ILLINOIS POLLUTION CONTROL BOARD
May 6, 2004

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-177
	)	(Enforcement – Land, Water)
JOHN PRIOR d/b/a PRIOR OIL COMPANY and JAMES MEZO d/b/a MEZO OIL COMPANY,	)	
	)	
Respondents.	)	

SALLY CARTER, JAVONNA HOMAN, ASSISTANT ATTORNEYS GENERAL, OFFICE OF THE ATTORNEY GENERAL, AND MICHAEL ROUBITCHEK, SPECIAL ASSISTANT ATTORNEY GENERAL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF COMPLAINANT; and

RESPONDENTS JOHN PRIOR AND JAMES MEZO APPEARED *PRO SE*.

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

On April 19, 2002, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a sixteen-count complaint against respondent John Prior d/b/a Prior Oil Company (Prior) and respondent James Mezo d/b/a Mezo Oil Company (Mezo). Prior and Mezo are oil producers and distributors. The complaint alleged oil pollution of land and water at four sites in Washington County.

The four sites are known as the Gompers site, the Wamac City Park tank battery, the Mezo Oestreich tank battery, and the Morgan Kalberkamp tank battery. The Gompers site is used as a shop, office, and equipment storage facility, while the other three sites are part of oil well operations and are used to receive and store crude oil. Prior allegedly committed violations at all four sites. Mezo allegedly committed violations only at the Mezo Oestreich tank battery.

For the reasons below, the Board finds that Prior and Mezo violated the Environmental Protection Act (Act) (415 ILCS 5 (2002)) and Board regulations. The Board orders Prior to pay a civil penalty of $300,000, Mezo to pay a civil penalty of $3,500, and Prior to pay the People's attorney fees in the amount of $6,600.

In this opinion, given the vast number of alleged violations and the multiple sites and respondents at issue, the Board first gives an overview of its decision. Second, the Board briefly describes the alleged violations and requested relief. Third, the Board sets forth the procedural history of this case. Fourth, the Board makes its findings of fact. Lastly, the Board discusses the issues and renders its legal conclusions on each count of the complaint, the purported defenses,

and the requested relief.

OVERVIEW OF THE BOARD'S DECISION

In this opinion, the Board finds that Prior violated the Act and Board regulations by dumping oil field waste and other wastes at the Gompers site without a permit, polluting the land. The Board also finds that Prior violated the Act and Board regulations by causing or allowing the release of crude oil at the Wamac City Park tank battery, the Mezo Oestreich tank battery, and the Morgan Kalberkamp tank battery, resulting in water pollution. In addition, the Board finds that Mezo violated the Act and Board regulations by allowing the release of crude oil at the Mezo Oestreich tank battery, resulting in water pollution. Both respondents committed other violations as well, all of which are discussed below.

Based on the factors of Section 33(c) of the Act (415 ILCS 5/33(c) (2002)), the Board finds that civil penalties against Prior and Mezo are warranted. After considering the factors of Section 42(h) of the Act (415 ILCS 5/42(h) (2002)), the Board imposes a $300,000 civil penalty on Prior and a $3,500 civil penalty on Mezo. In light of Prior's willful, knowing, and repeated violations, the Board also orders Prior to pay the People's attorney fees totaling $6,600.

ALLEGED VIOLATIONS AND REQUESTED RELIEF

Under the Act, the Attorney General may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. *See* 415 ILCS 5/31 (2002); 35 Ill. Adm. Code 103. In this case, the People brought a sixteen-count against Prior and Mezo for alleged violations at four sites in Wamac, Washington County.

All sixteen counts of the complaint allege violations by Prior (counts I-XVI), while three counts allege violations by Mezo (counts XII-XIV). The complaint alleges that Prior committed violations at all four sites (the Gompers site; the Wamac City Park tank battery; the Mezo Oestreich tank battery; and the Morgan Kalberkamp tank battery) and that Mezo committed violations at one site (the Mezo Oestreich tank battery). Seven counts involve the Gompers site (counts I-VII), while four counts involve the Wamac City Park tank battery (counts VIII-XI), three counts involve the Mezo Oestreich tank battery (counts XII-XIV), and two counts involve the Morgan Kalberkamp tank battery (counts XV-XVI).[1] Each of the sixteen counts is summarized below, followed by a description of the People's requested relief.

Alleged Violations

Count I—Alleged Open Dumping by Prior at the Gompers Site

In count I of the complaint, the People allege that Prior violated Sections 21(a), (p)(1), and (p)(6) of the Act (415 ILCS 5/21(a), (p)(1), (p)(6) (2002)) by causing or allowing the open dumping of waste at the Gompers site, resulting both in litter and in liquid discharge from the site. Comp. at 7.

[1] The Board cites the complaint as "Comp. at _."

Count II—Alleged Permitting Violations by Prior at the Gompers Site

Count II of the complaint alleges that Prior violated Sections 21(d) and (e) of the Act (415 ILCS 5/21(d), (e) (2002)) at the Gompers site by conducting a waste-storage or waste-disposal operation without a permit granted by the Illinois Environmental Protection Agency (Agency) and by storing, disposing, or abandoning waste at a site that does not meet the requirements for landfills. Comp. at 9-10.

Count III—Alleged Waste Disposal Permit Violations by Prior at the Gompers Site

The People allege in count III of the complaint that Prior violated Section 21(d) of the Act (415 ILCS 5/21(d) (2002)) and Section 812.101(a) of the Board's waste disposal regulations (35 Ill. Adm. Code 812.101(a)) by developing and operating a landfill at the Gompers site without a permit issued by the Agency. Comp. at 11.

Count IV—Alleged Failure by Prior to Make Hazardous Waste Determinations at the Gompers Site

In count IV of the complaint, the People allege that Prior violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2002)) and Section 722.111 of the Board's waste disposal regulations (35 Ill. Adm. Code 722.111) by generating solid waste at the Gompers site and failing to determine whether the waste is hazardous. Comp. at 13.

Count V—Alleged Labeling Violations by Prior at the Gompers Site

Count V of the complaint alleges that Prior violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2002)) and Section 739.122(c) of the Board's waste disposal regulations (35 Ill. Adm. Code 739.122(c)) by failing to label containers storing used oil. Comp. at 14.

Count VI—Alleged Failure by Prior to Clean Up Used Oil at the Gompers Site

Count VI of the complaint alleges that Prior violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2002)) and Section 739.122(d) of the Board's waste disposal regulations (35 Ill. Adm. Code 739.122(d)) by, upon detecting a used oil release at the Gompers site, failing to stop or contain the release, failing to clean up and properly manage the released used oil and other material, and failing to repair or replace any leaking used oil storage containers or tanks before returning them to service. Comp. at 16.

Count VII—Alleged Failure by Prior to Make Special Waste Determinations at the Gompers Site

In count VII of the complaint, the People allege that Prior violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2002)) and Section 808.121 of the Board's waste disposal regulations (35 Ill. Adm. Code 808.121) by failing at the Gompers site to determine whether generated waste is a special waste. Comp. at 17.

Count VIII—Alleged Water Pollution Caused by Prior at the Wamac City Park Tank Battery

Count VIII of the complaint alleges that Prior violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) by causing or allowing the discharge of contaminants to waters of the State at the Wamac City Park tank battery so as to cause water pollution. Comp. at 21.

Count IX—Alleged Failure by Prior to Clean Up Used Oil at the Wamac City Park Tank Battery

The People allege in count IX of the complaint that Prior violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2002)) and Section 739.122(d) of the Board's waste disposal regulations (35 Ill. Adm. Code 739.122(d)) by, upon detecting a used oil release at the Wamac City Park tank battery, failing to stop or contain the release, failing to clean up and properly manage the released used oil and other material, and failing to repair or replace any leaking used oil storage containers or tanks before returning them to service. Comp. at 22.

Count X—Alleged Water Pollution Hazard Caused by Prior at the Wamac City Park Tank Battery

Count X of the complaint alleges that Prior violated Section 12(d) of the Act (415 ILCS 5/12(d) (2002)) by depositing contaminants upon the land at the Wamac City Park tank battery in such place and manner as to create a water pollution hazard. Comp. at 24.

Count XI—Alleged Offensive Conditions in Waters Caused by Prior at the Wamac City Park Tank Battery

In count XI of the complaint, the People allege that Prior violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) and Section 302.203 of the Board's water pollution regulations (35 Ill. Adm. Code 302.203) at the Wamac City Park tank battery by causing offensive conditions in waters of the State. Comp. at 25.

Count XII—Alleged Water Pollution Caused by Prior and Mezo at the Mezo Oestreich Tank Battery

Count XII of the complaint alleges that Prior and Mezo violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) at the Mezo Oestreich tank battery by causing or allowing the discharge of contaminants to the waters of the State so as to cause water pollution. Comp. at 29.

Count XIII—Alleged Water Pollution Hazard Caused by Prior and Mezo at the Mezo Oestreich Tank Battery

The People allege in count XIII that Prior and Mezo violated Section 12(d) of the Act (415 ILCS 5/12(d) (2002)) at the Mezo Oestreich tank battery by causing or allowing

contaminants to be deposited upon the land in such place and manner as to create a water pollution hazard. Comp. at 30.

Count XIV—Alleged Offensive Conditions in Waters Caused by Prior and Mezo at the Mezo Oestreich Tank Battery

Count XIV alleges that Prior and Mezo violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) and Section 302.203 of the Board's water pollution regulations (35 Ill. Adm. Code 302.203) by causing or allowing the discharge of crude oil from the Mezo Oestreich tank battery, resulting in offensive conditions in waters of the State. Comp. at 31.

Count XV—Alleged Water Pollution Caused by Prior at the Morgan Kalberkamp Tank Battery

In count XV of the complaint, the People allege that Prior violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) at the Morgan Kalberkamp tank battery by causing or allowing the discharge of contaminants to the waters of the State so as to cause water pollution. Comp. at 33.

Count XVI—Alleged Offensive Conditions in Waters Caused by Prior at the Morgan Kalberkamp Tank Battery

Count XVI of the complaint alleges that Prior violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) and Section 302.203 of the Board's water pollution regulations (35 Ill. Adm. Code 302.203) by discharging crude oil from the Morgan Kalberkamp tank battery, causing offensive conditions in waters of the State. Comp. at 34.

Requested Relief

The People ask the Board for two types of relief. First, the People request that the Board impose civil penalties on respondents—$100,000 on Prior and $3,500 on Mezo. Second, the People ask the Board to assess Prior $6,600 for the People's attorney fees.

PROCEDURAL HISTORY

On April 19, 2002, the People filed the complaint against Prior and Mezo. On May 2, 2002, the Board accepted the complaint for hearing. Board Hearing Officer Carol Sudman held the hearing on September 15-16, 2003, in Nashville, Washington County. Seven witnesses testified over the two-day hearing.[2] The following persons testified on behalf of the People: Michael Grant, Assistant Regional Manger with the Agency's Bureau of Land; Christopher Cahnovsky, Regional Manger with the Agency's Bureau of Land; Cheryl Cahnovsky, an Emergency Responder in the Emergency Operations Unit of the Agency's Office of Chemical

[2] The Board cites the hearing transcript for September 15, 2003, as "Tr.1 at _" and the hearing transcript for September 16, 2003, as "Tr.2 at _."

Safety; Thomas Powell, Senior Emergency Responder in the Emergency Operations Unit of the Agency's Office of Chemical Safety; and Lawrence Bengal, Supervisor of the Illinois Department of Natural Resources' (DNR) Division of Oil and Gas (formerly the Illinois Department of Mines and Minerals). Each respondent appeared *pro se* and testified on his own behalf.

The People offered 27 exhibits at hearing, all of which were admitted into the record. Prior offered one exhibit, which was not admitted. Mezo offered two exhibits, both of which were admitted.[3] The People filed a post-hearing brief on October 29, 2003, along with a motion to exceed the 50-page limit on briefs (35 Ill. Adm. Code 101.302(k)).[4] The hearing officer granted the People's motion on November 5, 2003. Neither Prior nor Mezo filed a post-hearing brief.

FACTS

The Board makes its findings of fact for each of the four sites at issue: the Gompers site; the Wamac City Park tank battery; the Mezo Oestreich tank battery; and the Morgan Kalberkamp tank battery.

Gompers Site

The Gompers site is located at 140 Gompers Street in Wamac, Washington County. Tr.1 at 12, 35; People Exh. 2 at 1. Prior operated the Gompers site, which included buildings for Prior's shop, office, and equipment storage. Tr.1 at 12, 35-36; People Exh. 2- 4. On June 13, 1996, two Agency employees visited the Gompers site: Mike Grant, Assistant Regional Manager in the Bureau of Land; and Christopher Cahnovsky, Regional Manager in the Bureau of Land. Tr.1 at 8-9, 16, 31; People Exh. 2 at 1. The Agency had received a complaint that oil field waste was being dumped down an abandoned mineshaft at the Gompers site. Tr.1 at 15. Prior did not have a permit from the Agency to treat, store, or dispose of waste at the Gompers site. Tr.1 at 15, 36-37.

On June 13, 1996, a hose was running from a Prior Oil Company tanker truck into an abandoned mine shaft at the Gompers site. The hose was discharging an oily substance taken from tank battery containment dikes that are used to collect spilled material. DNR, Division of Oil and Gas took enforcement action against Prior for this "improper disposal" of "liquid oil field waste into an abandoned mine shaft." Tr.1 at 16-17, 19; Tr.2 at 12, 16-17; People Exh. 2, Photo 1, 4, 6-8.

Also on June 13, 1996, at the Gompers site, there was a pile of used, off-rim tires. Off-rim tires can collect water and serve as a breeding ground for disease vectors such as mosquitoes.

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[3] The Board cites the People's hearing exhibits as "People Exh. _ at _." The Board cites Mezo's hearing exhibits as "Mezo Exh. _ at _."

[4] The Board cites the People's brief as "People Br. at _."

Tr.1 at 17-18; People Exh. 2, Photo 2, 3. Also on the site was a large amount of stained soil around two unlabeled, open drums of oil. The oil was used. Tr.1 at 18-19; People Exh. 2, Photo 5.

On August 22, 2000, Mr. Cahnovsky inspected the Gompers site again. A pit at the site contained an old barbeque grill, car parts, plastic containers, paint cans, clothes, absorbent pads, and landscaping waste. The pit also contained a pool of approximately 70 gallons of an oily substance. The oily substance coated the soil walls and floor of the pit. The pit was about ten feet wide, 20 feet long, and seven feet deep. Prior claimed that he had did not know the pit was there or how the material ended up in the pit. Tr.1 at 39-42; People Exh. 3, Photo 1-5 (8/22/00).

A sample of the oily substance from the pit, taken by the Agency, revealed flammable crude oil, containing toluene, ethylbenzene, benzelethelene, xylene, other polynuclear aromatics, and 2, 4, 6 tri-bromophenal. Tr.1 at 42-47; People Exh. 3. Conditions had not changed at the Gompers site seven days later on August 29, 2000. Tr.1 at 48; People Exh. 3. However, when the Agency returned to the site on August 31, 2000, the pit had been excavated. The materials had been removed from the pit and placed in a 20-yard roll-off box on the back of a truck on-site. Tr.1 at 48-49; People Exh. 3, Photo 1-6 (8/31/00).

Also on August 31, 2000, there was a large amount of oil staining and puddling on the surface soil at the southwest side of Prior's shop. The oil was used. The oily material was next to two 30-gallon drums. The drums were unlabeled and some of the oily material was present on top of the drums. Mr. Cahnovsky explained to a Prior employee that the drums were leaking and that the oil could be "scraped up and put in the same roll-off box" that contained the oil from the pit. Tr.1 at 49-50; People Exh. 3, Photo 7-8.

The Agency sent a Violation Notice to Prior on November 2, 2000. The notice suggested how Prior could resolve the alleged violations. The suggestions included removing all waste from the site by December 14, 2000. Tr.1 at 50-52; People Exh. 3.

On November 3, 2000, three Agency employees returned to the Gompers site: Ken Mensing, Regional Mangaer; Jeff Benbenek, Bureau of Air; and Mr. Grant. The Agency had received complaints about materials being burned in the open air at the Gompers site. The site had a trench approximately eight feet wide, 30 feet long, and four feet deep. The trench contained smoldering plastic bags, straw, and oily material, emitting a white-gray smoke. Tr.1 at 20-23; People Exh. 4, Narrative, Photo 1-6. Prior admitted to instructing his employees to dig the trench to deposit and burn the material, though he was aware that the actions would violate environmental laws. Prior stated that he ordered the burning because he was concerned about oily water running off the site due to impending rain. Mr. Mensing instructed Prior to extinguish the smoldering material, and Prior agreed to later dispose of the material in a permitted landfill. Tr.1 at 24; People Exh. 4, Narrative. Adjacent to the trench was a ten-foot-by-ten-foot area of dumped oily material and straw, now contaminated, that had been used in an attempt to absorb the oily material. Tr.1 at 22-23, 29-30; People Exh. 4, Narrative, Photo 7, 8.

On December 5, 2000, Mr. Cahnovsky and Mr. Grant returned to the Gompers site in response to a complaint that oil well development waste had been dumped there. Tr.1 at 52-53;

People Exh. 6. The site had tire tracks leading up to an oil-stained area. Tr.1 at 52-55; People Exh. 6, Site Sketch, Photo 1, 2. Vehicle tracks led to another area of oily material, located by dense vegetation and concrete slabs. There were approximately three barrels, or 126 gallons, of oily fluids on the ground. The oily substance appeared to have been discharged by hose to be deposited beneath the vegetation and concrete, generally out of view. Tr.1 at 55-58; People Exh. 6, Photo 3-5, 10, 12. Finally, many of the items in the pit on August 22, 2000, and subsequently excavated and placed into a roll-off box on August 31, 2000, were back on the ground at the site on December 5, 2000, in a large pile of oil-contaminated soil. Tr.1 at 57; People Exh. 6, Photo 6.

Prior submitted a Compliance Commitment Agreement (CCA) to the Agency on December 12, 2000. The Agency rejected the CCA on December 26, 2000. People Exh. 8, Narrative. When inspected again by the Agency on August 30, 2001, the site appeared unchanged since the December 5, 2000 inspection. Prior had agreed to clean up the site by January 2001. The Agency sent Prior a Notice of Intent to Pursue Legal Action (NIPLA) dated May 22, 2001, giving Prior an opportunity to meet with the Agency. Prior did not respond to the NIPLA in writing, but did call the Agency to schedule a meeting that he ultimately cancelled. The People filed the complaint initiating this action with the Board on April 19, 2002. In March 2003, Prior supplied the Agency with cleanup documentation. Tr.1 at 58-59, 61-68; People Exh. 7, 8, 9.

An Agency site visit on May 8, 2003, revealed that the abandoned mine shaft had been closed and that the material burned in the trench had been removed from the site. Tr.1 at 25-26, 29-30; Tr.2 at 13; People Exh. 9. DNR, Abandoned Mines Lands Reclamation Division filled the abandoned shaft in July 1998. Tr.2 at 12-13. Agency personnel on the May 2003 site visit observed no impacted soil pile from the pit on-site, no waste material in the pit, no stained soil, and no drums of oil that had been used. Tr.1 at 68; People Exh. 9.

Wamac City Park Tank Battery

Prior operated a tank farm, also known as a tank battery, at the Wamac City Park, located in Wamac, Illinois.[5] Tr.1 at 74-75, 79; People Exh. 11 at 1, Photo 10 (7/28/97). The site is used to receive and store crude oil as part of an oil well operation. Tr.1 at 74. On July 21, 1997, approximately 31 to 48 barrels of crude oil, including brine or saltwater extracted from the ground during production, were released. The release came from a 210-barrel capacity aboveground tank at the site. One barrel equals 42 gallons. That evening, Woody Myers, an inspector from DNR's Division of Oil and Gas, visited the site. Prior reported the release on the same day to the Illinois Emergency Management Agency (IEMA), claiming that lightning struck the tank farm. None of the tanks showed damage indicative of a lightning strike. IEMA assigned the spill incident number 971314. Tr.1 at 74, 78, 81-82, 128; Tr.2 at 4; People Exh. 11

[5] DNR regulations under the Illinois Oil and Gas Act (225 ILCS 725 (2002)) define a "tank battery" as "one or more open or closed top tanks, of any capacity, that are located on a lease, unit or adjacent property, for the purpose of collecting, separating and/or storing crude oil and/or other liquid oilfield wastes that are generated as a result of oil and gas production operations." 62 Ill. Adm. Code 240.10.

at 1-2, 4.

The released crude oil was not contained by a dike within the tank battery, nor was it contained by a poorly built soil berm or short wall surrounding the dike and tank battery. At the Wamac City Park tank battery, the released crude oil drained 20 to 30 feet down-gradient through the park and into a small drainage way that led to Fulton Creek. Prior placed straw bales in Fulton Creek downstream from the point of the release. The straw bales did not successfully contain the release and the crude oil passed through them. A thunderstorm in the evening of July 21, 1997, spread the crude oil release farther into the waterways. Prior took no steps to recover the released crude oil on July 21, 1997. Tr.1 at 74, 78-80, 82-86; Tr.2 at 18; People Exh. 11 at 1-3, Maps, Photo 0, 9-10, 13 (7/22/97).

Cheryl Cahnovsky, an Emergency Responder in the Emergency Operations Unit of the Agency's Office of Chemical Safety, visited the Wamac City Park tank battery on July 22, 1997. A strong odor of crude oil permeated the site and the tank battery's soil had puddles of oil. On that day, Prior speculated that children must have caused the release by reaching through a chain-link fence with a stick and opening one of the tank's ball valves. The chain-link fence surrounding the tank farm was not locked. Tr.1 at 70, 77, 79-81, 83; People Exh. 11 at 2, Photo 3, 7, 8 (7/22/97), Photo 9-11 (7/28/97). Within one-quarter mile of the tank battery, heavy crude oil was visible in Fulton Creek and crude oil residue on top of the water discolored the Creek to a brownish yellow. Tr.1 at 84; People Exh. 11, Photo 11-12 (7/22/97).

On July 22, 1997, nine children were playing in the crude oil in Fulton Creek. When Prior was informed of this by Ms. Cahnovsky, he responded: "only nine children?" That day, oil and petroleum scum was visible in Fulton Creek three miles from the site. Tr.1 at 88-90; People Exh. 11 at 3, Photo 4-7. Vegetation along the bank of the Creek was covered with crude oil. People Exh. 11, Photo 1.

Also on July 22, 1997, Ms. Cahnovsky instructed Prior on remedial steps he needed to take. She told him that he lacked the equipment to respond to the release and that the two workers he had present were not enough. She also warned Prior that the Agency would ask the United States Environmental Protection Agency (USEPA) to respond to the release if Prior did not take it seriously. Later in the day on July 22, 1997, Prior had workers deploy four absorbent booms in Fulton Creek that Ms. Cahnovsky had provided. The workers used shovels to try to remove oil from the Creek bank, but did not use a pressure washer to clean the bank or a leaf blower to direct surface oil to a collection point. A vacuum truck on-site was not being used to recover oil for much of July 22, 1997, if it was ever used that day. Tr.1 at 85-88; People Exh. 11 at 2-3. Ms. Cahnovsky testified about Prior's July 22, 1997 remediation efforts: "Well, they weren't adequate. He seemed to be responding to what I asked him to do eventually, but it wasn't very – he wasn't proactive, and he was moving after several repeated discussions of what needed to be done." Tr.1 at 90.

On July 28, 1997, Ms. Cahnovsky returned to the site in response to a Wamac resident's complaint that crude oil was draining into Fulton Creek by her home. Tr.1 at 90-91; People Exh. 11 at 3. Much of the released crude oil contained in the tank battery's dike had been removed, but the soil outside the tank battery remained covered with oil. Crude oil was still draining into

Fulton Creek, and the Creek banks and vegetation were covered with crude oil. Ms. Cahnovsky again instructed Prior to contain the oil. Tr.1 at 90-91; People Exh. 11 at 3. On July 28, 1997, Prior explained that children did not cause the release after all, but rather an oil business competitor had sabotaged the tank battery. The tank battery remained unlocked on July 28, 1997. Tr.1 at 91-92; 138; People Exh. 11 at 3-4.

On September 11, 1997, Ms. Cahnovsky returned to the site. The tank battery, the fence for which remained unlocked, had several inches of crude oil pooled behind its containment berm. Crude oil residue was no longer visible in Fulton Creek. Tr.1 at 92-94; People Exh. 12 at 1, Photo 1-2.

Regarding incident number 971314, the Agency sent a Violation Notice to Prior dated January 16, 1998, by certified mail, return receipt requested. Prior did not accept the mailing. The Agency delivered by hand another Violation Notice, dated August 21, 1998, for the same incident. The notice included the Agency's recommended steps for cleaning up the crude oil release. Tr.1 at 95-96; People Exh. 13, 14. Prior submitted to the Agency a report by Prior's consultant, Hopper Environmental, dated October 10, 2000, documenting soil sample testing. Based on this report, the Agency determined that no further remedial action was required. Tr.1 at 97-98.

Mezo Oestreich Tank Battery

The Mezo Oestreich tank battery is located at 224 Wabash in Wamac, Washington County. Tr.1 at 98, 119-20. The tank battery has three approximately 200-barrel aboveground tanks and an oil-water separator. The site is used to receive and store crude oil as part of an oil well operation. In 1997, Prior operated the Mezo Oestreich tank battery. Tr.1 at 98, 120, 123; People Exh. 16 at 1.

Mezo sold the oil and gas interests at the site to Prior in 1995. Tr.2 at 19-20. However, the permit for operating the site, issued by DNR's Division of Oil and Gas, remained in Mezo's name. DNR was unaware of the sale until 2003. Tr.1 at 120; Tr.2 at 16-22; People Exh. 16 at 1; People Exh. 25. In September 1996, Mezo paid DNR the fiscal year 1997 annual well fee for the Mezo Oestreich site, which was billed in July 1996. Tr.2 at 21-25; People Exh. 26, 28. Prior could not have been transferred Mezo's permit because DNR had a "permit block" on Prior due to enforcement actions pending against Prior. Tr.2 at 21-22; People Exh. 15 at 2. Mezo is permitee for 41 oil wells in Illinois, and has been in the oil production business for 23 years. Tr.1 at 148; Tr.2 at 28-29.

Prior reported a 50-barrel crude oil spill at the Mezo Oestreich tank battery to IEMA on June 30, 1997. He indicated that the spill reached nearby Fulton Creek. Earlier that day, the Wamac Village Clerk reported this release to IEMA, stating that one mile of Fulton Creek had been impacted with oil. IEMA assigned the release incident number 971159. On the evening of June 30, 1997, Prior began work to build up the soil containment berm around the tank battery. Rain that day advanced the oil farther downstream. Prior did not inform Mezo about the release until several days later. Tr.1 at 99, 101, 123-25, 130; People Exh. 15 at 1-2, Maps; People Exh. 16, Photo 2; Mezo Exh. 1.

Two Agency employees visited the site on July 1, 1997: Thomas Powell, Senior Emergency Responder in the Emergency Operations Unit of the Agency's Office of Chemical Safety; and Emergency Responder Cheryl Cahnovsky. Oil stains were present on the ground throughout the battery and recoverable crude oil was present in the drainage ditch leading to Fulton Creek. Recoverable crude oil was also present in Fulton Creek. Prior put straw bales at the spill site and in Fulton Creek, but did not use a siphon or underflow dam. The straw bales were washed away within the Creek. No absorbent booms or pads were deployed, as is common in the oil production industry, and no oil recovery, such as by vacuum truck, was occurring. Oil stained the Fulton Creek sidewalls and bridges and oil residue was present throughout Fulton Creek. Oil was visible approximately 2.5 miles downstream in Sewer Creek. Heavy accumulations of recoverable crude oil were present two miles downstream. The tank battery, drainage way, and Fulton Creek had a strong petroleum odor. Tr.1 at 115, 120, 122-30; People Exh. 15 at 1-2, Photo 1-10.

Ms. Cahnovsky returned to the site on July 22, 1997. Approximately one foot of released crude oil mixed with water was pooled on the ground within the tank battery behind the newly built-up containment berm. This oil had been released since the July 1, 1997 inspection. Tr.1 at 99-102; People Exh. 15 at 3; People Exh. 16 at 1, Photo 1-2 (7/22/97). Soil just outside of the containment berm and in the drainage way was still oily. Tr.1 at 102; People Exh. 16 at 1. Crude oil was still visible in Fulton Creek. Tr.1 at 102.

On July 28, 1997, Ms. Cahnovsky returned to the site. Tr.1 at 103. Prior stated that an oil business competitor sabotaged his tank battery, causing the crude oil release. Access to the tank battery was not restricted, such as by a fence. One of the tank valves was leaking crude oil into the containment berm on July 28, 1997. When Ms. Cahnovsky pointed this out to Prior, he attempted to tighten the valve, but the leak continued. Tr.1 at 103, 128, 138; People Exh. 16 at 1, Photo 12. A pit containing crude oil was present in the tank battery area's soil floor, behind the containment berm. Tr.1 at 104; People Exh. 16, Photo 1 (7/28/97).

The Agency sent a Violation Notice dated December 12, 1997, to Mezo by certified mail, return receipt requested. The notice included the Agency's recommended steps for cleaning up the crude oil release. Tr.1 at 131-33; People Exh. 20. The Agency sent a Violation Notice dated November 12, 1998, to Prior by hand delivery. The notice included the Agency's recommended steps for cleaning up the release. Tr.1 at 131-33; People Exh. 21.

Mezo submitted to the Agency a report dated March 6, 1998, and a revised version dated April 4, 1998. The reports were prepared by Mezo's environmental consultant, Chase Environmental. Tr.1 at 134-35. The Agency found the reports inadequate and asked for further contaminant sampling of soil sediment and water. Tr.1 at 136-36. The Agency issued a NIPLA to Prior dated August 6, 1999. Mezo Exh. 1. Prior's environmental consultant, Hopper Environmental, performed the additional sampling and documented the results in a March 12, 2003 report submitted to the Agency. Tr.1 at 134, 137.

Morgan Kalberkamp Tank Battery

The Morgan Kalberkamp tank battery is located near 312 Wabash in Wamac, Washington County. The site has aboveground tanks and is used to receive and store crude oil as part of an oil well operation. Tr.1 at 105; People Exh. 17 at 1. Prior operated the tank battery in 2000. Tr.1 at 107. Prior reported a crude oil spill in July 2000 at this site to IEMA. IEMA assigned incident number 2001370 to the release. Tr.1 at 105-06; People Exh. 17 at 1. Approximately 1.5 to 3 barrels of crude oil were released. Tr.1 at 107-08; People Exh. 17 at 1. The released oil reached Fulton Creek. Tr.1 at 108. Prior stated that the release was caused by vandalism. Access to the tank battery was not restricted, such as by a fence. Tr.1 at 108, 138; People Exh. 17 at 1.

Agency Emergency Responder Cheryl Cahnovsky visited the site on July 19, 2000. Tr.1 at 107; People Exh. 17 at 1. Approximately 300 feet of Fulton Creek had crude oil present. Oil was present along the Creek banks. Tr.1 at 108; People Exh. 17 at 1. Prior used straw bales in the Creek to try to contain the crude oil. Tr.1 at 108. An oil recovery truck was present at the site, but not operating. Ms. Cahnovsky instructed Prior to remediate the release. Tr.1 at 109; People Exh. 17 at 1. Residences are near the site and one resident complained that released oil was present on his property. Tr.1 at 109; People Exh. 17 at 1.

Ms. Cahnovsky returned to the site on July 24, 2000. Tr.1 at 109; People Exh. 18 at 1. Oily straw and a small amount of crude oil were still present in Fulton Creek. Some oil remained on the Creek bank. Ms. Cahnovsky again instructed Prior on remediating the release. Tr.1 at 110-12; People Exh. 18 at 1, Photo 5. Prior's environmental consultant, Hopper Environmental, submitted a report dated March 12, 2003, to the Agency. The report documented the crude oil spill cleanup at the Morgan Kalberkamp tank battery, as well as cleanups at the Gompers site and the Mezo Oestreich tank battery. Tr.1 at 113-14.

DISCUSSION

The Board first discusses each of the complaint's 16 counts in turn, including the purported defenses raised by Prior and Mezo. The Board then addresses the People's requested relief: civil penalties and attorney fees.

Count I—Alleged Open Dumping by Prior at the Gompers Site

The People allege in count I of the complaint that Prior violated Sections 21(a), (p)(1), and (p)(6) of the Act by causing or allowing the open dumping of waste at the Gompers site, resulting both in litter and liquid discharge from the site. Comp. at 7.

Provisions Allegedly Violated: Sections 21(a), (p)(1), and (p)(6) of the Act

Section 21(a) of the Act provides that "[n]o person shall: Cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2002). "Open dumping" is defined as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the

requirements of a sanitary landfill." 415 ILCS 5/3.305 (2002). "Refuse" means "waste." 415 ILCS 5/3.385 (2002).

The Act defines "waste" as:

> [A]ny 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 . . . . 415 ILCS 5/3.535 (2002).

Section 721.104(b)(5) of the Board's waste disposal regulations provides:

> b) Solid wastes that are not hazardous wastes. The following solid wastes are not hazardous wastes:
>
> 5) Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy. 35 Ill. Adm. Code 721.105(b)(5).

The Act defines "sanitary landfill" as:

> [A] facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the Board may provide by regulation. 415 ILCS 5/3.445 (2002).

Section 21(p)(1) of the Act provides that "[n]o 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: litter." 415 ILCS 5/21(p)(1) (2002). The Litter Control Act defines "litter" as:

> [A]ny 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 injure any person or create a traffic hazard, potentially infectious medical waste as defined in . . . the Environmental Protection Act, or anything else of any unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly. 415 ILCS 105/1 (2002).

Section 21(p)(6) of the Act provides that "[n]o 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: standing or flowing liquid discharge from the dump site." 415 ILCS 5/21(p)(6) (2002).

Board Analysis of Count I

Section 21(a) of the Act. Many items were strewn about the Gompers site, including used tires, an old grill, car parts, plastic containers, paint cans, landscaping materials, oil field waste, smoking plastic bags, oil-soaked straw, and leaked used oil. These materials were discarded and thus are "waste" under the Act. Prior consolidated waste at various locations around the Gompers site, including a pit, a trench, and an abandoned mineshaft. The Board therefore finds that Prior open dumped waste. Prior also lacked a waste storage or disposal permit for the Gompers site. Accordingly, the Board finds that Prior violated Section 21(a) of the Act by causing or allowing the open dumping of waste at a site that does not fulfill the requirements for a sanitary landfill.

Section 21(p)(1) of the Act. The Board has adopted the definition of "litter" provided in the Litter Control Act for purposes of Section 21 of the Act. *See* St. Clair County v. Mund, AC 90-64 (Aug. 22, 1991). Many of the items dumped at the Gompers site, such as the old tires, grill, car parts, plastic containers, landscaping waste, and paint cans, are discarded materials that fall squarely within the statutory definition of "litter." The Board therefore finds that Prior violated Section 21(p)(1) of the Act by causing or allowing the open dumping of waste in a manner that resulted in litter.

Section 21(p)(6) of the Act. A pit at the Gompers site contained approximately 70 gallons of standing oily liquid that had been discarded. Also, oily fluids were discharged through a hose to the abandoned mineshaft on the site. The Board finds that Prior violated Section 21(p)(6) of the Act by causing or allowing the open dumping of waste in a manner that resulted in standing liquid discharge or flowing liquid discharge from the dump site.

Count II—Alleged Permitting Violations by Prior at the Gompers Site

Count II of the complaint alleges that Prior violated Sections 21(d) and (e) of the Act at the Gompers site by conducting a waste-storage or waste-disposal operation without a permit granted by the Agency, and by storing, disposing, or abandoning waste at a site that does not meet the requirements for landfills. Comp. at 9-10.

Provisions Allegedly Violated: Sections 21(d)(1) and (e) of the Act

Section 21(d)(1) of the Act provides:

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 . . . . 415 ILCS 5/21(d)(1) (2002).

Section 21(e) of the Act provides as follows:

> No person shall:
>
> e. Dispose, treat, store or abandon any waste . . . except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder. 415 ILCS 5/21(e) (2002).

Board Analysis of Count II

Prior discharged and accumulated waste over time at the Gompers site. Prior intentionally disposed of oil field waste by hose from a tanker truck into an abandoned mineshaft. Later, at another area of the site, Prior dumped oil field waste to the ground out of view, under dense vegetation and concrete rubble. The site had accumulations of waste tires, a large pit containing, among other things, a grill, paint cans, plastic containers, and oil field waste, and a trench with smoldering plastic bags and oily straw. The material excavated from the pit was later dumped from the roll-off box onto the ground at the site. The Gompers site did not include a tank battery, but instead had only buildings for a shop, office, and equipment storage. Much of the waste came from off-site.

Prior never acquired a permit from the Agency to develop or operate a landfill at the Gompers site. Prior does not argue for, nor do the facts support, applying any permit exemption under Section 21(d)(1) of the Act. The Board finds that Prior violated Section 21(d)(1) by conducting a waste-storage or waste-disposal operation at the Gompers site without a permit. The Board further finds that Prior violated Section 21(e) of the Act by disposing, storing, or abandoning waste at the Gompers site, a facility that does not meet the standards for a landfill under the Act or Board regulations.

Count III—Alleged Waste Disposal Permit Violations by Prior at the Gompers Site

The People allege in count III of the complaint that Prior violated Section 21(d)(2) of the Act and Section 812.101(a) of the Board's waste disposal regulations by developing and operating a landfill at the Gompers site without a permit issued by the Agency. Comp. at 11.

Provisions Allegedly Violated: Section 21(d)(2) of the Act and Section 812.101(a) of the Board's Waste Disposal Regulations

Section 21(d)(2) of the Act provides:

> No person shall:
>
> d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> ***
>
> 2. In violation of any regulations or standards adopted by the Board under this Act . . . . 415 ILCS 5/21(d)(2) (2002).

Section 812.101(a) of the Board's waste disposal regulations provides:

> All persons, except those specifically exempted by Section 21(d) of the Environmental Protection Act (Act) . . . 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 . . . . 35 Ill. Adm. Code 812.101(a).

Board Analysis of Count III

As the Board found in its analysis of count II, Prior conducted a waste-storage or waste-disposal operation at the Gompers site without a landfill permit. The Board also found that Prior does not qualify for any exemption from landfill permitting. The Board now finds that Prior violated 35 Ill. Adm. Code 812.101(a) by operating a landfill at the Gompers site without submitting the necessary permit application to the Agency. Prior does not argue otherwise. By violating Section 812.101(a), Prior also violated Section 21(d)(2) of the Act.

Count IV—Alleged Failure by Prior to Make Hazardous Waste Determination at the Gompers Site

In count IV of the complaint, the People allege that Prior violated Section 21(d)(2) of the Act and Section 722.111 of the Board's waste disposal regulations at the Gompers site by generating solid waste and failing to determine whether the waste is hazardous. Comp. at 13.

Provisions Allegedly Violated: Section 21(d)(2) of the Act and Section 722.111 of the Board's Waste Disposal Regulations

Section 21(d)(2) of the Act, which is set forth above under count III, prohibits waste handling that violates Board regulations. Section 722.111 of the Board's waste disposal regulations provides:

> A person who generates solid waste . . . 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.
>
> ***
>
> 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. 35 Ill. Adm. Code 722.111.

"Solid waste" is "any discarded material." "Discarded material" includes material that has been "abandoned" by being "disposed of." 35 Ill. Adm. Code 721.102(a) and (b).

Board Analysis of Count IV

Approximately 70 gallons of an oily substance was found in a pit at the Gompers site. Prior had not characterized the oily material. In fact, he claimed to be unaware of the pit and its contents. An Agency sample of the material revealed flammable crude oil, containing toluene, ethylbenzene, benzelethelene, xylene, other polynuclear aromatics, and 2, 4, 6 tri-bromophenal. The oily material in the pit had been discarded through disposal and thus was "solid waste."

Section 721.104(b)(4) (35 Ill. Adm. Code 721.104(b)(4)), which is set forth above under count I, does exclude from the definition of hazardous waste certain solid wastes associated with crude oil development or production. However, the exclusion does not authorize open dumping such solid waste, and even if the exclusion applied to the oily material in this case, Prior, having generated the material, was responsible for determining whether it was hazardous waste. He failed to do so. The Board finds that by generating a solid waste and failing to determine whether the waste is hazardous, Prior violated 35 Ill. Adm. Code 722.111 and therefore also violated Section 21(d)(2) of the Act.

Count V—Alleged Labeling Violations by Prior at the Gompers Site

Count V of the complaint alleges that Prior violated Section 21(d)(2) of the Act and Section 739.122(c) of the Board's waste disposal regulations by failing to label containers storing used oil. Comp. at 14.

Provisions Allegedly Violated: Section 21(d)(2) of the Act and Section 739.122(c) of the Board's Waste Disposal Regulations

Section 21(d)(2) of the Act, which is set forth above under count III, prohibits waste handling that violates Board regulations. Section 739.122(c) of the Board's waste disposal regulations 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.
>
> ***
>
> (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." 35 Ill. Adm. Code 739.122(c).

Section 739.100 provides these definitions:

> "Used oil" means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.
>
> "Used oil generator" means any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation. 35 Ill. Adm. Code 739.100.

Board Analysis of Count V

Agency inspections over the years revealed that the Gompers site had a number of

unlabeled drums containing used oil generated at Prior's shop on the site. Prior failed to label or mark the drums with the words "Used Oil." The Board finds that by failing to label containers storing used oil, Prior violated 35 Ill. Adm. Code 739.122(c) and therefore also violated Section 21(d)(2) of the Act.

Count VI—Alleged Failure by Prior to Clean Up Used Oil at the Gompers Site

Count VI of the complaint alleges that Prior violated Section 21(d)(2) of the Act and Section 739.122(d) of the Board's waste disposal regulations by, upon detecting a release of used oil to the environment, failing to stop the release, failing to contain, clean up, and properly manage the released used oil, and failing to repair or replace any leaking used oil storage containers or tanks before returning them to service. Comp. at 16.

Provisions Allegedly Violated: Section 21(d)(2) of the Act and Section 739.122(d) of the Board's Waste Disposal Regulations

Section 21(d)(2) of the Act, which is set forth above under count III, prohibits waste handling that violates Board regulations. Section 739.122(d) of the Board's waste disposal regulations provides:

> (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 [underground storage tanks] and which has occurred after October 4, 1996, a generator shall perform the following cleanup steps:
>
> ***
>
> 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. 35 Ill. Adm. Code 739.122(d).

Board Analysis of Count VI

Prior had repeated releases of oil at the Gompers site that he failed to properly address. However, the People in all but two instances point to oil field waste discharges, such as to the mineshaft and pit. By definition, this material is not "used oil." "Used oil" is defined as

> [A]ny oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical

impurities. 35 Ill. Adm. Code 739.100.

Because the oil field waste had not been refined from crude oil, it cannot be deemed "used oil." Prior therefore cannot have violated Section 739.122(d) by failing to properly clean up the oil field waste.

However, leaked used oil generated from Prior's shop was present at the Gompers site. Because Section 739.122(d), by its terms, applies only to releases that occurred after October 4, 1996, the provision does not apply to the drums of leaking used oil observed on June 13, 1996. Section 739.122(d) does apply, however, to the released used oil observed on August 31, 2000. On that date, there was a large amount of used oil staining and puddling on surface soil by Prior's shop. Used oil was also present on top of the drums. No measures had been taken to stop, contain, or clean up the released used oil.

The Board finds that Prior violated Section 35 Ill. Adm. Code 739.122(d) and therefore also violated Section 21(d)(2) of the Act by failing to stop, contain, clean up, or properly manage this release of used oil to the environment.

Count VII—Alleged Failure by Prior to Make Special Waste Determination at the Gompers Site

In count VII of the complaint, the People allege that Prior violated Section 21(d)(2) of the Act and Section 808.121 of the Board's waste disposal regulations by failing at the Gompers site to determine whether generated waste is a special waste. Comp. at 17.

Provisions Allegedly Violated: Section 21(d)(2) of the Act and Section 808.121 of the Board's Waste Disposal Regulations

Section 21(d)(2) of the Act, which is set forth above under count III, prohibits waste handling that violates Board regulations. Section 808.121 of the Board's waste disposal regulations provides:

> Generator Obligations
>
> a. Each person who generates waste shall determine whether the waste is a special waste. 35 Ill. Adm. Code 808.121.

Board Analysis of Count VII

The Board's analysis of count IV, finding that Prior committed the violations alleged by failing to determine whether the waste he generated was hazardous, applies with equal force to the analysis of count VII. Prior not only failed to characterize the flammable crude oil in the pit, he claimed to be unaware of the pit itself. Prior was responsible for determining whether the material was special waste. The Board finds that by generating waste and failing to determine whether the waste is special waste, Prior violated 35 Ill. Adm. Code 808.121 and therefore also violated Section 21(d)(2) of the Act.

Count VIII—Alleged Water Pollution Caused by Prior at the Wamac City Park Tank Battery

Count VIII of the complaint alleges that Prior violated Section 12(a) of the Act by causing or allowing the discharge of contaminants to waters of the State at the Wamac City Park tank battery so as to cause or tend to cause water pollution. Comp. at 21.

Provisions Allegedly Violated: Section 12(a) of the Act

Section 12(a) of the Act provides:

No person shall:

a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources . . . . 415 ILCS 5/12(a) (2002).

The Act defines "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2002). The Act defines "water pollution" as:

> [S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545 (2002).

The Act defines "waters" as "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State." 415 ILCS 5/3.550 (2002).

Board Analysis of Count VIII

In July 1997, there was a crude oil release to Fulton Creek from Prior's Wamac City Park tank battery. Approximately 31 to 48 barrels of oil were released. The oil was not contained by the dike or the poorly constructed earthen berm surrounding the tank battery. The oil drained down-gradient 20-30 feet through the Wamac City Park into an unnamed tributary that leads to Fulton Creek. Oil flowed into the water and onto the Creek banks. Oil covered vegetation and wooden debris. Oil and petroleum scum was in Fulton Creek approximately three miles downstream from the tank battery. Numerous children played in the released oil in Fulton Creek.

The Board finds that there was a discharge of a contaminant to the environment so as to cause water pollution, *i.e.*, a discharge to State waters that will or is likely to create a nuisance or render such waters harmful or detrimental or injurious. Prior does not dispute this.

Instead, Prior argues that he did not cause or allow the discharge because the release resulted from sabotage by an oil business competitor. On this record, however, the Board cannot find it more likely than not that the discharge resulted from sabotage. Prior failed to offer any credible evidence that saboteurs caused the release. Indeed, this was Prior's third proffered excuse for the release, after abandoning his first two rationales: lightning strike; and vandalism by children.

Moreover, Prior was responsible for taking reasonable measures to secure his tank battery from unauthorized access. Here, Prior was capable of exercising control over the source of the pollution, yet failed to take basic precautions against trespassers, like locking the fence around the tank battery. Even if the record supported Prior's bald assertion of sabotage, he nevertheless "allowed" the discharge by failing to have adequate security over his tank battery. *See* Perkinson v. PCB, 187 Ill. App. 3d 689, 694-95, 543 N.E.2d 901, 904 (3d Dist. 1989) ("the owner of the source of pollution causes or allows the pollution . . . unless the facts establish the owner either lacked the capability to control the source . . . or had undertaken extensive precautions"); Meadowlark Farms, Inc., v. PCB, 17 Ill. App. 3d 851, 861, 308 N.E.2d 829, 836 (5th Dist. 1974) (property owner violated Act's prohibition on causing or allowing discharge resulting in water pollution because owner had "capability of controlling the pollutional discharge").

The Board finds that Prior violated Section 12(a) of the Act by causing or allowing the discharge of a contaminant to environment at the Wamac City Park tank battery so as to cause water pollution.

Count IX—Alleged Failure by Prior to Clean Up Used Oil at the Wamac City Park Tank Battery

The People allege in count IX of the complaint that Prior violated Section 21(d)(2) of the Act and Section 739.122(d) of the Board's waste disposal regulations by, upon detecting a release of used oil to the environment at the Wamac City Park site, failing to stop and clean up the release. Comp. at 22.

Provisions Allegedly Violated: Section 21(d)(2) of the Act and Section 739.122(d) of the Board's Waste Disposal Regulations

Section 21(d)(2) of the Act, which is set forth above under count III, prohibits waste handling that violates Board regulations. Section 739.122(d) of the Board's waste disposal regulations, which is set forth above under count VI, requires a used oil generator, upon detecting a release, to stop and contain the release, clean up and manage the release, and, if needed, repair or replace leaking containers or tanks before returning them to service.

Board Analysis of Count IX

Once the July 1997 crude oil release to Fulton Creek occurred, Prior failed to contain and remediate the release in a timely or effective manner. However, as discussed above under count VI, crude oil is not "used oil." The definition of "used oil" refers to "oil that has been refined from crude oil." 35 Ill. Adm. Code 739.100. Because the crude oil released from the Wamac City Park tank battery was not "used oil," the Board finds that the People failed to prove that Prior violated Section 739.122(d) of the Board's regulations or Section 21(d)(2) of the Act as alleged under this count.

Count X—Alleged Water Pollution Hazard Caused by Prior at the Wamac City Park Tank Battery

Count X of the complaint alleges that Prior violated Section 12(d) of the Act by depositing contaminants upon the land at the Wamac City Park tank battery in such place and manner as to create a water pollution hazard. Comp. at 24.

Provisions Allegedly Violated: Section 12(d) of the Act

Section 12(d) of the Act provides:

> No person shall deposit any contaminant upon the land in such place and manner so as to create a water pollution hazard. 415 ILCS 5/12(d) (2002).

Board Analysis of Count X

For the reasons below, the Board finds that Prior's release of 31 to 48 barrels of crude oil at the Wamac City Park tank battery created a water pollution hazard. A water pollution hazard is condition that may become water pollution in the future. *See, e.g.*, Jerry Russell Bliss, Inc. v. IEPA, 138 Ill. App. 3d 699, 703, 485 N.E.2d 1154, 1157 (5th Dist. 1985) ("Since section 12(d) refers to conduct not yet amounting to a violation of section 12(a) [citation omitted], a water pollution hazard must be found before either violation may be found.").

In this instance, the crude oil released to the soil and drainage way outside the tank battery containment berm was a water pollution hazard that became water pollution after reaching the waters of the State. The tank battery was only 20 to 30 feet from the drainage way. Before the oil reached Fulton Creek, the contaminants were in such place and manner that they posed a water pollution hazard. In addition, the pools of oil that remained in the drainage way and on the Creek banks in close proximity to the water were a water pollution hazard until cleaned up.

For the crude oil release at the Wamac City Park tank battery, the Board finds that Prior deposited oil upon the land in such place and manner as to create a water pollution hazard in violation Section 12(d) of the Act.

Count XI—Alleged Offensive Conditions in Waters Caused by Prior at the Wamac City Park Tank Battery

In count XI of the complaint, the People allege that Prior violated Section 12(a) of the Act and Section 302.203 of the Board's water pollution regulations at the Wamac City Park tank battery by causing offensive conditions in waters of the State. Comp. at 25.

Provisions Allegedly violated: Section 12(a) of the Act and Section 302.203 of the Board's Water Pollution Regulations

Section 12(a) of the Act provides:

> No person shall cause or threaten or allow the discharge of any contaminants into the environment in any State . . . so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (2002).

Section 302.203 of the Board's water pollution regulations prohibits 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. 35 Ill. Adm. Code 302.203.

Board Analysis of Count XI

As discussed above under count VIII, the July 1997 discharge by Prior from the Wamac City Park tank battery to Fulton Creek resulted in visible oil in waters of the State. Accordingly, the Board finds that Prior violated Section 302.303 of the regulations and therefore violated Section 12(a) of the Act.

Count XII—Alleged Water Pollution Caused by Prior and Mezo at the Mezo Oestreich Tank Battery

Count XII of the complaint alleges that Prior and Mezo violated Section 12(a) of the Act at the Mezo Oestreich tank battery by causing or allowing the discharge of contaminants to the waters of the State so as to cause water pollution. Comp. at 29.

Provisions Allegedly Violated: Section 12(a) of the Act

Section 12(a) of the Act, which prohibits causing or allowing contaminant discharges resulting in water pollution, is set forth under count VIII above, as are related definitions.

Board Analysis of Count XII

There was a 50-barrel crude oil release on June 30, 1997, at the Mezo Oestreich tank battery. The oil was discharged to an unnamed tributary to Fulton Creek, to Fulton Creek, and

eventually 2.5 miles downstream to Sewer Creek. A day after the release, oil was present in the unnamed tributary, Fulton Creek, and Sewer Creek, and recoverable oil was present on the banks of Fulton Creek.

Neither respondent contests these facts, or that pollution occurred in State waters as a result of the release. Instead, Prior again argues that he is not liable because this release occurred due to a competitor's sabotage. Mezo argues that he is not responsible because he sold the oil and gas interests to Prior before the release occurred. Tr.1 at 142, 144-46.

Prior's sabotage argument fails here for the reasons it failed above regarding the Wamac City Park tank battery release. First, the record lacks any convincing evidence that the release was caused by sabotage. Second, even if sabotage occurred, Prior "allowed" the discharge because he controlled the site and yet took no precautions to prevent unauthorized access. The Mezo Oestreich tank battery had no fence or other means to control access. As found above, Prior was responsible for taking reasonable measures to secure his tank battery from unauthorized access. *See* Perkinson, 187 Ill. App. 3d at 694-95, 543 N.E.2d at 904 (question is whether "the owner either lacked the capability to control the source . . . or had undertaken extensive precautions"); Meadowlark Farms, 17 Ill. App. 3d at 861, 308 N.E.2d at 836 (issue is whether the owner had the "capability of controlling the pollutional discharge"). The Board finds that Prior violated Section 12(a) of the Act by causing or allowing the discharge of a contaminant to environment at the Mezo Oestreich tank battery so as to cause water pollution.

As for Mezo, he sold the Mezo Oestreich oil and gas interests to Prior in 1995. At the time of the June 30, 1997 release, however, Mezo held the site's operating permit issued by DNR's Division of Oil and Gas. The Board has no jurisdiction under the Illinois Oil and Gas Act (225 ILCS 725 (2002)), but the Board will consider whether and to what extent the permit is probative of Mezo's capability to control the pollution source, which, as discussed above, is relevant to liability under Section 12(a) the Act.

Under the Illinois Oil and Gas Act, the "permittee" means "the owner holding or required to hold the permit." 225 ILCS 725/1 (2002). A DNR "permit block" existed against Prior due to pending enforcement actions against him. The permit block precluded transferring the permit from Mezo to Prior. Mezo was aware of this, testifying that Prior "had a violation that prevented the State from transferring." Tr. 1 at 151.

DNR remained unaware of the sale to Prior. Lawrence Bengal, Supervisor of DNR's Division of Oil and Gas, testified that absent a permit transfer from Mezo to Prior, or an operating agreement allowing Prior to operate while Mezo retained ownership, neither of which happened here, Prior was not allowed to operate the tank battery. Tr.2 at 20-22. Mezo nevertheless continued to pay the DNR annual well fees for the Mezo Oestreich site. Because Prior could not operate the site in his own name and there was no operating agreement, Mezo was effectively posing as the facility's permittee.

The Board finds that Mezo's actions allowed Prior to operate a facility that DNR did not permit Prior to operate. Because DNR would not have allowed Prior to operate the Mezo Oestreich tank battery, there may never have been an opportunity for the water pollution to occur

but for Mezo remaining the facility's permittee. Moreover, after the release, Mezo had his environmental consultant take samples to assess impacts from the crude oil release. Mezo submitted environmental reports to the Agency in March and April 1998. In Mezo's own words, "I knew I still had a responsibility because the permit was still in my name, because it hadn't been transferred, even though I didn't own the equipment any more." Tr.1 at 146.

Ownership of property is not a prerequisite to violating the Act or Board rules against causing or allowing improper emissions. A complainant "must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793, 618 N.E.2d 1282, 1286 (5th Dist. 1993). A preponderance of the evidence in this record demonstrates that Mezo, as the permitted operator of the site, had the capability to control the site when the release occurred and failed to take precautions against the crude oil escaping the tank battery.

Accordingly, the Board finds that Mezo violated Section 12(a) of the Act by allowing the discharge of a contaminant to environment at the Mezo Oestreich tank battery so as to cause water pollution. To hold that Mezo is not liable here would contradict the Act and case law, as well as promote sham operating arrangements at the expense of the environment.

Count XIII—Alleged Water Pollution Hazard Caused by Prior and Mezo at the Mezo Oestreich Tank Battery

The People allege in count XIII that Prior and Mezo violated Section 12(d) of the Act at the Mezo Oestreich tank battery by depositing contaminants upon the land in such place and manner as to create a water pollution hazard. Comp. at 30.

Provisions Allegedly Violated: Section 12(d) of the Act

Section 12(d) of the Act, which prohibits depositing contaminants on the land so as to create a water pollution hazard, is set forth under count X above.

Board Analysis of Count XIII

For the reasons below, the Board finds that Prior's release of crude oil at the Mezo Oestreich tank battery created a water pollution hazard. As discussed above, a water pollution hazard is condition that may become water pollution in the future. *See, e.g.*, Jerry Russell Bliss, Inc., 138 Ill. App. 3d at 703, 485 N.E.2d at 1157.

Here, a 50-barrel crude oil release occurred. The oil reached Fulton Creek and ultimately 2.5 miles downstream in Sewer Creek. Recoverable crude oil was present in the drainage ditch leading to Fulton Creek. Oil stained the Fulton Creek sidewalls and bridges. Before the oil reached Fulton Creek, the contaminants were in such place and manner that they posed a water pollution hazard. In addition, the oil that remained in the drainage ditch and on the Creek sidewalls in close proximity to the water was a water pollution hazard. For the Mezo Oestreich tank battery crude oil release, the Board finds that Prior deposited a contaminant upon

the land in such place and manner so as to create a water pollution hazard, violating Section 12(d) of the Act.

However, the Board finds that the People failed to prove that Mezo violated Section 12(d). The People's complaint alleges that Mezo "caused or allowed contaminants to be deposited upon the land" in such place and manner as to create a water pollution hazard. Comp. at 30. However, Section 12(d), unlike Section 12(a) of the Act, does not use the terms "cause" or "allow" in its prohibition. Section 12(d) specifically states that "[n]o person shall deposit any contaminant upon the land in such place and manner so as to create a water pollution hazard." 415 ILCS 5/12(d) (2002).

The Board will not read words into the Act where the General Assembly has eschewed them. Though the Board found that Mezo allowed the discharge in violation of Section 12(a) based on his capability to control the site and his failure to take precautions against the release, Mezo simply did not deposit the contaminants upon the land. Prior did.

Count XIV—Alleged Offensive Conditions in Waters Caused by Prior and Mezo at the Mezo Oestreich Tank Battery

Count XIV alleges that Prior and Mezo violated Section 12(a) of the Act and Section 302.203 of the Board's water pollution regulations by causing or allowing the discharge of crude oil from the Mezo Oestreich tank battery, resulting in offensive conditions in waters of the State. Comp. at 31.

Provisions Allegedly Violated: Section 12(a) of the Act and Section 302.203 of the Board's Water Pollution Regulations

Section 12(a) of the Act and Section 302.203 of the Board's water pollution regulations are set forth under count XI above. Section 12(a) of the Act prohibits causing or allowing a contaminant discharge so as to violate Board regulations. Section 302.203 of the Board's water pollution regulations requires State waters to be free of offensive conditions, such as visible oil.

Board Analysis of Count XIV

As discussed above under count XII, the June 1997 crude oil release caused or allowed by Prior and Mezo from the Mezo Oestreich tank battery to Fulton Creek and Sewer Creek resulted in visible oil in waters of the State. Accordingly, the Board finds that Prior and Mezo violated Section 302.303 of the regulations and therefore violated Section 12(a) of the Act.

Count XV—Alleged Water Pollution Caused by Prior at the Morgan Kalberkamp Tank Battery

In count XV of the complaint, the People allege that Prior violated Section 12(a) of the Act at the Morgan Kalberkamp tank battery by causing or allowing the discharge of contaminants to the waters of the State so as to cause or tend to cause water pollution. Comp. at 33.

Provisions of the Act Allegedly Violated: Section 12(a) of the Act

Section 12(a) of the Act, which prohibits causing or allowing contaminant discharges resulting in water pollution, is set forth under count VIII above, along with corresponding definitions.

Board Analysis of Count XV

The Morgan Kalberkamp tank battery had a 1.5 to 3 barrel crude oil spill in July 2000. Residences are near the site. The crude oil release reached Fulton Creek. On July 19, 2000, approximately 300 feet of the Creek had oil present and oil was on the Creek banks. Five days later, some crude oil was still in the Creek and on its banks.

The Board finds that there was a discharge of a contaminant to the environment so as to cause water pollution, *i.e.*, a discharge to waters of the State that will or is likely to create a nuisance or render such waters harmful or detrimental or injurious. Prior does not contest this. Instead, Prior again argues that he did not cause or allow the discharge because the release resulted from vandalism. Prior's argument fails here as it failed for the releases at the other two tank batteries. On this record, the Board cannot find it more likely than not that the discharge at the Morgan Kalberkamp tank battery resulted from vandalism. Prior failed to offer any credible evidence that vandals caused the release.

Moreover, there was no fence around the tank battery or other means of restricting access to the tanks. As was the case at the Wamac City Park tank battery and the Mezo Oestreich tank battery, Prior was responsible for taking reasonable measures to secure the Morgan Kalberkamp tank battery from unauthorized access. Prior again was capable of exercising control over the source of the pollution, but failed to take even simple precautions against trespassers. Even if the record supported Prior's claim of vandalism, he still "allowed" the discharge by failing to have adequate security at the tank battery. *See* Perkinson, 187 Ill. App. 3d at 694-95, 543 N.E.2d at 904; Meadowlark Farms, 17 Ill. App. 3d at 861, 308 N.E.2d at 836.

The Board finds that Prior violated Section 12(a) of the Act by causing or allowing the discharge of a contaminant to environment at the Morgan Kalberkamp tank battery so as to cause water pollution.

Count XVI—Alleged Offensive Conditions in Waters Caused by Prior at the Morgan Kalberkamp Tank Battery

Count XVI of the complaint alleges that Prior violated Section 12(a) of the Act and Section 302.203 of the Board's water pollution regulations by discharging crude oil from the Morgan Kalberkamp tank battery, causing offensive conditions in waters of the State. Comp. at 34.

Provisions Allegedly Violated: Section 12(a) of the Act and Section 302.203 of the Board's Water Pollution Regulations

Section 12(a) of the Act and Section 302.203 of the Board's water pollution regulations are set forth under count XI above. Section 12(a) of the Act prohibits causing or allowing a contaminant discharge so as to violate Board regulations. Section 302.203 of the Board's water pollution regulations requires State waters to be free of offensive conditions, including visible oil.

Board Analysis of Count XVI

As discussed above under count XV, the July 2000 crude oil release caused or allowed by Prior from the Morgan Kalberkamp tank battery to Fulton Creek resulted in visible oil in waters of the State. Accordingly, the Board finds that Prior violated Section 302.203 of the regulations and therefore violated Section 12(a) of the Act.

Relief

Having found that Prior and Mezo violated the Act and Board regulations, the Board will now decide the appropriate relief. The People ask for two forms of relief. First, the People ask the Board to impose a $100,000 civil penalty on Prior and $3,500 civil penalty on Mezo. Second, the People ask the Board to require that Prior pay the People $6,600 for attorney fees. The Board will first address civil penalties and then attorney fees.

Civil Penalties

The Board considers the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (2002)) to determine whether a civil penalty should be imposed on a respondent for a violation. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation. Specifically, Section 33(c) reads:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> i. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> ii. The social and economic value of the pollution source;
>
> iii. The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

iv. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

v. Any subsequent compliance. 415 ILCS 5/33(c) (2002).

If the Board, after considering the Section 33(c) factors, finds that a civil penalty should be imposed, then the Board considers the factors of Section 42(h) of the Act (415 ILCS 5/42(h) (2002)) to determine the appropriate penalty amount. The Board now turns to the Section 33(c) factors.

Whether Civil Penalties Should Be Imposed.

Section 33(c)(i): Character and Degree of Injury or Interference. At the Gompers site, Prior intentionally disposed of waste and allowed it to remain for years. For example, Prior discharged oil field waste into a pit and through a hose to an abandoned mineshaft. Leaking drums of used oil caused soil contamination. Dumped off-rim tires provided a potential breeding ground for disease vectors. Conducting these activities without a permit at a site that does not meet the requirements for a sanitary landfill interferes with the protection of public health by creating potential environmental hazards and undermining the permitting system.

Prior also caused or allowed crude oil discharges resulting in pollution of State waters, both at the Wamac City Park tank battery and at the Morgan Kalberkamp tank battery. Prior and Mezo caused or allowed a crude oil discharge resulting in water pollution at the Mezo Oestreich tank battery. Miles of State waters were impacted. When they played in Fulton Creek, children were exposed to the discharged crude oil, which contains carcinogens. Cleanups were accomplished slowly and only with State enforcement pressure. The Board weighs this factor against Prior and Mezo.

Section 33(c)(ii): Social and Economic Value of the Pollution Source. The Board recognizes the importance of Illinois' oil production industry. Prior's related business facilities at the Gompers site and the oil production operations at the three tank batteries have social and economic value. The Board weighs this factor in favor of Prior and Mezo.

Section 33(c)(iii): Suitability or Unsuitability of Pollution Source to the Area in Which it is Located. The three tank batteries are in close proximity to Fulton Creek. The Board further notes that DNR regulations prohibit tank batteries constructed after July 1, 2001, from being located "within 200 feet of a stream, body of water, or marshy land, unless the permittee can demonstrate to [DNR] that construction standards or topography will prevent accidental discharge into these features." 62 Ill. Adm. Code 240.810(b)(5)(B).

Properly constructed and operated, however, nothing in this record demonstrates that the three tank batteries are located at inherently unsuitable sites. Nor does the record show that the Gompers site is unsuitable for Prior's business office, shop, and equipment storage. The Board weighs this factor in favor of Prior and Mezo.

Section 33(c)(iv): Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Discharges. It was technically practicable and economically reasonable for Prior to properly dispose of the waste he dumped at the Gompers site, to characterize waste, and to label, and manage releases from, his used oil drums. Additionally, it was technically practicable and economically reasonable for Prior to have prevented the discharges from the three tank batteries and to more expeditiously and effectively minimize, contain, and remediate the releases once they occurred. The same is true of Mezo with respect to the Mezo Oestreich tank battery.

For example, an adequately sized and constructed dike and berm around each tank battery could have kept the discharged oil from reaching Fulton Creek. DNR regulations require each containment dike to have a capacity at least equal to 1.5 times the largest tank it contains. Tr.1 at 82 and Tr.2 at 18 (referring to 62 Ill. Adm. Code 240.810(c)(1)). Tanks at the Wamac City Park and Meso Oestreich batteries had capacities of approximately 200 barrels, yet crude oil releases ranging from 31 to 50 barrels reached Fulton Creek. Prior also could have quickly employed absorbent booms, a vacuum truck, and pressure washers, rather than relying on ineffective straw bales and allowing critical time to pass while crude oil moved downstream. The Board weighs this factor against Prior and Mezo.

Section 33(c)(v): Subsequent Compliance. The People acknowledge that Prior and Mezo have subsequently come into compliance. People Br. at 37-39. However, documented compliance took years and came only after prodding from Agency inspectors, after sending violation notices, and, with the exception of the Wamac City Park site, after filing this enforcement action. The Board does not consider respondents' subsequent compliance here a significantly mitigating factor where it came so slowly and only after the dogged efforts of the State. *See* ESG Watts, Inc. v. PCB, 282 Ill. App. 3d 43, 52-53, 668 N.E.2d 1015, 1022 (4th Dist. 1996) ("Evidence . . . presented [demonstrated] petitioner's failure to comply with many regulations until after enforcement proceedings were initiated . . . . The Board's decision that a stiff penalty was warranted to deter future violations was neither arbitrary nor capricious."). The Board weighs this factor only slightly for Prior and Mezo.

Board Finding on Whether Civil Penalties Should Be Imposed. The water pollution from the tank battery incidents, coupled with the sluggish and meager release responses, severely interfered with the protection of public health, as did Mezo posing as the Mezo Oestreich tank battery operator when Prior could not get a DNR permit. Protecting public health was likewise compromised by Prior intentionally discharging oil field waste at the Gompers site without an Agency permit. All these facts greatly outweigh the social and economic value of these facilities and the suitability of their locations.

It was also technically practicable and economically reasonable to have properly disposed of waste at the Gompers site and to have better contained and remediated the releases at the tank batteries. Subsequent compliance came, but only after State enforcement machinery was brought to bear. Based on the Section 33(c) factors, the Board finds that civil penalties against Prior and Mezo are warranted.

The Appropriate Amount of Civil Penalties.

The maximum civil penalties the Board can assess are established in Section 42(a) of the Act:

> [A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable for a civil penalty of not to exceed $50,000 for the violation and an additional civil penalty of not to exceed $10,000 for each day during which the violation continues . . . . 415 ILCS 5/42(a) (2002).

Prior committed 26 violations of the Act and Board regulations. Mezo committed three violations of the Act and Board regulations. All of the violations took years to satisfactorily resolve. Pursuant to Section 42(a) of the Act, the Board could require each respondent to pay a $50,000 civil penalty for each of his respective violations, and a $10,000 civil penalty for each day that violation continued.

At the Mezo Oestreich tank battery, for example, the crude oil release on June 30, 1997, that Prior and Mezo caused or allowed resulted in water pollution. Prior and Mezo could be fined $50,000 each for their respective violation of Section 12(a) of the Act. Sufficient cleanup results were submitted to the Agency in an environmental report dated October 12, 2003. The violation therefore continued for approximately six years and three months. Accordingly, in addition to the $50,000 civil penalty each faces, Prior and Mezo could each be fined an additional $22,800,000 for the continuing violation (*i.e.*, $10,000 for each of roughly 2,280 days).

Therefore, the Act's maximum penalty for each respondent, for this *one* continuing violation, is many millions of dollars. Of course, Mezo had two other violations at the Mezo Oestreich tank battery, and Prior had 25 other violations there and at the other three sites. Calculating the maximum penalties for each of these other violations would yield similarly high dollar amounts.

The People do not seek the statutory maximum penalties. Instead, the People ask the Board to impose a total civil penalty of $100,000 on Prior and a total civil penalty of $3,500 on Mezo. People Br. at 50. The Board considers the factors of Section 42(h) of the Act (415 ILCS 5/42(h) (2002)) to determine the appropriate amount of a civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. Section 42(h) of the Act specifically provides:

> In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> (1) the duration and gravity of the violation;
>
> (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and

regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefits accrued by the violator;

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

(5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2002). [6]

The Board will now consider the Section 42(h) factors in turn.

Section 42(h)(1): Duration and Gravity of Violation. Prior's violations at the Gompers site and the three tank batteries were long in duration and serious in gravity, as were Mezo's violations at the Mezo Oestreich tank battery.

Many of Prior's violations at the Gompers site were intentional. In June 1996, Prior used a hose to discharge oil field waste from a tanker truck to an abandoned mine shaft. Once DNR closed the shaft, Prior discharged oil field waste elsewhere on-site. In August 2000, oil field waste was found in a pit at the Gompers site. The site also had leaking used oil drums. After excavating the pit, Prior dumped the excavated waste from a roll-off box back onto the ground at the site. In November 2000, Prior admitted to instructing his employees to dig a trench to dump and burn plastic and oil waste, even though Prior knew the actions would violate environmental laws. In December 2000, additional intentional dumping of oil field waste was evident at the site as tire tracks led up to discharged oily materials, some of which were concealed beneath a pile of concrete rubble and dense vegetation. All of these activities took place at a site that does not meet the requirements for a sanitary landfill and without a waste disposal permit. Prior did not submit cleanup documentation to the Agency until March 2003, approximately one year after the People filed this enforcement action.

Additionally, Prior caused or allowed large discharges of crude oil from three tank batteries, polluting State waters. Mezo also allowed the crude oil discharge at one of these tank batteries: the Mezo Oestreich tank battery, where the first release occurred. On June 30, 1997, a release of 50 barrels (2,100 gallons) of crude oil took place at the Mezo Oestreich tank battery. The oil was discharged to Fulton Creek and was visible in Sewer Creek 2.5 miles downstream from the tank battery. Heavy accumulations of recoverable crude oil were present two miles

[6] Section 42(h) of the Act was substantially amended by P.A. 93-575, effective January 1, 2004. Among other things, the amendments establish that a violator's economic benefit from delayed compliance is to be the minimum penalty amount. Because the record in this proceeding was complete before January 1, 2004, the Board did not use the amendments in determining the appropriate penalties to impose on Prior or Mezo.

downstream. Less than one month later, on July 21, 1997, a release of 31 to 48 barrels (1,302 to 2,016 gallons) of crude oil took place at the Wamac City Park tank battery. Oil from this release was visible three miles downstream. Prior took no steps to recover crude oil on the day of the release. It was during the next day that the children were found playing with the discharged crude oil in Fulton Creek. A week after the incident, oil covered the soil around the battery and was still draining into Fulton Creek. In July 2000, a release of 1.5 to 3 barrels (63 to 126 gallons) of crude oil occurred at the Morgan Kalberkamp tank battery. Roughly 300 feet of Fulton Creek had oil present.

Adequate cleanup documentation was provided to the Agency years after these tank battery releases occurred: October 2000 for Wamac City Park; and March 2003 for Mezo Oestreich and Morgan Kalberkamp. This compliance came only after the State applied considerable enforcement pressure.

Prior did report each of the tank battery crude oil spills to IEMA. However, the impacts from the discharges were worsened by Prior's slow and ineffective remedial responses, allowing the contaminants to move farther downstream and coat more waters and banks with oil. Prior did not take the immediate steps with the proper equipment and staffing expected in the oil production industry to contain and recover spills. Agency inspectors were forced to repeatedly instruct Prior on what to do. Prior also displayed no concern for children playing in the waters he had polluted.

Prior did not inform Mezo of the release at the Mezo Oestreich tank battery until days after it occurred. Prior also had many more violations across more sites than Mezo. Mezo, however, shares culpability for making it possible for Prior to improperly operate the Mezo Oestreich tank battery under the cover of Mezo's DNR permit. Nor did Mezo respond to the crude oil spill in an adequate or timely fashion. The Board weighs this factor against both respondents, but finds the factor particularly aggravates the penalty amount for Prior.

Section 42(h)(2): Presence or Absence of Due Diligence. Prior and Mezo exercised little or no diligence in attempting to comply with the Act and Board regulations. Many of Prior's violations involved intentionally discharging contaminants to the environment and occurred repeatedly over the course of years. Mezo effectively ignored the environmental problems that could result from the operations at the Meso Oestreich tank battery while holding its DNR permit. Efforts to correct the violations were haphazard, even after the Agency informed respondents of the measures necessary to bring the sites into compliance. Compliance documentation for all of respondents' violations took years to provide, and came about only after the State enforcement process was well underway. The Board weighs this factor against Prior and Mezo.

Section 42(h)(3): Economic Benefit from Delayed Compliance. The record lacks any specific estimates of economic benefit respondents enjoyed by delaying compliance. The Board finds that, at a minimum, respondents benefited from the time value of money by delaying for years the expenditures necessary to comply with the Act and Board regulations. *See* IEPA v. Allen Barry d/b/a Allen Barry Livestock, PCB 88-71, slip op. at 77 (May 10, 1990) (discussing the cost savings of delayed compliance based on the time value of money). Prior also avoided

the time and expense of applying for a waste permit from the Agency for the Gompers site. The Board considers this an aggravating factor for both respondents.

Section 42(h)(4): Penalty Amount That Will Deter Further Violations and Enhance Voluntary Compliance. The size or financial capacity of an entity that violated the Act is relevant to setting a penalty amount that will deter future violations by the entity and those similarly situated. *See* People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op. at 34 (Nov. 15, 2001) ("[T]o arrive at a penalty amount that will have a deterrent effect, the size of the violator is an appropriate consideration."). Unfortunately, the record in this case has little evidence on the size of respondents' respective operations and lacks any evidence on each respondent's financial resources. The People brought this enforcement action against the individuals John Prior and James Mezo, each doing business as his namesake company. Each man appeared *pro se*.

As the Board discusses under the next Section 42(h) factor, John Prior has been violating the Act at sites across Illinois since the 1970s. For example, the Board in 1997 found that John Prior and a company of his violated the Act and Board regulations and held them liable for a $287,000 civil penalty. *See* People v. John Prior and Industrial Salvage, Inc., PCB 97-111 (Nov. 20, 1997). The commission and duration of many of the violations found today show that the 1997 penalty had little or no deterrent effect on John Prior.

Considering all of the circumstances, the Board finds that a significant civil penalty on Prior and a moderate civil penalty on Mezo will assist in deterring further violations. The Board finds, however, especially given the environmental harm in this case and Prior's egregious behavior here and in the past, that the $100,000 civil penalty the People request for Prior is too modest.

Section 42(h)(5): Previously Adjudicated Violations of the Act. The Board is aware of no previously adjudicated violations of the Act by Mezo. The Board weighs this factor in Mezo's favor.

Prior, on the other hand, has an extensive history of environmental violations, the entirety of which the Board need not set forth here. Several examples will suffice in assessing this Section 42(h) factor. In 1975, the Board found John Prior violated the Act and Board regulations by developing and operating a solid waste management site in Marion County without the required permits from the Agency. The Board imposed a $100 civil penalty on John Prior. *See* IEPA v. John Prior, PCB 75-184 (Sept. 4, 1975).

In 1995, the Board found that John Prior and his company, Industrial Salvage, Inc., violated multiple provisions of the Act and Board regulations at three landfills near Centralia, Marion County. Violations included causing, threatening, or allowing landfill leachate discharges so as to cause or tend to cause water pollution, and failing to comply with permit requirements for landfill closure and corrective action. The People did not seek, and the Board did not impose, civil penalties, at least in part because respondents were in bankruptcy. The Board, however, revoked a permit for one of the landfills:

> Past adjudicated violations against John Prior, and these instant violations at the three sites which have been ongoing for several years, provide evidence that respondents are unable to perform their duties as landfill owners and operators. *See* People v. John Prior and Industrial Salvage, Inc., PCB 93-248, slip op. at 23 (July 7, 1995).

The Board also ordered the immediate closure of all three landfills given the "extreme nature of the environmental problems at the three sites." *Id*.

In 1997, the Board found that John Prior and Industrial Salvage, Inc. again committed multiple violations of the Act and Board regulations at the same three landfills. Violations included causing, threatening, or allowing the release of contaminants to groundwater so as to cause or tend to cause water pollution. Specifically, the Board found that respondents failed to monitor wells for contaminants in the groundwater. When the Agency sampled the groundwater, tests showed that releases of inorganic chemicals from the three landfills caused exceedences of the Board's groundwater quality standards. Respondents also failed to implement corrective action as required to address the contamination, and failed to submit the required quarterly groundwater monitoring reports to the Agency. After considering the factors of Sections 33(c) and 42(h) of the Act, the Board imposed a $287,000 civil penalty on John Prior and his company. *See* John Prior, PCB 97-111, slip op. at 14-15. The Board concluded:

> [T]he severity of the environmental impact to the groundwater is significant . . . . Further, the Board finds that respondents have exercised no due diligence . . . in attempting to comply with the requirements of the Act and the Board's regulations. *** The Board hopes that a monetary penalty will serve to deter further violations by respondents . . . . Finally, the Board finds that its findings against respondents in PCB 93-248 weigh heavily against respondents . . . . *Id*.

Clearly, the $287,000 civil penalty did not deter further violations by Prior. Prior's business is different, but his concern for the environment, unfortunately, is not. Indeed, this case, unlike the 1997 case, proves instances of Prior knowingly violating the Act and intentionally causing pollution, along with establishing actual human exposure to Prior's contamination. Past violations weighed heavily against Prior in 1997 and weigh even more heavily now. The Board finds that Prior's compliance record shows his alarming disregard of the environment and environmental laws, which has revealed itself again in this case. This Section 42(h) factor significantly aggravates the penalty amount against Prior.

Board Finding on the Appropriate Amount of Civil Penalties. The violations in this case lasted a long time and were grave, including extensive water pollution. Neither respondent exhibited due diligence, and compliance resulted only from State enforcement tools. Respondents' ultimate compliance therefore tempers the penalty amount only minimally. Both respondents benefited economically by putting off spending money on compliance. Each of these factors is more aggravating in Prior's circumstances, however, given his intentional polluting and the number of his violations over the years and at four sites.

In addition, unlike Mezo, Prior has a long record of past environmental violations that

necessitates a significant penalty here to deter future violations by Prior and others like him. Even after the Board revoked one of Prior's landfill permits in 1995 and subjected him to a $287,000 civil penalty in 1997, Prior committed many more violations and failed to diligently correct them, as found today.

Based on the Section 42(h) factors, the Board imposes a $300,000 civil penalty on Prior and a $3,500 civil penalty on Mezo. Under Section 42(a) of the Act (415 ILCS 5/42(a)(2002)), these funds must be deposited in the Environmental Protection Trust Fund. The Board finds that the penalty amounts ordered today will aid in enforcing the Act. The Board might impose greater civil penalties if this record had demonstrated that respondents were large operators.

Attorney Fees

Section 42(f) of the Act provides:

> 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. 415 ILCS 5/42(f)(2002).

The People request that the Board require Prior to pay the People's attorney fees of $6,600. People Br. at 51.

The Board finds that Prior committed repeated violations in this case. For example, he repeatedly violated Section 12(a) of the Act by causing or allowing water pollution at the three tank batteries. *See* John Prior, PCB 97-111, slip op. at 15 (ordering John Prior and Industrial Salvage, Inc. to pay the People's attorney fees of $2,520 for "repeated" violations).

The Board also finds that Prior willfully and knowingly violated the Act. Prior ran a hose from his tanker truck into an abandoned mine shaft to discharge oil field waste at the Gompers site. At the same site, he intentionally dumped more oil field waste after the Agency had notified him that the dumping was not allowed. Prior also admitted that when he instructed his employees to dig a trench to dump and burn waste at the Gompers site, he knew the acts were against environmental laws. As the Board found above, it was technically practicable and economically reasonable for Prior to properly dispose of all these waste materials. *See* People v. ESG Watts, Inc., PCB 96-237, slip op. at 2-3, 11-12 (Feb. 19, 1998) ("willful and knowing " violations found where respondent was aware of legal obligations yet failed to comply); People v. Kershaw, PCB 92-164, slip. op. at 8 (Apr. 8, 1993) (violations were "knowing" when they were committed after respondent was notified that operations were violating the Act).

Section 42(f) of the Act, set forth above, authorizes the Board to award attorney fees to the People where a respondent has committed a willful, knowing, *or* repeated violation of the Act. Here, Prior willfully, knowingly, *and* repeatedly violated the Act. Therefore, the Board may award attorney fees to the People. The People's $6,600 figure is based on 55.5 hours of

attorney time (for pleadings, hearing preparation, and hearing) at a rate of $120 per hour and is supported by affidavit. People Br., Affidavit, Attachment 1. The Board finds the rate and hours reasonable based on Board precedent and the complexity of prosecuting this case. *See* Panhandle, PCB 99-191, slip op. at 35-36. Accordingly, the Board requires that Prior pay the People $6,600 in attorney fees. Under Section 42(f), these funds must be deposited in the Hazardous Waste Fund. *See* 415 ILCS 5/42(f)(2002)

CONCLUSION

The Board finds that Prior committed 26 violations of the Act and Board regulations at four sites. These violations included intentionally dumping oil field wastes at the Gompers site without a permit, as well as causing or allowing the release of crude oil at the Wamac City Park tank battery, the Mezo Oestreich tank battery, and the Morgan Kalberkamp tank battery, each time resulting in water pollution. In all, Prior released thousands of gallons of crude oil and polluted miles of State waters. While Prior responded to the spills without urgency, the crude oil spread through the environment and on one occasion, at least nine children were found playing in the pollution. Despite past penalties for violating the Act and Board regulations, Prior has remained a polluter.

Mezo committed three violations of the Act and Board regulations, including allowing the release of crude oil at the Mezo Oestreich tank battery, causing water pollution. This record contains no evidence of any past environmental violations by Mezo.

The Board orders Prior to pay a civil penalty of $300,000 and Mezo to pay a civil penalty of $3,500. As Prior violated the Act willfully, knowingly, and repeatedly, the Board also orders Prior to pay the People's requested attorney fees in the amount of $6,600.

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

ORDER

1. The Board finds that John Prior d/b/a Prior Oil Company (Prior) violated the following provisions of the Environmental Protection Act (Act) and Board regulations:

    a. At the Gompers site: Sections 21(a), (d)(1), (d)(2), (e), (p)(1), and (p)(6) of the Act (415 ILCS 5/21(a), (d)(1), (d)(2), (e), (p)(1), (p)(6) (2002)); Board regulations at 35 Ill. Adm. Code 722.111, 739.122(c), (d), 808.121, 812.101(a);

    b. At the Wamac City Park tank battery: Sections 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (2002)); Board regulations at 35 Ill. Adm. Code 302.203;

c. At the Mezo Oestreich tank battery: Sections 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (2002)); Board regulations at 35 Ill. Adm. Code 302.203); and

d. At the Morgan Kalberkamp tank battery: Section 12(a) of the Act (415 ILCS 5/12(a) (2002)); Board regulations at 35 Ill. Adm. Code 302.203.

2. The Board finds that James Mezo d/b/a Mezo Oil Company (Mezo) violated the following provisions of the Act and Board regulations at the Mezo Oestreich tank battery: Section 12(a) of the Act (415 ILCS 5/12(a) (2002)); Board regulations at 35 Ill. Adm. Code 302.203.

3. No later than July 6, 2004, which is the first business day following the 60th day after the date of this order, Prior must pay $300,000 in civil penalties and $6,600 in attorney fees of the People of the State of Illinois. Prior must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. Prior must pay the attorney fees by certified check or money order, payable to the Hazardous Waste Fund. The case number, case name, and Prior's social security number or federal employer identification number must be included on each certified check or money order.

4. No later than July 6, 2004, which is the first business day following the 60th day after the date of this order, Mezo must pay $3,500 in civil penalties. Mezo must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and Mezo's social security number or federal employer identification number must be included on each certified check or money order.

5. Prior and Mezo must send each certified check or money order to:

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

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

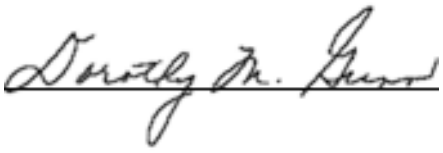
IT IS SO ORDERED.

Board Member T.E. Johnson dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the

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

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 6, 2004, by a vote of 4-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board