ILLINOIS POLLUTION CONTROL BOARD
March 20, 2003

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

JOHN BAUMGARTNER OF CHURCHILL, BAUMGARTNER & QUINN, LTD. APPEARED ON BEHALF OF STATE OIL COMPANY, WILLIAM ANEST, AND PETER ANEST;

MARK ERZEN OF KARAGANIS & WHITE APPEARED ON BEHALF OF CHARLES ABRAHAM, JOSEPHINE ABRAHAM, AND MILLSTREAM SERVICE, INC.; and

GERALD T. KARR OF THE OFFICE OF THE ATTORNEY GENERAL APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS.

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

In this water pollution enforcement case, the People of the State of Illinois (People) filed a complaint against the respondents State Oil Company (State Oil), William and Peter Anest (the Anests), Charles and Josephine Abraham (the Abrahams), and Millstream Service, Inc. (Millstream). The complaint alleged that the respondents violated Section 12(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) (2002)) by causing or allowing gasoline to leak from underground storage tanks into Boone Creek in McHenry County. In addition, the complaint sought reimbursement from the Abrahams and Millstream for costs incurred by the Illinois Environmental Protection Agency (Agency) when it performed investigative, preventative, and corrective actions.

The Abrahams and Millstream filed a cross-complaint against the Anests. On summary judgment, the Board concluded that the respondents violated Section 12(a) of the Act. The matter continued to hearing on cost recovery and the cross-complaint. After the hearing, State Oil and the Anests as well as the Abrahams and Millstream filed separate objections to hearing officer rulings. In this final opinion and order, the Board provides a summary of the procedural history in this matter, the statutory background, and pertinent facts. Furthermore, the Board

rejects the objections to hearing officer rulings, grants the Agency limited cost recovery, levies civil penalties against the respondents, requires remediation action, and finds that the respondents are jointly and severally liable for Agency costs and future remediation action costs.

PROCEDURAL HISTORY

On February 13, 1996, the People filed a two-count complaint. Count I alleged that State Oil, the Anests, the Abrahams, and Millstream violated Section 12(a) of the Act and count II sought cost recovery pursuant to Section 57.12(a) of the Act.

On March 16, 2000, the Board accepted a second-amended cross-complaint filed by the Abrahams and Millstream against the Anests. People v. State Oil Co., PCB 97-103, slip op. at 1 (Mar. 16, 2000). However, the Board subsequently struck count III of the cross-complaint as well as paragraphs 24, 25, 28, 29, 30, and 31 of count I and realleged in counts II and IV. People v. State Oil Co., PCB 97-103, slip op. at 13-14 (May 18, 2000). The Board also struck those portions of the cross-complaint seeking witness and attorney fees. People v. State Oil Co., PCB 97-103, slip op. at 14 (May 18, 2000). Finally, on April 4, 2002, the Board struck any portion of the cross-complaint that sought reimbursement of penalties. People v. State Oil Co., PCB 97-103, slip op. at 8 (Apr. 4, 2002). The remaining portions of the cross-complaint request that the Board find the Anests in violation of Sections 12(d) and 12(f) as well as Sections 21(a) and (d)(2) of the Act, and order the Anests to pay the Agency's remediation costs and complete any future remediation of the Site. Cross-comp. at 12, 14, 17-18.

On April 4, 2002, the Board granted summary judgment to the People on count I of the complaint against all respondents. People v. State Oil Co., PCB 97-103, slip op. at 10-13, 16-18 (Apr. 4, 2002). Specifically, the Board found that the respondents violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) 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. People v. State Oil Co., PCB 97-103, slip op. at 13, 17 (Apr. 4, 2002).

Count II of the People's complaint and the cross-complaint continued to hearing on October 21, 2002. All parties appeared and participated. After the hearing, State Oil and the Anests filed an objection to a hearing officer ruling allowing certain exhibits into evidence at the hearing.[1] Anest Obj. at 10. The Abrahams and Millstream also filed an objection to a hearing officer ruling allowing the same exhibits into evidence at hearing.[2] Abr. Obj. at 15. The Abrahams and Millstream also requested that certain testimony be excluded from the Board's

[1] State Oil's and the Anests' post-hearing objection will be cited as "Anest Obj. at __." Their post-hearing brief will be cited as "Anest Br. at __" and their reply brief as "Anest Reply at __." Their hearing exhibits will be cited as "SO Exh. _."

[2] The Abrahams' and Millstream's post-hearing objection will be cited as "Abr. Obj. at __." Their post-hearing brief will be cited as "Abr. Br. at __" and their reply brief as "Abr. Reply at __." Their hearing exhibits will be cited as "Abr. Exh. _." The People's hearing exhibits will be cited as "Compl. Exh. _."

consideration. *Id*. The parties for each objection requested that the arguments in the other parties' objection be incorporated as their own. Anest Obj. at 1; Abr. Obj. at 14.

All parties filed post-hearing briefs. The record is now closed and the Board considers the arguments contained with the respondents' objections and the parties' post-hearing briefs.

STATUTORY BACKGROUND

In count II of the People's complaint, the People seek cost recovery under Section 57.12 of the Act (415 ILCS 5/57.12 (2002)). In pertinent part, that sections provides:

> (a) 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, preventive action, corrective action and enforcement incurred by the State of Illinois resulting from an underground storage tank.

Before ordering any penalty for violation of the Act, the Board must consider the factors in Sections 33(c) and 42(h) of the Act. Section 33(c) of the Act states: "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:

> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;
>
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> (v) any subsequent compliance." 415 ILCS 5/33(c) (2002).

According to Section 42(h) of the Act the Board considers any matters of record in mitigation or aggravation of penalty, including "the following factors:

> (1) the duration and gravity of the violation;
>
> (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefits accrued by the violator because of delay in compliance with requirements;

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

(5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator." 415 ILCS 5/42(h) (2002).

Furthermore, Section 42(f) provides: "the Board . . . may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a willful, knowing or repeated violation of the Act." 415 ILCS 5/42(f) (2002).

The Abrahams and Millstream have requested that the Board find the Anests to be in violation of Sections 12(d) and (f) of the Act. Those sections provide:

No person shall:

* * *

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

* * *

(f) Cause, threaten or allow the discharge of any contaminant into the waters of the State . . . .

Additionally, the cross-complaint requests the Board to find the Anests to be in violation of Sections 21(a) and (d)(2) of the Act. Those sections provide:

No person shall:

(a) Cause or allow the open dumping of any waste.

* * *

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

* * *

(2) in violation of any regulations or standards adopted by the Board under this Act.

FACTS

As of late 1983, the Anests, and S&S Petroleum owned the Site and State Oil operated retail gasoline service stations at the Site. Abr. Exh. 16 at 6. In late 1983 or early 1984, gasoline was discovered leaking into nearby Boone Creek. *Id*. at 7. In January or February 1984, the underground storage tanks at the Site were tested and two tanks failed an air pressure test. *Id*. at 8, Abr. Exh. 18 at 3. That same month, SET Liquid Systems was hired to contain the discharge and to prevent gasoline from reaching the creek. Anest Exh. 10. The tanks were relined and passed a subsequent air pressure test. Abr. Exh. 18 at 3.

In December 1984, gasoline was again discovered leaking into Boone Creek adjacent to the Site. Abr. Exh. 16 at 8. The Agency was then notified but did not direct the Anests to perform any specific remedial action. *Id*. at 9. However, the McHenry County Health Department issued a notice to the Anests in January 1985 ordering the Anests to begin corrective measures to stop gasoline from seeping into Boone Creek. *Id*. at 13. There is no evidence that any testing of an underground storage tank was completed in 1985. Abr. Exh. 18 at 5. However, in May 1985, the Site was again inspected by the Agency, but the inspector did not observe gasoline leaking into the creek. Abr. Exh. 17 at 9-10. In August 1985, the Abrahams purchased the Site. Abr. Exh. 16 at 14. Prior to the purchase, William Anest told Charles Abraham that the tanks were no longer leaking. Abr. Exh. 18 at 7.

In December 1985, the Anests contracted with a company called IT to check tanks, contain any discharge, and establish interceptions to prevent gasoline from reaching the creek. In February 1986, State Oil, the Anests, and S&S Petroleum caused booms to be placed on Boone Creek near the Site in an effort to control leaking gasoline. Abr. Exh. 16 at 14. However, in January 1987, State Oil, the Anests, and S&S Petroleum indicated they would not undertake any further remediation work. *Id*. at 14-15.

At the Board's October 2002 hearing, emergency responders from the Agency testified about conditions at the leaking underground storage tank site (the Site). Edward Osowski and Donald Klopke, both Agency emergency responders who worked at the Site, testified at the hearing. Klopke testified that on February 27, 1986, a sheen was on the west side of Boone Creek, which is the side next to the Site. Tr. at 47. As of that date, Klopke was contacting S&S Petroleum regarding the Site. Tr. at 57. Klopke also stated that the lower explosive limit at the Site on January 28, 1987, was 100%, which signified a danger of explosion if an ignition source was applied to the material. Tr. at 48.

In February 1987, the Agency sent a letter to Charles Abraham. SO Exh. 1 (Exh. D). This letter requested the Abrahams to initiate six actions to mitigate the release of gasoline from the Site. *Id*. A second letter was sent by the Agency to the Abrahams on April 9, 1987. SO Exh. 1 (Exh. E). The letter indicated that because the Agency had received no response from the Abrahams the Agency was referring the matter to the Agency's legal staff. *Id*. On April 27, 1987, Charles Abraham sent a letter to James Patrick O'Brien at the Agency. SO Exh. 1 (Exh. G); Tr. at 63. That letter stated that Klopke told Abraham in February 1987, that the problem was not Abraham's because of an ongoing problem before Abraham purchased the property. Tr. at 66. However, the letter also indicated that Klopke later told Abraham the pollution at the Site was Abraham's problem, since representatives of State Oil indicated that Abraham knew of the pollution at the Site. *Id*. The letter argued that State Oil was responsible for the pollution

because State Oil (and the Anests) failed to address the problem properly from the beginning. SO Exh. 1 (Exh. G).

In 1987, the Abrahams retained Groundwater Technologies, Inc., to undertake actions to mitigate gasoline releases from the Site. Abr. Exh. 16 at 16. Groundwater Technologies performed a hydrogeologic assessment of the Site for which the Abrahams paid about $35,000. *Id*.

In 1989, Stephen Colantino, a member of the Agency's leaking underground storage tank program group, visited the Site. Tr. at 72. On his second visit, Colantino talked with Abraham about taking steps to investigate and mitigate releases from underground storage tanks on the Site. Tr. at 73. Colantino told Abraham that if Colantino was unable or unwilling to comply, the Agency would undertake those activities and would seek reimbursement of costs. *Id*. In February 1989, the Agency hired Heritage Remediation to design and install a recovery trench and interceptor recovery sumps at the Site. Tr. at 77. The trench was installed in an effort to halt or mitigate the migration of petroleum toward the creek. Tr. at 80. The Agency did not have any geological information to aid installation of the trench. Tr. at 109-11.

Sometime in 1989, during the Agency's trench work, the Abrahams had the underground storage tanks tested. Abr. Exh. 18 at 10. Five out of six tanks needed to be relined, which the Abrahams had done. *Id*. In 1990 and 1991, the Abrahams again contracted with Groundwater Technologies to complete four soil borings with monitoring wells to confine the contamination. Abr. Exh. 18 at 10.

On January 5, 1990, the Agency sent a corrective action notice to Abraham and Millstream. Tr. at 81. Colantino testified that the Agency would track costs associated with responding to leaking underground storage tanks. The Agency tracked the cost of contract work as well as Agency employee time and travel costs. Tr. at 96.

Jay Hamilton, the Agency project manager for the Site, testified that a plan was created by Groundwater Technologies to address the pollution at the Site. Tr. at 129. However, this plan was not implemented because the Abrahams waited for an Agency determination on a February 5, 1992 application seeking leaking underground storage tank fund (LUST fund) eligibility for prior remediation expenditures. Tr. at 132. Letters were sent to the Agency indicating that the Abrahams wished to implement clean-up of the Site but were waiting for a determination with regard to the LUST fund. Tr. at 141. It was not until June 24, 1997, that the Agency determined that the Abrahams were eligible for reimbursement from the LUST fund after a $50,000 deductible. Tr. at 142. It is not clear from the record whether the Abrahams have paid the deductible or whether they have received any reimbursement from the LUST fund.

Between February 5, 1992, and June 24, 1997, the Abrahams and the Anests were involved in litigation with regard to the Site. Tr. at 143. In April 1994, the Abrahams received a judgment for $128,403 against the Anests. Abr. Hrg. Exh. 6, at 18. That amount equaled the total sum spent by the Abrahams to mitigate the release of gasoline at the Site. Abr. Hrg. Exh. 18 at 10. That judgment was affirmed on appeal before the Second District Appellate Court in Abraham v. Anest, No. 2-94-1062 (2nd Dist. June 26, 1995). Abr. Exh. 18.

The Agency incurred clean-up costs at the Site from 1989 to 1991. Tr. at 150. These costs were not reimbursed, but a cost accounting was not sent to the Abrahams until at least 1996. *Id*. Many of the Agency's reimbursed costs are included in complainant's exhibits 15 through 18. However, at the Board's hearing, Hamilton, the project manager, was not able to determine the People's unreimbursed expenses based on the exhibits. Tr. at 170. Furthermore, the exhibits did not detail what the payments represented. Tr. at 171. Hamilton indicated that other documentation was necessary to determine what the payments represented. *Id*.

The Abrahams presented Agency invoice vouchers at the hearing, which showed other costs at the Site. Specifically, exhibit 13 showed the rental of booms to stop pollution of the creek. Abr. Exh. 13. The voucher showed that the booms were rented for 21 days at $70 a day for a total of $1,470. *Id*. Exhibit 14 showed rental of booms for another 55 days at $70 a day for a total of $3,850. Abr. Exh. 14. Exhibits 13 and 14 also showed that portions of the boom rental were double-billed. Tr. at 185. The vouchers in the Abrahams exhibits 13 and 14 provided supporting material providing line-item detail of expenditures. Colantino testified that he could only provide an educated guess that all the expenditures on vouchers related to the Site showed payment for work or material provided at the Site. Tr. at 188.

The record indicates that no mitigation or remediation work has been completed at the Site since 1996. The Agency has not issued a No Further Remediation letter to any respondent.

POST-HEARING MOTIONS

At the Board's hearing, Hearing Officer Bradley Halloran initially denied admission into evidence of complainant's exhibits 15 through 18. Tr. at 158. They were allowed only as an offer of proof. However, the issue was revisited and Hearing Officer Halloran determined that the exhibits should be admitted into evidence except for the first page of exhibit 15. Tr. at 168. Specifically, Hearing Officer Halloran ruled that the documents in the exhibits were kept in the regular course of business and any deficiency went to the weight the evidence was entitled rather than admissibility. Tr. at 197.

State Oil and the Anests filed a post-hearing objection, as did the Abrahams and Millstream, arguing that complainant's exhibits 16 through 18 should not have been admitted into evidence. Anest Obj. at 2; Abr. Obj. at 2. Furthermore, the respondents objected to certain testimony given by Hamilton. Anest Obj. at 5; Abr. Obj. at 13.

Objections to Exhibits 16 through 18.

When moving for admission of the exhibits, the People did not dispute that the documents contained in the exhibits were hearsay but argued that they were properly admissible under the business record exception to the hearsay rule. Tr. at 158-63. The respondents contend that the People failed to provide the necessary foundation for the admission of exhibits 16 through 18. Anest Obj. at 2-4; Abr. Obj. at 4. In addition, the respondents argue that the exhibits are irrelevant. Anest Obj. at 4; Abr. Obj. at 4. Finally, the respondents argue that the exhibits are double hearsay because the documents were based on other documents that were not

offered into evidence. Abr. Obj. at 8-12. The Board finds that the hearing officer properly admitted exhibits 16 through 18 into evidence.

The "business record" exception to the hearsay rule is codified in the Board's rules. Section 101.626(e) provides:

> Admission of Business Records. A writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event. To be admissible, the writing or record will have been made in the regular course of business, provided it was the regular course of business to make the memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be admitted to affect the weight of the evidence, but will not affect admissibility. 35 Ill. Adm. Code 101.626(e).

The Board's business record exception to the hearsay rule requires the party tendering the record to satisfy the foundation requirement of demonstrating that the record was made in the regular course of business. A sufficient foundation for admitting records may be established through testimony of the custodian of records or another person familiar with the business and its mode of operation. *See* In Estate of Savage, 259 Ill. App. 3d 328, 333, 631 N.E.2d 797, 801 (4th Dist. 1994).

Colantino provided testimony about the documents in exhibits 15. The parties later stipulated that the testimony Colantino provided for exhibit 15 would be "essentially the same" for exhibits 16, 17, and 18. Tr. at 105-06. Colantino's testimony was as follows:

> Q: Mr. Colantino, I'm going to show you a document that's been marked as Complainant's Exhibit No. 15 for identification and ask you to take a look at that if you would.
>
> A: I have.
>
> Q: What is this document?
>
> A: This is a State of Illinois travel voucher.
>
> Q: And was this travel voucher prepared by personal knowledge or from the information – I'm sorry, completed by a person with knowledge or from information transmitted by a person with knowledge of the information, acts or events appearing on it?
>
> A: Yes.
>
> Q: And were they prepared at or near the time of the events occurring on it?

A: Can you restate?

Q: Sure. Were these documents prepared at or near the time of the act or events appearing on them?

A: Yes.

Q: And is it the regular practice of the Illinois EPA to make such records?

A: Yes.

Q: And were these records kept in the regular course of IEPA's business activities?

A: Yes. Tr. at 96-97.

Colantino's testimony provides the requisite foundation to establish that exhibits 16 through 18 were business records. Colantino specifically stated that the records were made in the regular course of the Agency's business and were completed by a person with knowledge of the information appearing on it. Consequently, the respondents' objection to lack of foundation is without merit.

The respondents argue next that the exhibits should not have been admitted into evidence because they were irrelevant. Specifically, the respondents argue that documents within the exhibits were incorrectly admitted into evidence because the documents were not approved by a receiving officer, there was no evidence that the amounts on the documents were ever paid (Anest Obj. at 4-5), and Colantino was not even sure what amounts were unreimbursed expenses (Abr. Obj. at 12). The Board's business record exception clearly states that once the foundation is established for the record, "[a]ll other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be admitted to affect the weight of the evidence, but will not affect admissibility." 35 Ill. Adm. Code 101.626(e). Consequently, the circumstances and argument the respondents raise do not affect the admissibility of exhibits 16 through 18, but rather, go to the weight the evidence is entitled.

The respondents also argue that exhibits 16 through 18 should not have been admitted into evidence because the documents were double hearsay and the People did not provide an exception to each level of hearsay. Abr. Obj. at 8-12. Even if respondent's characterization of the letter as "double hearsay" is correct, the Board finds their argument unpersuasive. Respondents do not cite any authority for the proposition that "double hearsay" falls outside the ambit of the Board's business record rule, and we find nothing in the rule that disqualifies what respondents categorize as "double hearsay." *See, e.g.*, Amos v. Norfolk & Western Ry. Co., 191 Ill. App. 3d 637, 646, 548 N.E.2d 96, 102 (5th Dist. 1989) (holding that evidence admitted under Supreme Court Rule 236 for admission of business records was not disqualified by the respondent's double hearsay argument). Furthermore, in an analogous circumstance, the business record exception to the hearsay rule stated in Supreme Court Rule 236 expressly

provides that lack of personal knowledge by the maker may affect the weight of the evidence but not its admissibility. Amos, 191 Ill. App. 3d at 646, 548 N.E.2d at 102.

Hamilton's Testimony.

Hamilton testified that he was the Agency project manager at the Site since 1996. Tr. at 124. However, Hamilton indicated that he had not been to the Site and that his knowledge of the Site derived from the Agency files. Tr. at 123-24. Hamilton did not bring the Agency files to the hearing. Tr. at 156.

The respondents objected to Hamilton's testimony because, in part, he failed to produce the business records his testimony summarized. Anest Obj. at 8. The Board previously struck testimony Hamilton provided in an affidavit. People v. State Oil Co., PCB 97-103, slip op. at 8 (Nov. 19, 1998). In that order, we stated that while records may be admissible under an exception to the hearsay rule, Hamilton's recapitulation of the Agency file was not admissible. People v. State Oil Co., PCB 97-103, slip op. at 8 (Nov. 19, 1998).

In certain circumstances, testimony summarizing records is permissible. According to the Illinois Evidence Manual, "where the original writings are numerous and related and the fact to be proved is the result of an examination of the collection of writings, the originals need not be produced but their collective recitals may be proven by the testimony of a competent person who has examined them if the fact testified to can be ascertained by calculation." Spencer A. Gard, *Illinois Evidence Manual* Rule 6:09, at 240 (2d ed. 1979). It is generally required that the records themselves be made available to the adverse party for use in cross-examination. *See* Murray v. Kleen Leen, Inc., 41 Ill. App. 3d 436, 443, 354 N.E.2d 415, 421 (5th Dist. 1976).

In this instance, Hamilton's testimony on direct examination was limited. Hamilton testified about what additional work needed to be performed to characterize the Site (Tr. at 128) and he testified that he was not aware of anyone from the Agency telling the Abrahams that the Agency was not going to seek reimbursement of outstanding clean-up costs at the Site (Tr. at 131). Although Hamilton did not provide the Agency files that he relied upon to determine what further action was necessary at the Site, the respondents' cross-examination was not unfairly prejudiced. In fact, the respondents were allowed considerable leeway during cross-examination. *See* Tr. at 137 (People's objection overruled); Tr. at 145 (People's objection overruled).

Furthermore, Hamilton's testimony was not hearsay. The written testimony in Hamilton's affidavit, which the Board struck in its prior order, was a written recitation of documents in the Agency file. Consequently, the statements amounted to hearsay and the Board excluded those statements. In this instance, Hamilton's testimony is not a recitation of Agency documents but his opinion as project manager of the Site. The rule against hearsay is inapplicable in this circumstance. The Board finds that the hearing officer's ruling was not in error.

DISCUSSION

The Board now turns to issues emanating from the complaint and the cross-complaint, which remain to be resolved. In order, the Board will discuss the following: (1) cost recovery against the Abrahams and Millstream under count II of the complaint; (2) the proper remedies for the respondents' violation of Section 12(a) of the Act; and (3) the merits of the cross-complaint.

Cost Recovery Against Abrahams and Millstream

Count II of the People's complaint seeks cost recovery against the Abrahams and Millstream. Section 57.12(a) of the Act indicates that the owner or operator of an underground storage tank shall be liable for all costs of investigation, preventive action, corrective action and enforcement action incurred by the State of Illinois resulting from an underground storage tank. 415 ILCS 5/57.12(a) (2002).

The People allege that the Abrahams are the owners of the Site and Millstream is the operator of the Site. The Abrahams and Millstream do not contest that allegation, but they argue that the People failed to satisfy their burden of proof to establish what costs the Abrahams and Millstream must reimburse the Agency. Abr. Br. at 27-28. Furthermore, the Abrahams and Millstream contend that cost recovery should be barred in this instance according to the equitable doctrine of laches. *Id*. at 28-31.

Relying on the testimony of Colantino and complainant's exhibits 15 through 18, the People contend that the Abrahams and Millstream are liable for $98,616.04 in costs. P. Br. at 11-13. The Abrahams and Millstream contend that the People's calculation of costs is not reliable.

During the Board's hearing, the following cross-examination transpired:

Q: Mr. Colantino, I've handed you Complainant's Exhibits 16, 17, and 18. Tell me how much money is not reimbursed for this Site from those documents.

A: Could you state your question again? I'm sorry.

Q: Tell me how much unreimbursed expenses have been incurred by the State of Illinois with respect to this site based solely upon the documents that you have in your hand, 16, 17 and 18?

A: I would have no way of knowing. Tr. at 169-70.

Although this dialogue indicates that Colantino was unable to calculate the total costs that the State of Illinois has not been reimbursed for Agency action at the Site, this does not amount to a complete failure to provide proof of costs as the Abrahams and Millstream argue. The exhibits are properly in the record, and the Board's ruling must be based on that evidence.

The People arrived at the $98,616.04 figure by adding the total or subtotal of costs listed on 29 different vouchers contained within complainant's exhibits 15 through 18. The People did not ask for the costs listed on all of the travel vouchers and invoice vouchers included in those exhibits. Furthermore, the People did not provide a rationale for selecting certain travel vouchers and invoice vouchers for reimbursement but not others.[3] Regardless, the Board will limit its review to those travel vouchers and invoice vouchers listed in the People's brief.

The Board finds that certain invoice vouchers the People listed in their brief are unreliable. The People listed several invoice vouchers contained in exhibits 16, 17, and 18 in which the itemized costs do not mathematically relate to the requested cost reimbursement. Specifically, the Board rejects the requested reimbursement corresponding to bates stamped invoice voucher pages 276, 279, and 283 of exhibit 16; bates stamped invoice voucher pages 315, 319, 321, 323, 325, 327, 332, 334, and 387 of exhibit 17; and bates stamped invoice voucher pages 337, 342, 346, 348, 352, and 353 of exhibit 18. On all of these invoice vouchers, specific costs are listed and a total cost is listed on the voucher. However, a handwritten subtotal also appears. The People have requested the subtotal amount on those vouchers. However, the subtotal amount does not correspond to any of the costs listed on those vouchers. The People presented neither testimony at the Board's hearing, nor any argument in their brief, attempting to explain the origin of these subtotal amounts. Consequently, the Board finds that those specific vouchers are unreliable.

The Board finds that the remaining travel vouchers and invoice vouchers the People listed in their brief are reliable.[4] The unreimbursed costs listed on these vouchers amount to $86, 652.50.[5] All of the invoice vouchers reference the Site within the description of the services rendered section and the travel vouchers reference the Site within the designated purpose of travel section. The Board finds that the People are entitled to the reimbursement of $86,652.50 because the Abrahams owned the Site and Millstream operated at the Site at the time the costs were incurred; and the costs were incurred as a result of investigation, preventive action, corrective action and enforcement action relating to the leaking underground storage tanks at the Site.

The Abrahams and Millstream contend that they should not be held liable for certain costs accumulated by the Agency at the Site. Specifically, they argue that requiring them to reimburse thousands of dollars for rental of a boom is unfair because the boom could have been

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[3] The People's complaint (Comp.) indicates the Agency has incurred costs of approximately $156,647.77. Comp. at 10.

[4] The remaining eleven vouchers include bates stamped vouchers on pages 361 and 364 in exhibit 15, bates stamped vouchers on pages 270, 272, 273, and 289 in exhibit 16, and bates stamped vouchers on pages 310, 312, 329, 382, and 385 in exhibit 17.

[5] The travel voucher bates stamped page 364 in exhibit 15 lists total costs of $95.00. The People ask for $65 in their brief. Although this discrepancy may by a typographical error, the Board awards only the $65 the People requested in their brief.

purchased for a few hundred dollars. Abr. Reply at 14. The Board finds that the Abrahams and Millstream are not in a position to dictate how the Agency should have contracted for performance of clean-up work at the Site. The Abrahams and Millstream had an opportunity to direct the clean-up themselves, but they failed to do so. The Board will not review the Agency's clean-up procedures and costs absent expert testimony suggesting flawed science or engineering. The Board finds that the Agency's costs were reasonable.

Next, the Abrahams and Millstream argue that certain cost claims should be forfeited because of double billing. Abr. Br. at 14, 16. In the eleven vouchers that the Board finds justify reimbursement, the Board locates no instance of double billing. Consequently, the Board finds that the respondents' argument is meritless.

Finally, the Abrahams and Millstream contend that the Board should not order them to pay the Agency's unreimbursed costs because such an order would contravene the equitable principle of laches. The Board disagrees. Ordinary limitations statutes and principles of laches and estoppel do not apply to public bodies except under compelling circumstances. *See* Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-48, 220 N.E.2d 415, 425-26 (1966). The Supreme Court of Illinois has repeatedly held:

> While situations may arise which justify invoking the doctrine of estoppel even against the State when acting in its governmental capacity, we have always adhered to the rule that mere nonaction of governmental officers is not sufficient to work an estoppel and that before the doctrine can be invoked against the State or a municipality there must have been some positive acts by the officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had previously done. In applying the doctrine of estoppel, the courts will not decide the question by mere lapse of time but by all the circumstances of the case, and will hold the public estopped or not as right or justice may require. The doctrine is invoked only to prevent fraud and injustice. Hickey, 35 Ill. 2d at 448-49, 220 N.E.2d at 426.

In Hickey, the State of Illinois had failed to claim an interest in a parcel of land for over 50 years. Hickey, 35 Ill. 2d at 448-49, 220 N.E.2d at 426. The court held that by acting as though competing entities owned the land in fee simple for so many years, the State forfeited its interest in the land. In this instance, the Agency did not seek reimbursement for costs associated with the clean-up of the Site for only five years. The delay in this case does not remotely resemble the delay in Hickey. Nevertheless, the Abrahams contend that an Agency employee told them that they would not be responsible for action at the Site. However, a corrective action notice sent to the respondents in 1990 informed the Abrahams that they would be responsible for reimbursing the Agency's costs. *See* Compl. Exh. 6. The Board finds that Agency's conduct does not reveal compelling circumstances that demand the invocation of laches.

Remedy for Violation of Section 12(a) of the Act

In the Board's April 4, 2002 order in this matter, the Board granted summary judgment to the People against all respondents on count I of the complaint. People v. State Oil Co., PCB 97-103, slip op. at 10-13, 16-18 (Apr. 4, 2002). Specifically, the Board found that the respondents violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) 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. People v. State Oil Co., PCB 97-103, slip op. at 13, 17 (Apr. 4, 2002). Subsequently, the Board held a hearing and testimony was given which, in part, related to a proper remedy for the respondents' violations. The Board now discusses whether a civil penalty should be levied against the respondents' and whether the People are entitled to reimbursement of their costs and attorney fees.

Civil Penalty

In determining whether civil penalty is appropriate, the Board considers all facts and circumstances of record that bear upon the reasonableness of the respondents' violations of the Act. 415 ILCS 5/33(c) (2002).

Section 33(c). Section 33(c) lists five factors that the Board considers in making orders and determinations. The Board applies each factor to the facts of this case. First, it was discovered that gasoline was leaking from the Site into Boone Creek in late 1983 or early 1984. Agency inspections showed that gasoline continued to seep into the creek in 1987 and 1989. The Agency conducted mitigation and remediation activities between 1989 and 1991 to address the gasoline pollution. A recurring discharge of gasoline into a creek over a period of years is not reasonable and suggests that a civil penalty is appropriate. *See* 415 ILCS 5/33(c)(i) (2002). Second, gas stations generally have a social and economic value, but that value is degraded when the gas station acts as a source of water pollution. *See* 415 ILCS 5/33(c)(ii) (2002). Third, gasoline pollution of a creek over a period of years is not suitable to the area. *See* ILCS 5/33(c)(iii) (2002). Fourth, the record shows that booms were placed in the creek to absorb gasoline, that trench and wells were dug to control gasoline seepage, and that interceptors and sumps were installed to collect the discharge. Thus, it was technically practicable and economically reasonable to reduce and eliminate gasoline pollution from a leaking underground storage tank. *See* ILCS 5/33(c)(iv) (2002). Finally, there is no evidence of subsequent compliance since 1984 at the Site. *See* ILCS 5/33(c)(v) (2002).

The Board finds that all of the section 33(c) factors weigh in favor of a civil penalty against State Oil and the Anests as well as the Abrahams and Millstream for their violation of Section 12(a) of the Act. However, there are mitigating factors for both sets of respondents suggesting that a lower penalty amount is proper. To determine the proper penalty for the respondents, the Board considers factors listed in Section 42(h) of the Act.

Section 42(h). In determining the appropriate civil penalty, the Board considers any matters of record in mitigation or aggravation of penalty. 415 ILCS 42(h) (2002). The Board's determination is aided by the five factors listed in Section 42(h) of the Act. Because different considerations arise with regard to the appropriate civil penalty for State Oil and the Anests

compared to the Abrahams and Millstream, we will perform separate section 42(h) analyses for the two sets of respondents.

State Oil and the Anests.

Duration and Gravity of Violations. The Anests contend that the duration of the violation was only two days. Anest Br. at 3. The Anests' contention is inaccurate. During the Anests' ownership of the property, gasoline seepage was detected in late 1983 or early 1984 (Abr. Exh. 16 at 6) and then again in December of 1984 (*Id*. at 8). There is no evidence in the record that the impacted soil and offending underground storage tanks were immediately removed or fixed. However, the Anests stated that they are unaware of any gasoline leaking into Boone Creek after April 1985. Abr. Exh. 16 at 12. Furthermore, gasoline was not observed leaking into the creek in May 1985.

The gravity of the violations in this case is severe since gasoline was actually observed seeping into Boone Creek. Gasoline pollution into the creek inhibits general use of the public waterway resource, which the Board finds aggravates the appropriate civil penalty.

Diligence in Attempting to Comply. In support of their arguments that they should not be assessed a civil penalty, State Oil and the Anests cite two pre-Section 42(h) cases: Southern Asphalt Co. v. PCB, 60 Ill. 2d 204, 326 N.E.2d 406 (1975), and Park Crematory, Inc., v. PCB, 264 Ill. App. 3d 498, 637 N.E.2d 520 (1st Dist. 1994). Southern Asphalt involved two consolidated Board cases in which the Board assessed a civil penalty. Both penalties were overturned because the civil penalty was not required as an aid in the enforcement of the Act and amounted to an arbitrary abuse of the Board's discretion. Southern Asphalt, 60 Ill.2d at 212, 217, 326 N.E.2d at 410, 413. In the first instance, Southern Asphalt ceased operation within three months of discovering that a supplier had failed to procure a permit. Southern Asphalt, 60 Ill.2d at 212, 326 N.E.2d at 410. In the second instance, a company called Airtex ceased violating the Act one day after being notified of the violation by the Agency. Southern Asphalt, 60 Ill.2d at 217, 326 N.E.2d at 413. The court found that Southern Asphalt and Airtex both made good-faith efforts to comply with the Act and took steps to remedy the violation.

With regard to State Oil and the Anests, these respondents made limited efforts to comply with the Act. After a gasoline leak was discovered in late 1983 or early 1984, State Oil and the Anests relined tanks that had failed an air pressure test (Abr. Exh. 18 at 3) and hired a company to contain the gasoline discharge. When a leak was again discovered in December 1984, the Anests were subsequently issued a notice by the McHenry County Health Department to begin corrective measures to stop the gasoline from seeping into Boone Creek. Abr. Exh. 16 at 13.

There is no evidence in the record that any corrective measures were taken that stopped the gasoline pollution between December 1984 and May 1985. Nevertheless, an inspection in May 1985 did not reveal gasoline pollution in the creek. Regardless, this is not a case where a violator had taken all the necessary steps to achieve compliance after a violation of the Act. *See* Park Crematory, 264 Ill. App. 3d at 506-7, 637 N.E.2d at 526. The Anests admitted that gasoline continued to seep from the soil into the creek until about April 1985. The Anests have not presented any evidence that they removed any contaminated soil while they owned the property.

Although State Oil and the Anests did make limited efforts to comply with the Act, this case differs from the circumstances in Southern Asphalt because State Oil and the Anests did not cease operation immediately after a violation was recognized. In fact, State Oil continued to operate for another eight months after receipt of the McHenry County Health Department violation notice.

According to the Southern Asphalt court, the Act's provision for civil penalties was to "provide a method to aid the enforcement of the Act and that the punitive considerations were secondary." Southern Asphalt, 60 Ill.2d at 207, 326 N.E.2d at 408. Levying a civil penalty against State Oil and the Anests in this case aids in the enforcement of the Act because it informs violators that they may not delay efforts to comply with the Act while pursuing sale of the offending property. Thus, a civil penalty will have a prospective deterrent effect on current and future Act violators. Consequently, the Board finds that a civil penalty serves the purposes of the Act in this instance.

Economic Benefit from Delay in Compliance. By failing to address the gasoline pollution observed between December 1984 and April 1985, the Anests were able to delay costs relating to mitigation and remediation of the Site. However, subsequent to the Anests's sale of the property to the Abrahams, the Anests did pay for mitigation and remediation work periodically performed from December 1985 to January 1987. Thereafter, the Abrahams and the Agency contracted and paid for mitigation and remediation services. Because of state court litigation, the Anests ultimately paid over $128,000 in costs the Abrahams incurred cleaning the Site. Although the Anests were able to initially delay payment of mitigation and remediation services costs, the Anests were responsible for actions they undertook at the Site after the sale of the Site as well as those actions undertaken by the Abrahams. Consequently, it is unclear that the Anests's initial delay economically benefited them. The Board finds that this factor does not mitigate or aggravate a civil penalty for the Anests.

Penalty Amount that will Deter Further Violations and Aid in Enhancing Voluntary Compliance. State Oil and the Anests argue that a civil penalty should not be assessed against them because they have not been in control or possession of the property since 1985. State Oil and the Anests also contend that a penalty should not be imposed because there was a 12-year delay after the pollution was discovered until the State pursued litigation. Anest Br. at 2. The Board finds that to forego assessing a civil penalty in this circumstance would make a mockery of Section 12(a) of the Act as well as the concepts of deterrence and the enhancement of voluntary compliance. It is immaterial that State Oil and the Anests have not been in control or possession of the property since 1985. It is not disputed that these respondents were in control or possession of the property when gasoline pollution was observed flowing into Boone Creek in early 1985.

However, the People do not provide a baseline for what penalty amount will deter further violations and aid in enhancing voluntary compliance. The People simply argue, "only a high enough penalty amount will have a real deterrent effect on a violator like Respondents." P. Br. at 6. Consequently, this factor does not aid significantly in the Board's analysis. This factor does not serve to mitigate or aggravate the proper civil penalty against State Oil and the Anests.

Previously Adjudicated Violations. The People have not presented any evidence of a previously adjudicated violation. Consequently, this factor can only serve to mitigate State Oil's and the Anests' civil penalty.

The Board Finding on Appropriate Civil Penalty. The Board is unpersuaded by State Oil's and the Anests's arguments that they are undeserving of a civil penalty. The People request a civil penalty against State Oil and the Anests in the amount of $36,000. The People allege that the maximum violation in this circumstance would be $265,000 against each respondent.[6] P. Br. at 6-7. The People arrived at their proposed penalty by adding the initial $10,000 penalty for violation of Section 12(a) plus a $1,000 penalty for two observed violations during Agency inspections. The People then multiplied that $12,000 penalty by the three respondents to arrive at the $36,000 penalty.

Although State Oil and the Anests should have engaged in activity to mitigate or remediate the Site after receiving the notice of violation from McHenry County, the respondents received mixed signals when the Agency failed to instruct the respondents to take any action. However, the Agency's inaction does not absolve State Oil and the Anests of their responsibilities and duties according to the Act. The Board finds that the gravity of the violation in this instance aggravates the civil penalty, as does the lack of diligence in addressing the polluted soil and water between December 5, 1984 and August 15, 1985. However, the lack of adjudicated violations mitigates the civil penalty amount.

The People urge the Board to assess a $12,000 penalty against each of the three Anest respondents. The Anests argue that there is no authority in the Act to arrive at a penalty amount and then multiply it by the number of respondents. Anest Reply at 2. The Board finds that the People's multiplication of the $12,000 penalty by the number of respondents arbitrarily inflates the penalty. The Board rejects the People's proposed method of penalty calculation based on the number or respondents. Furthermore, the Board finds that, after balancing the Section 42(h) factors a $20,000 penalty is appropriate and furthers the purpose of the Act. In conclusion, the Board finds that the Anest respondents must pay a civil penalty of $20,000.

The Abrahams and Millstream. Initially, the Abrahams and Millstream contend that civil penalties should not be assessed against them because they were not responsible for the initial release of gasoline in 1984. Abr. Br. at 21. According to the Abrahams and Millsteam, they should not be penalized for the Anests' failure to resolve the gasoline release and resulting pollution.

This argument relates directly to the cause of action the Abrahams pursued in state court. To their credit, the Abrahams were successful in recovering from the Anests the cost of clean-up

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[6] The People arrived at the maximum penalty amount by adding an initial penalty of $10,00 for violation of Section 12(a) and a $1,000 per day penalty for the period of December 5, 1984 to August 15, 1985, the date of the Anests' sale of the property. The Board notes that the statutory penalties were amended in 1990 such that the initial penalty is $50,000 for violation of Section 12(a) and additional violations are $10,000 per day. *See* P.A. 86-1014, § 1, eff. July 1, 1990. The violations the People allege transpired before July 1, 1990.

the Abrahams performed at the Site. However, the fact that the Abrahams and Millstream did not initially cause the pollution at the site is immaterial with regard to their responsibilities and duties as owners and operators of the property. These responsibilities and duties have continued since 1985 regardless of who was actually performing remedial work at the Site. Consequently, the Board is not persuaded by the Abrahams' and Millstream's argument that they should not incur a civil penalty because they did not originally cause the release of gasoline at the Site. Thus, the Board will consider the Section 42(h) factors.

Duration and Gravity of Violations. The record indicates that gasoline periodically seeped into Boone Creek from 1985, when the Abrahams purchased the Site, until at least 1989, when the Agency began its remediation work. As with the State Oil and the Anests, the gravity of the violations in this case is severe since gasoline was actually observed seeping into Boone Creek. Gasoline pollution into the creek inhibits general use of the public waterway resource, which the Board finds aggravates the appropriate civil penalty. Furthermore, the gravity of the violation is readily discerned by Agency inspector Klopke's January 28, 1987 observation that there was a significant danger of explosion at the Site if an ignition sources was present.

Diligence in Attempting to Comply. Next, the Abrahams and Millstream contend that they attempted to comply with the Act by performing tank checks, containing discharge, and establishing interceptions to prevent gasoline seepage. *See* Anest Exh. 10. In February 1986, after the Abrahams took ownership of the Site, the Anests, State Oil, and S&S Petroleum placed booms in the creek to absorb released gasoline. Abr. Exh. 16 at 14. However, in 1987, the Anests, State Oil, and S&S Petroleum ceased activity at the Site. The Abrahams then contracted with Groundwater Technologies for the performance of studies and certain remedial actions. In 1989, the Abrahams failed to install a recovery trench and interceptor recovery sumps at the Site. Tr. at 73. Consequently, the Agency performed the trench work. At this time, the Abrahams tested the underground tanks and made necessary repairs. Abr. Exh. 18 at 10. The Abrahams then submitted a remediation plan to the Agency in 1992, but the Agency failed to Act for five years.

Although the Abrahams and Millstream did engage in mitigation activities during their ownership of the Site, the Abrahams failed to install the recovery trench and interceptor recovery sumps. Furthermore, the Agency, rather than the Abrahams and Millstream, removed a large amount of contaminated soil from the Site. While the Agency was conducting mitigation and remediation activities at the Site from 1989 to 1991, the Abrahams were conducting their own investigation of the tanks. Indeed, they repaired tanks that failed pressure tests. However, the Abrahams have presented no cogent reasoning to justify their failure to perform the work that the Agency completed. The failure to perform that work shows a lack of complete diligence to comply with the Act from 1989 to 1991.

The Board does not fault the Abrahams and Millstream for failing to remediate the Site between 1992 and 1997 while their LUST application stagnated with the Agency. As the Abrahams argue, it would be unconscionable to penalize them for the Agency's unreasonable delay. Abr. Br. at 25. Overall, this factor weighs slightly in favor of civil penalty aggravation.

Economic Benefit from Delay in Compliance. The only economic benefit that the Abrahams and Millstream may have reaped from their delay in compliance – or more accurately, their decision not to perform trench work or to remove soil – from 1989 to 1991 is the interest that money collected over the last decade. This interim opinion and order grants the Agency reimbursement of certain remediation costs, but those costs do not include accumulated interest. Consequently, this factor weighs slightly in favor of civil penalty aggravation.

Penalty Amount that will Deter Further Violations and Aid in Enhancing Voluntary Compliance. The Abrahams and Millstream contend that no penalty amount will deter further violations or aid in enhancing voluntary compliance. They claim that they were entangled in the Site remediation through fraud and were then blocked from completing that remediation by an unresponsive Agency. Abr. Br. at 26. However, the Board again notes that the Abrahams and Millstream forced the Agency to undertake remediation action by failing to conduct the trench work and soil removal from 1989 to 1991. As with State Oil and the Anests, to forego assessing a civil penalty in this circumstance would make a mockery of Section 12(a) of the Act as well as the concepts of deterrence and the enhancement of voluntary compliance.

However, the People again fail to provide a baseline for what penalty amount will deter further violations and aid in enhancing voluntary compliance. As with State Oil and the Anests, the People simply argue, "only a high enough penalty amount will have a real deterrent effect on a violator like Respondents." P. Br. at 6. Consequently, this factor does not aid significantly in the Board's analysis. This factor does not serve to mitigate or aggravate the proper civil penalty against the Abrahams and Millstream.

Previously Adjudicated Violations. The People have not presented any evidence of a previously adjudicated violation. Consequently, this factor can only serve to mitigate the Abrahams' and Millstream's civil penalty.

The Board Finding on Appropriate Civil Penalty. The Board is unpersuaded by the Abrahams' and Millstream's arguments that they are undeserving of a civil penalty. The People request a civil penalty against the Abrahams and Millstream in the amount of $42,000. The People allege that the maximum violation in this circumstance would be $1,277,000 against each respondent.[7] P. Br. at 6-7. The People arrived at the requested amount by adding the initial $10,000 penalty for violation of Section 12(a) plus a $1,000 penalty for observed violations at the Site during the Abrahams' ownership. The People then multiplied the proposed $14,000 penalty by the three respondents to arrive at a total $42,000 penalty. This method of calculation mirrors the method that the People used to arrive at the proposed civil penalty for the Anest respondents.

The Board finds that the duration and gravity of the violation in this instance aggravates the civil penalty as does the lack of diligence shown by the Abrahams' and Millstream's failure to conduct trench work and soil removal between 1989 and 1991. The Act does not indicate that

[7] The People arrived at the maximum penalty amount by adding an initial penalty of $10,000 for violation of Section 12(a) and a $1,000 per day penalty for the period of August 15, 1985 to February 2, 1989.

a responsible owner or operator can pick and choose which mitigation or remediation activities to conduct. However, the Board is cognizant that the Abrahams and Millstream did engage in some form of responsible mitigation and remediation work throughout their ownership of the Site. Furthermore, the lack of adjudicated violations mitigates the civil penalty.

Similar to the People's proposed penalty against the individual Anest respondents, the People propose a $14,000 penalty against each of the three Abraham respondents. As with the Anest respondents, the Board finds that the People's multiplication of the proposed $14,000 penalty by the number of respondents arbitrarily inflates the penalty. The Board finds that, after balancing the Section 42(h) factors and other pertinent concerns, a $20,000 penalty is appropriate and furthers the purpose of the Act. In conclusion, the Board finds that the Abraham respondents must pay a civil penalty of $20,000.

Future Remediation

The complaint seeks an order requiring the respondents to "pump out and dispose of the petroleum in the recovery trenches, deploy booms or absorbent pads to collect petroleum floating on Boone Creek, conduct a site investigation to determine the scope of the contamination at the Site and submit along term corrective action plan to address soil, groundwater and surface water contamination at and around the Site." Comp. at 8. However, the People's post-hearing brief does not make a similar prayer for relief. The People's post-hearing reply brief merely requests "an investigation of the Site." P. Reply at 7.

The Abrahams and Millstream argue that the complainant has not shown that there is petroleum that needs to be pumped out of recovery trenches or that booms need to be deployed on Boone Creek to absorb floating petroleum. The Board agrees. However, the record does not contain any evidence that the Site has been remediated to any standard. The Agency has not visited the Site since 1996 and it is unclear whether any remediation work has been performed by anyone at theSite since 1992. The circumstantial evidence suggests that the Site is still contaminated from the gasoline leaks from the underground storage tanks. Consequently, the Board finds that the respondents must perform any necessary cleanup of the Site according to the LUST program and must diligently pursue the acquisition of a No Further Remediation letter from the Agency.

Costs/Attorney Fees

Section 42(f) of the Act provides that the Board may award costs and reasonable attorney fees to the Attorney General if the respondent "has committed a willful, knowing or repeated violation of the Act." 415 ILCS 5/42(f) (2002). The People allege that the Abrahams willfully and knowingly violated the Act by continually ignoring the Agency and failing to comply with a 1990 corrective action notice.

The Board finds that the People are not entitled to costs and attorney fees. There is insufficient evidence in the record to show that the Abrahams willfully and knowingly ignored the 1990 corrective action notice. There is evidence that the Abrahams conducted testing of their underground tanks and repaired the flawed tanks sometime between 1989 and 1991. There is

also evidence that the Abrahams contracted with Groundwater Technologies to craft a remediation plan. That plan was submitted to the Agency in 1992 in the form of a LUST fund application. However, the Agency failed to respond to the Abrahams' application for five years. The People have not justified the delay. Furthermore, this unjustified delay does not support the People's contention that they are entitled to costs and attorney fees.

The Abrahams' and Millstream's Cross-complaint

Because the Board has concluded that the People are entitled to relief against the Abrahams and Millstream, the Board must now consider the import of the cross-complaint. The cross-complaint has three counts alleging that the Anests violated various sections of the Act. As a remedy, the cross-complaint seeks the transfer of the Abrahams' and Millstream's responsibility to pay $86,652.50 in costs and $42,000 in civil penalties to State Oil and the Anests. However, the Board has previously struck the Abrahams' and Millstream's prayer for relief of payment of their civil penalties. People v. State Oil Co., PCB 97-103, slip op. at 8 (Apr. 4, 2002). Consequently, the Board must determine whether State Oil and the Anests must pay $86,652.50 in Agency costs for the Abrahams and Millstream and whether the Anests must conduct future remediation. We consider each of the cross-complaint's three counts in turn.

For each allegation, the Abrahams and Millstream have the burden of proof. 415 ILCS 5/31(e) (2002). If such proof is provided, the burden shall be on the Anests to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship. 415 ILCS 5/31(e) (2002).

Count I

The first count of the cross-complaint alleges that the Anests violated Section 21(a) of the Act (415 ILCS 5/21(a) (2002)). That section provides that no person shall "cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2002). "Open dumping" means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. 415 ILCS 5/3.24 (2002). "Refuse" means waste, which means "any garbage . . . or other discarded material, including solid, liquid . . . resulting from . . . commercial . . . activities." 415 ILCS 5/3.53 (2002).

As the Board previously determined in this case, ~~Federal courts have found that~~ once petroleum has leaked from underground storage tanks, it becomes a "waste." People v. State Oil Co., PCB 97-103, slip op. at 4 (Aug. 19, 1999); *see also* Universal Scrap Metals, Inc. v. Flexi-Van Leasing, Inc., PCB 99-149, slip op. at 7 (Apr. 5, 2001) (agreeing with the Board's decision in State Oil that leaked fuel from an underground storage tank is waste within the meaning of Section 21(a) of the Act); Agricultural Excess & Surplus Ins. v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091, 1095 (N.D. Ill. 1995) ("Leaked gasoline from an underground storage tank is no longer useful and is appropriately defined as discarded material or solid waste.") The Board reconfirms that the leaked petroleum in this case was waste.

The Anests allowed the waste to be consolidated on the Site when they failed to conduct any soil removal. Although the Anests tested the underground storage tanks and made repairs to one tank, the Anests did not address the removal of the waste from the Site. Consequently, the

waste was consolidated on the Site. Furthermore, the Anests do not attempt to contest that the Site did not fulfill the requirements of a sanitary landfill.

However, the Anests argue that they cannot be held to have been in violation of Section 21(a) because they were not in control or possession of the property until April 1984. The Board is not persuaded by the Anests' argument. In cases adjudicating alleged violations of related sections of the Act, appellate courts have found that an alleged violator must have been in control over the source of pollution in such a way as to have caused or allowed the pollution. *See* People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 794, 618 N.E.2d 1282, 1287 (5th Dist. 1993) (finding a violation of Section 12(a) of the Act); Phillips Petroleum Co. v. PCB, 72 Ill. App. 3d 217, 221, 390 N.E.2d 620, 623 (2nd Dist. 1979) (alleging violation of Section 9(a) of the Act). The record before the Board shows that the Anests were aware of the petroleum release found by the Agency inspector in December 1994. Compl. Exh. 1 at 3. The Agency incident control sheet shows that the Agency contacted the Anests and S&S and requested them to perform certain mitigation actions. *Id*. This evidence shows that the Anests knew of the pollution and allowed it to persist. Furthermore, the Board has previously determined that the Anests were in control of the Site. *See* People v. State Oil, PCB 97-103, slip op. at 12 (Apr. 4, 2002). As owners of the Site, the Anests had adequate nominal control of the Site to require them to respond to the open dumping of waste.

All of the elements of a violation of Section 21(a) have been satisfied and the Board finds that the Abrahams and Millstream have proven that the Anests violated Section 21(a) of the Act.

Count II

The second count of the cross-complaint alleges that the Anests violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2002)). That section provides that no person shall conduct any waste-storage, waste-treatment, or waste-disposal operation "in violation of any regulations or standards adopted by the Board under this Act." 415 ILCS 5/21(d)(2) (2002). The Abrahams and Millstream allege that the Anests failed to comply with Section 732.200 of the Board's regulations. This section provides that "owners and operators of underground storage tanks shall, in response to all confirmed releases of petroleum, comply with all applicable statutory and regulatory reporting and response requirements." 35 Ill. Adm. Code 732.200.

The Abrahams and Millstream argue that the Anests violated Section 732.200 of the Board's regulations by failing to comply with Agency orders and requests in 1984 requiring the submission of a "proposal for the cleanup [of the Site] after studies [are] conducted of the geology [and] hydrology of the area." Compl. Exh. 1 at 4. However, it appears from complainant's exhibit 1 that the Anests did submit the requested proposal on December 10, 1994, four days after the request was made. Compl. Exh. 1 at 4. Furthermore, Section 732.200 did not exist in 1984. The Board will not enforce section 732.200 retroactively. Consequently, the Board finds that the Abrahams and Millstream have not satisfied their burden of proof on count II.

Count IV

The final count of the cross-complaint alleges that the Anests violated section 12(d) and (f) of the Act (415 ILCS 5/12(d), (f) (2002)). Section 12(d) provides that no person shall "deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard." 415 ILCS 5/12(d) (2002). Section 12(f) provides that no person shall "cause, threaten or allow the discharge of any contaminant into the waters of the State without an NPDES [National Pollutant Discharge Elimination System] permit." 415 ILCS 5/12 (f) (2002).

The Board has already determined that the Anests violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)), specifically that the Anests caused or threatened to allow the discharge of a contaminant into the environment so as to cause or tend to cause water pollution in Illinois or so as to violate regulations or standards adopted by the Board. People v. State Oil, PCB 97-103, slip op. at 12 (Apr. 4, 2002). Furthermore, the Board finds that the Anests violated Section 12(d) of the Act by allowing gasoline to seep into the ground and enter Boone Creek, which amounts to depositing contaminants upon the land in such place and manner so as to create a water pollution hazard. Similarly, the Board finds that the Anests violated Section 12(f) of the Act by allowing the discharge of gasoline into Boone Creek without an NPDES permit.

Remedy

Under count I and count IV of the Abrahams' and Millstream's cross-complaint, the cross-complainants seek an order requiring the Anests to (1) pay any costs the Abrahams and Millstream must reimburse the Agency; (2) remediate any gasoline and waste oil contamination remaining at the Site; and (3) pay all costs of the proceeding. The Abrahams and Millstream have not presented any reasoning to support their third prayer for relief. The Board finds no reason to redistribute the Abrahams' and Millstream's costs of the proceeding to the Anests. Consequently, the Board will address only the first two relief requests.

Transfer of Reimbursement of the Agency's Remediation Costs from the Abrahams to the Anests. The Abrahams argue that the Anests are completely responsible for the pollution at the Site and that the Anests should be required to pay the Agency's remediation costs. In support of their argument seeking transfer of liability for the Agency's costs, the Abrahams rely on Section 58.9(a)(1) of the Act (415 ILCS 5/58.9(a)(1) (2002)). This section states that neither the Agency, the People, nor any person may bring an action pursuant to the Act seeking recovery of costs for remedial activity beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond that person's proportionate share of remedial costs. 415 ILCS 5/58.9(a)(1) (2002). The Abrahams and Millstream cannot rely on this section to recoup the costs of the Agency's remediation. As the Board stated in its April 4, 2002 order, the Site is explicitly excluded from proportionate share liability because the Site is subject to State underground storage tank laws. People v. State Oil, PCB 97-103, slip op. at 18 (Apr. 4, 2002); 415 ILCS 5/58.1(a)(2)(iii) (2002).

The Abrahams also contend that the considerations of equity and the principles of common law require that the Anests pay the Agency's remediation costs. However, the Anests argue that the parties' previous state court action is a *res judicata* bar from the relief the Abrahams seek.

For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there is an identity of cause of action; and (3) there is an identity of parties or their privies. River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290, 302, 703 N.E.2d 883, 889 (1998). *Res judicata* will not be applied where it would be fundamentally unfair to do so. Altair Corp. v. Grand Premier Trust & Investment, Inc., 318 Ill. App. 3d 57, 62-63, 742 N.E.2d 351, 356 (2000); Weisman v. Schiller, Ducanto & Fleck, 314 Ill. App. 3d 577, 581, 733 N.E.2d 818, 822 (2000).

The Board finds that the doctrine of *res judicata* does not apply in this case because there is not an identity of cause of action. In the parties' state court action, the Abrahams sued the Anests on a breach of contract claim and a fraud claim. SO Exh. 4. In this case, the Abrahams' cross-complaint alleges violations of the Environmental Protection Act. Thus, the cause of action is different, thus the state court cause of action does not act as a *res judicata* bar to the relief the Abrahams seek.

The Anests also argue that the Abrahams cannot rely on the doctrine of collateral estoppel to obtain relief. Collateral estoppel applies when a party, or someone in privity with a party, participates in two separate and consecutive cases arising on different causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction. Nowak v. St. Rita High School, 197 Ill. 2d 381, 389-90, 757 N.E.2d 471, 477 (2001). The adjudication of the fact or question in the first cause will, if properly presented, be conclusive of the same question in the later suit, but the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined and not as to other matters which *might* have been litigated and determined. Nowak, 197 Ill. 2d at 390, 757 N.E.2d at 477.

The minimum threshold requirements for the application of collateral estoppel are: (1) the issue decided in the prior adjudication is *identical* with the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. DuPage Forklift Service, Inc. v. Material Handling Service, Inc., 195 Ill. 2d 71, 77, 744 N.E.2d 845, 849 (2001); American Family Mutual Insurance Co. v. Savickas, 193 Ill. 2d 378, 387, 739 N.E.2d 445, 451 (2000). Application of the doctrine of collateral estoppel must be narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment. Kessinger v. Frefco, Inc., 173 Ill. 2d 447, 467, 672 N.E.2d 1149, 1158 (1996).

Collateral estoppel is an equitable doctrine. DuPage Forklift Service, 195 Ill. 2d at 77, 744 N.E.2d at 849. Even where the threshold elements of the doctrine are satisfied, collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped. Savickas, 193 Ill. 2d at 388, 739 N.E.2d at 451. In deciding whether the doctrine of collateral estoppel is applicable in a particular situation, a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case. In determining whether a party has had a full and fair opportunity to litigate an issue in a prior action, those elements

which comprise the practical realities of litigation must be examined. Talarico v. Dunlap, 177 Ill. 2d 185, 192, 685 N.E.2d 325, 328 (1997).

The foundational issue decided in the prior state adjudication was whether the Anests had to pay for the costs of remediation activities undertaken by the Abrahams at the Site between 1989 and 1992. The issue to be decided in the case before the Board is whether the Anests must pay for the costs of remediation activities undertaken by the Agency at the Site between 1989 and 1992. The issues in the two cases are not identical. Consequently, the equitable doctrine of collateral estoppel cannot apply in this case.

Although the doctrines of *res judicata* and collateral estoppel do not apply in this circumstance, the Act provides for the proper determination of liability in this circumstance. The standard of liability for liability for costs of investigation, preventive action, corrective action and enforcement action incurred by the State resulting from an underground storage tank under Section 57.12 of the Act is the same as the standard of liability under Section 22.2(f) of the Act. Section 22.2(f) of the Act provides for joint and several liability for current owners and operators of a Site where there is a release of pollutants as well as persons who owned or operated the Site at the time of the release. *See* 415 ILCS 22.2(f) (2002). Consequently, the Abrahams and Anests, who both violated Section 12(a) of the Act, are jointly liable for the Agency's costs.

The Abrahams contend the Anests must pay the Agency's remediation costs because the Anests caused the contamination at the property. The Board finds that the Abrahams have failed to prove by a preponderance of the evidence that there is a reasonable basis for division of liability. Although the appellate court affirmed a jury verdict that the Anests breached the warranty in the Articles of Agreement warranting that the underground tanks were in proper operating condition, the breach of contract claim does not control the apportionment of liability for a violation of the Act. Furthermore, this record does not show that the Anests were totally responsible for the release of gasoline at the Site.

At least two tanks failed an air pressure test in early 1984 during the Anests' ownership of the Site. Abr. Exh. 16 at 6. These faulty tanks directly contributed to the gasoline leak. Although these tanks were relined, another gas leak was discovered in December 1984. *Id*. at 8. It is not clear from the record whether this leak was a result of residual gasoline present in the soil from the initial leak or whether the December 1984 release was the result of another faulty tank. When the tanks were pressure tested again until 1989, the Abrahams discovered that five out of six of their underground storage tanks did not pass the test. Abr. Exh. 18 at 10. The Abrahams have not shown by a preponderance of the evidence that the Anests are to blame for all of the faulty tanks in 1989. Consequently, the Abrahams have failed to provide a reasonable basis to support their contention that the Anests must, in effect, indemnify the Abrahams and pay the Agency's remediation costs.

Future Remediation. The Abrahams contend that due to the fraud involved in the sale of the Site from the Anests to the Abrahams, the Anests are in fact and in law the persons that proximately caused all of the releases at the Site. Abr. Cross Br. at 9. The Abrahams argue that the continued leaking from the underground storage tank is a natural and foreseeable consequence of the Anests' misrepresentations concerning the tank. *Id*. at 10. According to the

Abrahams it follows that the Anests must take all steps necessary to remediate any remaining contamination at the Site. *Id*. at 11.

Our analysis with regard to future remediation costs mirrors that regarding the payment of the costs of the Agency's past remediation costs. The Abrahams and Anests are jointly and severally liable for the cost of future remediation at the Site.

CONCLUSION

The Board finds that the Agency is entitled to reimbursement of costs it expended between 1989 and 1991 at the Site. Although the State has requested reimbursement of $98,616.04 in Agency costs, the Board awards the State $86,652.50. The Board rejects the State's request for reimbursement of costs listed on 18 of the 29 Agency invoice vouchers because those vouchers are unreliable.

After considering the factors listed in Section 33(c) of the Act as well as Section 42(h) of the Act, the Board finds that State Oil Company, William Anest, and Peter Anest must pay a civil penalty of $20,000 for violating Section 12(a) of the Act. Additionally, the Board finds that Charles Abraham, Josephine Abraham, and Millstream Service, Inc., must pay a civil penalty of $20,000 for violating Section 12(a) of the Act.

The People requested the Abrahams to reimburse costs associated with litigating this action as well as attorney fees. The People failed to satisfy their burden of proof to support such an award. The record does not show that the Abrahams willfully and knowingly violated the Act. Consequently, the Board denies the People's request for costs and attorney fees.

In accord with the allegations in count I and IV of the cross-complaint, the Board finds that the Anests violated Section 21(a) of the Act as well as Sections 12(d) and (f) of the Act. However, the Abrahams failed to satisfy their burden of proof with regard to count II. In their prayer for relief, the Abrahams requested the Board transfer liability for the Agency's remediation costs and future remediation from the Abrahams to the Anests. The Board finds that the Abrahams and the Anests are jointly and severally liable for the Agency's costs, but does not find any reasonable basis in fact or law to suggest that the Anests must indemnify the Abrahams.

Furthermore, the respondents are directed to conduct any necessary remediation at the Site and to acquire a No Further Remediation letter from the Agency. The Board finds that the Abrahams and the Anests are jointly and severally liable for any necessary remediation work at the Site.

In this final opinion and order, the Board incorporates the findings of fact and conclusions of law from its April 4, 2002 interim opinion and order (People v. State Oil Co., PCB 97-103 (Apr. 4, 2002)).

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board finds that State Oil Company, William Anest, Peter Anest, Charles Abraham, Josephine Abraham, and Millstream Service, Inc., violated Section 12(a) of the Act by allowing the discharge of contaminants into the environment so as to cause water pollution in Illinois.

2. Charles Abraham, Josephine Abraham, and Millstream Service, Inc., must cease and desist from further violations of the Act.

3. The Board finds that State Oil Company, William Anest, Peter Anest, Charles Abraham, Josephine Abraham, and Millstream Service, Inc., are jointly and severally liable for the Illinois Environmental Protection Agency's remediation costs in the amount of $86, 652.50.

4. Charles Abraham, Josephine Abraham, and Millstream Service, Inc., must pay a $20,000 civil penalty for violating Section 21(a) of the Act.

5. State Oil Company, William Anest, and Peter Anest must pay a $20,000 civil penalty for violating Section 21(a) of the Act.

6. State Oil Company, William Anest, Peter Anest, Charles Abraham, Josephine Abraham, and Millstream Service, Inc., must conduct any necessary remediation work at the Site and obtain a No Further Remediation letter from the Illinois Environmental Protection Agency. The respondents must diligently pursue acquisition of the No Further Remediation Letter.

7. The Board finds that State Oil Company, William Anest and Peter Anest committed the following violations:

    a. Allowing the open dumping of waste in violation of Section 21(a) of the Act;

    b. Depositing contaminants upon the land in such a place and manner so as to create a water pollution hazard in violation of Section 12(d) of the Act;

    c. Allowing the discharge of a contaminant into the waters of the State without an NPDES permit in violation of Section 12(f) of the Act.

8. No later than May 19, 2003, which is the 60th day after the date of this order, the respondents must pay the civil penalties ordered in paragraphs (3) and (4) of this order. The respondents must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and the respondent's social security number or federal employer identification number must be included on each certified check or money order.

9. The respondents must send each certified check or money order to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

10. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2002)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2002)).

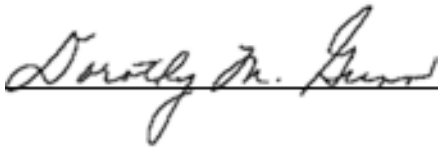
IT IS SO ORDERED.

Board Member W.A. Marovitz dissented.

Board Member M.E. Tristano abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 20, 2003, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board