ILLINOIS POLLUTION CONTROL BOARD
September 2, 2004

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-98
	)	(Enforcement – Water)
SKOKIE VALLEY ASPHALT, CO., INC., EDWIN L. FREDERICK, JR., individually and as owner and president of SKOKIE VALLEY ASPHALT, CO., INC., and RICHARD J. FREDERICK, individually and as owner and vice president of SKOKIE VALLEY ASPHALT, CO., INC.	)	
	)	
Respondents.	)	

MITCHELL L. COHEN AND BERNARD J. MURPHY, ASSISTANT ATTORNEYS GENERAL, OFFICE OF THE ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; and

MICHAEL B. JAWBIEL, LAW OFFICE OF MICHAEL B. JAWGIEL, P.C., AND DAVID S. O'NEILL, LAW OFFICE OF DAVID S. O'NEILL, APPEARED ON BEHALF OF RESPONDENTS.

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

On July 26, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a five-count second amended complaint against Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents). The complaint alleges that respondents violated Sections 12 (a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f) (2002)), as well as 35 Ill. Adm. Code 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a). The complaint alleges that the violations concern respondents' facility at Grayslake Village, Lake County.

For the reasons below, the Board finds that the respondents violated the Environmental Protection Act (Act) (415 ILCS 5 (2002)) and Board regulations. The Board orders the respondents to pay a civil penalty of $153,000, but will withhold a decision regarding attorney fees and costs until the matter is fully addressed by the parties.

PROCEDURAL HISTORY

On November 3, 1995, the People filed a complaint against Skokie Valley Asphalt Co., Inc. (Skokie Valley). The complaint alleged violations dating from May 1986 to March 1991.

The People filed a first amended complaint that added an additional count against Skokie Valley, but did not add any additional respondents on December 29, 1997. On July 26, 2002, the complainant filed a second amended complaint. That complaint added the Fredericks as respondents. The second amended complaint alleged that the Fredericks violated Sections 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f) (2002)), as well as Sections 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a) of the Board's regulations. The complaint alleged that the Fredericks falsified discharge monitoring reports, submitted a late application for a National Pollutant Discharge Elimination System (NPDES) permit, failed to comply with sampling and reporting requirements in their NPDES permits, discharged oil into a drainage ditch, and violated NPDES permit effluent limits.

On October 17, 2002, the Board accepted the People's second amended complaint. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Oct. 17, 2002). On March 20, 2003, the Board issued an order that denied the complainant's motion for summary judgment, accepted the respondents' answer into the record, and directed the hearing officer to proceed to hearing. People v. Skokie Valley Asphalt, Co., PCB 96-98 (Mar. 20, 2003). On June 5, 2003, the Board issued an order that denied Skokie Valley's motion to dismiss the Fredericks from the case, and granted the People's motion to strike affirmative defenses in part. People v. Skokie Valley Asphalt, Co., PCB 96-98 (Jun. 5, 2003). The Board denied the respondents' motion to reconsider the June 5, 2003 order in a July 24, 2003 Board order. *See* People v. Skokie Valley Asphalt, Co., PCB 96-98 (Jul. 24, 2003).

A hearing was held on October 30 and 31, 2002, at the Village Hall in Libertyville.[1] Six witnesses testified. The People filed 42 exhibits, and the respondents filed eight exhibits. All offered exhibits were accepted into evidence. On November 3, 2003, Board Hearing Officer Carol Sudman issued a hearing report that set a briefing schedule and found the witnesses credible.

On January 15, 2004, the People filed their brief accompanied by a motion for leave to file instanter. On March 12, 2004, the respondents filed their closing brief. On April 15, 2004, the People filed its reply brief and rebuttal arguments. The respondents filed a motion to strike and objections to the People's closing argument and reply brief on May 17, 2004. On May 26, 2004, the People filed a response to the motion, and a motion to strike respondents' motion to strike and objections.

FACTS

Skokie Valley was an asphalt-paving contractor with its main office located at 768 South Lake Street, Grayslake, Lake County (site). Tr. at 277-78. East of the site is the Avon-Fremont Drainage Ditch that flows to the north through the town of Grayslake into a lake called Third Lake. Tr. at 145-46; Comp. Exs 25 and 32. The lake, Grayslake, for which the town is named, is located to the northeast of the site. Comp. Ex. 32. On April 4, 1986, the Agency issued a site specific NPDES permit to Skokie Valley for the storm water runoff from the site. Tr. at 137,

[1] The Board cites the transcript for the hearing of October 30-31, 2003, as "Tr. at _."

Comp. Ex. 1. Skokie Valley was permitted to discharge storm water into Grayslake under NPDES permit No. IL 0065005. Tr. at 221; Comp. Ex. 1. The permit, which became effective on May 4, 1986, and expired on March 1, 1991, required Skokie Valley to submit monthly DMRs. Tr. at 27-29, Comp. Ex. 1. To comply with this requirement, Skokie Valley would have an employee take a sample from a discharge pipe and deliver the sample to North Shore Sanitary District for testing. Tr. at 283. The results were mailed to Skokie Valley and the DMR was usually completed by Skokie Valley dispatcher Bob Christiansen and signed by Richard Frederick. Tr. at 286, 313.

Skokie Valley was an Illinois corporation until its sale to Curran Contracting and dissolution in 1998. Tr. at 299-300, 432. The sale included all of the records of Skokie Valley. Tr. at 319-21. Edwin Frederick was the president of Skokie Valley from 1978 until its sale in 1998. Tr. at 432-35. Edwin Frederick's brother Richard Frederick was the vice president of Skokie Valley from 1978 until its sale in 1998. Tr. at 276. Edwin and Richard Frederick each owned 50 percent of Skokie Valley, were the only shareholders of Skokie Valley and were the only corporate officers of Skokie Valley. Tr. at 435-37.

Richard Frederick was responsible for the scheduling of all jobs, estimating, budgeting, hiring and controlling of all employees and subcontractors, equipment purchasing and repair and review of equipment. Tr. at 279-80. Edwin Frederick was responsible for estimating, insurance issues, management of payroll, job-site meetings, consultation with foremen and engineers, and liaison with government officials and customers. Tr. at 282.

Prior to 1978, Liberty Asphalt operated the Skokie Valley site. Tr. at 124. Liberty Asphalt was an asphalt manufacturing company owned and operated by Edwin and Richard Frederick's parents. Tr. at 279. Edwin Frederick worked for Liberty Asphalt for over 20 years. *Id*.

From 1978 to at least 1981 the Skokie Valley site was operated as an asphalt plant. Tr. at 279, 294-96. The respondents sold the plant and had it removed in 1981 or 1982. *Id*. Since the removal of the plant, the site was used as an office, and a maintenance and storage garage for equipment, trucks, asphalt liquid, asphalt primer coats and other storage tanks. Tr. at 278, 438, Comp. Ex. 32 and 34. The site housed the estimating department, the office and all the people who did billing. Tr. at 277-78.

The land between the site and the Avon-Fremont Drainage Ditch is a working farm field. Tr. at 359. A farm drainage tile ran through the site toward the Avon-Fremont Drainage Ditch. Tr. at 340-41. The outfall from the tile drains to the ditch due east of the site. Comp. Ex. 22. From December 1994 through April 1995, there was an oily discharge in the Avon Fremont Drainage Ditch. Tr. at 340-41, Comp. Ex. 34. Upon discovering the oily sheen on the water in the tile, the respondents plugged it. Tr. at 340. After the respondents plugged the drain tile on their property, the oil discharge in the ditch subsided and stopped. Tr. at 361-62; Comp. Ex. 34

In March 1995, the Agency sampled the effluent from the farm drainage tile that ran through the site at the Avon-Fremont drainage ditch. Tr. at 152. The concentration of oil gravimetric of the sample contained 664 milligrams of oil per liter. Tr. at 155-56; Comp. Ex. 21.

The Agency does not have any records showing that Skokie Valley submitted any DMRs in 1986 or 1987. Tr. at 49-50; Comp. Exs. 1, 8A and 26. According to the Agency's DMR Submission Record, Skokie Valley submitted two DMRs in 1988, five DMRs in 1989, and eleven in 1990. Tr. at 51-52; Comp. Exs. 1, 8 and 26. The Agency does not have a record of Skokie Valley submitting a DMR for the month of July in 1992. Tr. at 53; Comp. Ex. 8F.

The DMR submitted for December 1990, contained the same data as that submitted for November 1990. Tr. at 37-38; Comp. Exs. 2-3. The DMR originally submitted by Skokie Valley for February 1991 contained the same data as the report submitted for January 1991. Tr. at 40; Comp. Exs. 4-5. Skokie Valley subsequently submitted a corrected DMR for February of 1991. Tr. at 485. Resp. Ex. 4. In a May 13, 1993 letter to counsel, Richard Frederick stated that the respondents had inspected the two DMRs thought to be duplicate copies, and do not feel that they are duplicated in any way; and that if a duplicating mistake occurred, it took place somewhere other than their office. Resp. Ex. 4. Attached to the letter are non-duplicative DMRs for the two months in question. *Id*.

The DMR that Skokie Valley submitted in August 1991 indicated a 30-day average concentration for TSS of 55 mg/L and a daily maximum concentration for TSS of 55mg/L. Tr. at 54; Comp. Ex. 9. The DMR that Skokie Valley submitted for September 1991 indicated that their storm water discharge had a 30-day average concentration for TSS of 25 mg/L. The DMR that Skokie Valley submitted for September 1991 indicated that their storm water discharge had a 30-day average concentration for TSS of 25 mg/L. Tr. at 54-55; Comp. Ex. 10. The DMR that Skokie Valley submitted for October 1991 indicated that their storm water discharge had a 30-day average concentration for TSS of 41 mg/L and a daily maximum concentration of 41 mg/L. Tr. at 55; Comp. Ex. 11. The DMR that Skokie Valley submitted for February 1992 showed that their storm water discharge had a 30-day average concentration for TSS of 18 mg/L. Tr. at 55-56; Comp. Ex. 12. The DMRs that Skokie Valley submitted for November and December1992 indicated that their storm water discharge had a 30-day average concentration for TSS of 22 mg/L and 24 mg/L respectively. Tr. at 56; Comp. Exs. 13 and 14. The DMR that Skokie Valley submitted for May 1993 indicated that their storm water discharge had a 30-day average concentration for TSS of 24 mg/L. Tr. at 56-57; Comp. Ex. 15. The DMR that Skokie Valley submitted for June 1993 indicated that their storm water discharge had a 30-day average concentration for TSS of 35 mg/L and a daily maximum concentration of 35 mg/L. Tr. at 57; Comp. Ex. 16. The DMR that Skokie Valley submitted for April 1995 indicated that their storm water discharge had a 30-day average concentration for TSS of 126 mg/L and a daily maximum concentration of 126 mg/L. Tr. at 57-58; Comp. Ex. 17.

The Agency received Skokie Valley's NPDES permit renewal application on June 5, 1991. Tr. at 42; Comp. Ex. 6. Because the NPDES permit expired in March of 1991, the Agency sent a compliance inquiry letter to Skokie Valley in April 1991. Tr. at 42-46; Comp. Ex. 6. The respondents discussed the idea of coverage under a blanket permit instead of an individual NPDES permit with an Agency representative. Tr. at 322-25.

Agency inspector Kallis inspected the site on May 21, 1991. Tr. at 139-40; Comp. Ex. 19. Mr. Kallis left the site to avoid a confrontation, and never saw an effluent sampling point on that date. Tr. at 141-42. Donald Klopke worked in the Agency's Office of Emergency Response on

April 19, 1995, when he inspected the site, the Avon Fremont drainage ditch and the surrounding area. Tr. at 218-22. On that day, Mr. Klopke inspected the sight with fellow Agency employee Ken Savage and Betty Lavis – the on-scene coordinator from the U.S. EPA. Tr. at 227-28; Comp. Ex. 25. Mr. Klopke saw the oil sheen on the surface of the ditch and noticed a strong petroleum odor. Tr. at 222. Ms. Lavis prepared a pollution report on May 3, 1995 describing her visit to the site on April 18, 1995, that determined the source of the petroleum release into the Avon Fremont drainage ditch was Skokie Valley. Tr. at 227-28; Comp. Ex. 25. In her report, Ms. Lavis wrote that she had planned to conduct additional sampling, but that she was met at the site by Edwin and Richard Frederick who informed her that they had found a leak and would address the problem. Tr. at 228-31; Comp. Ex. 25. The respondents signed a notice of federal interest in an oil pollution incident and agreed to submit a clean-up project plan to the U.S. EPA for review. Comp. Ex. 25. The U.S. EPA required Skokie Valley to search for additional sources for the release on their site and suspected that there might be a pool of oil product accumulated under the site. *Id*. Three USTs that were installed in 1978 were removed from the site after the April 1995 incident. Comp. Ex. 34, pg. 8.

Agency inspector Chris Kallis also investigated the site in 1995. On March 1, 1995, Mr. Kallis took samples from the point where the farm drainage tile discharged into the ditch, observing at that time, a concentrated heavy oil sheen coming from the farm drainage tile and downstream in the ditch. Tr. at 151-55. Mr. Kallis did not notice any sign of contaminant upstream from the drainage tile. Tr. at 154.

On April 22, 1995, the respondents contacted environmental engineer James Huff after finding a visible sheen or oil on an opened drain tile on respondents' property. Tr. at 347-48. On Huff's advice, the respondents plugged the drain tile and reported the release. Tr. at 340-41. No releases have occurred since respondents plugged the drain tile. Tr. at 348. Huff visited the site a few days later and saw that the drain tile had been plugged and the soil brought to grade. Tr. at 352. He saw that absorbent booms were placed in the Avon-Freemont drainage ditch by the USEPA. Tr. at 348. He noticed an oil sheen near where the booms were in place and observed that the oil sheen did not exist a mile downstream from where the drain tile emptied into the ditch. Tr. at 348-49.

On April 25, 1995, respondents excavated a trench at the site to again locate the drain tile and Huff noticed oil in the center of the trench. On April 28, 1995, the respondents discovered that an underground heating oil tank contained water and reported a leaking underground storage tank incident to the Illinois Emergency Management Agency (IEMA). Tr. at 363-68. On April 28, 1995, the respondents followed Huff's recommendation and purchased higher quality booms and placed them in the drainage ditch. Tr. at 351-52.

After removing the underground storage tank, Huff determined that the release from that tank was minor and now thinks the oil sheen on the drainage ditch from 1994 to 1995 was caused by one or more items on the south side of the site. Tr. at 386-87. Huff ultimately concluded that the release to the drainage ditch was attributed to the abandoned gasoline and diesel lines from an above ground storage tank to the former pump island. Comp. Ex. 34.

After the sale of the site, and continuing at least until the time of the hearing, Edwin and Richard Frederick continue to fund the effort to eliminate any potential source of a release from the site. Tr. at 387-88. To date, the Fredericks have paid Huff at least $150,000 for environmental work performed at the site. Tr. at 467-68.

PRELIMINARY MATTERS

Before the Board decides this case, a number of preliminary matters must be addressed. Specifically, the Board must decide the motions to strike filed by the People and the respondents, the affirmative defenses of *laches* and estoppel, and the issue of Edwin and Richard Frederick's personal liability.

Motions to Strike

The respondents filed a motion to strike the People's reply brief on May 17, 2004. On May 26, 2004, the People filed a response to the motion as well as a motion to strike respondents' motion to strike.

Respondents assert that any statements in the People's reply brief that are not a reply to the respondents' brief, or limited to the facts in evidence, should be stricken. Resp. Mot. at 1-2. Respondent sets forth 14 specific sections of the People's reply brief that should be stricken for these reasons.

The People argue that respondents' motion to strike should not be a part of the record in this case and ask that it be stricken without the Board's consideration. The People assert that the reply brief is not a pleading, and that respondents cannot rely on Section 101.506 of the Board's rules to challenge the reply. Peop. Mot. at 2. The People also contend that the respondents did not ask for leave to file the motion and that the People have the burden of proof and must get the last word. Peop. Mot. at 2-3. The People ask that respondents' motion to strike be stricken and that the People be allowed to amend their fee petitions to reflect time spent addressing the motion to strike.

The Board grants the respondents' motion to strike as follows. Specifically, that portion of the People's reply that addresses attorney fees and costs exceed the scope of the arguments made in the respondents' brief and will not be considered in this order. The respondents have not had an adequate opportunity to respond to the request for attorney fees and costs. However, as the Board finds willful, knowing or repeated violations of the Act and regulations in this order, the Board may award costs and reasonable attorney fees. *See* 415 ILCS 5/42(f)(2002). In the interest of administrative economy, the People may rely on the information presented in the reply concerning attorney fees and costs. The People will also be given 21 days after the date of this order to file anything further on those issues. At the end of the 21-day period, the respondents will have the standard 14-day response period to respond to the People's request.

The Board finds the remainder of the People's reply appropriate, as it does not exceed the scope of the respondents' brief or seek to proffer new facts. Further, the Board is fully capable

of ascertaining the relevance and accuracy of the statements set forth in the reply and will weigh such statements accordingly. The remainder of the respondents' motion to strike is denied.

The People's motion to strike is denied. Although pleading is not defined in the Board's rules, the term will not be construed narrowly in order to prevent a party from challenging what it believes is an improper filing before the Board. Such a procedural vehicle must exist to prevent material prejudice. Nothing in the remainder of the People's motion to strike is persuasive, and the motion is denied.

Affirmative Defenses of *Laches* and Estoppel

Arguments

The respondents timely raised the affirmative defenses of *laches* and estoppel. The respondents assert that the complainant was aware of the roles of Edwin and Richard Frederick prior to the filing of the original complaint in 1995 and that all discovery pertinent to the parties was completed in 2000. Resp. Br. at 10. The respondents contend that no new information or additional allegations involving the Fredericks have been introduced to justify the untimely addition, and that as a result of the People's lack of due diligence; the Fredericks have been prejudiced in their ability to produce records, recall witnesses and remember events relevant to their defense in this matter. *Id*.

Specifically, the respondents state they made no attempt to retain any Skokie Valley or personal records since this case had been filed and the Fredericks were not named as respondents, and no new information was divulged through discovery that would lead a reasonable person to suspect that they would be named as respondents. Resp. Br. at 10-11. The respondents argue that dismissing the Fredericks as respondents will not act as impairment of the State's right to protect the public interest, because Skokie Valley will remain a respondent. Resp. Br. at 12. The respondents assert that compelling circumstances are involved in this matter; namely that the Fredericks are unable to fully defend themselves against charges of alleged incidents that occurred up to 17 years ago, and that the respondents should be able to rely on the representations and actions of the State to conclude they will not be required to defend themselves against allegations raised well after their retirement. Resp. Br. at 13. The respondents ask that the Fredericks be dismissed under the doctrines of *laches* and equitable estoppel.

The People argue that the respondents cannot claim *laches* because they lost their own records. Reply at 16. The People assert that respondents and their counsel knew this case was pending in 1998 when the assets of Skokie Valley were sold, and that this case was listed within the asset purchase agreement. *Id*. The People assert that it is not difficult to determine that respondents had access to, and were responsible for, their own records and that the asset purchase agreement gave full access to the property and records belonging, or relating to the respondents. Reply at 17.

The People argue that the Fredericks were named over a year before the hearing. Reply at 19. The People assert that the Fredericks were not prejudiced because the same three

witnesses – the Fredericks and Huff – were needed to defend both Skokie Valley and the Fredericks. Reply at 20. The People assert that once the Fredericks admitted in discovery that they were the two people responsible for the entire Skokie Valley operation, the People filed the second amended complaint adding them as respondents. Reply at 21. The People argue that respondents had to defend themselves against the exact same violations they had to defend on behalf of the corporation. Reply at 22. Finally, the People assert that there are no circumstances whatsoever to indicate respondents were misled or prejudiced by the Agency. *Id*.

Discussion

Although they have separate affirmative defenses, respondents have invoked the doctrines of *laches* and equitable estoppel together. An affirmative defense is a "response to a claim which attacks the *legal* right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank v. Phillips Petroleum Co. (January 23, 1997), PCB 97-100, slip op. at 2 n.1 (emphasis in original) (quoting *Black's Law Dictionary*); *see also* Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 633, 635 (4th Dist. 1984) (if the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense). In an affirmative defense, respondent alleges "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193 (Aug. 6, 1998). Stated another way, a valid affirmative defense gives color to complainant's claim, but then asserts new matter that defeats an apparent right of complainant. *See* Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2d Dist. 1991), *citing* Doyle, 121 Ill. App. 3d at 222, 459 N.E.2d at 635.

Laches is an equitable doctrine that bars relief where a defendant has been misled or prejudiced because of a plaintiff's delay in asserting a right. City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2nd Dist. 1990). There are two principal elements of *laches:* "lack of due diligence by the party asserting the claim and prejudice to the opposing party." Van Milligan v. Board of Fire and Police Commissioners, 158 Ill. 2d 85, 89, 630 N.E.2d 830, 833 (1994). Although *laches* as applied to public bodies is disfavored, it can apply under compelling circumstances even when the public body is operating in its governmental capacity. Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-48, 220 N.E.2d 415, 425-426 (1966) (citations omitted). The Supreme Court reaffirmed Hickey in Van Milligan. *See* Van Milligan, 158 Ill. 2d 85, 90-91, 630 N.E.2d 830, 833.

The Board finds that respondents do not have a valid claim of *laches* in this case. First, as acknowledged by respondents, the Agency and the Attorney General's Office were operating in a governmental capacity in prosecuting this case in order to protect the public's interest. Thus, compelling circumstances must be shown for *laches* to apply. Although some allegations in this matter date back to 1986, the People first filed its complaint in 1995. After that time the case has moved, albeit slowly, forward with both parties bearing at least some responsibility for the lengthy nature of time interval. Even though nine years seems an unduly long period of time, nothing in the record indicates that the People were not diligent in pursuing their claim.

Even assuming a lack of diligence, the Board cannot find that being added to the complaint in 2000 prejudiced the Fredericks. There is no indication that any evidence beyond what is needed to defend Skokie Valley was needed to defend the Fredericks. The Fredericks were aware of the suit against Skokie Valley at least as early as 1995. The asset purchase agreement clearly gives the Fredericks the right to any records they would have needed to defend this case. Respondents' claim that they had no reason to suspect these records would be of value to them in 1998 is specious. If the Fredericks failed to gather or account for the records they needed, it was a problem of their own making, and not as a result of any lack of diligence on the People's part. Based on the facts in this case, the Board can find no compelling circumstances to apply *laches* to the People in this matter.

A party may invoke the doctrine of equitable estoppel when it "reasonably and detrimentally relies on the words or conduct of another." Brown's Furniture v. Wagner, 171 Ill. 2d 410, 432, 665 N.E.2d 795, 806 (1996). The doctrine of estoppel "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." People v. Chemetco, PCB 96-76, slip op. at 10 (Feb. 19, 1998) (quoting Gorgess v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993)). The Illinois Supreme Court is reluctant to apply the doctrine of estoppel against the State because it "may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials." Brown's Furniture, 171 Ill. 2d at 431-32, 665 N.E.2d at 806; *see also* Chemetco, PCB 96-76, slip op. at 10-11 (Feb. 19, 1998).

But, as with *laches*, it has been stated with frequency that the State may be estopped when acting in a proprietary, as distinguished from its sovereign or governmental capacity and even, under more compelling circumstances, when acting in its governmental capacity. Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-48, 220 N.E.2d 415, 425-426 (1966). The Supreme Court reaffirmed Hickey more recently in Van Milligan. *See* Van Milligan, 158 Ill. 2d 85, 90-91, 630 N.E.2d 830, 833.

A party seeking to estop the government must prove three factors. First, it must prove that it relied on a government agency, its reliance was reasonable, and that it incurred some detriment as a result of the reliance. Chemetco, PCB 96-76, slip op. at 11(Feb. 19, 1998). Second, the party "must show that the government agency made a misrepresentation with knowledge that the representation was untrue." *Id.*; *see also* Medical Disposal Services v. PCB, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Third, "the government body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government." Chemetco, PCB 96-76, slip op. at 11 (Feb. 19, 1998); *see also* Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806.

The respondents did not present a sufficient case to estop the People in this instance. The respondents presented no evidence concerning its reliance on a governmental agency that the Fredericks would not be added as respondents, much less of any misrepresentation with knowledge that the misrepresentation was untrue. Further, the respondents have not pointed to any affirmative act that was made by the Attorney General's Office or the Agency. Thus, the affirmative defense of estoppel fails.

Personal Liability of the Fredericks

The respondents argue that the People presented insufficient evidence at trial to hold Edwin or Richard Frederick liable under the complaint. Resp. Br. at 15. The respondents assert that the Fredericks cannot be held liable for any of the counts relating to the NPDES permit because they were not permit holders and had no duty to comply with the permit requirements. *Id*.

The respondents argue that Agency witness Garretson had no information to lead him to believe that Edwin Frederick actually participated in any aspect of the discharge monitoring reports (DMRs) submitted by Skokie Valley. Resp. Br. at 16. The respondents argue that the People fail to make differentiation between the respondents based on their responsibilities under the NPDES permit. *Id*. The respondents assert that because the Fredericks were not owners of the property, they cannot be held liable as individuals for any release from the property. Resp. Br. at 15.

The People argue that the Fredericks did not take precautions to prevent pollution, ran the entire Skokie Valley operation, worked at the site, supervised employees, and much more. Reply at 24. The People note that Edwin Frederick consulted with foremen, acted as liason with governmental officials, signed the late NPDES permit application and letters submitted to the Agency, and was present on site during environmental inspections and investigations. *Id*.

Likewise, the People contend, Richard Frederick dealt with foremen, signed and certified Skokie Valley's DMRs and was present at the site during environmental inspections and investigations. Reply at 25. The People argue that respondents admitted in their brief that the Fredericks made major management decisions and decisions on spending large amounts of money on behalf of Skokie Valley. *Id*. The People assert that the Fredericks are personally liable for the environmental violations of their company because they were personally involved in or actively participated in at least some of the violations, and had the ability or authority to control the acts or omissions that gave rise to all the violations. Resp. Br. at 7; Reply at 25.

Discussion

The legal precedent for personal liability is provided in People v. C.J.R. Processing, Inc., 269 Ill. App. 3d 1013, 647 N.E.2d 1035 (3rd Dist. 1995). In that case, the court held that corporate officers might be held liable when their active participation or personal involvement is shown. C.J.R., 269 Ill. App. 3d at 1020. In discussing this standard in the context of a motion to dismiss, the court in People v. Tang, 346 Ill. App. 3d 277, 805 N.E.2d 243 (1st Dist. 2004), found that a plaintiff must do more than allege that the corporate officer held a management position or had general corporate authority; but must allege facts that the officer had personal involvement or actively participated in the acts resulting in liability, not just that he had personal involvement or active participation in the management of the corporation. *Id*.

As noted in C.J.R. Processing, the General Assembly intended for the Act to be liberally construed in imposing responsibility upon those who cause harm to the environment. C.J.R. Processing, Ill. App. 3d at 1016, citing 415 ILCS 5/2(b), (c) (1992). Deciding whether to impose

personal liability on a corporate officer is often difficult. In Tang, the court likened it to a situation in which an individual is hit by a negligently operated train. The railroad is liable in tort, but the president of the railroad is not. However, had the president been driving the train when it hit the plaintiff, or had been sitting beside the driver and ordered him to exceed the speed limit, he would be jointly liable with the railroad. Tang, 346 Ill. App. 3d at 280, citing Browning-Ferris v. Ter Maat, 195 F.3d 953,956 (7th Circ. 1999).

The Board finds that the evidence in this case shows that Edwin and Richard Frederick are personally liable for the activities of Skokie Valley. The record is replete with active participation or personal involvement by the Fredericks. The Fredericks, together, were responsible for the day-to-day operation of Skokie Valley. Both were present for environmental investigations and inspections. They also both corresponded and met with environmental government officials. While perhaps not driving the train, the Fredericks both sat beside the driver and gave instructions, and had the ability to control the activities that gave rise to the instant complaint. Accordingly, the Fredericks can be held personally liable under the doctrine set forth in C.J.R. Processing for any violations committed by Skokie Valley.

DISCUSSION

The Board first discusses each of the five counts in turn, including the purported defenses raised by the respondents. The Board then addresses the People's requested relief: civil penalties and attorney fees. In order to prevail in an enforcement case before the Board, the complainant must prove by a preponderance of the evidence that the respondents have committed the violations alleged in the complaint. People v. Fosnock, PCB 41-1, slip op. at 19 (Sept. 15, 1994). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Nelson v. Kane County Forest Preserve, PCB 94-244 (July 18, 1996).

Count I – Failure to Comply with Reporting Requirements

In count I of the complaint, the People allege that the respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2002)) and 35 Ill. Adm. Code 305.102(b) by falsifying their December 1990 and January 1991 discharge monitoring reports (DMR). Am. Comp. at 4. The People allege that respondents falsified the reports by altering the dates of previously submitted reports and submitting the duplicates to the Agency. *Id.*

Section 12(f) of the Act provides:

No person shall:

f. Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 38(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any

> regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (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).

Section 305.102(b) of the Board's water pollution regulations provides:

Reporting Requirements.

b. Every holder of an NPDES Permit is required to comply with the monitoring, sampling, recording and reporting requirements set forth in the permit and this chapter. 35 Ill. Adm. Code 305.102(b).

Standard Condition No. 19 of NPDES Permit No. IL 0065005 provides:

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

Analysis

The record is clear that the DMRs submitted for December 1990 and February 1991 contained the same data as that submitted for the November 1990 and January 1991 DMRs respectively. The People allege that respondents' falsified the DMRs for December 1990 and February 1991 by duplicating previous reports. Skokie Valley's DMRs were usually filled out and submitted by Skokie Valley employee Bob Christiansen. Mr. Christiansen suffered a heart attack during the time period in question. Tr. at 292.

It is undisputed that DMRs with data duplicating that contained in previously filed reports were submitted to the Agency. In fact, a review of the January 1991 DMR reveals that

respondents cite the reporting period for January as having only 28 days – from 91/01/01 to 91/01/28. Comp. Ex. 4. The Board finds the People have shown by a preponderance of the evidence that the respondents made a false statement, representation or certification to the Agency in at least these two instances. The Board finds the respondents have violated Section 12(f) of the Act (415 ILCS 5/12(f) (2002)) and 35 Ill. Adm. Code 305.102(b). However, the Board will consider the health issues surrounding Skokie Valley employee Mr. Christiansen as a mitigating factor in considering the penalty for this violation.

Count II – Late Application for Renewal of NPDES Permit

Count II of the complaint alleges that the respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2002)) and 35 Ill. Adm. Code 309.102(a) and 104(a) by not applying for a reissuance of Skokie Valley's National Pollutant Discharge Elimination System (NPDES) permit 180 days prior to the expiration date contained in its existing permit. Am. Comp. at 6.

Section 12(f) of the Act, which is set forth above under count I, prohibits discharge in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (2002).

Section 309.102(a) of the Board's Water Pollution Regulations provides:

> a. Except as in compliance with the provisions of this Act, Board regulations, and the CWA (33 U.S.C. 1251 et seq.), and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into waters of the State from a point source or into a well shall be unlawful. 35 Ill. Adm. Code 309.102(a).

Section 309.104(a) of the Board's Water Pollution Regulations provides:

> Renewal
>
> a. Any permittee who wishes to continue to discharge after the expiration date of his NPDES permit shall apply for reissuance of the permit not less than 180 days prior to the expiration date of the permit. 35 Ill. Adm. Code 309.104(a).

Analysis

The respondents do not dispute that Skokie Valley's NPDES permit renewal application was not filed within 180 days prior to the expiration date of the permit. The NPDES permit expired in March of 1991, and the Agency did not receive the application until June 5, 1991 – approximately nine months late. The respondents argue, rather, that it is questionable that Skokie Valley was required to reapply for an NPDES permit. The respondents argue that Skokie Valley should have qualified for a general permit for storm water discharges off of industrial properties that require no monitoring or submitting of DMRs. The respondents further assert that

they discussed this and were advised by consultants and Agency representatives that they did not need a NPDES permit for the site.

The Board is not convinced by respondents' arguments. The simple fact is that Skokie Valley did have a NPDES permit. The regulations require that any permittee wishing to continue to discharge must file for a renewal prior to 180 days before the NPDES permit expires. Skokie Valley did not timely apply for renewal. Any additional arguments are chaff.

The time to contest the need for the NPDES permit was at the time of issuance or reissuance. At that time, the respondents could have appealed the Agency's determination that a permit was needed. Instead, respondents failed to follow the clear requirement for renewal. The respondents have also argued that they were told by the Agency that an NPDES permit would not be required at the site. This assertion is not borne out in the record.

The Board finds respondents in violation of Section 12(f) of the Act (415 ILCS 5/12(f) (2002)) as well as 35 Ill. Adm. Code 309.102(a) and 309.104(a).

Count III – Failure to Comply with Sampling and Reporting Requirements

The People allege in count III of the complaint that respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2002)) and 35 Ill. Adm. Code 309.102(a) and (b) by not maintaining an accessible effluent sampling point for Skokie Valley's discharge from the lagoon, and by failing to submit DMRs to the Agency as required by Skokie Valley's NPDES permit. Am. Comp. at 8.

Section 12(f) of the Act and Section 309.102(a) of the Board's Water Pollution Regulations are set forth above under counts I and II.

Section 305.102(b) of the Board's Water Pollution Regulations provides:

Reporting Requirements

b. Every holder of an NPDES Permit is required to comply with the monitoring, sampling, recording and reporting requirements set forth in the permit and this chapter. 35 Ill. Adm. Code 305.102(b).

Special Condition No. 4 of NPDES Permit No. IL 0065005 provides:

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

Special Condition No. 1 of NPDES Permit No. IL 0065005 provides:

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

Analysis

Skokie Valley, as a NPDES permit holder, must comply with the reporting requirements detailed in its permit. See 35 Ill. Adm. Code 305.102(b). Special condition number 4 of Skokie Valley's NPDES Permit makes it clear that DMRs must be submitted no later than the 15th of the month following that being reported. The Agency does not have any records showing that Skokie Valley submitted any DMRs during the years of 1986 and 1987, or on 19 occasions thereafter.

Skokie Valley asserts that the Agency historically mislogs or misplaces information submitted in the DMRs. However, the record does not reveals a historic mishandling of submitted DMRs on the part of the Agency, but only an Agency witness' awareness that DMRs have been misfiled in the past. Tr. at 66, 197. In addition, the record contains correspondence by respondents acknowledging a failure to properly file DMRs with the Agency. The Board finds that the People have shown by a preponderance of the evidence that the respondents did not timely submit DMRs.

The People base their allegation that respondents did not maintain an accessible effluent sampling point on the testimony of Agency inspector Mr. Kallis. Mr. Kallis inspected the site on May 21, 1991, but left before he found a representative sampling point because of an incident with Edwin and Richard Frederick. Mr. Kallis stated that he "got the impression they wanted me to go, so I left just to avoid confrontation." Tr. at 141. Mr. Kallis did not provide any specific testimony concerning threatening language, or even a request that he leave, nor did he testify that he looked for, but failed to find a sampling point. A sampling point was available when Mr. Kallis took samples in 1992. The Board finds that the People failed to prove that respondents did not maintain an accessible sampling point. The People have not offered any testimony or exhibits describing a full inspection wherein a sampling point wasn't found. Mr. Kallis did not verify that no effluent sampling point was available on May 21, 1991, and a sampling point was available when he next sought one.

The Board finds respondents in violation of Section 12(f) of the Act, as well as 35 Ill. Adm. Code 309.102(a), 305.102(b) and special condition number 4 of NPDES permit IL 0065005 for failing to properly submit DMRs on a regular basis. However, the Board finds respondents did not violate special condition number 1 of NPDES permit IL 0065005, and the accompanying portions of the statute and regulations, for failing to maintain an accessible sampling point.

Count IV – Water Pollution

In count IV of the complaint, the People allege that respondents violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) and 35 Ill. Adm. Code 302.203, 304.105 and 304.106 by causing or allowing the discharge of contaminants into the Avon Drainage Ditch so as to cause water pollution. Am. Comp. at 13.

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, or so as to violate regulations or standards adopted by the Pollution Control Board under the Act. 415 ILCS 5/12(a) (2002).

Section 302.203 of the Board's Water Pollution Regulations provides:

Offensive Conditions

> Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin…35 Ill. Adm. Code 302.203

Section 304.124(c) of the Board's Water Pollution Regulations provides:

Offensive Conditions

c. Oil may be analytically separated into polar and nonpolar components. If such separation is done, neither of the components may exceed 15 mg/l (i.e. 15 mg/l polar materials and 15 mg/l nonpolar materials. 35 Ill. Adm. Code 304.124(c).

Section 304.105 of the Board's Water Pollution Regulations provides:

Violation of Water Quality Standards

> In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard…35 Ill. Adm. Code 304.105.

Contaminants, water pollution and waters were previously defined above under count I.

Analysis

From December 1994 through April 1995, there was an oily discharge in the Avon Fremont Drainage Ditch. The Board finds this 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. The respondents do not dispute that an oily discharge existed in the drainage ditch.

Instead, respondents argue that the People did not establish whether the Skokie Valley site was the most likely source of the discharge into the drainage ditch because an equally probable, if not more probable, source exists – the nearby Mitch's Green Thumb Nursery. In reviewing the record, however, the Board finds that the People met its burden and proved by a preponderance of the evidence that the oily sheen in the Avon-Fremont drainage ditch was caused, threatened or allowed by the respondents.

Not only did the respondents admit to the U.S. EPA that they had found the leak and would address the problem, no releases occurred once the respondents plugged the drain tile on their site. Further, Agency inspector Kallis investigated the site when the oil sheen was on the water in the drainage ditch, and did not notice any sign of contaminant upstream from the drainage tile. Accordingly, the Board finds that respondents violated Section 12(a) of the Act as well as 35 Ill. Adm. Code 302.203, 304.105, and 304.106.

The Agency took a water sample in March 1995, and had it tested for oil and grease content. Laboratory analysis revealed that the sample far exceeded 15 mg/l of oil. The Board finds that respondents violated Section 304.124(c) of the Board's Water Pollution Regulations. 35 Ill. Adm. Code 304.124(c).

Count V – Violation of NPDES Permit Effluent Limits

Count V of the complaint alleges that respondents violated Section 12(f)(2) of the Act (415 ILCS 5/12(f) (2002)) and 35 Ill. Adm. Code 304.141(a) and 309.102(a) by causing or allowing the discharge of effluent from the Skokie Valley facility to exceed concentration limits for total suspended solids (TSS) as set forth in Skokie Valley's NPDES permit.

Section 304.141(a) of the Board's water pollution regulations provides:

NPDES Effluent Standards

a. No person to whom an NPDES Permit has been issued may discharge any contaminant in his effluent in excess of the standards and limitations for that contaminant which are set forth in his permit. 35 Ill. Adm. Code 304.141(a).

Section 12(f) of the Act and Section 309.102(a) of the Board's Water Pollution Regulations are set forth above under counts I and II.

Analysis

NPDES Permit No. IL 0065005 contains the following effluent limits for total suspended solids: 15 mg/l for a 30-day average, and 30 mg/l for a daily maximum. A review of the DMRs submitted by the respondents reveals nine exceedences of the 30-day average concentration limit for TSS, and four exceedences of the daily maximum concentration limit for TSS. See Comp. Exs. 9-17.

The respondents argue that the Agency admitted at hearing that it does not take action if a singular DMR reflects levels higher than allowed under the NPDES permit and that even two reports back-to-back may only possibly lead to action by the Agency. This is immaterial, however, to whether or not the respondents violated the limits in its permit. The fact that the Agency may choose not to enforce isolated exceedences of NPDES permit limits does not alter that fact that such exceedences occurred, and are violations of the Act and regulations. Further, the respondents violated the limits in the NPDES permit for two consecutive months twice and for three consecutive months in 1991.

The respondents also argue that, in light of the numerous environmental factors beyond the control of a permittee that influence the level of TSS at any given point, Skokie Valley has a commendable record in accurately reporting the levels of TSS even if elevated. This argument must fail. The respondents do not have a commendable record in accurately submitting DMRs. Given the number of required DMRs that were not submitted, Skokie Valley may have exceeded TSS concentration limits with regularity. However, because of respondents' lack of compliance with the Act and regulations, as noted in count III, whether or not such exceedences occurred will remain unknown.

The Board finds that respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2002)) and 35 Ill. Adm. Code 309.102(a) and 305.102(b).

Relief

Having found that respondents violated the Act and Board regulations, the Board will now decide the appropriate relief. The People ask the Board to impose a civil penalty of $493,000 on the respondents. The People also request the Board order respondents to pay $135,500 for the People's attorney fees and $5,574.84 for the People's legal costs.

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 as follows:

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

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.

The respondents failed, in large part, to comply with Skokie Valley's NPDES permit. They did not submit the required DMRs for almost two years after the effective date of the permit and only sporadically thereafter. Further, respondents repeatedly exceeded the effluent limitations in the NPDES permit. The water pollution in the Avon-Fremont drainage ditch threatened the public health. The Board weighs Section 33(c)(i) against respondents.

The Board acknowledges the importance of good roads and highway maintenance as well as the need for asphalt paving companies such as Skokie Valley as part of that system. The Board weighs Section 33(c)(ii) in favor of respondents. Skokie Valley has been located at the site since 1978, and Liberty Asphalt operated in the same location for years prior to that date. The People have not argued that Skokie Valley is unsuitable to its area, and the Board weighs Section 33(c)(iii) in favor of the respondents.

Complying with the requirements of the NPDES permitting system is part of doing business in the State of Illinois. It was technically practicable and economically reasonable for the respondents to comply with the requirements of its permit. Additionally, it was technically practicable and economically reasonable for respondents to have prevented the discharge into the Avon-Freemont drainage ditch prior by addressing the contamination on their site prior to discharge. The Board weighs Section 33(c)(iv) against respondents.

Compliance with the requirements of the NPDES permit and the associated provisions of the Act and regulations occurred sluggishly if at all. Respondents did, ultimately, address the water pollution in the Avon-Freemont drainage ditch, but only when under scrutiny by the U.S. EPA and the Agency. The Board weighs this factor against the respondents.

Protecting public health was compromised by the respondents repeatedly failure to comply with the NPDES permitting requirements and associated regulations. The water pollution in the Avon-Fremont drainage ditch also threatened the protection of public health. These facts outweigh the social and economic value of the site, the suitability of location, and the efforts made by respondents to comply and remediate.

It was also technically practicable and economically reasonable to have complied with the requirements of the NPDES permit and to have remediated the site prior to the release that resulted in water pollution in the Avon-Freemont drainage ditch. Subsequent remediation came, but only after State and Federal enforcement was commenced. Based on the Section 33(c) factors, the Board finds that civil penalties against the respondents 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).

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.

The People do not seek the statutory maximum penalties. Instead, the People ask the Board to impose a total civil penalty of $493,000. 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). [2]

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

Section 42(h)(1): Duration and Gravity of Violation. The water pollution in the Avon-Fremont drainage ditch threatened the public health. However, the record indicates that the damage caused by the release was not extensive, and of a temporary nature. Agency Inspector Kallis testified that other than the sheen and odor, the water pollution resulted in no observable environmental impact. Respondents' violations relating to the NPDES permit were numerous and ongoing. They did not submit the required DMRs for almost two years after the effective date of the permit, and failed to submit them on a regular basis thereafter. Respondents exceeded the effluent limitations for TSS in the NPDES permit 13 times. Not complying with the NPDES permitting requirements interferes with the protection of public health by creating potential environmental hazards and undermining the permitting system. Respondents continuing disregard for that permitting system highlights the gravity of this type of violation.

The Board weighs this factor against respondents, primarily because of the number of repeated violations involving the NPDES permit.

Section 42(h)(2): Presence or Absence of Due Diligence. Respondents exercised little or no diligence in attempting to comply with the Act and Board regulations. Many of the violations occurred repeatedly over the course of years. Efforts to remediate the water pollution in the Avon-Fremont drainage ditch did occur, and the Fredericks continue to fund the effort to eliminate any potential source of a release from the site. Further, the Fredericks have paid at least $150,000 in order to remediate the site. However, remediation efforts occurred only after the respondents came under the purview of the Agency and the U.S. EPA, and the State enforcement process was well underway. The Board ultimately weighs this factor against Respondents, but will consider the remediation and cost thereof, in mitigation of the ultimate penalty.

Section 42(h)(3): Economic Benefit from Delayed Compliance. The record lacks any specific estimates of economic benefit respondents enjoyed by delaying compliance. The People assert that a significant amount of benefit is clear in light of the fact that the respondents sold Skokie Valley's assets for over $8.2 million. However, the record indicates that the

[2] 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 respondents.

environmental issues were known at the time of the sale in 1998, and the respondents have maintained financial liability for environmental matters. The benefit derived from not submitting DMRs appears marginal, and the respondents did, eventually, apply for a renewal of the NPDES permit. Accordingly, the Board does not consider this an aggravating factor.

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). As noted in the previous factor, the assets of Skokie Valley were sold for a significant amount of money. However, Edwin and Richard Frederick testified that they netted only a small amount after the liabilities of Skokie Valley were accounted for.

Considering all of the circumstances, the Board finds that a significant civil penalty on respondents will assist in deterring further violations. The Board finds, however, especially given the lack of observable environmental harm other than sheen and odor, that the $493,000 civil penalty the People request is too high.

Section 42(h)(5): Previously Adjudicated Violations of the Act. The Board is not aware of any previously adjudicated violations of the Act by respondents. The Board weighs this factor in respondents' favor.

Board Finding on the Appropriate Amount of Civil Penalties. The violations in this case lasted a long time and the permitting violations indicate a wanton disregard for the importance of the State's NPDES permitting system. The respondents did not exhibit due diligence in complying with the permitting system. Respondents did remediate the water pollution, and have spent in excess of $150,000 in environmental work on the site. This compliance regarding the water pollution in the Avon-Freemont drainage ditch should be considered in determining the penalty amount.

The People are seeking a civil penalty of $493,000. The maximum allowable penalty for these violations, without considering the continuation of any of the violations, is $4,600,000. In light of the ongoing nature of many of the violations, adding $10,000 for every day the violations continued would exponentially increase the maximum penalty. The Board found against the People regarding their allegation that respondents did not maintain an accessible effluent sampling point in count III. The People asked for $50,000 for failure to maintain an accessible effluent sampling point in count III. Reducing the penalty amount by those amounts means the People are seeking a penalty of $443,000 for the found violations. The People are seeking $250,000 for the water pollution violation of count IV, and $193,000 for the remainder of the found violations alleged in the complaint.

As discussed previously, the water pollution was temporary in nature and the resulting damage to the environment limited in nature and restricted to the odor and sheen. Thus, the penalty sought for the water pollution is excessive and will be reduced. Further, the penalty sought for count I will be mitigated by the circumstances surrounding the violations – namely the absence due to health reasons of the employee usually responsible for filling out and submitting

the DMRs. However, the remaining requested penalty amounts are justified by the respondents' disregard of the NPDES permitting system and will be fully imposed.

In reducing the penalty from that sought by the People, the Board notes that the respondents have no previously adjudicated violations and have spent a significant amount of money on mitigation. Based on the Section 42(h) factors, the Board imposes a $153,000 civil penalty on the respondents. Under Section 42(a) of the Act (415 ILCS 5/42(f)(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.

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 respondents to pay the People's attorney fees of $130,500 and costs of $5,574.84. People Br. at 40-41. The Board finds that respondents committed willful, knowing, or repeated violations in this case. For example, respondents repeatedly failed to file DMRs on a monthly basis as required by permit and regulation. 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. Therefore, the Board may award attorney fees to the People.

> As discussed earlier in this draft, the Board partially grants the respondents' motion to strike in regards to attorney fees and costs, but in the interest of administrative economy will allow the People to rely on the information presented in the reply. The People are also given 21 days after the date of this order to file anything further on those issues. At the end of the 21-day period, the respondents will have the standard 14-day response period to respond to the People's request for attorney fees and costs.

CONCLUSION

The Board finds that respondents violated the Act and the Board's Water Pollution Regulations by not timely applying for renewal of NPDES Permit No. IL 0065005, by failing to comply with reporting requirements of NPDES Permit No. IL 0065005, by causing, threatening or allowing water pollution, and exceeding the effluent limits of NPDES Permit No. IL 0065005. The Board orders respondents to pay a civil penalty of $153,000.

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

ORDER

1. The Board finds that Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr. and Richard J. Frederick (respondents) violated Section 12 (a) and (f) of the Act (415 ILCS 5/12(a) and (f) (2002)), and 35 Ill. Adm. Code 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a).

2. No later than October 18, 2004, which is the 60th day after the date of this order, respondents must pay $153,000 in civil penalties. Respondents must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and respondents' social security numbers or federal employer identification number must be included on each certified check or money order.

3. Respondents must send each certified check or money order to:

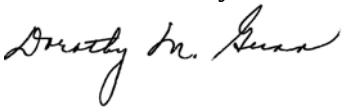
   Illinois Environmental Protection Agency
   Fiscal Services Division
   1021 North Grand Avenue East
   P.O. Box 19276
   Springfield, Illinois 62794-9276

4. 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.

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 September 2, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board