BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 02-177**
	)	**(Enforcement)**
JOHN PRIOR, d/b/a PRIOR OIL COMPANY, and JAMES MEZO, d/b/a MEZO OIL COMPANY,	)	
	)	
	)	
Respondents.	)	

NOTICE OF FILING

To: John Prior
421 North Morrison
Central City, Illinois 62801

James Mezo
418 East Main Street
P.O. Box 220
Benton, Illinois 62812

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION FOR WAIVER OF REQUIREMENTS and PEOPLE'S POST-TRIAL BRIEF, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of the
State of Illinois

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

BY: Sally A. Carter
SALLY A. CARTER
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: 10/27/03

CERTIFICATE OF SERVICE

I hereby certify that I did on the 27th day of October, 2003, send by First Class Mail, with postage thereon fully prepaid, by depositing in the United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING, MOTION FOR WAIVER OF REQUIREMENTS and PEOPLE'S POST-TRIAL BRIEF

To: John Prior
421 North Morrison
Central City, Illinois 62801

James Mezo
418 East Main Street
P.O. Box 220
Benton, Illinois 62812

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

To: Dorothy Gunn, Clerk
Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

A true and correct copy was also sent to:

Carol Sudman
Hearing Officer
Pollution Control Board
1021 North Grand Avenue East
Springfield, Illinois 62794

Sally A. Carter
SALLY A. CARTER
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. JOHN PRIOR, d/b/a PRIOR OIL COMPANY, and JAMES MEZO, d/b/a MEZO OIL COMPANY, Respondents.	)	PCB NO. 02-177 (Enforcement)

MOTION FOR WAIVER OF REQUIREMENTS

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney General of the State of Illinois, hereby moves the Illinois Pollution Control Board ("Board") to waive certain requirements, namely that the People's Post-Trial Brief not exceed fifty (50) pages as required by 35 Ill. Adm. Code 101.302(k). In support of its Motion, the Complainant states the following:

1. On April 19, 2002, the complaint was brought against the Respondents in the name of the People of the State of Illinois, by James E. Ryan, Attorney General of the State of Illinois, on his own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA").

2. The thirty-five (35) page complaint alleged a multitude of land pollution and water pollution violations at four oil production sites. In particular, the complaint pled that John Prior ("Prior") open dumped oil production fluids and other wastes at the Gompers site. The People further asserted that Prior improperly released crude oil to State waters from the Wamac City Park site, the Mezo Oestreich tank battery and the Morgan Kalberkamp site. Finally, the People alleged that James Mezo's improper release of crude oil at the Mezo Oestreich tank battery caused water pollution.

3. Concurrently with this Motion, Complainant is submitting a Post-Trial Brief to the Board for filing that is in excess of fifty pages in length.

4. Complainant has diligently attempted to restrict the length of Complainant's Post-Trial Brief, but has found it impossible to abide by the fifty-page limit and fully set forth the numerous complex matters that must be discussed by the Complainant to provide a thorough analysis of the applicable law and facts in support of the Complainant's position. In addition, as the Complainant's analysis is dispositive to the outcome of the case, a thorough review of the applicable law and facts is warranted by the People in this case.

WHEREFORE, for the reasons set forth above, the PEOPLE OF THE STATE OF ILLINOIS requests that the Board provide approval for the People's Post-Trial Brief for filing in excess of 50 pages.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the
State of Illinois

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

BY: Sally A. Carter
SALLY A. CARTER
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: 10/27/03

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**No. 2-177**
	)	
JOHN PRIOR, d/b/a PRIOR OIL COMPANY, and JAMES MEZO, d/b/a MEZO OIL COMPANY,	)	
	)	
Respondents.	)	

PEOPLE'S POST-TRIAL BRIEF

The Complainant, PEOPLE OF THE STATE OF ILLINOIS, has established that John Prior's open dumping of oil production fluids and other wastes at the Gompers site has not only caused land pollution violations but has also threatened nearby surface and ground water. Second, the People have proven that John Prior's improper releases of crude oil from the Wamac City Park site, the Mezo Oestreich tank battery and the Morgan Kalberkamp site have not only caused water pollution but have threatened nearby vegetation, State waters, the public and aquatic life. In the same token, the People have verified that James Mezo's improper release of crude oil at the Mezo Oestreich tank battery caused water pollution and threatened nearby vegetation, State waters, the public and aquatic life.

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I. INTRODUCTION

The People call upon the Board to censure multiple and repeated violations of the Act and the Board's regulations committed by John Prior ("Prior") on or about June 13, 1996, through March 12, 2003, at the Gompers site. By causing or allowing the open dumping of waste at a disposal site upon his property through the consolidation of refuse from one or more sources, Prior violated Section 21(a) of the Act, 415 ILCS 5/21(a) (2000). Count I. Due to the waste resulting in litter at the Gompers site, Prior violated Section 21(p)(1) of the Act, 415 ILCS 5/21(p)(1) (2000). Count I. Moreover, Prior caused or allowed the open dumping of liquid crude oil in a manner that resulted in standing or flowing liquid from the Gompers site and thereby violated Section 21(p)(6) of the Act, 415 ILCS 5/21(p)(6). Count I. By conducting a waste-storage or waste-disposal operation upon the Gompers site without a permit granted by the Illinois EPA and by storing, disposing or abandoning waste at the Gompers site, a site that does not meet the requirements of the Act, Prior respectively violated Sections 21(d) and (e) of the Act, 415 ILCS 5/21(d) and (e) (2000). Count II. Prior also developed and operated a landfill without a permit issued by the Illinois EPA and thus, violated 35 Ill. Adm. Code 812.101(a) and Section 21(d)(2) of the Act. Count III. By generating a solid waste and failing to determine whether the waste is a hazardous or a special waste, Prior respectively violated 35 Ill. Adm. Code 808.121 and 35 Ill. Adm. Code 722.111 and Section 21(d)(2) of the Act. Count IV, VII. By failing to label containers storing used oil, Prior violated 35 Ill. Adm. Code 739.122(c) and Section 21(d)(2) of the Act. Count V. Lastly, at the Gompers site, upon detecting a release of used oil to the environment, Prior violated Section 35 Ill. Adm. Code 739.122(d) and Section 21(d)(2) of the Act, by failing to stop the release, contain the released used oil, clean up and properly manage the released used oil and other material and repair or replace any leaking used oil storage containers or tanks prior to returning them to service. Count VI.

In addition, the People request that the Board objurgate violations committed by Prior on or about July 21, 1997, violations committed by Prior and James Mezo ("Mezo") on or about June 30, 1997, and violations committed by Prior on or about July 19, 2000. For these three incidents, the Respondents violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2000), by causing, allowing or threatening the discharge of contaminants to the waters of the State so as to cause or tend to cause water pollution or to violate the Board's regulations or standards. Counts VIII, XII, XV. At the three release sites, the Respondents caused offensive conditions in violation of the water quality standards, 35 Ill. Adm. Code 302.203. Counts XI, XIV, XVI. On two occasions, the Respondents violated Section 12(d) of the Act, 415 ILCS 5/12(d) (2000), by depositing contaminants upon the land in such place and manner as to create a water pollution hazard. Counts X, XIII. Lastly on one occasion, Prior, upon detecting a release of used oil to the environment, violated Section 35 Ill. Adm. Code 739.122(d) and Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2), by failing to stop the release, contain the released used oil, clean up and properly manage the release used oil and other material and repair or replace any leaking used oil storage containers or tanks prior to returning them to service. Count IX.

At hearing, the People presented evidence confirming the above violations and that Prior's repeated inaction demonstrates his disregard for the level of compliance each person must exercise to comply with the Act and associated regulations. In support of civil penalties, the People offered evidence of Prior's lack of due diligence, including proof that Prior not only directed his employees to open burn, but dumped waste back on site in defiance of Illinois EPA instruction to excavate and properly remove the waste. (Day 1, Tr. at 24, 57); *see also*, People's Exhibit 4 and 6. This evidence fully supports the People's request for a violation finding for all counts of the Complaint; for the imposition of an appropriate and substantial

penalty, representative of the serious nature of the violations; and for the award of reasonable attorney's fees.

II. VIOLATIONS

A. John Prior's Violation of Section 21(a) of the Act at the Gompers site.

As supported by the testimony of Mr. Michael Grant ("Grant") and Mr. Chris Cahnovsky, the alleged land pollution violations at 140 Gompers Street, Wamac ("Gompers site") have been substantiated by Complainant.

Section 21(a) of the Act, 415 ILCS 5/21(a) (2000), provides:

> No person shall:
>
> > Cause or allow the open dumping of any waste.

The testimony of Grant and Chris Cahnovsky have clearly verified the open dumping of waste on site. On June 13, 1996, Grant observed a hose running from a Prior Oil tanker truck into an abandoned mine shaft; the hose discharged an oily substance to the ground in close proximity to the mine shaft. (Day 1, Tr. at 16-17); *see also*, People's Exhibit 2. When questioned about the oily discharge, an employee of Prior's, Mr. Juvenile Hixenbaugh, admitted to discharging storm water from tank battery containment dikes.[1] However, Mr. Larry Bengal, Supervisor of the Oil and Gas Division, Illinois Department of Natural Resources ("Illinois DNR") stated that clean storm water discharge does not exist in tank battery containment dikes. Accordingly, Illinois DNR regulations do not permit the discharge of containment dike storm water fluid. (Day 2, Tr. at 16).[2] On June 13, 1996, Grant further beheld a pile of off-rim tires

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[1] The Illinois DNR regulates and permits the hauling of liquid oil field waste in Illinois. (Day 2, Tr. at 16-17). At the time of the incident, Prior did not maintain the required disposal and hauling permits from the Illinois DNR. (Day 1, Tr. at 16, Day 2, Tr. at 17).

[2] According to Illinois DNR, Oil and Gas regulations, storm water collected from tank battery containment dikes may not be discharged into an abandoned mine shaft. (Day 1, Tr. at 19); *see also,* People's Exhibit 2.

and a considerable amount of stained soil abutting two unlabeled and opened drums of used oil. (Day 1, Tr. at 17-19); *see also,* People's Exhibit 2.

On August 22, 2000, Chris Cahnovsky observed a pit about 20-feet-long by 10-feet-wide by 7-feet-deep containing an old BBQ grill, car parts, plastic containers, paint cans, clothes, absorbent pads, landscape waste and approximately 70 gallons of an oil-like substance. (Day 1, Tr. at 40-41); *see also,* People's Exhibit 3. A day later, Chris Cahnovsky returned to sample the oil-like substance and ultimately determined that it was crude oil, an ignitable waste, that met the definition of a Department of Transportation ("DOT") flammable waste, a special waste, and that it contained toluene, ethylbenzene, benzelethelene, xylene, other polynuclear aromatics and 2, 4, 6 tri-bromophenal (Day 1, Tr. at 43-47); *see also,* People's Exhibit 3.

On August 29, 2000, Chris Cahnovsky revisited the Gompers site; conditions had not changed since the August 22, 2000, visit. (Day 1, Tr. at 48); *see also,* People's Exhibit 3. Two days later, Chris Cahnovsky returned to witness pit excavation activities. He noted that waste had been removed from the pit and placed in a 20-yard roll-off box. (Day 1, Tr. at 48-49); *see also,* People's Exhibit 3. While on site, Chris Cahnovsky beheld a large amount of used oil on the ground and on top of two unlabeled 30-gallon drums on the southwest side of the shop. (Day 1, Tr. at 49-50); *see also,* People's Exhibit 3.

A few months passed and in November 2000, the Illinois EPA returned to the Gompers site to respond to an open burning complaint. A new trench contained smoking plastic bags of straw and oil. (Day 1, Tr. at 20-23); *see also,* People's Exhibit 4. Adjacent to this location, Grant observed another area of dumped oil and contaminated straw. (Day 1, Tr. at 23); *see also,* People's Exhibit 4. At the time of the incident, Prior admitted to instructing his employees to burn the waste even though he knew this violated State environmental laws. (Day 1, Tr. at 24); *see also,* People's Exhibit 4.

In response to a complaint that oil well development waste had been dumped in a hole behind the Prior Oil Company shop, Chris Cahnovsky reinspected the site on December 5, 2000. (Day 1, Tr. at 52-53); *see also*, People's Exhibit 6. Upon arrival, Chris Cahnovsky became aware of an oil stained area approximately 100 feet south of the railroad tracks. Due to tire tracks leading up to the oil stained area, he concluded that a truck backed in and dumped the waste.[3] (Day 1, Tr. at 54); *see also,* People's Exhibit 6. A Prior Oil Company tanker truck and vehicle tracks led to oily waste in dense vegetation and concrete rubble. (Day 1, Tr. at 55-57); *see also,* People's Exhibit 6. Finally, many of the waste items observed in the pit on August 22 and subsequently excavated and placed into a roll-off box on August 31, 2000, were now dumped back on the ground on December 5, 2000. (Day 1, Tr. at 57); *see also,* People's Exhibit 6.

Despite Prior's commitments to clean up the site by January 2001, it was not until March 2003, that Prior supplied the necessary documentation verifying compliance. Prior never submitted receipts for the disposal of general trash and tires. (Day 1, Tr. at 65-68); *see also*, People's Exhibit 9.

At the time of the violations, the definition of "waste" was set forth at Section 3.53 of the Act, 415 ILCS 5/3.53 (2000), and stated as follows:

> "WASTE" means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved materials in irrigation return flows, or coal combustion by-products as defined in Section 3.94, or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-products materials as defined by the Atomic Energy Act of 1954, as amended, (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation

[3] At the time of this incidence, Prior did not possess any permits from Illinois DNR, Oil and Gas Division, to haul oil field waste. (Day 1, Tr. at 54-55); *see also,* People's Exhibit 6.

Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

The items observed by Grant and Chris Cahnovsky such as the oil, used or waste tires, an old BBQ grill, car parts, plastic containers, paint cans, clothes, absorbent pads, landscape waste, and oil-contaminated straw, clearly constitute discarded material as provided by the definition of waste.

Grant and Chris Cahnovsky testified Prior never attained a permit from the Illinois EPA authorizing the development of a waste storage or waste disposal operation at the Gompers site. In addition, both gentlemen stated Prior did not acquire a permit to develop and operate a landfill from the Illinois EPA. (Day 1, Tr. at 15, 36-37).

As demonstrated by the uncontested facts, Prior open dumped waste from one or more sources at the Gompers site. Furthermore, Prior did not have a permit from the Illinois EPA, and the Gompers's site did not meet the other criteria of a sanitary landfill contrary to the requirements of Section 21(a) of the Act, 415 ILCS 5/21(a) (2000). It should be noted that the People have proven that Prior has caused or allowed the open dumping of various waste items on site. In particular, the Respondent has caused or allowed the open dumping of oil, used or waste tires, an old BBQ grill, car parts, plastic containers, paint cans, clothes, absorbent pads, landscape waste, and oil-contaminated straw. These uncontested facts thereby fulfill the requirement of Section 21(a) of the Act that a "consolidation of refuse from one or more sources" took place on site. *People v. Conrail*, 245 Ill. App. 3d 167, 613 N.E. 2d 784 (5th Dist. 1993).

B. <u>John Prior's Violation of Section 21(p)(1) of the Act at the Gompers site</u>.

Section 21(p)(1) of the Act, 415 ILCS 5/21(p)(1) (2000), provides:

No person shall:

> In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
>
> 1. litter.

The waste open dumped at Prior's site constitutes litter as set forth in Section 1 of the Litter Control Act, 415 ILCS 105/1 (2000) and defined as follows:

> "LITTER" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings, or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle (as defined in the Illinois Vehicle Code), motor vehicle parts, furniture, oil, carcass of a dead animal, any nauseous or offensive matter of any kind, any object likely to injury any person or create a traffic hazard, potentially infectious medical waste as defined in Section 3.84 of the Environmental Protection Act, or anything else of any unsanitary nature, which has been discard, abandoned, or otherwise disposed of improperly.

The Board has adopted this definition of "litter" provided in the Litter Control Act for purposes of Section 21 of the Act. *See, St. Clair County v. Louis I. Mund,* AC 90-64, August 22, 1991. As such, the facts set forth above, specifically the oil, used or waste tires, an old BBQ grill, car parts, plastic containers, paint cans, clothes, absorbent pads, landscape waste, and oil-contaminated straw, clearly show that Prior has caused or allowed the open dumping of waste in a manner that resulted in litter in violation of Section 21(p) of the Act.

C. <u>John Prior's Violation of Section 21(p)(6) of the Act at the Gompers site.</u>

As supported by Chris Cahnovsky's testimony, Prior caused or allowed standing or flowing liquid discharge from the Gompers site.

Section 21(p)(6) of the Act, 415 ILCS 5/21(p)(6) (2000), provides:

> No person shall:
>
> > In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
> >
> > 6. standing or flowing liquid discharge from the dump site.

In August 2000, Chris Cahnovsky discovered a pit that contained approximately 70 gallons of standing liquid oil. (Day 1, Tr. at 40-41); *see also,* People's Exhibit 3. By causing or allowing the open dumping of any waste, specifically liquid crude oil, in a manner which resulted in standing or flowing liquid discharge from the dump site, Prior violated Section 21(p)(6) of the Act, 415 ILCS 5/21(p)(6) (2000).

D. <u>John Prior's Violation of 35 Ill. Adm. Code 812.101(a) and Section 21(d) of the Act at the Gompers site.</u>

Section 21(d) of the Act, 415 ILCS 5/21(d) (2000), provides as follows:

> No person shall:
>
> d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> 1. Without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for (i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated, or (ii) a facility located in a county with a population over 700,000, operated and located in accordance with Section 22.38 of this Act, and used exclusively for the transfer, storage, or treatment of general construction or demolition debris;
>
> 2. In violation of any regulations or standards adopted by the Board under this Act; or
>
> 3. Which receives waste after August 31, 1988, does not have a permit issued by the Agency, and is (i) a landfill used exclusively for the disposal of waste generated at the site, (ii) a surface impoundment receiving special waste not listed in an NPDES permit, (iii) a waste pile in which the total volume of waste is greater than 100 cubic yards or the waste is stored for over one year, or (iv) a land treatment facility receiving special waste generated at the site; without giving notice of the operation to the Agency by January 1, 1989, or 30 days after the date on which

> the operation commences, whichever is later, and every 3 years thereafter. The form for such notification shall be specified by the Agency, and shall be limited to information regarding: the name and address of the location of the operation; the type of operation; the types and amounts of waste stored, treated or disposed of on an annual basis; the remaining capacity of the operation; and the remaining expected life of the operation.
>
> Item 3 of this subsection (d) shall not apply to any person engaged in agricultural activity who is disposing of a substance that constitutes solid waste, if the substance was acquired for use by that person on his own property, and the substance is disposed of on his own property in accordance with regulations or standards adopted by the Board.
>
> This subsection (d) shall not apply to hazardous waste.

Section 812.101 of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 812.101(a) (1994), provides:

> (a) All persons, except those specifically exempted by Section 21 (d) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1991, ch. 111-1/2, par. 1021(d) [415 ILCS 5/21(d)] shall submit to the Agency an application for a permit to develop and operate a landfill. The application must contain the information required by this Subpart and by Section 39(a) of the Act, except as otherwise provided in 35 Ill. Adm. Code 817.

As previously discussed, Prior operated a landfill but never acquired a permit from the Illinois EPA authorizing the development and operation of a landfill at the Gompers site; waste was placed and accumulated over time for disposal at a site that was not exempted from the permitting requirements of Section 21(d)(1) of the Act. (Day 1, Tr. at 15, 37). In addition, by developing and operating a landfill without a permit issued by the Illinois EPA, Prior violated 35 Ill. Adm. Code 812.101(a).

These facts further evince that Prior conducted a waste-storage or waste-disposal operation upon his property without an Illinois EPA permit. Grant and Chris Cahnovsky testified to Prior not possessing an Illinois EPA permit to conduct a waste-storage, waste-treatment or waste-disposal operation. (Day 1, Tr. at 15, 36). Accordingly, waste from off-site sources has

been stored or disposed of at the Gompers site, a site that does not have the required Illinois EPA permit, in contravention of Section 21(d) of the Act, 415 ILCS 5/21(d) (2000).

E. John Prior's Violation of Section 21(e) of the Act at the Gompers site.

Again through the testimony of Chris Cahnovsky and Grant, the People have shown that Prior disposed, treated, stored or abandoned waste or transported waste to the Gompers site, a facility that does not fulfill the requirements of the Act.

Section 21(e) of the Act, 415 ILCS 5/21(e) (2000), provides as follows:

> No person shall:
>
> e. Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

Not only have Illinois EPA field inspectors repeatedly observed oil, used or waste tires, an old BBQ grill, car parts, plastic containers, paint cans, clothes, absorbent pads, landscape waste, and oil-contaminated straw at the Gompers site, but they have repeatedly observed a hose running into an abandoned mine shaft from un-permitted Prior Oil tanker trucks. (Day 1, Tr. at 16-17); *see also*, People's Exhibit 2. Prior Oil Company employees admitted to discharging stormwater collected from tank battery containment dikes into the abandoned mine shaft. *See,* People's Exhibit 2. Once Illinois DNR subsequently closed the abandoned mine shaft, Prior dumped the oil development waste in dense vegetation and concrete rubble on site. (Day 1, Tr. at 52-57); *see also,* People's Exhibit 6.

Consistent with Prior's inappropriate disposal of waste at a site that does not fulfill the requirements of the Act, Prior instructed his employees to burn open dumped plastic bags of straw and oil. (Day 1, Tr. at 24); *see also,* People's Exhibit 4. Even more egregious is once the Illinois EPA inspector directed Prior to excavate and properly dispose of waste material including oil from an on-site pit, Prior dumped the waste from the roll-off box back onto the ground. (Day 1, Tr. at 57); *see also,* People's Exhibit 6.

The facts are clear, Prior has repeatedly and knowingly disposed, stored or abandoned any waste or transported any waste for disposal to the Gompers site, a site that does not meet the requirements of the Act. In so doing, Prior violated Section 21(e) of the Act, 415 ILCS 5/21(e) (2000).

F. <u>John Prior's Violation of 35 Ill. Adm. Code 722.111 and Section 21(d)(2) of the Act at the Gompers site.</u>

The testimony of Chris Cahnovsky has convincingly proven that Prior generated a solid waste at the Gompers site and failed to determine whether the waste was hazardous. Section 722.111 of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 722.111 provides:

> A person who generates a solid waste, as defined in 35 Ill. Adm. Code 721.102, shall determine if that waste is a hazardous waste using the following method:
>
> a. The person should first determine if the waste is excluded from regulation under 35 Ill. Adm. Code 721.104.
>
> b. The person should then determine if the waste is listed as a hazardous waste in 35 Ill. Adm. Code 721.Subpart D.
>
> (Board Note: Even if a waste is listed, the generator still has an opportunity under 35 Ill. Adm. Code 720.122 and 40 CFR 260.22 (1986) to demonstrate that the waste from the generator's particular facility or operation is not a hazardous waste.
>
> c. For purposes of compliance with 35 Ill. Adm. Code 728, or if the waste is not listed as a hazardous waste in 35 Ill. Adm. Code 721.Subpart D, the generator shall then determine whether the waste is identified in 35 Ill. Adm. Code 721.Subpart C by either:
>
> 1. Testing the waste according to the methods set forth in 35 Ill. Adm. Code 721.Subpart C, or according to an equivalent method approved by the Board under 35 Ill. Adm. Code 720.121; or
>
> 2. Applying knowledge of the hazard characteristic of the waste in light of the materials or processes used.
>
> d. If the generator determines that the waste is hazardous, the generator shall refer to 35 Ill. Adm. Code 724, 725, 728 and 733 for possible exclusions or restrictions pertaining to the management of the specific waste.

On August 22, 2000, approximately 70 gallons of an oily substance existed in an on-site pit. (Day 1, Tr. at 40-41); *see also,* People's Exhibit 3. In response to questions posed by the Illinois EPA, Prior claimed not to know the identity of the waste, but suggested that the waste was too black to be crude oil. (Day 1, Tr. at 42); *see also*, People's Exhibit 3. Because Prior had not sampled the liquid waste, the Illinois EPA returned the following day to perform the necessary assessment sampling. (Day 1, Tr. at 42-43); *see also,* People's Exhibit 3. While the Illinois EPA concluded that the waste was crude oil, Prior was ultimately responsible for completing this determination. (Day 1, Tr. at 43-47); *see also,* People's Exhibit 3. Accordingly, by generating a solid waste and failing to determine whether the waste is hazardous, Prior violated 35 Ill. Adm. Code 722.111 and Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (2000).

G. John Prior's Violation of 35 Ill. Adm. Code 739.122(c) and Section 21(d)(2) of the Act at the Gompers site.

Section 739.122(c) of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 739.122(c), provides:

> Used oil generators are subject to all applicable federal Spill Prevention, Control and Countermeasures (40 CFR 112) in addition to the requirements of this Subpart. Used oil generators are also subject to the Underground Storage Tank (35 Ill. Adm. Code 731) standards for used oil stored in underground tanks whether or not the used oil exhibits any characteristics of hazardous waste, in addition to the requirements of ths subpart.
>
> * * *
>
> (c) Labels
>
> (1) Containers and aboveground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words "Used Oil."

The testimony of Grant and Chris Cahnovsky have convincingly substantiated that Prior failed to clearly label or mark all containers and above ground tanks storing used oil with the words "Used Oil." On June 13, 1996, Grant beheld two unlabeled drums of used oil at the

Gompers site. (Day 1, Tr. at 18-19); *see also,* People's Exhibit 2. Four years later in August, 2000, Chris Cahnovsky observed two unlabeled 30-gallon drums of used oil on the southwest side of the shop. (Day 1, Tr. at 49-50); *see also*, People's Exhibit 3. By failing to label containers storing used oil, Prior violated 35 Ill. Adm. Code 739.122(c) and Section 21(d) of the Act, 415 ILCS 5/21(d) (2000).

H. <u>John Prior's Violation of 35 Ill. Adm. Code 739.122(d) and Section 21(d)(2) of the Act at the Gompers site.</u>

Section 739.122(d) of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 739.122(d), provides:

> Used oil generators are subject to all applicable federal Spill Prevention, Control and Countermeasures (40 CFR 112) in addition to the requirements of this Subpart. Used oil generators are also subject to the Underground Storage Tank (35 Ill. Adm. Code 731) standards for used oil stored in underground tanks whether or not the used oil exhibits any characteristics of hazardous waste, in addition to the requirements of this Subpart.
>
> * * *
>
> (d) Response to releases. Upon detection of a release of used oil to the environment that is not subject to the federal requirements of 40 CFR 280, Subpart F and which has occurred after October 4, 1996, a generator shall perform the following cleanup steps:
>
> BOARD NOTE: Corresponding 40 CFR 279.22(d) applies to releases that "occurred after the effective date of the authorized used oil program for the State in which the release is located." The Board adopted the used oil standards in docket R93-4 at 17 Ill. Reg. 20954, effective November 22, 1993. USEPA approved the Illinois standards at 61 Fed. Reg. 40521 (Aug. 5, 1996), effective October 4, 1996. The Board has interpreted "the effective date of the authorized used oil program" to mean the October 4, 1996 date of federal authorization of the Illinois program, and we substituted that date for the federal effective date language. Had USEPA written something like "the effective date of the used oil program in the authorized State in which the release is located," the Board would have used the November 22, 1993 effective date of the Illinois used oil standards,
>
> 1) Stop the release;

2) Contain the released used oil

3) Properly clean up and manage the released used oil and other materials; and

4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

Chris Cahnovsky and Grant testified not only to repeated releases of oil, but Prior's blatant disposal activities at the Gompers site. Generally once the release occurred, Prior failed to contain and remediate the release and affirmatively acted to aggravate the incident in defiance of Illinois EPA directives.

For instance, in June 1996, an oily substance discharged to an abandoned mine shaft from a hose connected to a Prior Oil tanker truck. (Day 1, Tr. at 16-17); *see also,* People's Exhibit 2. Not only did Prior fail to undertake measures to stop, contain and clean up the used oil, a Prior Oil Company employee admitted to actively discharging such material. *Id.* On the same date, a considerable amount of stained soil existed in the area of two opened drums of oil, but no measures were employed to stop, contain and clean up the used oil. (Day 1, Tr. at 18-19); *see also*, People's Exhibit 2.

On August 22, 2000, liquid oil stood in a pit, however, the oil was not placed in a roll-off box until August 31, 2000. (Day 1, Tr. at 40-49); *see also*, People's Exhibit 3. Once excavated, Prior dumped the excavated oiled-waste back on the ground in opposition to Illinois EPA instruction. (Day 1, Tr. at 57); *see also,* People's Exhibit 6. On the same date, Chris Cahnovsky noted two drums likely observed by Grant four years earlier with a large amount of used oil on top of and on the ground surrounding the drums. (Day 1, Tr. at 49-50); *see also,* People's Exhibit 3. Clearly, no measures had been applied to stop, contain and clean the used oil.

A few months later in November, Prior continued to act in defiance of State environmental laws by dumping oiled straw at two on-site locations. Not only did Prior fail to properly clean up the used oil, but Prior instructed his employees to burn the waste oil and straw. (Day 1, Tr. at 20-24); *see also,* People's Exhibit 4.

In December 2000, the Illinois EPA revisited the Gompers site. Since the Illinois DNR closed the abandoned mine, Prior caused or allowed the open dumping of oil development waste in a hole behind the Prior Oil Company shop. (Day 1, Tr. at 52-57); *see also*, People's Exhibit 6. No measures were being employed to stop, contain and properly contain the released oil. Prior subsequently committed to performing the required remediation of the released used oil by January 2001; however, it was not until March 2003 that these measures were completed. (Day 1, Tr. at 61-68); *see also,* People's Exhibit 9.

The facts are clear. Upon detection of a release of used oil to the environment, Prior failed to stop the release, contain the released used oil, clean up and properly manage the released used oil and other material and repair or replace any leaking used oil storage containers or tanks prior to returning them to service. By so doing, the Respondent has violated Section 739.122(d) of the Board's Waste Disposal regulations, 35 Ill. Adm. Code 739.122(d) and Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (2000).

I. John Prior's Violation of 35 Ill. Adm. Code 808.121 and Section 21(d)(2) of the Act at the Gompers site.

The testimony of Chris Cahnovsky has decisively confirmed that Prior generated a waste and failed to determine whether the waste was a special waste. Section 808.121 of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 808.121, provides in relevant part:

> Generator Obligations
>
> a. Each person who generates waste shall determine whether the waste is a special waste.

Based on the same facts identified in the discussion of Prior's violations of 35 Ill. Adm. Code 722.111 and Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (2000), Prior generated a waste and failed to determine whether the waste was a special waste in violation of 35 Ill. Adm. Code 808.121 and Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (2000). *See,* Section II.F.

J. The Respondents' Violation of Section 12(a) of the Act.

1. The Respondents caused or allowed the discharge of contaminants into the environment.

The evidence produced at hearing clearly proved that Prior and Mezo's actions resulted in violations of the Act. Section 12(a) of the Act, 415 ILCS 5/12(a) (2000), provides that:

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

The elements of this provision are (1) causing, threatening or allowing the discharge of (2) contaminants (3) into the environment (4) to cause or tend to cause water pollution or to violate applicable water quality standards. In the three incidents at issue, Mr. Tom Powell and/or Ms. Cheryl Cahnovsky testified that the Respondents caused or allowed the discharge of oil, a contaminant, into the environment. (Day 1, Tr. at 78-94, 101-104, 108-113, 123-130); *see also* People's Exhibits 11, 12, 15, 17, 18. Prior did not contest the release of oil from the three sites, nor did Mezo challenge the release of oil from the Mezo Oestreich #1 tank battery. (Day 1, Tr. at 81-82, 85-86, 92, 97, 103, 108, 133-134, 138, 142-147). Accordingly, the People have established the first three elements of a Section 12(a) violation.

2. The Respondents' releases caused or tended to cause water pollution.

The sole remaining issue is whether or not these releases of oil caused or tended to cause water pollution. At the time of the releases, the definition of water pollution was set forth

in Section 3.55 of the Act, 415 ILCS 5/3.55 (2000)[4]. However, whether a release caused water pollution is ultimately a common sense proposition. When oil is released to State waters and black oil, silver or rainbow sheens are observed on the water, water pollution has occurred. The concept is simple. Section 3.55 of the Act, 415 ILCS 5/3.55 (2000), provided:

> 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 contaminant into any waters of the State, as will or is likely to create a nuisance or render such water 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 elements of this provision are the (1) alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of State or such discharge of any contaminant into any waters of the State (2) as will or is likely to create (a) nuisance or (b) render such waters harmful or (c) detrimental or (d) injurious to one of the following uses: (i) public health, (ii) human or (iii) animals or other aquatic life. The People need only establish that the Respondents' releases more likely than not caused, threatened or allowed water pollution. In *Central Illinois Public Service Company v. Pollution Control Board,* 116 Ill. 2d 397, 507 N.E. 2d 819 (1987), the Supreme Court agreed with the Board's interpretation that the Act treats water as a resource, and that pollution occurs whenever contamination is *likely* to render such water unusable. 507 N.E. 2d at 824.

a. The alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State.

This Board heard testimony proving that the alteration of the physical, thermal, chemical, biological or radioactive properties of the water have occurred.

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[4] Since the filing of the instant action, the definition of water pollution has been renumbered to Section 3.545 of the Act, 415 ILCS 5/3.545 (2002).

1. Count VIII[5]

Illinois EPA Emergency Responder Cheryl Cahnovsky visited the Wamac City Park ("Park") site, the subject of the July 21, 1997, release. This site involved a spill of at least 31-48 barrels of oil that was not contained within the poorly constructed fire walls surrounding a tank farm. (Day 1, Tr. at 78-82); *see also,* Exhibit 11. The crude oil drained down gradient 20-30 feet through the Wamac City Park into an unnamed tributary that leads to Fulton Creek and ultimately into Sewer Creek. (Day 1, Tr. at 78); *see also*, Exhibit 11. Oil flowed into the water and onto the banks of the unnamed tributary and Fulton Creek on July 22, 1997; oil covered wooden debris. Oil and petroleum scum was in Fulton Creek for approximately three miles down stream from the release point. (Day 1, Tr. at 83-84, 88-89), *see also,* Exhibit 11. On July 28, 1997, Cheryl Cahnovsky reinspected the site and noted that oil continued to cover the soil and drain into Fulton Creek. (Day 1, Tr. at 91-92); *see also*, Exhibit 11. In addition, oil coated vegetation and creek banks; pools of oil were caught in wooden debris and trash. *See*, Exhibit 11. Clearly, these facts evince that oil altered the physical properties of the water.

2. Count XII[6]

The Mezo Oestreich #1 tank battery ("Mezo Oestreich") was the site of the June 30, 1997, release. The site involved a release of approximately 50 to 75 barrels of crude oil to a field, an unnamed tributary to Fulton Creek, Fulton Creek and eventually 2.5 miles downstream to Sewer Creek. (Day 1, Tr. at 124-129); *see also*, Exhibit 15. A day later, Powell observed oil in both the unnamed tributary leading to Fulton Creek, Fulton Creek and Sewer Creek. (Day 1, Tr. at 124-129); *see also*, Exhibit 15. At Irvington Road, recoverable oil existed upon the creek

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[5] For purposes of this Count, "Respondent" refers to John Prior, d/b/a Prior Oil Company.

[6] For purposes of this Count, "Respondents" refers to John Prior, d/b/a Prior Oil Company and James Mezo, d/b/a Mezo Oil Company. The Mezo Oestreich tank battery is registered to James Mezo and operated by John Prior (Day 1, Tr. at 120; Day 2, Tr. at 19).

and within the eddies. Oil stains persisted upon the sidewalls and oil residues remained in Fulton Creek. (Day 1, Tr. at 124-129); *see also,* Exhibit 15. Clearly, the oil on the water is indicative of the alteration of the water's physical properties.

3. Count XV[7]

At the site of the July 19, 2000, release, the Morgan Kalberkamp #1 tank battery ("Morgan Kalberkamp"), Cheryl Cahnovsky observed oil along the creek banks and Fulton Creek for approximately 300 feet. (Day 1, Tr. at 100-109); *see also*, Exhibit 17. Five days later, crude oil and oily straw remained on the banks and in Fulton Creek. (Day 1, Tr. at 110-112); *see also,* Exhibit 18. It is self-evident that the physical properties of the water were altered by the oil.

b. *Or* such discharge of any contaminant into any waters of the State.

As outlined above, the People have clearly upheld in evidence the alternative requirement, that contaminants, oil, have been discharged to State waters. Prior has not disputed that such discharges of contaminants to State waters have occurred in each of the three incidents. Nor did Mezo challenge the discharge of contaminants from the Mezo Oestreich site to State waters. (Day 1, Tr. at 81-82, 85-92, 97, 103, 108, 133-134, 138, 142-147). The People have thereby proven "such discharge of any contaminant to waters of the State."

c. As will or is likely to create one of four things.

Next, the People need only satisfy one of the following four elements: (a) nuisance or (b) to render such waters harmful or (c) detrimental or (d) injurious to one of the following uses: (i) public welfare (ii) human or (iii) animals or other aquatic life. The People do not have to prove actual nuisance but the mere likelihood of a creation of a nuisance is sufficient. By allowing oil

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[7] For purposes of this Count, "Respondent" refers to John Prior, d/b/a Prior Oil Company.

to come into direct contact with the water, the Respondents have likely created a nuisance or has rendered such waters injurious to those users specified in former Section 3.55 of the Act. Previously, the appellate courts have upheld the finding of a danger of water pollution, even in the absence of actual evidence of pollution. *See Allaert Rendering Inc. v. Pollution Control Board*, 91 Ill. App. 3d 153, 414 N.E. 2d 492 (3rd Dist.1980); *City of Pekin v. Pollution Control Board*, 47 Ill. App. 3d 187, 361 N.E. 2d 889 (3rd Dist.1977). Nor should it be ignored that the State has an interest in protecting its own resources. In *CIPS v. Pollution Control Board,* the Illinois Supreme Court agreed with the Board's definition of water pollution, stating that:

> [T]he Act treats water as a resource and that pollution occurs whenever contamination is likely to render water unusable. Under the Board's interpretation **there is no need to show that actual harm will occur, only that harm would occur if the contaminated water were to be used**. Since the Board is charged with administering the Environmental Protection Act, its interpretation of the statute is entitled to deference.

116 Ill. 2d at 409. (Emphasis added).

As to the four alternative elements set forth above, the People have established not only the nuisance element for the three releases, but also that the waters were rendered harmful to potential users, such as the public, animal or other aquatic life. The releases of oil on June 30, 1997, July 21, 1997, and July 19, 2000, likely created a nuisance as the releases caused oil sheens and layers of floating product on State waters. *See,* Counts VIII, XII, and XV. Moreover, the layers of floating oil likely rendered the waters harmful to the public, animal or aquatic life.

More particularly, the Park site is located in the Wamac City Park; the tank battery is adjacent to the park's baseball field. (Day 1, Tr. at 79). As a result of the Park site incident, Cheryl Cahnovsky documented that nine children had been playing in an oil-impacted Fulton Creek. (Day 1, Tr. at 88-89). The oil-contaminated creek not only posed a threat to potential users of this waterway, but was, in fact, a direct threat to the children covered in oil

contaminated water and soil. *See,* Exhibit 11, Photographs 4 and 5 of July 22, 1997. The People have clearly met these standards and have thereby established a violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2000).

3. Alternatively, the People have proven a Section 12(a) violation by establishing that the Respondents violated 35 Ill. Adm. Code 203.

While the People have satisfied the previously referenced elements of a water pollution violation, a Section 12(a) violation may alternatively be established through the violation of a regulatory standard. Section 12(a) provides that:

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

(Emphasis added).

As such, a Section 12(a) violation may alternatively be met through the violation of a regulatory standard. Section 302.203 of the Board's Water Pollution regulations, 35 Ill. Adm. Code 302.203, prohibits the existence of offensive conditions in State waters:

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

For Counts XI, XIV and XVI, the People have provided undisputed evidence that Prior violated Section 302.203 by causing offensive conditions. The same uncontested evidence establishes that Mezo caused offensive conditions at the Mezo Oestreich site in violation of Section 302.203. *See,* Count XIV. The visible oil and petroleum scum in the unnamed tributary to Fulton Creek, Fulton Creek and Sewer Creek at the Park site; the crude oil in the unnamed tributary to Fulton Creek, Fulton Creek and Sewer Creek at the Mezo Oestreich site; and the oil in Fulton Creek at the Morgan Kalberkamp site all signify offensive conditions in State waters. By violating Section 302.203, the Respondents have defied the second prong of Section 12(a) that no person shall violate regulations or standards adopted by the Board under this Act.

K. The Respondents' Violation of Section 12(d) of the Act.

For Counts X and XIII, the People have convincingly established that Prior's releases at the Park and the Mezo Oestreich sites, and Mezo's release at the Mezo Oestreich site created a water pollution hazard as forbidden by Section 12(d) of the Act, 415 ILCS 5/12(d) (2000), which provides the following:

> No person shall deposit any contaminant upon the land in such place and manner so as to create a water pollution hazard.

The elements of this charge are (1) the deposit of any contaminant (2) upon the land (3) in such place and manner as to create a water pollution hazard. A water pollution hazard is essentially an activity that may in the future ripen into a water pollution violation. *See, e.g., Jerry Russell Bliss, Inc. v. EPA,* 138 Ill. App. 3d 699, 92 Ill. Dec. 911 (5th Dist. 1985). ("Section 12(d) refers to conduct not yet amounting to a violation of Section 12(a), a water pollution hazard must be found before either violation may be found."). In the two events at issue, each instance of a water pollution hazard released a contaminant to a State water. The parties did not contest that the Mezo Oestreich site and the Park site released oil. Nor did the Respondents challenge that some amount of oil reached State waters. Before the oil reached the waters of the State, the contaminants were in such place and manner that they posed a water pollution hazard to nearby water. In addition, not all of the oil traveled to the water but remained on the land in close proximity to the water. These contaminants, until completion of cleanup as verified by sampling, may have continued to pose a water pollution hazard.

The evidence clearly satisfies a Section 12(d) violation for each incident as outlined above. At the Park site, the contamination source was approximately 20 to 30 feet from the unnamed tributary. In addition, oil was located on the banks of the unnamed tributary and Fulton Creek in close proximity to the waters of the State. *See,* Count X. Secondly, at the Mezo Oestreich site, oil was located in a field, an unnamed tributary, and along the sidewalls of Fulton

Creek near State waters. *See,* Count XIII. Based on these uncontested facts, Prior clearly deposited oil upon the land in such place and manner at the Park and Mezo Oestreich sites so as to create a water pollution hazard in contravention of Section 21(d) of the Act. In the same manner, Mezo deposited oil upon the land in such place and manner at the Mezo Oestreich site to create a water pollution hazard in violation of Section 21(d).

L. John Prior's Violation of 35 Ill. Adm. Code 739.122(d) and Section 21(d)(2) at the Park site.

The record before the Board clearly makes evident that Prior's actions or inactions at the Park site defied 35 Ill. Adm. Code 739.122(d) and Section 21(d)(2). See, Section II. L. Cheryl Cahnovsky testified to a spill of at least 31-48 barrels of oil that drained down gradient through the Wamac City Park into an unnamed tributary that leads to Fulton Creek and eventually into Sewer Creek. (Day 1, Tr. at 78-82). Once the release occurred, Prior failed to contain and remediate the release. According to the Illinois EPA emergency responder, Prior's remediation efforts were less than adequate; Prior only performed the required remediation after several discussions with the Illinois EPA. (Day 1, Tr. at 90). A week after the incident, oil covered the soil and drained into Fulton Creek. (Day 1, Tr. at 91-92); *see also,* Exhibit 11. Pools of oil were still caught in wooden debris and trash. *See*, Exhibit 11. Nearly three months after the incident, several inches of crude oil remained in the containment berm. (Day 1, Tr. at 94); *see also,* People's Exhibit 12.

The facts are clear. Upon detection of a release of used oil to the environment, Prior failed to stop the release, contain the released used oil, clean up and properly manage the released used oil and other material and repair or replace any leaking used oil storage containers or tanks prior to returning them to service. By so doing, the Respondent has violated Section 739.122(d) of the Board's Waste Disposal regulations, 35 Ill. Adm. Code 739.122(d) and Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (2000).

M. Defenses.

1. James Mezo's Transfer Argument for the Mezo Oestreich site is Without Merit.

Mezo failed to allege as an affirmative defense that he transferred the Mezo Oestreich lease to Prior before the June 30, 1997, release. Mezo failed to establish that, more likely than not, he did not control the lease at the time of the release. While the evidence consisted of testimony that Mezo sold the Oestreich lease and equipment to Prior before the release occurred, Mezo admitted to possessing the operating permits from the Illinois DNR, Oil and Gas Division, at the time of the spill event. (Day 1, Tr. at 142, 150-151; Day 2, Tr. at 30).

Bengal not only confirmed that Mezo was the permittee of record for the Mezo Oestreich lease at the time of the incident, but explained the applicable permitting requirements for oil and gas producers under the Illinois Oil and Gas Act, 225 ILCS 725/1. (Day 2, Tr. at 19). According to the Illinois Oil and Gas Act and associated regulations, a permittee is the person holding the permit that authorizes their operation of the wells or the brine hauling transportation system. (Day 2, Tr. at 17). The site's permittee is responsible for compliance with the Illinois Oil and Gas Act. (Day 2, Tr. at 18); *see also,* Section 1 of the Illinois Oil and Gas Act, 225 ILCS 725/1 and 62 Ill. Adm. Code 240.10. Because Mezo was the Illinois DNR permittee for the Mezo Oestreich lease, Mezo was the sole person authorized to operate this lease. However, Prior physically operated the Mezo Oestreich lease.

Bengal testified to a recent review of an Assignment between Mezo and Prior. In the course of his review, Bengal determined that Mezo was posing as the permittee for the Mezo Oestreich lease. (Day 2, Tr. at 19-21). Bengal further concluded that Mezo served as the facility's permittee due to Prior's inability to operate the facility in his own name. (Day 2, Tr. at 22). A permit block existed against Prior due to a number of outstanding Illinois DNR enforcement actions between the agency and Prior. (Day 2, Tr. 21-22). A veteran oil producer,

Mezo understood Prior could not attain a permit for the facility due to these outstanding compliance deficiencies; thus, Mezo posed as the permittee and even continued to pay the Illinois DNR annual well fees for the Mezo Oestreich lease. (Day 1, Tr. at 151; Day 2, Tr. at 22-25); *see also,* People's Exhibit 26, 28. Mezo's actions allowed Prior to run a lease that the Illinois DNR, Oil and Gas Division would never have permitted Prior to operate. The resulting water pollution and environmental damage at the Mezo Oestreich lease would never have occurred but for Mezo posing as the lease's permittee.

2. John Prior's Allegations of Vandalism Does Not Negate Prior's Violations of the Act.

Prior failed to plead as an affirmative defense the purported vandalism at each site that is the subject of the instant proceeding. Prior failed to show that, more likely than not, the open dumping and/or spill events resulted from the actions of an unknown third party. The only evidence consisted of conjecture by the Respondent. Prior testified to his conclusion that vandalism was the cause of the incidents because another individual "has a vendetta against me for some reason, and I really don't know why." (Day 1, Tr. at 139). He provided no basis for this conclusion on direct examination, but only offered conjecture stating that "every time it happened, it either just rained or was raining at the time." (Day 1, Tr. at 139). Prior failed to elaborate on what, if any, connection existed between the rain events and his alleged claims of vandalism.

The weight of any testimony must be viewed in terms of interest and bias. The bias of a witness toward a party for whom he is called to testify is always pertinent on the question of his credibility. *People v. Emerling,* 341 Ill. 424, 173 N.E. 474 (1930). Prior was responsible for the operations at the four sites and now seeks to minimize his liability through these unsupported allegations of vandalism.

The People contend that Prior has been less than forthright in his allegations and has attempted to shift all of the blame for this spill onto the vandal(s). Assuming *arguendo* that "somebody" else did in fact sabotage the facilities, Prior is still liable for the violations because of his acts and omissions.

At the Gompers site, Prior's vandalism allegation is completely meritless and contradicts the on-site statements of not only himself, but his employees. First, in June 1996, a hose discharged waste from a Prior Oil Company tanker truck into an abandoned mine shaft. Moreover, a Prior Oil Company employee admitted to discharging material from tank batteries into the abandoned mine shaft. (Day 1, Tr. at 16-17). Second, in August 2000, a waste-filled pit existed a mere 150 yards behind Prior's office. Prior initially claimed that he had no knowledge about either the pit or its waste; nine days later, Prior asserted he had the pit dug one month earlier to bury concrete. (Day 1, Tr. at 42, 48).[8] While Prior eventually excavated the waste items from the pit into a roll-off box, they were subsequently dumped in a pile back on site. (Day 1, Tr. at 57).

Third, in November 2000, Prior admitted to instructing his employees to clean out oil-contaminated straw from an on-site building and directing its burning even though he recognized these directives were in defiance of environmental laws. (Day 1, Tr. at 24). Finally in December, 2000, Chris Cahnovsky continued to behold similar evidence of Prior Oil Company tanker trucks dumping oil field generated waste. However, now that the State closed the abandoned mine, the dumping transpired in a pile of concrete rubble and dense vegetation on site. (Day 1, Tr. 55).

If Prior's allegation of vandalism is true, an interesting question arises: why didn't Prior initially allege vandalism at the Gompers site? Prior never provided filed police reports nor

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[8] Chris Cahnovsky never observed any concrete in the pit. (Day 1, Tr. at 48).

presented any further elaboration on his vandalism allegations. The Board cannot engage in conjecture as to whether a disgruntled neighbor might have been the purported vandal. The record contains no plausible evidence whatsoever as to the identity of the "somebody" who apparently conducts repeated and numerous acts of vandalism at the Prior sites, but there are plenty of facts from which conclusions and inferences may legitimately be drawn to establish liability. The totality of the allegations of vandalism indicate the implausibility of Prior's recent allegations. To understand the extent of Prior's alleged vandalism defense, the scope of the acts covered by this defense at the remaining three sites must be further explored.

Turning to the Park site, Prior initially reported to the Illinois Emergency Management Agency ("IEMA") that a lightening strike caused the spill. (Day 1, Tr. at 81).[9] A day later, Prior informed Cheryl Cahnovsky children opened a ball valve; seven days later, Prior told Cheryl Cahnovsky that another competitor sabotaged his tank battery. (Day 1, Tr. at 81, 92). The obvious question is which of Prior's statements is true? Again, the Board cannot engage in conjecture concerning Prior's purported vandalism defense at the Park site, but must rely upon legitimate facts in the record to determine liability. Based on on-site observations and Prior's inconsistent statements, it is obvious that Prior's allegation of vandalism at the Park site is a recent unsupported fabrication seeking to minimize his culpability for the allegations.

While Prior more consistently alleged vandalism at the Mezo Oestreich and the Morgan Kalberkamp sites, Prior never submitted filed police reports to the Board. (Day 1, Tr. at 103,108). Instead, Prior offered limited conjecture concerning his vandalism allegations at all four sites. (Day 1, Tr. at 139).

The record does contain substantiated evidence that site security was inadequate for precluding access to potential trespassers or vandals. The Gompers, Mezo Oestreich and the

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[9] While on site on July 22, 1997, the Illinois EPA did not observe damage to the tank battery from a lightening strike. (Day 1, Tr. at 81).

Morgan Kalberkamp sites did not possess fences or other means to control access. (Day 1, Tr. at 40, 108); *see also,* Exhibit 3, 15, 16. On repeated occasions, the State representatives would arrive to the Park site to find the gates unlocked and open to the facilities. (Day 1, Tr. at 81, 91, 94); *see also,* Exhibit 11, 12. More likely than not, Prior failed to provide even marginal attention to the security and supervision of the facilities.

The Board must apply the law to these facts. In the context of environmental liability, the legal issues include whether Prior exercised control over the source of the pollution and whether it had taken any precautions against vandalism.

Perkinson v. Pollution Control Board, 187 Ill. App.3d 689 (3rd Dist. 1989), involved a discharge from a swine waste lagoon through a trench. Perkinson contended that he was not responsible for "causing or allowing" the discharge because he lacked knowledge of the trench and because the trench was apparently dug by a vandal. Citing *Phillips Petroleum Co. v. Pollution Control Board,* 72 Ill. App. 3d 217 (1979), the court stated that "the law does not impose strict liability on property owners for pollution which results from a cause beyond the owner's control." 187 Ill. App. 3d at 693. The court discussed the factual situations in *Phillips Petroleum* (involving a spill caused by a carrier in transit) and *Union Petroleum Corp. v. United States* (Ct. Cl. 1981), 651 F.2d 734 (involving a spill caused by vandals), the court observed:

> The evidence in the case at bar is far less favorable to the owner of the premises where the pollution occurred. There is nothing to indicate that Perkinson had taken any precautions against vandalism, and other than his disavowal of any knowledge or authorization for the digging of the trench, no evidence of the source of the trench was introduced at all. At most Perkinson's evidence would permit the trier of fact to draw an inference of third-party intervention, but that evidence does not compel a finding that Perkinson took reasonable precautions to prevent such occurrences.

187 Ill. App. 3d at 693-94. Having dispensed with Perkinson's factually unsupported claim that the spill was not preventable, the court explicitly rejected the arguments regarding lack of knowledge:

> Many cases have held that the owner's lack of knowledge of the discharge is no defense under the Environmental Protection Act. The leading case is *Meadowlark Farms, Inc. v. Pollution Control Board* (1974), 17 Ill. App. 3d 851, 308 N.E. 2d 829, where water pollution was caused by seepage through mine refuse piles. The PCB found that Meadowlark Farms owned the surface rights of the property and thus owned the source of pollution and had the capability of controlling the pollutional discharge.

187 Ill. App. 3d at 694. The court in *Perkinson* reaffirmed "the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts establish the owner either lacked the capability to control the source, as in *Philips Petroleum*, or had undertaken extensive precautions to prevent vandalism or other intervening cause, as in *Union Petroleum*." 187 Ill. App. 3d at 694-95.

The record in the present case against Prior clearly shows that Prior had the capability to control the four facilities at issue. Moreover, Prior failed to undertake extensive precautions to prevent vandalism or other intervening causes. This failure is manifest in Prior's failure to repeatedly lock the gate at the Park site or to install gates at the remaining three sites.

Since the early days of the Act, Courts have affirmed that the ownership of the pollutional source supports the imposition of liability under the Act for water pollution and other violations of the Act and regulations caused or contributed to by the pollution source. *See, Meadowlark Farms, Inc. v. Pollution Control Board,* (5th Dist. 1974), 17 Ill. App. 3d 851, 302 N.E. 2d 829, 835-36; *see also, Freeman Coal Mining Corp. v. Pollution Control Board*, (5th Dist. 1974), 21 Ill. App. 3d 157. At each of the release sites, the Respondent exercised control over the property pursuant to oil leases. Civil liability under the Act is grounded upon control over the source of the pollution and the lack of knowledge regarding a release does not bar such liability.

III. THE BOARD SHOULD IMPOSE A SUBSTANTIAL MONETARY PENALTY BASED ON STATUTORY PENALTY FACTORS

The evidence demonstrates that numerous violations of the Act and regulations have occurred. Section 42(a) of the Act permits the Board to impose penalties against those who violate any provision of the Act or regulation adopted by the Board, 415 ILCS 5/42(a) (2000). The Board may impose a maximum penalty of $50,000.00 for each violation of the Act, and an additional $10,000.00 penalty for each day the violation continues, 415 ILCS 5/42(a) (2000).

The Board has broad discretionary powers to assess civil penalties under the statutory authority vested by the Act, *Southern Illinois Asphalt Company v. Pollution Control Board,* 60 Ill. 2d 104, 326 N.E. 2d 406 (1975). Courts have traditionally upheld the imposition of civil penalties where it will "aid in the enforcement of the Act," but not where it is shown to be merely "punitive." *Southern Illinois Asphalt Company,* 326 N.E.2d at 412; *see also, City of Monmouth v. Pollution Control Board,* 57 Ill. 2d 482, 313 N.E. 2d 161 (1974) (punitive considerations for civil penalties are secondary).

In the last thirty years of enforcement under the Act, civil penalties assessed by the Board or Illinois courts have fallen between two ends of a spectrum. On the one end, little or no civil penalties have been deemed necessary because of pertinent facts that weighed heavily upon the nature of the violations or the extent of the alleged pollution. Technical or paperwork violations, such as the failure to obtain permits or submit reports, have frequently been afforded this treatment. *See, Park Crematory, Inc. v. Pollution Control Board,* 201 Ill. Dec. 931, 637 N.E.2d 520 (1st Dist. 1994); *Trilla Steel Drum Corporation v. Pollution Control Board,* 180 Ill. App.3d 1010, 536 N.E.2d 788 (1st Dist. 1989). Similarly, the inadvertence of the respondent, *Southern Illinois Asphalt Company, supra,* the good faith efforts of a respondent to bring about compliance prior to the filing of a complaint, *Park Crematory, Inc., supra; Bressler Ice Cream Company v. Pollution Control Board,* 21 Ill.App.3d 560, 315 N.E.2d 619 (1st Dist. 1974), and

lack of any economic benefit from noncompliance, *Park Crematory, Inc., supra*, have figured prominently in cases involving low or nominal civil penalties.

On the other end of the spectrum, some enforcement actions brought under the authority of the Act have resulted in substantial monetary penalties. In these cases, circumstances showing the unreasonableness of the respondent's conduct or its lack of good faith, *ESG Watts, Inc., v. Pollution Control Board,* 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996), the seriousness and lengthy duration attributed to the violations, *People v. John Prior and Industrial Salvage, Inc.,* PCB No. 97-111 (November 20, 1997); *People v. Panhandle Eastern Pipeline Company,* PCB No. 99-191 (November 15, 2001), the need for deterrence, *People v. Waste Hauling Landfill, Inc and Waste Hauling, Inc.,* PCB No. 95-91 (May 21, 1998), or the accrual of a significant economic benefit, *Panhandle, supra,* have been important considerations in the penalty determination.

Of course, most litigated cases fall somewhere in the middle of the aforementioned spectrum. The determination as the amount of the penalty is dependent on the unique facts of each case, as no exact "formula" for arriving at a penalty exists. *People v. Bernice Kershaw and Darwin Dale Kershaw,* PCB No. 92-164 (April 20, 1995); *People v. ESG Watts, Inc.,* PCB No. 96-233 (February 5, 1998). Based on numerous aggravating facts supported by the record, the People contend that this case against John Prior should be ranked at the higher end of the penalty spectrum. However, based on several mitigating facts, any penalty imposed against James Mezo should be ranked at the lower end of the penalty spectrum.

In making its orders, the Board is required to consider any matters of record concerning the reasonableness of the alleged pollution, including those factors identified in Section 33(c). The Board is also authorized by the Act to consider any matters of record concerning the mitigation or aggravation of penalty, including those matters specified in Section 42(h). *See, People v. Bernice Kershaw and Darwin Kale Kershaw d/b/a Kershaw Mobil Home Park,* PCB

92-164 (April 20, 1994). The People will outline its penalty demand in two parts: first, a consideration of the Section 33(c) factors and secondly, a consideration of the Section 42(h) factors.

A. Section 33(c) Factors.

1. The character and degree of injury or interference.

From at least June 13, 1996, to a date better known to Prior on or about March 12, 2003, Prior allowed open dumped waste to remain on the Gompers site without the required permits from the Illinois EPA. (Day 1, Tr. at 16-19, 20-23, 40-41, 43-50, 52-57, 65-68); *see also,* Exhibit 2, 3, 4, 6, 9. Prior's failure to attain the required permits served to undermine the permitting process set up through the Act and Board regulations..." *People of the State of Illinois v. Sure-Tan, Inc.* PCB 90-62, page 9 (April 11, 1991). Not only did the oil in the pit pose a fire hazard, but it contained toluene, ethylbenzene, benzelethelene, xylene, other polynuclear aromatics and 2, 4, 6 tri-bromophenal. (Day 1, Tr. at 43-47); *see also,* People's Exhibit 3. Chris Cahnovsky explained that the oil in the pit could contaminate nearby groundwater, cause soil contamination and release volative organic compounds into the atmosphere. (Day 1, Tr. at 41, 47). In addition, the off-rim tires provided a potential breeding ground for mosquitos, the oil-production waste dumped in the abandoned mine shaft posed a threat to nearby groundwater; the open burned oil-contaminated straw caused or threatened air pollution; and the overfilled oil drums caused soil contamination and during storm water runoff, posed a threat of surface water contamination. (Day 1, Tr. at 18, 20, 24, 50-51). Accordingly, this factor should be weighed against Prior at the Gompers site.

In addition, Prior caused, allowed or threatened the discharge of contaminants near various unnamed tributaries that led to Fulton Creek, Fulton Creek and Sewer Creek so as to cause or tend to cause water pollution. In each instance, visible oil and/or petroleum scum

coated the unnamed tributaries, Fulton Creek and in certain instances, Sewer Creek. (Day 1, Tr. at 78, 83-84, 88-89, 100-112, 124-129). At the Mezo Oestreich site, Mezo caused or allowed the discharge of oil that covered an unnamed tributary to Fulton Creek, Fulton Creek and Sewer Creek so as to cause or tend to cause water pollution. (Day 1, Tr. at 124-129). The Respondents' noncompliance caused an actual risk to the nearby tributaries, Fulton Creek and in certain instances, Sewer Creek, and therefore establishes the unreasonableness of the violations that should be weighed against the Respondents[10]. *Cf., People v. John Prior and Industrial Salvage, Inc.,* PCB No. 97-111 (November 29, 1997).

2. The social and economic value of the pollution source.

The Board has previously found that a pollution source typically possesses a "social and economic value" that is to be weighed against its actual or potential environmental impact. *People v. Waste Hauling Landfill, Inc., and Waste Hauling, Inc.,* PCB No. 95-91 (May 21, 1998). However, the operation of a site without the required permit diminishes such value as it violates the law. *See, People of the State of Illinois v. Sure-Tan, Inc.* PCB 90-62, page 9 (April 11, 1991). Prior's operation of an un-permitted open dump at the Gompers site did not provide a social and economic value to the community.

The People do not dispute that oil production operations have value to the community. In these instances, however, Prior's operation of three noncompliant oil production sites did not provide a social and economic value to the community. At the Mezo Oestreich site, this factor is further aggravated by Mezo posing as the permittee because Prior did not possess the required Illinois DNR permit. Accordingly, this factor should be weighed against both Respondents at the Mezo Oestreich site.

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[10] In addition, Prior interfered with the Illinois EPA's inspections of these incidents due to his inconsistent statements to field staff. *See,* II.M.2

3. The suitability or unsuitability of the pollution source.

The pollution sources, the Park, the Mezo Oestreich, and the Morgan Kalberkamp sites are located in close proximity to various unnamed tributaries that lead to Fulton Creek. Of greatest concern is the Park site which is in the city park and abuts a baseball field. Accordingly, the People dispute the suitability of these three sources to the areas in which they are located. The People do not dispute the suitability of the location of the Gompers site.

4. The technical practicability and economic reasonableness of compliance.

It was technically practicable and economically reasonable for Prior to eliminate his noncompliance at the Gompers site through the labeling of all containers storing used oil with the words "used oil"; the remediation and the appropriate disposal of the used oil surrounding the two drums, in the pit, in the concrete and dense vegetation, and any other oil-stained area; and the removal and disposal of all waste to a sanitary landfill or recycling facility, as appropriate. Moreover, it was technically practicable and economically reasonable for Prior to attain compliance at the Park, Mezo Oestreich and Morgan Kalberkamp sites by stopping the release, containing the released used oil, cleaning up and properly managing the released used oil and other contaminated material. In addition, it was technically practicable and economically reasonable for Prior to repair or replace any facility leaking used oil before returning them to service. In the same manner, it was technically practicable and economically reasonable for Mezo to achieve compliance at the Mezo Oestreich.

5. Subsequent compliance.

The People acknowledge that the Respondents have recently made efforts to address their noncompliance following notification of noncompliance by the Illinois Attorney General's Office. However, Prior's recent compliance at the Gompers site came only after Illinois EPA field staff personally informed him on at least four occasions of the measures necessary to

bring the site into compliance, *See,* (Day 1, Tr. at 42-43, 48, 50); *see also,* Exhibit 3, 4; the Illinois EPA mailed Violation Notices providing the same information to Prior, *see,* (Day 1, Tr. at 51-52), *see also,* Exhibit 3; the Illinois EPA mailed a Notice of Intent to Pursue Legal Action ("NITPLA") letter to Prior, *See* (Day 1, Tr. at 59-60); *see also,* Exhibit 7; and the Illinois Attorney General's Office filed a complaint before the Board, *See,* Complaint filed April 19, 2002.

Moreover, Prior's compliance at the Park site did not come until the Illinois EPA emergency responder repeatedly informed him of the necessary compliance measures on July 22 and 28, 1997, *See,* (Day 1, Tr. at 85-87, 90, 92), *see also,* Exhibit 11; the Illinois sent Violation Notices to Prior containing the same information, *See,* (Day 1, Tr. at 95-96), *see also,* Exhibits 3 and 4; and the Illinois EPA mailed a NITPLA to Prior, *See,* (Day 1, Tr. at 97).

To attain Prior's and Mezo's compliance at the Mezo Oestreich site, the Illinois EPA field staff had to inform the Respondents of the required remedial activities, *See,* (Day 1, Tr. at 103), *see also,* Exhibit 16; the Illinois EPA had to issue Violation Notices, *See,* (Day 1, Tr. at 131), *see also,* Exhibits 20 and 21; the Illinois EPA had to mail a NITPLA, *See,* (Day 1, Tr. at 134); and the Illinois Attorney General's Office had to initiate this proceeding.

Finally, Prior's late compliance at the Morgan Kalberkamp site came only after the Illinois EPA emergency responder informed him on both July 19 and 24, 2000, of the necessary compliance activities, *See,* (Day 1, Tr. at 109, 112), and the Illinois Attorney General's Office filed suit against Prior.

It should not be deemed a mitigating factor if compliance is achieved only after enforcement proceedings are initiated. *ESG Watts, Inc. v. IPCB,* 282 Ill. App. 3d 43, 52-53 (4th Dist. 1996). ("Evidence. . . presented regarding petitioner's failure to comply with many regulations until after enforcement proceedings were initiated, of the hardship imposed upon the Agency in collecting monies due & the necessity of deadlines to ensure the smooth

operation of the Agency. The Board's decision that a stiff penalty was warranted to deter future violations was neither arbitrary nor capricious."). While the Respondents have recently achieved compliance, with the exception of the Park site, the violations continued until the initiation of enforcement proceedings by the Attorney General's Office.

B. Section 42(h) Factors.

Under Section 42(h) of the Act, 415 ILCS 5/42(h) (2000), the Board must examine the following factors when making determination on an appropriate civil penalty; duration and gravity of the violations, due diligence of the violator to address the violations, the economic benefit that accrued to the violator, the monetary amount that will deter further violations of that violator and others similarly situated, and any previously adjudicated violations.

1. The duration and gravity of the violation.

A civil penalty imposed under the Act must "bear some relationship to the seriousness of the infraction or conduct" of the polluter. *Southern Illinois Asphalt Company, supra; Trilla Steel Drum Corp. v. Pollution Control Board,* 180 Ill. App. 3d 1010, 1013 (1989) (penalty should be "commensurate with the seriousness of the infraction"). The Act "authorizes the Board to assess civil penalties for violations regardless of whether these violations resulted in actual pollution." *ESG Watts v. Illinois Pollution Control Board,* 282 Ill. App. 3d 43, 51 (4th Dist. 1996). In this case, the evidence establishes repeated violations of long duration and significant gravity committed by Prior. Meanwhile, Mezo's violations at the Mezo Oestreich site are more aptly characterized as an isolated event.

a. Duration.

Prior open dumped a variety of waste items including liquid crude oil and defied a number of waste disposal regulations at the Gompers site since a date better known to the Respondent on or before June 13, 1996. In addition, Prior caused repeated releases of oil to

State waters since at least on or before June 30, 1997. While the water pollution incidents occurred in 1997 and 2000, Prior did not submit documentation verifying compliance until March 2003. Appellate Courts have affirmed the imposition of penalties for violations which did not directly result in adverse environmental consequences but were of a longstanding and repeated nature. *People v. McHenry Shores Water Company,* 295 Ill. App. 3d 628, 393 N.E. 2d at 399 (2nd Dist. 1998). Prior's noncompliance spans a period of approximately six and a half years and as such, this factor should be weighed heavily against Prior.

As detailed *supra,* violations were first observed by the Illinois EPA at the Mezo Oestreich site on July 1, 1997, but began at a time better known to Respondent Mezo. Violations continued until Mezo submitted documentation verifying compliance in March 2003. Violations occurred over a period of six years, during which time Mezo received Violation Notices and NITPLA letters from the Illinois EPA.

b. Gravity.

The Board should consider the seriousness of Prior's discharge of oil production waste to an abandoned mine shaft, release of oil to the ground from two unlabeled and opened drums of used oil, open dumped waste and oil in an on-site pit, open dumped and burned oil-contaminated straw, open dumped tires, open dumped oil-well development waste in concrete rubble and dense vegetation, and failure to possess a permit from the Illinois EPA to conduct a waste-storage, waste-treatment or waste-disposal operation.

The gravity of these violations were discussed by Grant and Chris Cahnovsky. First, the oil well development waste dumped in the abandoned mine shaft not only caused land pollution, but threatened groundwater. (Day 1, Tr. at 20). Second, concerns were expressed of soil contamination and during storm water runoff, potential surface water contamination in the area of the overfilled oil drums. (Day 1, Tr. at 50). Third, the oil in the on-site pit contained toluene,

ethylbenzene, benzelethelene, xylene, other polynuclear aromatics and 2, 4, 6 tri-bromophenel and may have resulted in the release of volatile chemicals to the air. (Day 1, Tr. at 41, 45-50). Moreover, the open dumped waste and oil caused land pollution, threatened groundwater, was ignitable and met the definition of a DOT flammable waste. (Day 1, Tr. at 41, 43-47); *see also,* People's Exhibit 3.

Fourth, open dumped oil-contaminated straw caused air pollution when open burned. The combustion of any matter in the open may result in the release of contaminants to the air that may be injurious to human, plant or animal life, to health or property or cause a nuisance. (Day 1, Tr. at 24). Fifth, the open dumping of tires can cause or threaten the spread of certain disease carrying vectors (including mosquitos carrying the West Nile virus) when off-rim tires are not covered and water is allowed to accumulate inside the tire. (Day 1, Tr. at 18).[11] Sixth, the open dumped oil-well development waste in concrete rubble and dense vegetation caused soil contamination and posed a risk for groundwater contamination, stormwater runoff and surface water contamination. (Day 1, Tr. at 57). Finally, the failure to possess the required permits from the Illinois EPA for the Gompers site "undermined the permitting process set up through the Act and Board regulations . . ." *See, Sure-Tan, supra.*

The impacts associated with the Respondents' oil releases are one more consideration for this Board. Extensive oil impacts existed at the sites of the three incidents. At least 3 miles downstream and 2.5 miles downstream of the releases at the Park and the Mezo Oestreich sites, respectively, pollutional impacts were evident. (Day 1, Tr. at 83-84, 88-89, 124-129). The seriousness of the water violations can only be understood through an appreciation of the underlying goals of Section 12 of the Act. Section 12 prohibits both pollutional discharges to

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[11] Mosquitos are a vector that breed in the stagnant water often found in off-rim tires. (Day 1, Tr. at 18).

waters of the State as well as water pollution hazards posed by contaminants deposited upon the land in proximity to waters. The intentionally broad statutory definition of "waters" includes not only surface streams and ponds, and groundwater, but also sloughs and intermittent waterways such as drainage ditches and seasonal creeks.

The pollution caused by the crude oil releases to the waters of the State is obvious. The offensive conditions resulting from even a small amount of oil include the various types of sheen on the surface and deposits of sediments or sludge on the bottom of the streams. The physical and chemical conditions of the streams are altered by the oil to the extent that aquatic life cannot exist. The Respondents' noncompliance caused the actual release of contaminants and therefore establishes the unreasonableness of the pollutants that should be weighed against both Prior and Mezo. *See, Prior and Industrial Salvage, supra.* The Respondents' noncompliance caused an actual risk to State waters, its inhabitants and users and therefore establishes the gravity of these violations.

2. The presence or absence of due diligence.

Prior exercised no diligence during the years it was causing releases of oil to State waters and even defied Illinois EPA instruction by inappropriately dumping recently-excavated material back on the ground at the Gompers site. Prior had innumerable opportunities to observe and correct his noncompliance. Instead, Prior waited until after the initiation of enforcement by the State of Illinois before it completed compliance efforts. These uncontested facts demonstrate a lack of good faith by the Respondent Prior. In the same token, Mezo required nearly 7 years to finalize compliance at the Mezo Oestreich site and thus, evince a lack of good faith.

Good faith has not been found to be a matter of intent, since neither intent or guilty knowledge is a necessary element to finding a violation. Rather, good faith attempts at

compliance are a significant factor to consider in determination of an appropriate penalty. *Bressler Ice Cream Company v. Illinois Pollution Control Board,* 21 Ill. App. 3d 560, 315 N.E. 2d 619 (1st Dist. 1974); *Chicago Magnesium Casting Company v. Illinois Pollution Control Board,* 22 Ill. App. 3d 489, 317 N.E. 2d 689 (1st Dist. 1974); *CPC International, Inc. v. Illinois Pollution Control Board,* 24 Ill. App. 3d, 203, 321 N.E. 2d 58 (3d Dist. 1975). If violators "evince a sincere desire . . . to cooperate. . . this attitude should be noted and encouraged" by taking it into account during the penalty assessment. *Bressler Ice Cream,* 315 N.E. 2d at 621. Penalties may be mitigated when the violator acts promptly to correct the violation and demonstrates cooperative efforts. *CPC International,* 321 N.E. 2d at 61.

Good faith has been inferred from behavior which reflects diligence and which is reasonably directed towards the goal of achieving compliance. *Illinois EPA v. Allen Barry,* PCB No. 88-71, 1990 Ill. ENV. LEXIS 465, 74 (May 10, 1990). In the instant case, no such inference may be made as the Respondents required nearly 7 years to comply. Despite numerous conversations with Illinois EPA field staff, Violation Notices and NITPLA letters repeating those measures necessary to bring the respective sites into compliance, the Respondents only finalized compliance efforts after the initiation of enforcement by the Office of the Attorney General. (Day 1, Tr. at 42, 43, 48, 50-52, 59-60, 85-87, 90-92, 95-97, 103, 109, 112, 131, 134); *see also,* People's Exhibit 3, 4, 7, 11, 16, 20, 21. At best, good faith and due diligence on the part of the Respondents were minimal.

Nor is it a defense to findings of violations or a bar to assessment of civil penalties that the Respondents have recently come into compliance with the Act and associated regulations.

Section 33(a) of the Act, 415 ILCS 5/33(a) states, in pertinent part:

> ...It shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation, except where such action is barred by any applicable State or federal statute of limitation.

In the case of *Modine Mfg. Co. v. Pollution Control Bd.,* 193 Ill. App.3d 643, 648 (2d Dist. 1990), the court included the following in its reasoning:

> Initially, Modine contends that the imposition of a penalty here would not aid in the enforcement of the Act because it was no longer in violation of the Act at the time the complaint was filed. While there is arguably some support for this view, we believe all the relevant facts and circumstance must be examined to determine if a civil penalty is to be imposed as a method to aid in the enforcement of the Act. Thus, we decline to hold categorically that penalties may not be imposed for wholly past violations (*citations omitted*).

As stated in Section 33(a) of the Act, and as recited in *Modine,* it is not a defense to findings of violations or a bar to assessment of civil penalties that the person has recently come into compliance with the Act and the regulations promulgated thereunder. As discussed *supra,* if compliance is achieved only after enforcement proceedings are initiated, due diligence should not be weighed in favor of the violator. *See, ESG Watts, Inc. v. Illinois Pollution Control Board,* 282 Ill. App. 3d 43, 52-53 (4th Dist. 1996). The record reveals that the Respondents were not only informed of those measures necessary to bring the sites into compliance, but that the Respondents, particularly Prior, continued to blatantly disregard Illinois EPA instruction despite repeated conversations with Illinois EPA personnel and written notices and warnings from the Illinois EPA.[12] In short, good faith and due diligence on the part of the Respondents were minimal and clearly, should not be weighed in favor of the Respondents.

3. Economic benefit.

As set forth within Section 42(h)(3) of the Act, the Board is authorized to consider any economic benefits derived by a violator in determining an appropriate civil penalty to remove or neutralize the economic incentive to violate environmental laws and regulations. In *United States v. Smithfield Foods, Inc.,* 972 F. Supp. 338 (E.D. Va 1997), the court acknowledged that

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[12] In addition, Prior's inconsistent statements to field staff concerning the cause of the various incidents evince a lack of good faith and due diligence on his part. *See,* II.M.2.

the goal of deterrence requires a penalty to have both an economic benefit component to ensure that the violator does not profit from its violation of the law, as well as a punitive component to account for the degree of seriousness of the violations. A penalty should include the economic benefit of noncompliance; otherwise, the violator and the potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance. Accordingly, it is apparent that the goal of economic benefit is to prevent a violator from profiting from its wrongdoing.

Economic benefit to an environmental violator is not only the monetary gains derived by lack of compliance, but the cost savings resulting from delayed compliance. *Standard Scrap Metal Company v. Illinois Pollution Control Board,* 142 Ill. App. 3d 655, 491 N.E. 2d 1251 (1st Dist. 1986); *Wasteland, Inc. v. Illinois Pollution Control Board,* 118 Ill. App. 3d 1041, 456 N.E.2d 964 (3rd Dist. 1983). Not assessing a civil penalty, and merely permitting a respondent to allege that the cost associated with coming into compliance following an enforcement action is a sufficient penalty encourages violators to wait until an enforcement action is begun before complying with the law. *Wasteland, Inc.,* 456 N.E. 2d at 976.

The existence of economic benefit may be assumed without introduction of evidence on the matter. *People v. Waste Hauling Landfill,* PCB No. 95-91 at pg. 29 (May 21, 1998); *See also, ESG Watts, Inc. v. Illinois Pollution Control Board,* 282 Ill. App. 3d 43, 53 (4th Dist. 1996) ("Although the evidence supporting any economic benefit gained through the late filing of reports is slight to nonexistent, we deem it reasonable to assume petitioner received the 'time value of money' by delaying the expenditures necessary to prepare such reports. Certainly, petitioner received an economic benefit by delaying its payment of quarterly fees").

In the instant case, Prior not only failed to timely remediate, remove and appropriately dispose of all open dumped waste from the Gompers site, but failed to attain the required waste

disposal permits from the Illinois EPA. Failure to attain permits saves the offender the time and expense of acquiring the permit. *See, People of the State of Illinois v. Sure-Tan, Inc.* PCB 90-62, page 9 (April 11, 1991). Prior also failed to timely stop the releases, contain the released used oil, clean up and properly manage the released used oil and other contaminated material, and to conduct final clearance sampling at the remaining incidents. These are all costs that Prior either failed to expend or delayed expending, thereby providing Prior a considerable economic benefit. Finally, Mezo accrued an economic benefit due to his failure to timely contain and remediate the released used oil at the Mezo Oestreich site.

4. The amount of penalty which will serve to deter or enhance voluntary compliance.

The imposition of a civil penalty for each violation may deter further violations by the one penalized or by others, thus aiding in the administration of the Act. *Southern Illinois Asphalt v. Illinois Pollution Control Board,* 60 Ill. 2d 204, 326 N.E. 2d 406 (1975). Through the imposition of penalties upon those who blatantly disregard applicable rules and regulations, others who might consider cutting corners at the expense of the environment are deterred. *Wasteland, Inc.,* 456 N.E. 2d at 967. "The assessment of penalties against recalcitrant defendants who have not sought to comply with the Act voluntarily but who have by their activities forced the Agency or private citizens to bring action against them may cause other violators to act promptly and not wait for the prodding of the Agency." *Lloyd A. Fry Roofing Company v. Pollution Control Board,* 46 Ill. App. 3d 412; 361 N.E. 2d 23, 28-29. (5th Dist. 1977). This position was specifically adopted in 1986 by the First District in *Standard Scrap Metal Co. v. Pollution Control Board,* 142 Ill. App. 3d 655 (1st Dist. 1986).

Deterrence is an appropriate objective for the Board to evaluate in its penalty assessments, even where a violator has already achieved compliance or the violations have caused no environmental harm. *ESG Watts. Inc., v. Pollution Control Board,* 282 Ill. App. 3d

43, 668 N.E. 2d 1015 (4th Dist. 1996) (respondent's compliance came only after initiation of enforcement, and associated hardships imposed on Illinois EPA warranted a "stiff" penalty to assure deterrence).

There is a pronounced need for deterrence in the instant case. The Board should place a high priority on assessing a penalty that is substantial enough to encourage future compliance by Prior and the regulated community. This deterrence is necessitated by Prior's egregious actions at the Gompers site in defiance of Illinois EPA directives and the repeated conduct associated with Prior's water pollution violations. Moreover, Prior's extensive noncompliance history dictates the Board's imposition of a significant monetary penalty to prevent operators that might, through design or coincidence, mirror Prior's "environmental programs." In addition, Mezo must be deterred from posing as another oil facility's permittee in the future. A high civil penalty against Prior and a more moderate civil penalty against Mezo will provide an incentive for other oil operators to comply with the Act and will preserve the waters of the State.

5. Previously adjudicated violations of the Act.

The People are currently unaware of any previously adjudicated violations of the Act involving Mezo; however, Prior has an extensive non-compliance history. In fact, Prior has one of the longest, if not the longest, environmental non-compliance history in Illinois. Shortly after the enactment of the Act in 1970, the Board found Prior in violation of Section 21(d) of the Act and Rules 201 and 202(a) of Chapter 7, Solid Waste, for developing and operating a solid waste management site in Marion County without the required development and operating permits from the Illinois EPA. *See*, *Environmental Protection Agency v. John Prior*, PCB 75-184 (September 4, 1975). The Board assessed a $100.00 penalty for the violations.

A decade later, Prior continued to defy State environmental laws; this time the violations occurred at two sites commonly referred to as the Centralia/Prior and the Centralia/Prior

Blackwell landfills. In 1985, the People alleged that John Prior d/b/a Industrial Salvage, Inc., failed to place daily cover on exposed refuse in violation of 35 Ill. Adm. Code 807.305(a) and 807.301; failed to spread and compact refuse in violation of 35 Ill. Adm. Code 807.303(b) and 807.301; failed to deposit refuse into the toe of the fill in violation of 35 Ill. Adm. Code 807.303(a) and 807.301; failed to collect and dispose of litter in violation of 35 Ill. Adm. Code 807.306 and 807.301; failed to comply with permit conditions in violation of 35 Ill. Adm. Code 807.302 and 807.301; and failed to control leachate adequately in violation of 35 Ill. Adm. Code 807.314(e) and 807.301. Each of these violations also resulted in a violation of Sections 21(a) and (d)(2) of the Act. Prior agreed to pay a civil penalty in the amount of $12,000.00 for these violations. *See, People v. John Prior d/b/a Industrial Salvage, Inc.*, Marion County No. 85-CH-17 (August 5, 1986).

On December 8, 1993, the State filed yet another complaint against John Prior and Industrial Salvage. *See, People v. John Prior and Industrial Salvage, Inc.*, PCB 93-248. After an evidentiary hearing, the Board entered an order and opinion finding that Prior and Industrial Salvage, Inc., violated Section 12 of the Act, by causing or allowing pollutional discharges from the landfills to a stream; Section 21 of the Act, by failing to comply with permits issued by the Illinois EPA regarding the required closure and corrective actions for landfills; and Section 21.1 of the Act, by failing to post adequate financial assurance for the sites. The complainant did not seek a monetary penalty against the respondents because they were both engaged in bankruptcy proceedings. *See,* Opinion and Order of the Board dated July 7, 1995.

In 1996 and 1997, the parties were again before the Board for violations at three landfills near Centralia known as the Centralia/Prior site, the Prior/Blackwell site and the Industrial Salvage site. *See, People v. John Prior and Industrial Salvage, Inc.*, PCB 97-111. The People alleged that the respondents failed to monitor and report groundwater quality, failed to maintain

and secure monitoring wells, discharged contaminants into the groundwater causing water pollution, and failed to implement a corrective action plan. The Board found the respondents to be in violation of the Act and Board regulations and imposed a civil penalty against the respondents in the amount of $287,000.00 and ordered the respondents to reimburse complainant $2,520.00 for attorney fees. *See,* Opinion and Order of the Board, dated November 20, 1997. Due to Prior's extensive non-compliance history, not only should the Board aggravate this factor, but the Board should impose a significant penalty against Prior to deter future violations.

IV. RELIEF REQUESTED

The People request a final order from the Board imposing an appropriate civil penalty for each count of the Complaint. Accordingly, the People recommend the following relief:

A. Statutory Maximum Penalty.

The Board has typically looked to an estimation of the statutory maximum penalty as a logical benchmark to begin considering matters in aggravation and mitigation of penalties. *See, Panhandle, supra.* The formula for this penalty calculation starts with a reference to the statutory maximum penalties available under Section 42(a) and (b) of the Act. A penalty for the initial violation of statutory or Board regulations is first derived by multiplying the statutory maximum penalty amount by the actual number of violations. Additional violations are computed for each day of noncompliance which are then, in turn, added to the initial penalty calculation. *See, ESG Watts, Inc., supra; People v. James and Carol Gilmer,* PCB No. 99-27 (August 24, 2000).

For instance, at the Gompers site, Prior's violation of Section 21(a) of the Act results in a statutory maximum penalty of $50,000 for the principal violation and an additional $24,640,000 for each day of continuing violations (i.e., 2464 days x $10,000 = $24,640,000). The total penalty for Prior's Section 21(a) violation at the Gompers site alone is an estimated

$24,690,000 (i.e., $50,000 + 24,690,000). A calculation of the statutory maximum penalty for Prior's remaining land pollution violations would generate similar statutory maximum penalties.

In addition, a calculation of the statutory maximum penalty for Prior's water pollution violations at the Park, Mezo Oestreich and Morgan Kalberkamp sites and Mezo's water pollution violation at the Mezo Oestreich site would produce comparable statutory maximum penalties. For instance, at the Mezo Oestreich site, Prior's and Mezo's violation of Section 12(a) of the Act has a statutory maximum penalty of $50,000 for the principal violation and an additional $20,820,000 for each day of continuing violations (i.e., 2080 days x $10,000 = $20,820,000). The total penalty apiece for Prior's and Mezo's Section 12(a) violation is estimated at $20,870,000 (i.e., $50,000 + $20,820,000). A similar calculation for the Respondents' remaining water pollution violations would result in similar penalties.

As set forth herein, a substantial fine is warranted in this case. The People are not requesting the potentially assessable statutory maximum as plead in the Complaint. As discussed *supra,* the potentially assessable statutory maximum is well in excess of hundreds of millions of dollars against Prior and in excess of millions of dollars against Mezo. Alternatively, the People argue that a penalty of $100,000 is reasonable for Prior and $3,500 is a reasonable penalty for Mezo given the circumstances and due consideration of the factors enumerated under Section 33(c) and 42(h) outlined above. The People cite the following cases in support of their contention: circumstances showing the unreasonableness of the Respondent's conduct or its lack of good faith prompted the Board to assess a penalty of $680,200, *People v. ESG Watts, Inc.*, PCB 96-233 (February 5, 1998); the Respondent's blatant disregard for the applicable law and corresponding lack of due diligence resulted in a $200,000.00 penalty, *People v. Summit Environmental Services, Inc.,* PCB No. 94-202 (September 21, 1995); the seriousness and lengthy duration attributed to the violations resulted in a $287,000 penalty,

People v. John Prior and Industrial Salvage, Inc., PCB No. 97-111 (November 20, 1997); *see also*, the imposition of a $164,000.00 penalty for water pollution violations in *People v. Riverside American Farms,* Franklin County Circuit Court No 92-CH-38, October 20, 2000; the need for deterrence prompted the Board to impose a $472,000 penalty, *People v. Waste Hauling Landfill, Inc and Waste Hauling, Inc.,* PCB No. 95-91 (May 21, 1998); and most recently the accruing of a significant economic benefit and the lengthy duration of the violations resulted in Board imposing a $850,000 penalty, *People v. Panhandle Eastern Pipeline Company,* PCB No. 99-191 (November 15, 2001). As set forth in the People's discussion of the Section 33(c) and 42(h) factors above, all of these factors exist in this case against Prior and strongly support the People's request for the imposition of a $100,000 civil penalty against Prior. In addition, the People's analysis of the Section 33(c) and 42(h) factors support the People's requested $3,500 civil penalty against Mezo.

B. Attorney's Fees.

Section 42(f) of the Act states as follows:

> The State's Attorney of the county in which the violations occurred, or the Attorney General, shall bring such actions in the name of the People of the State of Illinois. Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board or a court of competent jurisdiction 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.

The People respectfully request the award of attorney fees of $6,600.00. The People are entitled to the aforementioned attorney's fees on the ground that Prior repeatedly violated the

Act.[13] The People do not seek attorney fees from Mezo.

1. Repeated violations.

The People respectfully request the award of attorney fees due to Prior's repeated violations of the Act. The Board has made limited rulings addressing what constitutes a repeated violation of the Act for purposes of Section 42(h). In *People v. Chicago Heights Refuse Depot,* PCB 90-112 (October 10, 1991), the Board found a distinction between a continuing and a repeated violation of the Act for the purposes of the Respondent's non-submittal of groundwater monitoring results over a several year period. For a repeated violation of the Act, the Board's analysis focused on whether there were prior, similar findings of violations against the Respondent. In *People v. Kershaw, et al.,* PCB 92-164 (April 8, 1993), the water pollutional discharges continued from 1985 to 1992, even though the State notified the Respondent of the violations in 1985. Since the Respondent continued to allow water pollutional discharges even after being notified that the operation of the facility was in violation of the Act, the Board found that the Respondent committed a repeated and knowing violation of the Act. Based on this precedent, in *People v. Panhandle Eastern Pipe Line Company,* PCB 99-191 (November 15, 2001), the Board awarded attorney's fees and costs of over $115,000 where the Respondent repeatedly exceeded its annual NOx permit limit.

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[13]In addition, Prior's repeated open dumping of waste at the Gompers site after Illinois EPA instruction to appropriately dispose of the excavated material demonstrates that the violations were also "knowingly" committed. (Day 1, Tr. at 48-49, 57); *see also,* Exhibits 3, 6. Knowledge is generally defined as an "acquaintance with the fact or truth" and, where it is an element of a statutory offense, such knowledge is present if a person is "aware of a high probability of its existence." Black's Law Dictionary (West's Abridged 4th Edition). A person need not have the appreciation as to the illegality of the conduct. *People of the State of Illinois v. Clybourn Metal Finishing Company,* PCB 89-157 (A & B) (July 1991); citing *Kampen v. Department of Transportation,* 103 Ill. Dec. 884 (2nd Dist. 1986). Courts have frequently observed that the element of knowledge may be proven by "circumstantial evidence and the reasonable inferences therefrom." *People v. Tucker*, 542 N.E. 2d 804, 186 Ill. App. 3d 683 (1st Dist. 1989); *Schlobohm v. Rice*, 510 N.E. 2d 43, 157 Ill. App. 3d 90 (1st Dist. 1987) (element of knowledge is "not susceptible of direct proof" and thus may be shown by circumstantial evidence "reasonably and fairly drawn").

The facts of this case are clearly analogous to the Board's previous determinations of what constitutes a repeated violation of the Act. Not only has Prior had similar releases of oil to State waters that have resulted in violations of Section 12(a) and (d) of the Act and the associated regulations, Prior was notified of the impropriety of such releases after the first incident at the Mezo Oestreich site on June 30, 1997. (Day 1, Tr. at 98-105, 122-130); *see also,* Exhibit 16. After the Illinois EPA issued Violation Notices against Prior in August and November 1998 for releases at the Park and Mezo Oestreich sites, respectively, Prior released oil to State waters at the Morgan Kalberkamp site. (Day 1, Tr. at 131, 134); *see also,* Exhibits 14 and 21.

The facts are clear. Prior has repeatedly released oil to State waters. After the initial release at the Mezo Oestreich site, Prior continued to operate its oil production operations in the very same non-compliant manner. Based on the repeated nature of the violations, the People respectfully request that the Court award attorney's fees and costs.

2. Reasonableness of attorney's fees.

The People's request for attorney fees in the amount of $6,600.00 is reasonable in light of the applicable case law and the time expended by the People to prosecute this case against Prior. *See,* Attachment 1 and incorporated herein detailing the amount of time the People have expended prosecuting this case.

The People respectfully request the award of attorney's fees in the amount of $6,600.00 (i.e., $120 x 55 attorney hours). The People's request is reasonable in light of prior Board decisions. In *People v. ESG Watts, Inc.* PCB 94-127, the Board awarded attorney's fees in the amount of $120 per hour and this amount was reapplied by the Board in *People v. ESG Watts, Inc.,* PCB 96-107, *People v. ESG Watts,* PCB 96-233, *People v. ESG Watts, Inc.,* PCB 96-237, *People v. John Prior,* PCB 97-211, and in *People v. Waste Hauling Landfill,* PCB 95-91. Attorney's fees have been awarded not only for the time associated with the trial (hearing), but

for the time associated with trial preparation, discovery, the drafting of pleading and preparing briefs. *People v. Spirco Environmental, Inc.*, PCB 97-203; *see also, Panhandle, supra.*

WHEREFORE, the People respectfully requests that this Court find for the People and provide the following relief:

A. Find that on or about June 13, 1996, and continuing through March 12, 2003, Prior has violated Sections 21(a), (d), (e), (p)(1), (p)(6) of the Act, and 35 Ill. Adm. Code 722.111, 739.122(c), (d), 808.121, 812.101(a), respectively, by causing land pollutional violations at the Gompers site as alleged in the Complaint.

B. Find that, on or about June 30, 1997, and continuing through March 12, 2003, Prior has violated Sections 12(a) and (d) of the Act, and 35 Ill. Adm. Code 302.203 and 302.208 respectively by causing, allowing, or threatening water pollution, by creating water pollution hazards, and by creating offensive conditions as alleged in the Complaint;

C. Find that, on or about June 30, 1997 and continuing through March 12, 2003, Mezo has violated Sections 12(a) and (d) of the Act, and 35 Ill. Adm. Code 302.203 and 302.208 respectively by causing, allowing, or threatening water pollution, by creating water pollution hazards, and by creating offensive conditions as alleged in the Complaint;

D. Enter judgment in favor of the People and against the Respondents;

E. Assess a civil penalty of $100,000 against John Prior;

F. Assess a civil penalty of $3,500 against James Mezo;

G. Award attorneys fees of $6,600.00 to the People, to be paid by Prior; and

H. Grant such other and further relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN
Attorney General
of the State of Illinois

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

BY: Sally A. Carter
SALLY A. CARTER
Environmental Bureau
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: October 27, 2003

STATE OF ILLINOIS)
)SS
COUNTY OF SANGAMON)

AFFIDAVIT

I, SALLY A. CARTER, after being duly sworn and upon oath, state as follows:

1. I am an Assistant Attorney General in the Environmental Bureau of the Office of the Attorney General and assigned to represent the People of the State of Illinois in the case of *People of the State of Illinois v. John Prior, d/b/a Prior Oil Company and James Mezo, d/b/a Mezo Oil Company,* No. 02-177.

2. I have reviewed the hours I spent prosecuting this case and as set forth in Attachment 1 to this Affidavit and under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument pertaining to the hours I spent prosecuting this case are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

FURTHER, AFFIANT SAYETH NOT.

Sally A. Carter
SALLY A. CARTER

SUBSCRIBED AND SWORN to before me this 27 day of October, 2003.

Peggy J. Poitevint
Notary Public

OFFICIAL SEAL
PEGGY J. POITEVINT
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 4-16-2006

ATTACHMENT 1

The People respectively request an award of $6,660.00 based upon 55.50 attorney hours employed to prosecute this case. A conservative breakdown of the attorney hours spent prosecuting this case is set forth in the following table:

DESCRIPTION OF WORK PERFORMED BY MS. CARTER	HOURS
Pleadings	
Complaint 4/19/02	5.00
Interrogatories and Request for Production 8/4/03	1.50
Complainant's Brief 10/27/03	24.50
Hearing Preparation	
September 4, 2003 - September 14, 2003	12.50
Hearing	
September 15, 2003 - September 16, 2003	12.00
Total Attorney Hours	55.50 x 120/hr
Total Award of Attorney's Fees Requested	$6,660.00

Due to the volume of this pleading,

please contact the Clerk's Office

at

312/814-3629

to view this file.