ILLINOIS POLLUTION CONTROL BOARD
October 20, 1994

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	PCB 93-58 (Enforcement)
L. KELLER OIL PROPERTIES, INC.,	)	
Respondent.	)	

JOHN J. KIM, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT, and

WILLIAM W. AUSTIN, of PARKER, SIEMER, AUSTIN & RESCH, APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a six-count complaint filed by complainant the People of the State of Illinois on March 19, 1993. The complaint alleges that respondent L. Keller Oil Properties, Inc. (Keller) failed to comply with the reporting requirements for releases from an underground storage tank (UST). Those reporting requirements are set forth at 35 Ill. Adm. Code 731.162, 731.163, and 731.164. The complaint alleges 18 violations of these regulations, stemming from nine releases at six different sites. Hearings were held before hearing officer Joseph Kelleher on August 31, October 5, and October 6, 1993 in Springfield, Illinois. No members of the public were present.

APPLICABLE REGULATIONS

Section 731.162(a) of the Board's regulations requires the owner or operator of a UST to perform specific abatement measures after confirmation of a release from the UST. Subsection (b) requires the owner or operator to submit a report to the Illinois Environmental Protection Agency (Agency) within 20 days after release confirmation, summarizing the initial abatement steps taken. This report is commonly known as a 20-day report.

Similarly, Section 731.163(a) requires owners and operators to assemble initial site characterization information, while subsection (b) requires the owner or operator to submit a report within 45 days of confirmation of the release, summarizing the information collected. This report is commonly known as a 45-day report. Finally, Section 731.164 requires owners and operators to prepare and submit a free product removal report within 45 days of confirmation of the release. All three of these sections

became effective on June 12, 1989.

JURISDICTION

Initially, Keller argues that, pursuant to G.J. Leasing Co. Inc. v. Union Electric Co. (S.D. Ill. 1993), 825 F. Supp. 1363, the Board is precluded from enforcing 35 Ill. Adm. Code Part 731. In that case, the court held that the Illinois UST program was preempted by federal law because Illinois' program lacked federal approval. However, the portion of the order that found the federal law preemption was subsequently vacated on December 17, 1993, rendering this argument invalid. Therefore, the Board does have jurisdiction to enforce 35 Ill. Adm. Code Part 731.

FACTS

The Mt. Vernon site

The first count of the six count complaint concerns a UST system located at 3401 West Broadway in Mount Vernon, Jefferson County, Illinois, which is owned and/or operated by Keller. The site has at least one UST with associated piping that has at least ten (10) per centum of the volume is beneath ground surface. Complainant alleges that on or about February 1, 1989, December 23, 1989, and November 5, 1990 petroleum spilled, leaked, emitted, discharged, escaped or leached from a UST at the site into the subsurface soils and possibly groundwater at or in the vicinity of the site. Those releases were reported to the Emergency Services and Disaster Agency (ESDA)[1] on February 1, 1989, December 23, 1989, and November 5, 1990. (Comp. Exh. 1-3.)[2] Complainant also contends that free product was observed as a result of the February 1989 release. The Agency sent notices to Keller following the three releases on March 13, 1989, January 5, 1990, and November 15, 1990. (Comp. Exh. 10-12.) Those notices differ in language, but all informed Keller that the release of petroleum requires submission of reports to the Agency. Complainant alleges that Keller failed to submit the required 20 and 45-day reports for each of the three releases, thus violating Sections 731.162(b) and 731.163(b). Complainant also contends that Keller failed to submit a free product removal report in connection with the February 1989 release, thus violating Section 731.164(d).

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[1] ESDA is now known as the Illinois Emergency Management Agency.

[2] Complainant's exhibits, which are mismarked as "petitioner's" exhibits, will be indicated by "Comp. Exh.", while exhibits submitted by Keller will be denoted as "Resp. Exh.". The transcript of the hearing will be indicated as "Tr. at X.".

The Charleston (Lincoln Street) site

The second count concerns Keller's UST system located at 419 West Lincoln in Charleston, Coles County, Illinois. Keller's site contains at least one UST and associated piping that has ten (10) per centum of the volume beneath ground surface. Complainant contends that on or about December 15, 1988 and June 1, 1989 petroleum at Keller's site spilled, leaked, emitted, discharged, escaped or leached from a UST into the subsurface soils and possibly groundwater at or in the vicinity of the site. Those releases were reported to ESDA on December 15, 1988 and June 7, 1989. (Comp. Exh. 4 & 5.) The Agency sent notices to Keller in response to the incident on December 29, 1988 and on June 13, 1989. (Comp. Exh. 13 & 14.) Those notices informed Keller that the releases of petroleum require submission of reports to the Agency. Complainant alleges that Keller failed to submit the required 20 and 45-day reports for the two releases, thus violating Sections 731.162(b) and 731.163(b).

The Pontoon Beach site

The third count of the complaint stems from Keller's facility located at 4160 Pontoon Road, Pontoon Beach, Madison County, Illinois. The site contains at least one UST and associated piping that has ten (10) per centum of the UST's volume beneath ground surface. Complainant alleges that on or about August 3, 1989, a UST spilled, leaked, emitted, discharged, escaped or leached petroleum into the subsurface soils and possibly groundwater at or in the vicinity of the site. That release was reported to ESDA on August 3, 1989. (Comp. Exh. 6.) In response to the incident the Agency sent a notice to Keller on August 14, 1989. (Comp. Exh. 15.) That notice informed Keller that the release of petroleum required submission of reports to the Agency. Complainant alleges that Keller failed to submit the required 20 and 45-day reports for the release, thus violating Sections 731.162(b) and 731.163(b).

The Bement site

Count four of the complaint concerns a UST system located at 249 South Macon, Bement, Piatt County, Illinois which is owned and/or operated by Keller. The site has at least one UST with associated piping that has at least ten (10) per centum of its volume beneath ground surface. Complainant contends that on or about December 4, 1989, petroleum spilled, leaked, emitted, discharged, escaped or leached from a UST at the site into the subsurface soils and possibly groundwater at or in the vicinity of the site. That release was reported to ESDA on December 4, 1989. (Comp. Exh. 7.) The Agency sent notice of the release to Keller on December 8, 1989. (Comp. Exh. 16.) That notice informed Keller that the release of petroleum required submission of reports to the Agency. Complainant alleges that Keller failed

to submit the required 45-day report for the release, thus violating Section 731.163(b).

The Charleston (18th Street) site

The fifth count of the complaint concerns a facility located at 814 18th Street, Charleston, Coles County, Illinois. The site has at least one UST with associated piping that has at least ten (10) per centum of its volume beneath ground surface. Complainant alleges that on or about January 26, 1990 petroleum spilled, leaked, emitted, discharged, escaped or leached from a UST at the site into the subsurface soils and possibly groundwater at or in the vicinity of the site. That release was reported to ESDA on January 26, 1990. (Comp. Exh. 8.) On February 8, 1990 the Agency sent notice of the incident to Keller. That notice informed Keller that the release of petroleum require submission of reports to the Agency. (Comp. Exh. 17.) Complainant alleges that Keller failed to submit the required 20 and 45-day reports for the release, thus violating Sections 731.162(b) and 731.163(b).

The Salem site

The final count of the complaint concerns Keller's facility located at Interstate 57 and Illinois Route 50 in Salem, Marion County, Illinois. The site has at least one UST with associated piping that has at least ten (10) per centum of its volume beneath ground surface. Complainant alleges that on or before May 9, 1990 petroleum spilled, leaked, emitted, discharged, escaped or leached from a UST at the site into the subsurface soils and possibly groundwater at or in the vicinity of the site. That release was reported to ESDA on May 9, 1990. (Comp. Exh. 9.) On May 21, 1990, the Agency sent notice of the release to Keller. That notice informed Keller that the release of petroleum required submission of reports to the Agency. (Comp. Exh. 18.) Complainant alleges that Keller failed to submit the required 20 and 45-day reports for the release, thus violating Sections 731.162(b) and 731.163(b).

DISCUSSION

Keller does not deny that there were confirmed releases at all six sites. Additionally, Keller does not deny that it is the owner or operator of the UST system at each site, with the exception of the 18th Street site in Charleston. Keller raises several claims in its defense: 1) that the regulations were not in effect at the time of the releases; 2) that Keller substantially complied with the requirements of the regulations; 3) that the Agency's inconsistent enforcement and tardy communication with Keller should bar enforcement; 4) that Keller's compliance with requirements established during a December 1991 pre-enforcement conference estop the Agency from

proceeding against Keller; and 5) that the requested civil penalties are not appropriate.

Owner or Operator at 18th Street

Keller contends that complainant has failed to show that Keller was the owner or operator of the UST system at the Bartley's Garage site on 18th Street in Charleston. Keller states that its president testified at hearing that its involvement with the Bartley Garage was solely as a commercial account, where Keller supplied fuel to the garage. (Tr. at 166.) Keller further points to the testimony of Keller's operations manager, who testified that in the interests of good business, Keller assisted many of its customers in filling out tank registrations "and often filled those registrations out as Keller being the owner of the tank when in fact we were not the owner of the tank." (Tr. at 284-285.) In response, complainant argues that Keller should not be allowed to hold itself out as the owner of a UST system for purposes of tank registration, but then take the position that it is not the owner.

The Board finds that this issue was settled by Keller's response to complainant's request to admit facts. On page six of Keller's response, filed with the Board on August 25, 1993, Keller answers "admitted" in response to the statement "Keller owns and/or operates an UST system at Bartley Garage, a gasoline filling station located at 814 18th Street, Charleston, Coles County, Illinois." Thus, Keller has admitted to being the owner or operator of the UST system at Bartley Garage.

Effective Date of Regulations

Keller contends, without further explanation, that the regulations involved in this case did not go into effect until after the releases, so that Keller cannot be charged with any duty under those regulations. In response, complainant states that there were federal rules (40 CFR 280) which required the same sort of reports prior to the effective date of the state regulations. Thus, complainant claims that Keller was subject to a reporting duty for all releases.

Sections 731.162, 731.163, and 731.164 were adopted by the Board in In the Matter of: UST Update, USEPA Regulations (September 23, 1988) (April 27, 1989), R88-27. Those rules became effective on June 12, 1989. Three of the releases at issue in this case were confirmed before June 12, 1989: the February 1, 1989 release at the Mount Vernon site, and the December 15, 1988 and June 7, 1989 releases at the Lincoln Street site in Charleston. The Board finds that Keller cannot be found in violation of Sections 731.162, 731.163, and 731.164 for those three releases, which were confirmed before those sections were effective. Those sections require an owner or operator to

provide specific reports within a specific time period (i.e., 20 or 45 days) after confirmation of a release. All of those three release were confirmed prior to the effective date of the regulations, and two of those releases were confirmed more than 20 and 45 days before the effective date. Thus, timely compliance with the rules was impossible. We will not retroactively enforce a rule for which timely compliance was impossible. As to complainant's argument that there were federal reporting requirements in place for that period, the complaint does not allege violations of any federal provisions. Thus, even assuming that the Board would have jurisidiction over the federal requirements, there are no alleged violations of 40 CFR 280 properly before the Board.

In sum, we find that Keller was not subject to the provisions of Sections 731.162, 731.163, and 731.164 for the releases confirmed on February 1, 1989 at the Mount Vernon site, and the releases confirmed on December 15, 1988 and June 7, 1989 at the Lincoln Street site in Charleston.[3]

Substantial Compliance

Keller argues that it "substantially complied" with the requirements of the regulations. Keller contends that it had numerous oral and written communications with the Agency during its corrective action activities, and that those communications constitute substantial compliance with Sections 731.162(b) and 731.163(b). For example, in connection with the Mount Vernon site, Keller notes a number of contacts between it and the Agency, and notes that on January 30, 1992, it filed a 20-day and 45-day report for the three releases at Mount Vernon.[4] (Resp. Exh. 10 & 11.) Likewise, Keller notes contacts with the Agency regarding the Pontoon Beach and Bement sites, and the filing of a 20-day report (for Pontoon Beach) and 45-day reports (for both Pontoon Beach and Bement) on January 30 and 31, 1992. (Resp. Exh. 31, 32, and 41.) As to the Bartley Garage site in Charleston, Keller points to communications with the Agency, and

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[3] We note that the only alleged violation of Section 731.164, which requires the submission of a free product report, was made as to the February 1, 1989 Mount Vernon release. Thus, only allegations of violation of Sections 731.162(b) and 731.163(b) remain.

[4] Keller states that the reports were filed as agreed during a December 10, 1991 pre-enforcement conference. Much of Keller's argument concerning the specific contacts relates to the February 1, 1989 confirmed release. We note that we have found no violation relating to that release, because the regulations were not effective on that date.

Keller's good faith efforts to comply. Finally, as to the Salem site, Keller states that a letter dated 12 days after the release fulfilled the requirements of the 20 day report, and that 20-day and 45-day reports were submitted to the Agency on January 30, 1992. (Resp. Exh. 61 & 62.)

In response, complainant contends that Keller's actions in response to the releases, and Keller's communications with the Agency, do not explain why Keller failed to submit the 20 and 45 day reports in a timely manner. Complainant maintains that it has shown that Keller was the owner or operator at each site, that there were confirmed releases, that the regulations required Keller to submit reports within a specific period of time, and that Keller did not submit the required reports in a timely manner. Complainant argues that for Keller to claim that the submission of reports in January 1992, for releases which occurred in 1989 and 1990, constitutes substantial compliance is "nonsensical at best".

The Board rejects Keller's contention that it substantially complied with the regulations. It is clear from the record that Keller took significant action in response to the releases, and that Keller was in regular communication with the Agency. However, this action and communication cannot change the fact that Keller failed to submit 20 and 45 day reports within the time period allowed by the regulations. We find no evidence of substantial compliance with the 20 and 45 day time frames. The submission of the reports in January 1992, while ending the continuing failure to submit reports, simply does not constitute substantial compliance with the rules.[5]

Inconsistent Enforcement and Tardy Communication

Next, Keller contends that the Agency's inconsistent enforcement of the reporting requirements and its tardy communication with industry bar this enforcement action. Keller maintains that the record shows that there were no forms for the 20 and 45 day reports until October 1991, that the Agency was very slow in reviewing incidents, that Keller's compliance efforts were at least average for the industry, and that the overall regulatory climate during this phase-in period of the new regulations was much less organized and less stringent. Keller also argues that considering the frequent written and oral contacts between the Agency and Keller and its environmental consultants, it is unfair for the Agency not to have notified Keller of the alleged violations.

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[5] We also note that the record does not show that 20 and 45 day reports have ever been filed for the release at the Bartley Garage in Charleston.

In response, complainant maintains that Keller's "growing pains" defense is without merit. Complainant contends that the Agency's initial understaffing led to a focus on emergency situations, and that such focus is need-based enforcement, not inconsistent enforcement. Complainant also argues that although one of Keller's witnesses testified that it was common practice to give oral, rather than written, reports to the Agency, industry practice does not dictate what is compliance under the law. Further, complainant maintains that the creation of forms by the Agency is not required by the regulations, and the effectiveness of the regulations is not dependent upon the existence of such forms.

The Board finds that Keller's claims that the rules were inconsistently enforced, and that communication with industry was slow, do not bar the Agency from enforcing the reporting regulations. We are sympathetic to the uncertainties which arise when new regulations become effective. Nevertheless, the owner or operator is charged with compliance with the rules, regardless of whether the Agency is enforcing those rules in the manner that the owner or operator believes is appropriate. Once again, the inquiry is whether Keller was the owner or operator of the site when a release was confirmed, and whether Keller complied with the reporting requirements in a timely manner. The fact that the reporting requirements may not have been uniformly enforced, and that communication with industry may have been less than complete, cannot change the fact that Keller failed to comply with Sections 731.162(b) and 731.163(b).

Estoppel

Finally, Keller argues that its compliance with requirements established during the December 1991 pre-enforcement conference estop the Agency from pursuing this enforcement action. Keller contends that at that pre-enforcement conference, the Agency and Keller reached an agreement that if Keller furnished the missing reports, the Agency would not bring an action to enforce the regulations. Keller states that it relied on the Agency's representations when it filed the reports in January 1992. Keller maintains that for the Agency to now pursue enforcement is unfair and fails to recognize the importance of trust between the Agency and the regulated community. Keller argues that an agreement not to enforce was upheld in Modine Manufacturing Co. v. Pollution Control Board (2d Dist. 1990), 176 Ill.App.3d 1172, 549 N.E.2d 359, 139 Ill.Dec. 847, and that the holding in Modine is equally applicable to the agreement between Keller and the Agency.

In response, complainant first challenges Keller's contention that there was an agreement not to enforce the rules. Complainant points to a memorandum prepared two days after the pre-enforcement conference, which states that the Agency informed

Keller that it would proceed with enforcement and seek penalties. (Resp. Exh. 1.) Assuming *arguendo* that such an agreement existed, complainant contends that the estoppel argument still fails. Complainant maintains that the doctrine of estoppel lies against the State only when there have been positive acts by State officials which may have induced the action of the adverse party, and that the doctrine is invoked only to prevent fraud and injustice. (Jack Bradley, Inc. v. Department of Employment Security (1991), 146 Ill.2d 61, 585 N.E.2d 123; Rockford Life Insurance Co. v. Department of Revenue (1986), 112 Ill.2d 174, 492 N.E.2d 1278.) Complainant argues that in this case, there was no positive act by the Agency, and certainly no act performed by Keller beyond that which was already required.

The record contains conflicting evidence on the issue of the alleged agreement. On the one hand, the memorandum prepared by an Agency employee on December 12, 1991 specifically states "[t]he Agency informed Keller Oil we would proceed with enforcement and seek penalties for noncompliance with the regulations at all of the Keller stations to which the Agency has sent Compliance Inquiry Letters." (Resp. Exh. 1 at 1.) On the other hand, two of Keller's witnesses testified at hearing that the memorandum was wrong, and that there was a specific statement by an Agency employee that if Keller submitted the missing reports the file would be closed and Keller would be in compliance. (Tr. at 198; 263-264.) For example, Gregory Kemper, a Keller employee, testified that "if we complied with the requested 20 day and 45 day report forms that we discussed at that meeting, that the file would be closed and that we would be in compliance...[t]hat was a direct statement." (Tr. at 263-264.) After considering this evidence, the Board finds that there was an agreement between the Agency and Keller. We find that the sworn testimony of Keller's witnesses, both of whom attended the December 1991 pre-enforcement conference, outweighs the statement in the memo that the Agency told Keller that it would pursue enforcement. Complainant did not present testimony from any of the three Agency employees present at the pre-enforcement conference, which might have rebutted the testimony of Keller's witnesses.

Having found the existence of an agreement not to enforce, the Board must examine the elements of estoppel, as applied against the State. As complainant points out, estoppel lies against the State only when there have been positive acts by State officials which may have induced the action of the adverse party. (Jack Bradley, Inc. v. Department of Employment Security (1991), 146 Ill.2d 61, 585 N.E.2d 123.) The Board has rarely applied the doctrine of estoppel. (People of the State of Illinois v. Freedom Oil Company (May 5, 1994), PCB 93-59; City of Herrin v. Illinois Environmental Protection Agency (March 17, 1994), PCB 93-195). In those cases where we have found estoppel, the Agency was found to have affirmatively misled a party and

then sought enforcement against that party for acting on the Agency recommendation. (See, e.g. In the Matter of: Pielet Brothers' Trading, Inc. (July 13, 1989), AC 88-51.)

We find that estoppel does not apply in this case. We agree with complainant that Keller performed only those acts which were already required--the filing of the 20 and 45 day reports--in reliance on the Agency's agreement not to enforce. We cannot find that the Agency affirmatively misled Keller, since the only action taken by Keller was compliance, although late, with the existing regulations. Estoppel against public bodies is not favored (Miller v. Town of Cicero (1st Dist. 1992), 225 Ill. App.3d 105, 590 N.E.2d 490), and we do not find that the facts of this case rise to the level of estoppel.

However, there remains the issue of the agreement not to enforce. In Modine Manufacturing Co. v. Pollution Control Board (2d Dist. 1988), 176 Ill.App.3d 1172, 549 N.E.2d 359 (Modine I)(an unpublished order discussed in Modine Manufacturing Co. v. Pollution Control Board (2d Dist. 1990), 193 Ill.App.3d 643, 549 N.E.2d 1379), the appellate court found that the Agency's agreement not to institute enforcement proceedings for emission violations barred a subsequent enforcement action for those alleged violations. This decision was not based on principles of estoppel. The Board subsequently applied Modine I in finding that the Agency was barred from bringing an administrative citation action where statements made by an Agency field inspector led the respondent to believe that no administrative citation would be filed if the respondent cleaned up his facility. (Illinois Environmental Protection Agency v. Wright (August 30, 1990), AC 89-227.)

After reviewing the facts of this case, we find no difference between the Agency field inspector's representation that no administrative citation would be brought in Wright, and the agreement that we have found between the Agency and Keller in this case. In both cases, Agency personnel agreed that if the respondent took action (i.e. filing the missing reports within a specified time period), no further action would be taken.[6] Complainant attempts to distinguish the court's decision in Modine I by noting that it is not clear in that case whether the Agency contested the existence of an agreement, while in the instant case complainant disputes any promise of non-enforcement. However, as noted above, we have found that the evidence shows the existence of an agreement not to enforce. It would be unfair

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[6] Although complainant does assert in its reply brief that Cindy Davis, the Agency employee alleged to have made the agreement, did not have any authority to make an agreement, there is no evidence in the record on this point.

to allow the Agency to agree not to pursue enforcement, and then pursue such enforcement regardless of the agreement. Therefore, we find that the Agency is barred from enforcing Sections 731.162(b) and 731.163(b) as to those releases for which Keller filed the missing reports in January 1992: the December 23, 1989 and November 5, 1990 releases at the Mount Vernon site (Resp. Exh. 10 & 11); the August 3, 1989 release at Pontoon Beach (Resp. Exh. 31 & 32); the December 4, 1989 release at Bement (Resp. Exh. 41); and the May 9, 1990 release at Salem (Resp. Exh. 61 & 62).[7]

DECISION

Based on the record, the Board finds that Keller failed to comply in a timely manner with the reporting requirements of Sections 731.162(b) and 731.163(b) for the January 26, 1990 release at the Bartley Garage in Charleston. Keller does not deny that there was a confirmed release at that site, nor does Keller claim that the required reports were submitted in a timely manner. Indeed, there is no evidence in this record that the 20 and 45 day reports for the release at Bartley Garage have ever been filed. The only defenses offered by Keller in relation to this release[8] have been rejected by the Board. Thus, we find Keller in violation of Sections 731.162(b) and 731.163(b) for the January 26, 1990 release at the Bartley Garage in Charleston.

REMEDY

Having found Keller in violation of Sections 731.162(b) and 731.163(b), the Board must order an appropriate remedy. Pursuant to Section 33(c) of the Environmental Protection Act (Act) (415 ILCS 5/33(c) (1992)), when issuing its orders and determinations, the Board is to consider all facts and circumstances relating to the reasonableness of the emissions, discharges, or deposits involved, including:

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

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[7] The record is not clear as to exactly which sites were discussed at the December 1991 meeting. The memo specifically mentions Pontoon Beach, Mount Vernon, and Bement, but then concludes with a general reference to "each of Keller Oil's twelve LUST sites". (Resp. Exh. 1 at 2.) We believe that the evidence tends to show that all of the sites were discussed at the meeting, and thus that all were covered by the agreement.

[8] As noted above, Keller contended that it is not the owner or operator of the Bartley Garage site, and that it had substantially complied with the requirements of the regulations.

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

3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

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

5. any subsequent compliance.

The Board's consideration of these factors has been difficult, because neither complainant nor Keller has specifically addressed the factors. For example, there is no discussion of the suitability or unsuitability of the pollution source to the area in which it is located. Nevertheless, the Board has considered each of the Section 33(c) factors. There has been no subsequent compliance by Keller. The 20 and 45 day reports for the release at the Bartley Garage have not been filed, although the release was confirmed on January 26, 1990. Failure to file the required reports is a serious matter. Without the data required by the regulations, the Agency cannot determine the degree of injury to the environment.

Keller has not argued that it was technically impracticable or economically unreasonable to file the reports, and the Board specifically finds that the filing of those reports is both practicable and reasonable. However, Keller does state that its contractor was initially denied access to the site by the owner of the garage, but that once Keller obtained access, the necessary cleanup was performed. (Tr. at 279-281.) The Board finds that the delay in access may have contributed to a delay in filing the reports, although the testimony is not clear as to the time during which access was denied. Thus, the delay in access mitigates the violation somewhat. However, the missing reports still have not been filed, although Keller has apparently obtained access to the property and has performed cleanup.

PENALTY

In assessing a penalty, Section 42(h) of the Act authorizes the Board to consider any matters of record in mitigation or aggravation of penalty, including but not limited to:

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 the requirements of the Act and regulations or to secure

relief therefrom as provided by the Act;

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

4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with the 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 the Act by the violator.

The first factor, the duration and gravity of the violation, aggravates the penalty against Keller. The releases at Bartley Garage were confirmed on January 26, 1990, yet Keller has never filed either a 20-day or a 45-day report. As noted above, the reporting violations are serious violations, because the reports enable the Agency to make decisions on the extent of the contamination at the site. We specifically reject Keller's implication that the violations are merely technical violations. Reporting requirements are an essential part of the environmental regulatory scheme, and failure to comply with those requirements are not "technical noncompliance".

The second factor, due diligence on the part of Keller, also aggravates the penalty against Keller. Not only did Keller fail to submit the reports in a timely manner, but those reports have never been filed. It is true that Keller has apparently performed the necessary remedial actions. However, the fact that Keller has complied with other regulations regarding cleanup activities does not translate to due diligence in complying with the reporting requirements of Sections 731.162(b) and 731.163(b).

There is no specific evidence in the record on the amount of economic benefit gained by noncompliance, although Keller has saved the amount necessary to actually prepare and file the missing reports. However, we find that this factor neither aggravates nor mitigates the penalty.

The fourth factor allows consideration of the amount of penalty necessary for deterrence, both as to the violator and to those persons also subject to the regulations. Complainant contends that a penalty of $12,500 per violation is appropriate to deter future violations. Complainant notes that this figure is substantially lower than the statutory maximum penalty, but contends that this figure would send the message that Keller's conduct is unacceptable. Keller contends that complainant's suggested penalty would not deter future violations or enhance voluntary compliance.

Finally, the fifth factor, concerning previous adjudications of violations, mitigates the penalty. Complainant admits that there are no prior adjudications against Keller.

As noted above, complainant requests the imposition of a $12,500 penalty for each violation, plus an award of costs and fees pursuant to Section 42(f) of the Act. Section 42(a) provides for civil penalties of up to $50,000 per violation, plus up to $10,000 for each day that the violation continues. Given Keller's very lengthy, and continuing, failure to file the required reports, complainant's requested penalty per violation is much less than the maximum penalty. After considering all of the Section 33(c) and Section 42(h) factors, both aggravating and mitigating, the Board will impose a $7500 penalty for each violation, resulting in a total penalty of $15,000. That amount is consistent with our decision in People v. Freedom Oil (June 6, 1994), PCB 93-59, where we imposed a $30,000 penalty for violations of both the investigation and reporting requirements of Sections 731.162 and 731.163. We find that a $15,000 penalty will aid in the enforcement of the Act. Additionally, we will order Keller to submit the missing reports, and to cease and desist from violations of Sections 731.162(b) and 731.163(b).

We find that our decision in this case is consistent with the appellate court's decision in Park Crematory, Inc. v. Pollution Control Board (June 20, 1994), No. 1-92-2729. In that case, the appellate court vacated a $9000 penalty imposed for failure to have required permits. The court found that Park Crematory had acted in good faith, had corrected the violations when notified of those violations, and was in full compliance prior to the initiation of the enforcement case. In this case, however, we have found that Keller remains out of compliance more than four years after the confirmation of the release, and after specific notification by the Agency. Quite simply, Keller still has not filed the required 20 and 45 day reports. Thus, we find that the $15,000 penalty is appropriate under these facts.

As for an award of costs and fees pursuant to Section 42(f), the Board finds that Keller has committed knowing violations of Board regulations. Keller knew, since the Agency's February 8, 1990 letter, that there were reporting requirements, and had knowledge of the specific state requirements since at least December 1991, when the pre-enforcement conference occurred. Thus, we will award attorney's fees and costs, as requested by complainant and allowed by Section 42(f).

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

ORDER

The Board hereby finds L. Keller Oil Properties (Keller) in

violation of Sections 731.162(b) and 731.163(b) in connection with the January 26, 1990 confirmed release at the Bartley Garage site, 814 18th Street, in Charleston, Coles County, Illinois. We award the following relief:

1. Keller shall submit properly completed 20 and 45 day reports for the release to the Illinois Environmental Protection Agency (Agency) within 35 days of the date of this order, and shall cease and desist from further violations of Sections 731.162(b) and 731.163(b).

2. Keller shall pay the sum of fifteen thousand dollars ($15,000) within 35 days of the date of this order. That payment shall be made by certified check or money order, payable to the Treasurer of the State of Illinois, designated for deposit to the Environmental Protection Trust Fund, and shall be sent by First Class mail to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   2200 Churchill Road
   Springfield, IL 62706

   The certified check or money order shall clearly indicate on its face the case name and number and Keller's Federal Employer Identification Number or Social Security Number.

   Any penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act (35 ILCS 5/1003 (1992)), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

3. Keller shall pay the attorney's fees and costs incurred by the Office of the Attorney General in its representation of the People of the State of Illinois. Within 14 days from receipt of this order, the Attorney General shall file with the Board, and serve upon Keller, an affidavit of fees and costs relating to the two violations found against Keller. Keller may file a response with the Board within 7 days after service of the affidavit.

IT IS SO ORDERED.

M. McFawn concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of October, 1994, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board