulations, and their NPDES permit conditions? Is it more likely than not that Respondents caused or allowed water pollution, failed to timely renew their NPDES permit, failed to comply with sampling and reporting requirements called for in their NPDES permit, violated effluent limits in their NPDES permit, and failed to comply with reporting requirements by filing false DMRs?

More recently, courts have preferred to simply define "burden of proof" rather than "preponderance of evidence". The definition of "burden of proof" is whether the allegation is more probably true than not true.<sup>60</sup> Thus, Complainant's burden is to establish that it is more true

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<sup>57</sup> Compl. Exh.s 9, 10, 11, 12, 13, 14, 15, 16 and 17.

<sup>58</sup> Compl. Exh. 1.

<sup>59</sup> 415 ILCS 5/31(e)(2002).

<sup>60</sup> Illinois Pattern Jury Instruction, Section 21.01

than not true that Respondents committed the violations of the Act, the Board's regulations, and the conditions of their permit.

The People exceed this burden on all counts against all Respondents.

### **III. FACTS**

#### **A.**

#### **RESPONDENTS ARE REQUIRED TO HAVE NPDES PERMIT**

Chris Kallis, an Illinois EPA field inspector explained why SVA was required to have an NPDES permit for their Grayslake site. He works for the Illinois EPA Bureau of Water and has been employed with the Illinois EPA for approximately 22 years.<sup>61</sup> He has held the title of Environmental Protection Specialist for approximately 20 years.<sup>62</sup> His duties are to conduct inspections and investigations to ensure compliance with the Illinois Environmental Protection

Drainage Ditch.<sup>66</sup>

SVA was required to have an NPDES permit because the Illinois EPA Field Operations Section determined that SVA had storm water runoff associated with industrial activity that could be a threat to water quality.<sup>67</sup> Those potential sources of pollution were storm water runoff from gravel, sand, stone, recycled bituminous concrete, pavement, asphalt, cement based tanks, and gasoline, fuel oil, and other storage tanks.<sup>68</sup>

On April 4, 1986, Illinois EPA issued a site specific NPDES permit for the storm water runoff from the SVA facility.<sup>69</sup> The intent or purpose of a NPDES site specific permit is to ensure that water quality standards are met by requiring the permittee, SVA, to monitor the stormwater discharge on a regular basis.<sup>70</sup>

## **B.**

### **RESPONDENTS VIOLATE PERMIT REQUIREMENTS RIGHT FROM THE START**

Mike Garretson laid the foundation and presented evidence related to each violation of Respondents' NPDES permit except that Respondents failed to maintain an accessible sampling point.

Mike Garretson has worked for the Illinois EPA in Springfield for twenty-four (24)

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<sup>66</sup> Tr. at pp. 119-120; Compl. Exh.s 18, 19, 22, and 24.

<sup>67</sup> Tr. at p. 131; Compl. Exh.s 19, 22, and 24.

<sup>68</sup> Tr. at p. 134.

<sup>69</sup> Tr. at p. 137; Compl. Exh. 1.

<sup>70</sup> Tr. at p. 137

years.<sup>71</sup> He is the acting manager of the Compliance Assurance Section, Water Pollution Control Division.<sup>72</sup> When he started with the Agency, he worked in the Operator Certification Unit of the Water Pollution Control Division and in 1987 became the Manager of the Compliance Operations Unit within the same division.<sup>73</sup> The Compliance Operations Unit is responsible for monitoring compliance of storm water, water, and waste water treatment facilities with NPDES permits issued by the Agency, processing Discharge Monitoring Reports (“DMRs”) received by the Agency, and taking compliance or enforcement action as necessary.<sup>74</sup> The Unit compares the discharge data in DMRs submitted by facilities with discharge limits contained in the NPDES permit issued to the facility.<sup>75</sup>

With this experience as background, Mike Garretson was familiar with SVA because they had a NPDES permit.<sup>76</sup> His Unit at the Illinois EPA reviewed and coded SVA’s permit requirements into their computer system in order to track compliance.<sup>77</sup> The Illinois EPA issued SVA their NPDES permit, IL-0065005, for their Grayslake facility April 4, 1986.<sup>78</sup> The permit

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<sup>71</sup> Tr. at 23.

<sup>72</sup> Tr. at 23, 24.

<sup>73</sup> Tr. at 23, 24.

<sup>74</sup> Tr. at 24.

<sup>75</sup> Tr. at 25.

<sup>76</sup> Tr. at 25.

<sup>77</sup> Tr. at 32.

<sup>78</sup> Tr. at 27, 28; Comp. Exh. 1.



became effective on May 4, 1986, and expired on March 1, 1991.<sup>79</sup> It allowed SVA to discharge stormwater into Grays Lake through a storm sewer.<sup>80</sup> The permit required SVA to submit monthly DMRs.<sup>81</sup>

According to their permit, SVA was supposed to start submitting their DMRs to the Illinois EPA June 15, 1986 - the 15<sup>th</sup> day of the month after the permit became effective.<sup>82</sup> SVA had to submit DMRs even if they were not discharging once the permit was issued.<sup>83</sup>

Mr. Garretson explained that in the late 1980s and early 1990s, the Illinois EPA Division of Water Pollution Control, Compliance Assurance Section received DMRs in the mail.<sup>84</sup> The DMRs were typically date-stamped and logged into DMR Submission Records before being copied and distributed to the regional offices and records unit.<sup>85</sup> The DMR Submission Record is a logbook that lists NPDES permit holders, their permit numbers, and the dates DMRs are received at the Illinois EPA.<sup>86</sup> This was the same procedure the Illinois EPA used for DMRs received from SVA.<sup>87</sup>

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<sup>79</sup> Tr. at 27; Comp. Exh. 1.

<sup>80</sup> Comp. Exh. 1.

<sup>81</sup> Tr. at 28, 29; Comp. Exh. 1 - see page 3, Special Condition 4.

<sup>82</sup> Tr. at 32, 33; Comp. Exh. 1.

<sup>83</sup> Tr. at 33; Comp. Exh. 1.

<sup>84</sup> Tr. at 33.

<sup>85</sup> Tr. at 33, 34; Compl. Exh. 8.

<sup>86</sup> Tr. at 47, 48; Compl. Exh. 8.

<sup>87</sup> Tr. at 34; Compl. Exh. 8.

Even though SVA's NPDES permit became effective in May of 1986, there is no evidence that SVA submitted any DMRs that year.<sup>88</sup> Likewise, SVA did not submit any DMRs as required by their NPDES permit in 1987.<sup>89</sup> The DMR Submission Record indicates that SVA submitted only two DMRs, rather than the twelve required by their permit, for year 1988: November and December.<sup>90</sup> Respondents admit they did not submit any earlier DMRs in a letter written to the Illinois EPA signed by Richard Frederick.<sup>91</sup> In the same November 1988 letter, Respondents state they will now submit DMR reports as required.<sup>92</sup>

Nevertheless in 1989, SVA failed to submit DMRs for the months of April, June, August, September, October, November, and December.<sup>93</sup> Again, in a January 1990 letter Respondents admit that they failed to submit DMRs as required by their NPDES permit.<sup>94</sup> Respondents, in that same January 1990 letter also assure the Illinois EPA that DMR omissions will not occur again.<sup>95</sup> Yet, in that same year, SVA failed to submit a DMR for the month of September.<sup>96</sup> And again in

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<sup>88</sup> Tr. at 49 and Comp. Exh.s 1 and 26.

<sup>89</sup> Tr. at 50; Comp. Exhs. 1 and 8A.

<sup>90</sup> Tr. at 51, 52; Comp. Exhs. 1, 8B, and 26.

<sup>91</sup> Tr. at 289 - 91; Comp. Exh. 26.

<sup>92</sup> Comp. Exh. 26.

<sup>93</sup> Tr. at 52; Comp. Exh. 8C.

<sup>94</sup> Tr. at 291 - 92; Comp. Exh. 27.

<sup>95</sup> Comp. Exh. 27.

<sup>96</sup> Tr. at 52; Comp. Exh. 8D. Note: the question in the transcript indicates 1999; however, the answer by the witness, and the exhibit refers to 1990. 1999 appears to be a typographical error, or a mistatement by Assistant Attorney General Cohen.

1992, SVA failed to submit their DMR for the month of July.<sup>97</sup>

If SVA submitted their DMRs, they were sometimes late, or false.<sup>98</sup> For example, SVA did not submit their December 1990 DMR, which was due January 1991, until April 25, 1991.<sup>99</sup> Like most of SVA's DMRs, it was signed and certified by Richard J. Frederick.<sup>100</sup> Other than the date SVA put on the December 1990 DMR, the data is identical to the data SVA submitted on its November 1990 DMR.<sup>101</sup> The November and December DMRs also look identical.<sup>102</sup>

SVA's January 1991 DMR, signed and certified by Richard Frederick, was due February 15, 1991.<sup>103</sup> The Illinois EPA did not get it until April 25, 1991.<sup>104</sup> The Illinois EPA received SVA's February 1991 DMR before receiving SVA's January DMR: February 28th.<sup>105</sup> Other than the dates Respondents wrote in, the data in the January and February 1991 DMRs are identical.<sup>106</sup>

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<sup>97</sup> Tr. at 53; Comp. Exh. 8F.

<sup>98</sup> Tr. at 37 - 41; Comp. Exhs. 1, 2, 3, 4, 5 and 8.

<sup>99</sup> Tr. at 37; Comp. Exhs. 1, 3 and 8D.

<sup>100</sup> Tr. at 37; Comp. Exh. 3.

<sup>101</sup> Tr. at 37, 38; Comp. Exhs. 2 and 3. Note: the line of questioning related to Complainant's Exh. 2 is missing from the transcript. It should appear approximately at the end of page 36 before the questions related to Complainant's Exh. 3. Comp. Exh. 2 was admitted into evidence and questions linking Comp. Exhs. 2 and 3 are in the transcript.

<sup>102</sup> Tr. at 38, 39; Comp. Exhs. 2 and 3.

<sup>103</sup> Tr. at 39; Comp. Exh. 4.

<sup>104</sup> Tr. at 39; Comp. Exh. 4 and 8E.

<sup>105</sup> Tr. at 39; Comp. Exh. 4, 5 and 8E.

<sup>106</sup> Tr. at 40; Comp. Exh. 4 and 5.

Other than the dates, the copies of the January and February 1991 DMRs appear identical.<sup>107</sup>

Mr. Garretson explained, there are many variables that can effect storm water discharges.<sup>108</sup> Weather, sampling procedures, and testing procedures are the types of variables that can result in different values reported on discharge monitoring report forms.<sup>109</sup> Therefore, it is very unusual for the Illinois EPA to get DMRs from the same company with identical scientific data two months in a row.<sup>110</sup>

Some DMRs submitted by SVA indicated violations with their NPDES permit discharge limits.<sup>111</sup> SVA's NPDES permit lists storm water discharge concentration limits for total suspended solids ("TSS").<sup>112</sup> The TSS concentration limits are 15 milligrams per liter ("mg/l") as a 30 day average and 30 mg/l as a daily maximum.<sup>113</sup>

The August 1991 DMR signed and certified by Richard Frederick and submitted to the Illinois EPA for SVA indicated a 30 day average concentration for TSS to be 55 mg/l.<sup>114</sup> The same DMR indicated a daily maximum concentration for TSS to be 55 mg/l.<sup>115</sup>

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<sup>107</sup> Tr. at 40; Comp. Exh. 4 and 5.

<sup>108</sup> Tr. at 41.

<sup>109</sup> Tr. at 41.

<sup>110</sup> Tr. at 40, 41.

<sup>111</sup> Tr. at 53 - 58; Comp. Exhs. 1, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

<sup>112</sup> Tr. at 53; Comp. Exh. 1.

<sup>113</sup> Tr. at 53; Comp. Exh. 1.

<sup>114</sup> Tr at 54; Comp. Exh. 9.

<sup>115</sup> Tr. at 54; Comp. Exh. 9.

The September 1991 DMR form submitted by SVA indicated their storm water discharge had a 30 day average concentration for TSS of 25 mg/l.<sup>116</sup>

SVA's October 1991 DMR form reported a 30 day average for TSS of 41 mg/l.<sup>117</sup> The daily maximum concentration for the same reporting period of TSS in SVA's storm water discharge was also 41 mg/l.<sup>118</sup>

In February 1992, the 30 day average concentration of TSS discharged from SVA's site was 18 mg/l.<sup>119</sup>

SVA reported their 30 day average TSS concentration in November 1992 was 22 mg/l.<sup>120</sup>

For December 1992, SVA reported on their DMR that their 30 day average TSS concentration in the storm water discharge was 24 mg/l.<sup>121</sup>

The DMR form SVA submitted for May 1993 indicated a TSS 30 day average concentration of 24 mg/l.<sup>122</sup>

The DMR SVA submitted for June 1993 indicated a TSS storm water concentration level for the 30 day average of 35 mg/l.<sup>123</sup> In the same DMR SVA reported their daily maximum

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<sup>116</sup> Tr. at 54, 55; Comp. Exh. 10.

<sup>117</sup> Tr. at 55; Comp. Exh. 11.

<sup>118</sup> Tr. at 55; Comp. Exh. 11.

<sup>119</sup> Tr. at 55, 56; Comp. Exh. 12.

<sup>120</sup> Tr. at 56; Comp. Exh. 13.

<sup>121</sup> Tr. at 56; Comp. Exh. 14.

<sup>122</sup> Tr. at 56, 57; Comp. Exh. 15.

<sup>123</sup> Tr. at 57; Comp. Exh. 16.

concentration for TSS was also 35 mg/l.<sup>124</sup>

SVA also submitted a DMR for April 1995.<sup>125</sup> SVA reported their storm water discharge contained a 30 day average concentration for TSS of 126 mg/l.<sup>126</sup> SVA also reported their daily maximum concentration for TSS in April, 1995, was 126 mg/l.<sup>127</sup>

The 30 day average concentration for storm water discharges SVA reported in the DMR form submitted to the Illinois EPA for August, September, and October, 1991; February, November, and December, 1992; May and June, 1993; and April, 1995 were in excess of the concentration limits allowed in their NPDES permit.<sup>128</sup> The daily maximum discharge concentration SVA reported for August and October 1991, June 1993, and April 1995 also were in excess of the concentration limits allowed in their NPDES permit.<sup>129</sup>

The NPDES permit the Illinois EPA issued to SVA set the effluent limitations.<sup>130</sup> The permit expired on March 1, 1991.<sup>131</sup> To renew the NPDES permit, SVA had to reapply with the Illinois EPA 180 days before March 1, 1991 - 180 days before the permit expired.<sup>132</sup> SVA did not

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<sup>124</sup> Tr. at 57; Comp. Exh. 16.

<sup>125</sup> Tr. at 57; Comp. Exh. 17.

<sup>126</sup> Tr. at 57, 58; Comp. Exh. 17.

<sup>127</sup> Tr. at 57, 58; Comp. Exh. 17.

<sup>128</sup> Tr. at 53 - 58; Comp. Exhs. 1, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

<sup>129</sup> Tr. at 53 - 58; Comp. Exhs. 1, 9, 11, 16 and 17.

<sup>130</sup> Comp. Exh. 1.

<sup>131</sup> Tr. at 27 and 41; Comp. Exh. 1.

<sup>132</sup> Tr. at 41, 42; Comp. Exh. 1. The renewal application was due approximately September, 1990.

reapply for their NPDES permit 180 days before March 1, 1991.<sup>133</sup> SVA did not apply to renew at any time while the permit was in force.<sup>134</sup> The Illinois EPA did not receive SVA's permit renewal application until months after the permit had already expired.<sup>135</sup>

The Illinois EPA received SVA's permit renewal application June 5, 1991.<sup>136</sup> It was submitted, signed and certified on June 3, 1991 by Edwin L. Frederick, Jr., President of SVA.<sup>137</sup> Since the NPDES permit expired in March of 1991, the Illinois EPA's Compliance Assurance Section sent a Compliance Inquiry Letter to SVA in April.<sup>138</sup> The letter requested SVA submit the permit renewal application directly to the Compliance Assurance Section rather than the Permit Section.<sup>139</sup> On May 7, 1991, Edwin Frederick admitted in a letter to the Illinois EPA that SVA was required to have an NPDES permit.<sup>140</sup>

Respondents repeatedly violated requirements spelled out in their NPDES permit. In addition, Respondents, who admitted that they were legally obligated to renew their NPDES permit, failed to do so in a timely manner and continued to discharge into waters of the state.

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<sup>133</sup> Tr. at 42; Comp. Exh. 6.

<sup>134</sup> Comp. Exhs. 1 and 6.

<sup>135</sup> Comp. Exhs. 1 and 6.

<sup>136</sup> Tr. at 42; Comp. Exh. 6. Note: SVA's permit renewal application was incomplete. The Illinois EPA had to request additional information from SVA. The Illinois EPA received the additional information from SVA on January 7, 1992. See Comp. Exh. 7.

<sup>137</sup> Tr. at 42; Comp. Exh. 6.

<sup>138</sup> Tr. at 42 - 46; Comp. Exh. 6.

<sup>139</sup> Tr. at 42 - 46; Comp. Exh. 6.

<sup>140</sup> Tr. at pp. 456-59; Comp. Exh. 29

C.

**ARE RESPONDENTS SAMPLES REPRESENTATIVE OF DISCHARGE?**

Respondents' NPDES permit also required that samples be taken from a point representative of the effluent discharge.<sup>141</sup> To comply with this requirement Respondents must maintain an accessible effluent sampling point.<sup>142</sup>

Mr. Kallis noted in an August 9, 1991 Illinois EPA memo that SVA was out of compliance with its 1986 NPDES permit because SVA had no representative sampling point in order to grab stormwater for testing.<sup>143</sup> A representative sampling point is needed in order for an NPDES permittee to grab samples to ensure compliance with the NPDES permit. It is also necessary for the Illinois EPA to grab samples for confirmation that the permittee is meeting the NPDES permit limits.<sup>144</sup>

Attached to the August 9, 1991 memo is a June 4, 1991 memo.<sup>145</sup> The June 4, 1991 memo describes Mr. Kallis' May 21, 1991 inspection of SVA in which Mr. Kallis was at SVA trying to determine whether SVA had yet installed a representative discharge sampling point.<sup>146</sup> During that inspection, Mr. Kallis had a conversation with the Frederick brothers. Mr. Kallis explained his purpose for the inspection, but the Fredericks' tempers flared and they began yelling

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<sup>141</sup> Compl. Exh. 1, Special Condition 1.

<sup>142</sup> Compl. Exh.s 1, 19, and 20.

<sup>143</sup> Tr. at pp. 137-138, 145; Comp. Exh. 19 at p. 1.

<sup>144</sup> Tr. at p. 138

<sup>145</sup> Tr. at p. 138; Comp. Exh. 19, June 4, 1991 memo.

<sup>146</sup> Tr. at pp. 139-140; Comp. Exh. 19, June 4, 1991 memo.



obscurities at Mr. Kallis.<sup>147</sup> Mr. Kallis left SVA in order to avoid a confrontation.<sup>148</sup> Mr. Kallis never saw an effluent sampling point on May 21, 1991.<sup>149</sup>

While SVA operated under the 1986 NPDES permit, SVA did not have an accessible representative sampling point from which to grab samples.<sup>150</sup> This is true for the time period SVA had a NPDES permit, May 4, 1986, through at least May 21, 1991.<sup>151</sup>

#### D.

### RESPONDENTS ALSO CAUSE OR ALLOW WATER POLLUTION

In addition to the repeated violations of their NPDES permit, Respondents also cause or allow water pollution from their Grayslake site.<sup>152</sup>

#### 1. OFFICE OF EMERGENCY RESPONSE CALLED TO THE SCENE

From December 1994 through April 1995, the Illinois EPA's Office of Emergency Response and other agencies investigated oil releases in the Avon-Fremont Drainage Ditch just east of the SVA site.<sup>153</sup>

Donald Klopke has worked for Illinois EPA since March of 1980; since 1984 he has

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<sup>147</sup> Tr. at pp. 139-40; Compl. Exh. 19, June 4, 1991 memo. Mr. Kallis further expresses his concern about the hostility he experienced from the Frederick Brothers in his August 9, 1991, memo to Margaret Howard (Compl. Exh. 19) where he specially requests that any section 31 meeting be held in Springfield, or at the Attorney General's Office.

<sup>148</sup> Compl. Exh. 19, June 4, 1991 memo.

<sup>149</sup> Tr. at p. 142

<sup>150</sup> Tr. at p. 145

<sup>151</sup> Compl. Exh.s 1 and 19.

<sup>152</sup> Compl. Exh. 34 and Resp. Exh. 6.

<sup>153</sup> Tr. at 233; Compl. Exh.s 22, 23, 24, 25, 34, p. 14.; Resp. Exh. 6.

worked for the Illinois EPA's Office of Emergency Response's Emergency Response Unit.<sup>154</sup>

The mission of the Emergency Response Unit is to protect the public health, safety, and the environment with respect to emergencies dealing with chemicals and petroleum.<sup>155</sup> For example, the Emergency Response Unit will respond to oil or petroleum discharges into bodies of water.<sup>156</sup> Mr. Klopke has responded to hundreds of emergency situations; approximately fifty percent of the emergencies he responded to dealt with oil or petroleum releases.<sup>157</sup> Mr. Klopke often investigates oil spills with investigators from the U.S. EPA.<sup>158</sup>

Mr. Klopke is familiar with SVA, the Avon Drainage Ditch, and the area around SVA because he inspected those areas on April 19, 1995.<sup>159</sup> Ken Savage, also from the Illinois EPA's Office of Emergency Response, and Betty Lavis, the on-scene coordinator for the U.S. EPA, were with him that day.<sup>160</sup> When he got to the site, he immediately saw the oil sheen on the surface of the Avon-Fremont Drainage Ditch and noticed a strong petroleum odor.<sup>161</sup> Ms. Lavis noted free product bubbling up in the farm field drainage tile directly east of SVA between SVA's property

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<sup>154</sup> Tr. at p. 213-215; the Emergency Response Unit was formerly known as the Office of Chemical Safety.

<sup>155</sup> Tr. at 214.

<sup>156</sup> Tr. at p. 214

<sup>157</sup> Tr. at p. 215

<sup>158</sup> Tr. at 219-220.

<sup>159</sup> Tr. at p. 218-219, 221-222.

<sup>160</sup> Tr. at p. 223, 227-228; Comp. Exh. 25 at p. 1.

<sup>161</sup> Tr. at p. 222

and the Avon-Fremont Drainage Ditch.<sup>162</sup> Mr. Klopke also crossed a bridge over the Avon-Fremont Drainage Ditch downstream from where the farm drainage tile feeds into the Ditch.<sup>163</sup> From the bridge, he could see and smell diesel fuel.<sup>164</sup> Based on his training and experience, the sheen and odor indicated to Mr. Klopke an oil or petroleum release.<sup>165</sup>

Mr. Klopke recalled seeing above ground storage tanks on the SVA site during his inspection. Given his experience, Mr. Klopke knew that a large facility such as SVA probably had leaking underground storage tanks that might have been a contributing factor to the oil in the Avon-Fremont Drainage Ditch.<sup>166</sup> However, on April 18, the Frederick brothers denied that there were any underground storage tanks at SVA.<sup>167</sup>

Mr. Klopke also visited the nearby landscaping business, Mitch's Green Thumb, that day and saw no oil there.<sup>168</sup> In fact, Klopke could not identify any other responsible businesses or facilities for the oil in the Avon-Fremont Drainage Ditch other than SVA.<sup>169</sup>

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<sup>162</sup> Comp. Exh. 25 at p. 1. Resp. Exh. 6 includes a Pollution Report from Betty Lavis sent to Respondents Environmental Consultant James Huff dated June 13, 2000. The PolRep notes that "[i]n April 1995, a petroleum release occurred from the SVA site into the Avon-Fremont Drainage ditch. U.S. EPA OSC Betty Lavis coordinated a cleanup of the Avon-Fremont Drainage ditch and traced the release back to a leaking underground heating oil tank on the SVA site."

<sup>163</sup> Tr. at 223 - 24.

<sup>164</sup> Tr. at pp. 223-24

<sup>165</sup> Tr. at p. 222

<sup>166</sup> Tr. at p. 226

<sup>167</sup> Comp. Exh. 25 at p. 1.

<sup>168</sup> Tr. at p. 224

<sup>169</sup> Tr. at pp. 224-226

Betty Lavis of the U.S. EPA prepared a Pollution Report or "PolRep" on May 3, 1995 describing her visit to SVA on April 18, 1995 with Mr. Klope and Ken Savage and April 25th.<sup>170</sup> The PolRep indicates that the U.S. EPA was successful in determining that the source of the petroleum release into the Avon-Fremont Drainage Ditch was SVA.<sup>171</sup> On April 18<sup>th</sup>, Richard and Larry Frederick told her there were no underground, or above ground storage tanks in use on their property.<sup>172</sup> In the PolRep, Ms. Lavis wrote that on April 25, 1995, she had planned to do additional sampling at SVA, but she was met at the site by the Frederick brothers who said that they found a leak and would address the problem.<sup>173</sup> Ms. Lavis reiterates her findings and SVA's responsibility for the 1995 oil release in the Avon-Fremont Drainage Ditch in a 2000 PolRep.<sup>174</sup>

The leak that the Fredericks discovered seemed to be from a 2,000 gallon underground storage tank at the SVA property.<sup>175</sup> Ms. Lavis also noted the possibility that "due to past practices" at SVA there may have been a pool of oil under SVA contributing to the continuing release of oil from SVA into the farm tile leading to the Avon Drainage Ditch.<sup>176</sup> The 1995 PolRep mentions the 2000 gallon storage tank - but it also mentions the possibility that there may

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<sup>170</sup> Tr. at p. 227; Comp. Exh. 25. Note that in Exhibit 25, U.S. EPA abbreviates Skokie Valley Asphalt as "SVAC".

<sup>171</sup> Tr. at p. 228; Comp. Exh. 25.

<sup>172</sup> Compl. Exh. 25.

<sup>173</sup> Tr. at pp. 228-231; Comp. Exh. 25 at p. 2.

<sup>174</sup> Resp. Exh. 6.

<sup>175</sup> Compl. Exh. 34.

<sup>176</sup> Tr. at p. 232; Comp. Exh. 25 at p. 3.

be additional product under the property that might be contributing to the release.<sup>177</sup>

## 2. FIELD INSPECTOR ASSISTS WATER POLLUTION INVESTIGATION

Chris Kallis, the Illinois EPA Field Inspector familiar with SVA, also assisted in the oil release and water pollution investigation at the Avon Drainage Ditch in 1995.

In response to the ongoing investigation as to contaminants that SVA was discharging into the Avon-Fremont Drainage Ditch, on March 1, 1995, Mr. Kallis took samples from the point where the farm drainage tile discharged into the Ditch.<sup>178</sup> While Mr. Kallis collected that sample, he observed a concentrated heavy oil sheen coming from the farm drainage tile and downstream in the Avon-Fremont Drainage Ditch.<sup>179</sup> During the time he collected the samples, he noted a petroleum-based odor near the collection point coming from the farm drainage tile.<sup>180</sup> Mr. Kallis did not see any sign of oil, grease or any contaminant in the Avon-Fremont Drainage Ditch upstream from the drainage tile.<sup>181</sup>

Mr. Kallis used standard procedures for collecting the samples, and those samples were analyzed at the laboratory for organics and pesticides.<sup>182</sup> The results of the analysis revealed

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<sup>177</sup> Tr. at p. 232; Compl. Exh. 25.

<sup>178</sup> Tr. at pp. 151-152; Comp. Exh. 21; Comp. Exh. 32 illustrates the approximate location of Kallis' sample, just north of the two P's.

<sup>179</sup> Tr. at p. 154-155

<sup>180</sup> Tr. at p. 156

<sup>181</sup> Tr. at p. 154

<sup>182</sup> Tr. at p. 151-153, 155; Comp. Exh 21

concentrations of oil at 664 mg/l.<sup>183</sup> The maximum oil concentration allowed is 15 mg/l.<sup>184</sup>

On March 22, 1995, Mr. Kallis returned to SVA for another inspection and prepared a memo documenting his inspection.<sup>185</sup> On that day, Mr. Kallis spoke to Richard Frederick and again observed oil in the Avon-Fremont Drainage Ditch coming from the farm drainage tile.<sup>186</sup>

Mr. Kallis' report of his March 22, 1995 visit to SVA and the surrounding area contained a summary of recent inspections by the Illinois EPA Emergency Response Unit and the Illinois EPA Field Operations Section.<sup>187</sup> On December 23, 1994, January 5, 1995, March 1, 1995, and March 9, 1995, Illinois EPA personnel observed an oily discharge from the farm drainage tile discharging into the Avon-Fremont Drainage Ditch.<sup>188</sup> On all of those occasions, there was a diesel fuel odor present and a visible oil sheen on the water in the Ditch.<sup>189</sup>

This 1995 water pollution investigation at the Avon Drainage Ditch east of SVA's property was not the first one for Mr. Kallis or the Illinois EPA.<sup>190</sup> For example, he investigated a similar water pollution complaint on March 3, 1987.<sup>191</sup> The Illinois EPA received a citizen

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<sup>183</sup> Tr. at pp. 155-156; Comp. Exh 21; Comp. Exh 23. The maximum allowable concentration for oil is 15 mg/l. 35 Ill. Adm. Code 304.124(c).

<sup>184</sup> 35 Ill. Adm. Code 304.124(c) and 304.105.

<sup>185</sup> Tr. at p. 157-158; Comp. Exh. 22.

<sup>186</sup> Tr. at p. 158, 160; Comp. Exh. 22.

<sup>187</sup> Compl. Exh. 22.

<sup>188</sup> Compl. Exh. 22.

<sup>189</sup> Comp. Exh. 22 at p. 2-3.

<sup>190</sup> Tr. at 149; Compl. Exh.s 18, 19 (June 4, 1991, memo), 22, and 24; Resp. Exh. 6.

<sup>191</sup> Tr. at 149; Compl. Exh.s 18, 19 (June 4, 1991, memo), 22, and 24.

complaint of oil in the Avon-Fremont Drainage Ditch listing SVA as the possible source.<sup>192</sup> Kallis traced the oil contamination in the ditch to the SVA site.<sup>193</sup> SVA was pumping contaminated water from their lagoon into a manhole that ultimately discharged through a drain tile into the Avon-Fremont Drainage Ditch.<sup>194</sup>

Mr. Kallis and others witnessed and documented instances of water pollution caused or allowed by Respondents in violation of the Act and the Board's regulations over a period of years. All of the respondents should be held liable for the water pollution violation in 1994 and 1995.

### **3. RESPONDENTS FINALLY INVESTIGATE THEIR OWN SITE!**

Finally, after being asked about the oil discharging into the Avon-Fremont Drainage Ditch, in April of 1995, the Frederick brothers contacted an environmental engineer.<sup>195</sup> They contacted James Huff ("Huff") of Huff and Huff, Inc.<sup>196</sup> He is an environmental consultant and a licensed professional engineer.<sup>197</sup> Initially, Respondents explained that they needed Huff's services because the United States Environmental Protection Agency ("USEPA") was conducting a 104(e) investigation of their site.<sup>198</sup> The USEPA had Respondents' site on their Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") list because of an earlier

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<sup>192</sup> Compl. Exh. 18.

<sup>193</sup> Tr. at 149; Compl. Exh. 18.

<sup>194</sup> Tr. at 149-50; Compl. Exh. 18.

<sup>195</sup> Tr. at 335, 347.

<sup>196</sup> Tr. at 334 - 335.

<sup>197</sup> Tr. at 334.

<sup>198</sup> Tr. at 336 - 37.

release to the environment.<sup>199</sup> The USEPA inspection related to the earlier environmental release.<sup>200</sup>

After the first conversation, Huff agreed to meet the Fredericks at the SVA site the following week.<sup>201</sup> However, before that meeting ever took place, Huff received another call from one of the Frederick brothers on Saturday morning, April 22, 1995.<sup>202</sup> He explained to Huff that Respondents had been excavating on their property and found a drain tile.<sup>203</sup> When Respondents opened the drain tile, there was a visible sheen or oil on the water.<sup>204</sup> They agreed that for now Respondents should pull out part of the drain tile and backfill that area with a clay type soil to stop the flow, and first thing Monday morning report the oil spill release to the USEPA.<sup>205</sup>

The drain tile flowed toward the Avon-Fremont Drainage Ditch.<sup>206</sup> It was important to stop the flow from the drain tile because since December 1994, there had been an oil sheen reported intermittently on the Avon-Fremont Drainage Ditch.<sup>207</sup> They believed the drain tile on SVA's site

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<sup>199</sup> Tr. at 337 - 38; Comp. Exh. 34, Appendix C; Resp. Exh. 6.

<sup>200</sup> Tr. at 337 - 38.

<sup>201</sup> Tr. at 338 - 39.

<sup>202</sup> Tr. at 339, 347; Comp. Exh. 34, p. 14.

<sup>203</sup> Tr. at 339 - 40.

<sup>204</sup> Tr. at 339 - 40.

<sup>205</sup> Tr. at 340.

<sup>206</sup> Tr. at 341; Comp. Exh. 34.

<sup>207</sup> Tr. at 340 - 41; Comp. Exh. 34, p. 14 - 16.



was the one connected to the Avon-Fremont Drainage Ditch.<sup>208</sup> They wanted to plug the drain tile in order to stop the flow of oil to the Avon-Fremont Drainage Ditch.<sup>209</sup>

When Huff went to the SVA site a few days later, he observed the condition of the Avon-Fremont Drainage Ditch and the newly plugged farm drain tile.<sup>210</sup> He saw absorbent booms placed in the Avon-Fremont Drainage Ditch by USEPA contractors.<sup>211</sup> He saw an oil sheen near where the booms were already in place.<sup>212</sup> And he observed that the oil sheen did not exist after traveling a mile downstream from where the farm drain tile emptied into the Avon-Fremont Drainage Ditch.<sup>213</sup> A series of booms had been installed at the point where the drain tile emptied into the Avon-Fremont Drainage Ditch.<sup>214</sup> Though there was some oil in this area, it was not apparent that oil was still flowing out of the drain tile since it was already plugged.<sup>215</sup> In terms of the portion of the drain tile on SVA's property, Huff noted that the soil had been disturbed in the area, the drain tile had been plugged, and the soil brought back to grade.<sup>216</sup>

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<sup>208</sup> Tr. at 340 - 41; Comp. Exh. 34, p. 14 - 16.

<sup>209</sup> Tr. at 340 - 41; Comp. Exh. 34, p. 14 - 16.

<sup>210</sup> Tr. at 348.

<sup>211</sup> Tr. at 348; Comp. Exhs. 33C, 34, p. 14.

<sup>212</sup> Tr. at 348.

<sup>213</sup> Tr. at 348 - 49.

<sup>214</sup> Tr. at 349 - 50; Comp. Exh. 33B, upper right hand corner.

<sup>215</sup> Tr. at 349 - 50.

<sup>216</sup> Tr. at 352. See also Comp. Exh. 34, p. 14: In November, 2000, Huff prepares a "Site Investigation and Work Plan" which he prepared for SVA and submitted to the Illinois EPA. In it, he notes that on "April 22, 1995, Skokie Valley located a field tile exiting its property in the northeast corner of the property. (See Figure 2 - 1). A 50 foot section of the drain tile was

On April 25, 1995, Respondents excavated a trench on SVA's property trying to again locate the drain tile.<sup>217</sup> Huff observed oil in the center of the excavated trench.<sup>218</sup>

On April 28, 1995 Respondents discovered that one of their heating oil tanks for one of their buildings on the west side of their property contained water.<sup>219</sup> Water in the underground storage tank indicated a potential hole in the tanks piping or the tank itself.<sup>220</sup> They reported a leaking underground storage tank incident to IEMA, the Illinois Emergency Management Agency, and speculated that the heating oil from the tank was the source of the oil in the Avon-Fremont Drainage Ditch.<sup>221</sup>

Also on April 28<sup>th</sup>, Huff recommended to Respondents that they purchase better booms for the Avon-Fremont Drainage Ditch to protect the environment.<sup>222</sup> Respondents purchased other booms and assumed responsibility for the oil booms on the Avon-Fremont Drainage Ditch from the USEPA.<sup>223</sup>

Huff's work at the site for Respondents did not stop in April 1995, with the better boom recommendation and discovery of the leaking underground storage tank; it continued over eight

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removed and both ends were plugged with clay soil. As of this date, all known Skokie Valley discharges through the Avon-Fremont Drainage Ditch stopped."

<sup>217</sup> Comp. Exh. 34, p.14.

<sup>218</sup> Comp. Exh. 34, p. 14.

<sup>219</sup> Tr. at 363 - 64.

<sup>220</sup> Tr. at 364.

<sup>221</sup> Tr. at 363 - 64, 367 - 68; Comp. Exh. 34, p. 14 - 15.

<sup>222</sup> Tr. at 351.

<sup>223</sup> Tr. at 351 - 52; Comp. Exh. 34, p. 14.

years to this day.<sup>224</sup> For example, after reporting the leak to IEMA, Huff began making arrangements to have the tank removed.<sup>225</sup> A series of test pits or trenches were dug on the site to see if there was evidence of any oil or petroleum sitting on the ground water.<sup>226</sup> One test pit was dug on the south side of SVA's property east of a former diesel and gasoline fuel island.<sup>227</sup> It was the general vicinity where a former gasoline underground storage tank was located.<sup>228</sup> Oil and water were present in the test pit at the site of the former pump island.<sup>229</sup>

After having the leaking underground storage tank removed, Huff determined that the release of heating oil was minor.<sup>230</sup> Once he learned the heating oil release was minor, Huff no longer believed the leaking underground storage tank was the source of the discharge into the Avon-Fremont Drainage Ditch.<sup>231</sup> Huff now thought the oil sheen on the Avon-Fremont Drainage Ditch from late 1994 through April 1995 was caused by one or more items on the south side of

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<sup>224</sup> Tr. at 368, 389 - 90; Comp. Exh. 34.

<sup>225</sup> Tr. at 368; Comp. Exh. 34, p.14 - 15. Eventually three underground storage tanks were removed from the site. Tr. at 368 - 69. See diagram, Compl. Exh. 31.

<sup>226</sup> Tr. at 363, 383; Comp. Exh. 34, p. 15.

<sup>227</sup> Tr. at 383; Comp. Exh. 34, p. 15.

<sup>228</sup> Tr. at 383.

<sup>229</sup> Tr. at 383; Comp. Exh. 34, p. 15. The former fuel island or gas pumps were located and are drawn in the southeast (lower right hand) corner of the site near the plugged drain tile that leads to the Avon-Fremont Drainage Ditch. See, for example, Huff's diagrams in Comp. Exh. 34, Figure 2-1, p. 9; Figure 3-3, p. 22; and Figure 4-7, p. 56.

<sup>230</sup> Tr. at 385, 418; Comp. Exh. p. 13 and 14.

<sup>231</sup> Tr. at 385 - 86; Comp. Exh. 34, p. 14.

Respondents' property.<sup>232</sup> The possible causes or items were the former underground gasoline storage tank, a fill line from above ground storage tanks ("AST") that went over to the same fuel pump island, or a line that went from hot mix asphalt to an underground storage tank.<sup>233</sup>

After extensive work on the SVA site, Huff concluded that ". . . the release to Avon-Fremont Drainage Ditch was attributed to the abandoned gasoline and diesel lines from the ASTs to the former pump island . . . ."<sup>234</sup>

#### **IV. WHAT IS RESPONDENTS' DEFENSE**

##### **TO VIOLATING THEIR PERMIT AND CAUSING WATER POLLUTION?**

What is SVA's defense? What is the Frederick's brothers defense to repeatedly violating their NPDES permit and causing or allowing water pollution? After eight years of litigation this is a fair question. It seems that Respondents defense, affirmative or otherwise, is that it is unfair to bring an enforcement action against the Fredericks individually because the violations occurred so long ago and the People should be prohibited from enforcing Illinois environmental law. In other words, even though the law places personal liability on corporate officers who are involved in violations of the Act, or had the ability and authority to control the acts or omissions that gave rise to the violation, the Fredericks should be excused.<sup>235</sup>

Their affirmative defense is found in "Respondent's Answer and Affirmative Defense to

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<sup>232</sup> Tr. at 386 - 87.

<sup>233</sup> Tr. at 386 - 87; Comp. Exh. 34, p. 14.

<sup>234</sup> Comp. Exh. 34, p. 14.

<sup>235</sup> People v. C.J.R. Processing, Inc., et al., 269 Ill. App. 3d 1013, 647 N.E.2d 1035 (3d Dist. 1995).

Complainant's Second Amended Complaint." Following a Motion to Strike or Dismiss

Affirmative Defenses and a June 5, 2003, Board Order, Respondents' affirmative defense is:

Under the doctrines of laches and equitable estoppel, the Complainants should not be allowed to amend its Complaint to include Respondents Edwin L. Frederick, Jr. and Richard J. Frederick, as Respondents and these Respondents should not be required to respond to said Complaint.

The violations happened long ago, so it is unfair to name the Fredericks, and the People should be prohibited from enforcing environmental laws.

The Respondents also insert other inferences into the record which might be confused as defenses. First, we tried to take care of the DMR issue long ago so that is not an issue. Second, had we not caused or allowed water pollution in 1994/95, the People would not have sought to enforce the repeated NPDES violations. And third, since the draft NPDES permit based on our late renewal application that was never issued had different conditions, the violations while our permit was in force are not violations. These are not really defenses.

First, mailing DMRs back and forth years after they were due to the Illinois EPA does not correct past reporting violations.<sup>236</sup> The Act and Board regulations require compliance with the reporting requirements of the permit. Special Condition 19 of Respondents' permit prohibits Respondents from filing false reports with the Illinois EPA. It is the DMRs received, or not, at the Illinois EPA that determines the violations. Copies of other documents that do not indicate they were ever received by the Illinois EPA are meaningless.

Second, Respondents are charged with causing, or allowing water pollution in 1994/95. The original Complaint was filed in the fall of 1995. It only included NPDES permit and DMR

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<sup>236</sup> Resp. Exh.s 1, 2, 3, 4 and 5.

violations. The original Complaint was later amended to add the water pollution count against Respondents. The People of the State of Illinois originally brought this enforcement action against Respondents because of the serious and repeated NPDES permit violations. It was only after the case was started that the People added the water pollution count.

And third, the fact that a draft permit was passed around long after Respondents NPDES permit expired is irrelevant in terms of the violations committed while the permit was in effect. Respondents were required to comply with the terms of their permit when it was in force. They did not. Respondents repeatedly discharged too much TSS in violation of their permit. Who knows what the concentration limits would have been had Respondents maintained a representative accessible sampling point. Do not forget, Respondents decided where and when to take the samples.

All these inferences Respondents try to assert as defenses fail just as their affirmative defense fails. This case was filed in 1995. Edwin Frederick was President of SVA. Richard Frederick was Vice President. Together they ran the day to day operations of the corporation. Together they communicated with the Illinois EPA. Together they consulted with and retained an environmental engineer to address their water pollution violation. All this was before, or during 1995.

The Fredericks knew of this litigation. They were going to be the witnesses since they were the ones dealing with the Illinois EPA and signing almost every document submitted to the Illinois EPA on behalf of SVA. During the course of this litigation, in 1998, the Fredericks sold their business; they dissolved their corporation. The Fredericks are responsible for the destruction of the corporate records after the sale and dissolution. Under these circumstances, the doctrines of

laches and equitable estoppel must fail. The Respondents, all of them, have no defense to the repeated NPDES permit violations and causing or allowing water pollution.

#### V. ANALYSIS

Respondents thinly veiled defenses all fail. Regardless of whether they are affirmative, or not, the facts remain the same: Respondents repeatedly violated their NPDES permit and caused or allowed water pollution.<sup>237</sup> With no defenses left for Respondents to assert, the issue becomes whether the violations are unreasonable. Section 33(c) of the Act provides an analysis with a list of factors to help determine whether Respondents' violations were unreasonable. Section 33(c) of the Act, 415 ILCS 5/33(c) (2002), provides, in pertinent part, as follows:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not 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.

**Factor number 1: the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people.**

Factor number one can be broken down into two different analyses: one for the technical NPDES permit violations, Counts I, II, III, and V; and one for the water pollution violation, Count

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<sup>237</sup> See, for example, Compl. Exh. 34 and Resp. Exh. 6.

IV. Both analyses weigh against Respondents, but it is difficult to measure the degree of injury when referring to Respondents technical violations.

Respondents filed false reports by apparently photocopying DMRs and submitting them to the Illinois EPA. Respondents repeatedly failed to file DMRs. When Respondents did file DMRs, they were often late and indicated excess TSS discharges. Throughout the valid permit period, Respondents never had an accessible representative effluent sampling point. And they failed to apply to renew their NPDES permit on time and continued to operate without one. Did Respondents fail to file DMRs and file false DMRs because they did not take or test samples? Did the test results indicate such high levels of TSS, or oils and grease flowing into Grays Lake that they chose not to submit them? How did they get the samples? Where did they take them from? All these violations serve to undermine the NPDES program and prevent the Illinois EPA from doing its job - protecting the environment. Only the Respondents know the degree of injury they caused by not complying with their permit requirements.

SVA discharged petroleum-based products into the Avon-Fremont Drainage Ditch, a water of the State of Illinois, many times.<sup>238</sup> SVA had a long history of water quality violations before the 1994/95 Avon Drainage Ditch petroleum release.<sup>239</sup> Mr. Kallis, the Illinois EPA inspector, and Mr. Huff, Respondents' own environmental consultant, spell out the long history of citizen complaints about oil in the Ditch and oil releases from the SVA site.

The Avon-Fremont Drainage Ditch flows through a populated area. Citizens who lived near the Avon-Fremont Drainage Ditch were subjected to petroleum-contaminated water and

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<sup>238</sup> See, for example, Compl. Exh. 34 and Resp. Exh. 6.

<sup>239</sup> See, for example, Compl. Exh. 34 and Resp. Exh. 6.



diesel odors many times over the years. The Frederick brothers, familiar with the history of the SVA site, asphalt plant, fuel island, and underground storage tanks, never tried to clean up their site before 1995. By 1995, their site was in such deplorable condition that eight years later, their environmental engineer is still working to clean it.

We do not know the degree of injury respondents caused to the health and general welfare of the people or to Grays Lake in terms of the NPDES permit violations, but the repeated TSS violations provide an idea. Obviously, oil discharging through a farm field drain tile into waters of the state severely compromises the health and general welfare of the people. Factor number 1 weighs heavily against Respondents.

**Factor number 2: the social and economic value of the pollution source.**

Although Respondents employed people, and paid taxes, the social and economic value of their asphalt paving business should be weighed against the environmental harm caused. They polluted waters of the state with oil and excess sediment. The lives of the citizens who live near Grays Lake and the Avon-Fremont Drainage Ditch were interfered with and adversely affected; the citizens have the Constitutional right to a healthful environment.<sup>240</sup> In addition to the environmental harm and impact on citizens caused by Respondents' violations, the Board should also take into account the costs incurred by the public.<sup>241</sup> Under these circumstances, factor number two should not weigh in favor of Respondents.

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<sup>240</sup> Illinois Constitution, Article XI, Section 2.

<sup>241</sup> For example, consider only the water pollution violation in 1994/95. Personnel from the Illinois EPA (OER and Field Inspector) and USEPA went to the site numerous times over the 5 month period. The USEPA also had to hire a contractor to place booms in the Avon Drainage Ditch.

**Factor 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.**

This factor too is difficult to analyze. SVA and before them, Liberty Asphalt was at the site. Both businesses were asphalt paving businesses. Priority of location really is not an issue since most of the land surrounding SVA's site is farmland. In other words, if Respondents complied with their NPDES permit, did not discharge excess amounts of sediment, or pollute the surrounding waters of the State, the People would not take issue with the suitability of SVA to the area. The problem, of course, arises because Respondents did not comply with their NPDES permit requirements, did discharge excess sediment, and did pollute waters of the state. Since each of these violations were repeated, and impacted Grays Lake and the Avon Drainage Ditch on more than one occasion, the suitability of location must weigh against Respondents.

**Factor 4: the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from such pollution source.**

Factor four can also be broken down into two analyses. One for correcting the technical NPDES permit violations and one for preventing the 1994/95 Avon Drainage Ditch water pollution incident. Before thinking of each analyses separately, it is worth noting that Respondents never claimed the cost of compliance was an issue. Respondents could afford to comply with the environmental laws.

Was it technically practicable and economically reasonable for Respondents to submit DMRs each month, even during months they did not discharge? . . . to create and maintain an accessible effluent sampling point? . . . to take steps to limit their TSS concentrations? . . . or to apply for their NPDES permit on time? Of course it was. There is practically no cost associated with complying with the permit requirements except to pay for the water sample test and postage

to mail in the DMR.

Was it technically practicable and economically reasonable for Respondents to prevent the water pollution that occurred in the Avon Drainage Ditch in 1994/95? Yes. James Huff could have advised to remove the underground storage tanks that were no longer in use and to remediate the site . . . had Respondents bothered to contact him after any of the other earlier water quality or water pollution incidents. Respondents chose not to take any steps to clean their site until 1995, when the USEPA and the Illinois EPA kept identifying their property as the only possible source of oil in the Avon-Fremont Drainage Ditch. Even then Respondents initially denied having underground storage tanks on their property. The fix on all counts was technically practicable and economically reasonable for Respondents. This factor weighs heavily against them.

**Factor 5: any subsequent compliance.**

Any subsequent compliance? Yes. Respondents filed some DMRs after their permit expired. However, their permit did expire, and it was never renewed. Respondents continued to discharge from their site without a permit. Some of the discharges exceeded the TSS concentration limits set by the original permit. And, eight years later, Respondents are still trying to remediate the site by removing all the oil contamination. There have been no further reports of water pollution since Respondents plugged the drain tile on their property. Nevertheless, since Respondents continued to discharge without a permit and continue to remediate the site, this factor must also weigh against them.

Factors 1, 3, 4, and 5 weigh heavily against Respondents. Factors 2 may not weigh against Respondent, but does not weigh in Respondents favor. Taking all the facts and circumstances into consideration with the factors listed in section 33(c), Respondents repeated violations are

unreasonable.

**VI. CONCLUSION**


WHEREFORE, Complainant respectfully requests that this Board find that Respondents violated the Act as alleged in each count of the Second Amended Complaint, order Respondents to immediately cease and desist from further violations of the Act and Board Regulations, assess a civil penalty against Respondents, assess Complainant's costs and fees in this action against Respondents, and such other relief the Board deems appropriate.

PEOPLE OF THE STATE OF ILLINOIS,  
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MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

ROSEMARIE CAZEAU, Chief  
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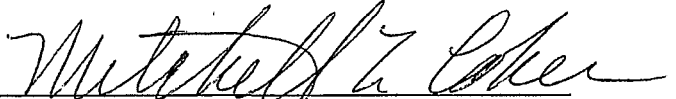
  
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CERTIFICATE OF SERVICE

I, MITCHELL COHEN, an Assistant Attorney General, certify that on the 15<sup>th</sup> day of January, 2004, I caused to be served by placing in the U.S. Mail with appropriate postage a **Motion for Leave to File Instanter and The People of the State of Illinois' Closing Argument and Post Trial Brief** to the parties named on the attached service list.

  
MITCHELL L. COHEN  
Assistant Attorney General