STATE OF MICHIGAN

IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM

MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENIVIRONMENT,

Plaintiff,

v

STREFLING OIL COMPANY, STREFLING REAL ESTATE INVESTMENTS #1, LLC, and RONALD G. STREFLING,

Defendants.

ORDER AND OPINION

HON. ROSEMARIE E. AQUILINA

Docket No: 11-156-CE

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan this 21st day of December, 2012

PRESENT: The Honorable Rosemarie E. Aquilina 30th Judicial Circuit Court Judge

This matter comes before the Court as an *Evidentiary Hearing.* This Honorable Court, after reviewing all briefs, motions, supporting documents, depositions, and testimony; and after reviewing all applicable law, states the following:

BACKGROUND FACTS

This case concerns the release of petroleum products from the underground storage tank systems at two gasoline stations and a bulk storage facility owned by Defendants. On February 16, 2012, this Court issued an order granting Partial Summary Disposition in this case, as to the liability of the parties, pursuant to MCR 2.116(C)(10). This Court ruled there is no genuine issue of any material fact and that as a matter of law Plaintiff is entitled to Partial Summary Disposition as it pertains to all legal issues. This Court ordered: (1) Defendants Strefling Oil

Company and Strefling Real Estate are liable for past and future "responsive activity costs" incurred by Plaintiff, Michigan Department of Natural Resources and Environment ("MDNRE"), relating to John's Pro Filling Station and the Strefling Bulk Plant; (2) Defendants Strefling Oil Company and Ron Strefling are liable for past and future "responsive activity costs" incurred by MDNRE relating to the Galien Filling Station; (3) Defendants are jointly and severally liable for all past "responsive activity costs" incurred by MDNRE that are multisite costs; (4) Defendants Strefling Oil Company and Strefling Real Estate are not in compliance with Part 213 and 201 of the Natural Resources & and Environmental Protection Act ("NREPA") and are required to complete corrective actions in connection with the release of hazardous substances at John's Pro Filling Station and the Strefling Bulk Plant; (5) Defendants Ron Strefling and Strefling Oil are not in compliance with Part 213 and required to complete corrective actions in connection with the releases of hazardous substances at the Galien Filling Station; (6) Defendant Strefling Oil is liable for administrative penalties due to their failure to submit statutorily required reports under Part 213; and (7) Defendants are in violation of Part 213 and are subject to civil penalties pursuant to MCL 324.21323(1)(d). All issues of liability were resolved in the February 16, 2012 Order. The sole issues to be resolved in this Opinion and Order are the amount of damages. These damages are the past response activity costs, administrative penalties, civil penalties, and attorney's fees.

Part 213, Leaking Underground Storage Tanks, of NREPA, MCL 324.21301a, *et seq.* was amended by the Legislature. Prior to the amendments, Part 213 and Part 201 of NREPA worked collectively to regulate enforcement and remediation of the leaks from underground storage tanks. The Michigan Court of Appeals has ruled the 2012 amendments are retroactive. *BP Products North America, Inc v Department of Environmental Quality*, 2012 Mich App Lexis

1633 (Mich App, August 15, 2012). This Court has held that the amendments will be applied retroactively.

PLAINTIFF'S ARGUMENT

In addressing Defendants' claim that: (1) administrative penalties were untimely pursuant to MCL 600.5813; and (2) civil fines were untimely pursuant to MCL 324.213231. Plaintiff points out that MDNRE's claims for administrative penalties have already been determined by this Court to be timely. Based on the language of Section 21313a, each day an owner or operator fails to comply with the statutory obligations constitutes a new violation. A new cause of action occurs each day the obligation has not been fulfilled. MCL 600.5813 would only bar violations which occurred six years prior to MDNRE filling its complaint. MDNRE filed its complaint on February 4, 2011 and the administrative penalties alleged are for a period between September 20, 2006 and January 18, 2007, which is within the six-year statute of limitations period.

As to the claim of civil fines pursuant to MCL 324.213221, MCL 324.213221a requires owners and operators submit a Final Assessment Report ("FAR") within 365 days of a release. Failure to timely submit a FAR is a violation of Part 213. *Attorney General v Bulk Petroleum Corp,* 276 Mich App 654, 660 (2007). Defendants claim the civil fines are untimely because the claim was filed 3 years after the FAR was due is mistaken because every day that a FAR is not submitted is a new violation under Part 213. Therefore, an award of civil fines is permissible because a new action occurs each day Defendant fails to submit a FAR and comply with the statue. MDNRE may, therefore, recover for violations occurring within the three year statute of limitation period prior to filing the complaint.

Plaintiff requests a total of $44,414.78 in costs of corrective action, $37,713.13 in attorney fees, $275,500 in administrative penalties, and $1,562,400 in civil fines.

DEFENDANTS' ARGUMENT

Defendants maintain that MDNRE's request for costs of corrective action, with the exception of $8,994.79, should be denied because they are not costs of corrective action as defined under Part 213. Specifically, all but $8,994.79 consists of salaries and wages of employees of the State of Michigan. It is Defendant's assertion, based on a plain reading of the statute, that the statute does not include these costs and to include them would constitute judicial redrafting. These costs were not to prevent, minimize, or mitigate injury to the public health, safety, or welfare because the cost of these employees would have been paid regardless. Lastly, the cost of corrective action for the wages and salaries are not supported by factual evidence. This is because MDNRE relies on "time reports" that do not specifically identify the action MDNRE engaged in which constituted preventing, minimizing, or mitigating injuries to the public health, safety, or welfare.

The attorney fees requested by MDNRE do not comply with the standard under Michigan law and MDNRE does not meet the burden of showing the attorney fees are reasonable. The billing records submitted by MDNRE do not meet this requirement because MDNRE's attorneys do not keep detailed billing records, as is admitted by MDNRE to be the practice of attorneys employed by the State of Michigan.

In regard to administrative penalties pursuant to MCL 324.21313a, Defendants maintain this Court should decline to assess these penalties so Defendants can complete the actions necessary to clean up the sites. Defendants do not have the necessary resources to both engage in the corrective actions needed to clean up the site and pay the administrative penalties and civil fines. Additionally, the MDNRE claim for administrative penalties was not done in a timely manner. The claim is untimely and this Court should apply the six year statute of limitations in

MCL 600.5813. This Court should use the date the FARs were due as the measuring date for the six year period in determining whether the complaint was timely.

In regard to the civil fines, Defendants do not have the necessary resources to engage in corrective actions to clean up the site and pay the administrative penalties and civil fines. In order to maintain the capability to clean up the sites, this Court should refuse to assess civil fines. The claim for violation of Part 213 is untimely because the Complaint was not filed until February 4, 2011, more than six years after the FARs were due. Each day should not be treated as a violation, but the day the FAR was due should be treated as the sole day of the violation. Hence, the filing of the claim is untimely.

CONCLUSIONS OF LAW

This Court has previously ruled Defendants are liable for past "response activity costs." Based on the 2012 amendments, MDNRE is now able to recover for "costs of corrective action" instead of "response activity costs." *See* MCL 324.21323b(1)(a). All parties are jointly and severally liable. *Id.* Costs of corrective action are all costs "lawfully incurred by the state relating to the selection and implementation of corrective action under this part." *Id.* Corrective action "means the investigation, assessment, cleanup, removal, containment, isolation, treatment, or monitoring of regulated substances released into the environment from an underground storage tank system that is necessary under this part to prevent, minimize, or mitigate injury to the public health, safety, or welfare, the environment, or natural resources." MCL 324.21302(h).

Plaintiff requests this Court award the costs of corrective action for a period through February 24, 2011. MDNRE requests $4,886.06 as a result of the release of regulated substances at the Galien Filling Station, $6,455.34 as a result of the release of regulated substances at the John's Pro Filing Station, $9,976.72 as a result of the release of regulated substances at the

Strefling Bulk Plant, and $27,491.66 in multi-site costs as a result of the release of regulated substances at the Galien Filling Station, John's Pro Filing Station, and Strefling Bulk Plant.

"A person challenging the recovery of costs under this subsection has the burden of establishing the costs were not reasonably incurred under the circumstances that existed at the time the costs were incurred." *See* MCL 324.21323b(2).

This Court finds Defendants have not shown the costs requested by Plaintiff were unreasonably incurred under the circumstances. While the majority of the costs incurred by Plaintiff are for salaries and wages incurred by MDNRE, which would have been paid regardless, these employees could have worked on other assignments. Instead, they were used to prevent, mitigate, and minimize injuries to the public's health, safety, and welfare to the environment and natural resources resulting from Defendants actions. Based on a plain reading of the statute, the costs Plaintiff incurred meet the standard regardless of the fact they were already previously employed. Courts must apply and interpret statues by giving the words their plain meaning. *Ligons v Critten Hosp*, 490 Mich 61, 70 (2011). The tasks the employees completed were related to the prevention, mitigation, and minimization of injuries to the public, health, safety, and welfare to the environment and natural resources. Therefore, the costs are reasonable and meet the standard set forth in the statute. This Court consequently awards costs of corrective action to Plaintiff for a period through February 24, 2011. Cost for corrective action are as follows: $4,886.06 as a result of the release of regulated substances at the Galien Filling Station; $6,455.34 as a result of the release of regulated substances at the John's Pro Filing Station; $9,976.72 as a result of the release of regulated substances at the Strefling Bulk Plant; and $27,491.66 as a result of the release of regulated substances at the Galien Filling Station; John's Pro Filing Station, and Strefling Bulk Plant.

Attorney Fees

Pursuant to MCL 324.21323b(3), MDNRE is entitled to "attorney fees" and 'costs of litigation" because it is the "prevailing or substantially prevailing party" in the action. MPNRE seeks $3,421.88 in attorney fees and costs of litigation related to the Galien Filling Station, $1,916.25 in attorney fees and costs of litigation related to the John's Pro Filling Station, $2,098.75 in attorney fees and costs of litigation related to the Strefling Bulk Plant, and $30,276.25 in attorney fees and costs of litigation related to the multi-site costs. Plaintiff requests $135.00 per hour for the work completed by Elaine Fishoff, and $182.50 per hour for work completed by Andrew Prins and Danielle Allison-Yokom.

This Court finds Plaintiff is entitled to attorney fees pursuant to MCL 324.21323b(3). Plaintiff relies upon the 1994 Desktop Reference on the Economics of Law Practice in Michigan, the 2007 Economics of Law Practice Summary Report, along with affidavits from attorneys from the State of Michigan who worked on the case. Defendant asks this Court to hold the attorney fees are not reasonable because, as Plaintiff acknowledges, the Attorney General's Office does not keep detailed billing records and billing summaries. This Court relies upon the factors set forth in *Smith v Khouri,* 481 Mich 519 (2008) to determine a reasonable attorney fee. Those factors include:

> [T]he professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Id; Wood v Detroit Automoble Inter-Ins Exch,* 413 Mich 573; NW2d 653 (1982).

While Plaintiffs did not keep detailed billing records, they do offer sufficient evidence of the time expended on the case and of what is a reasonable fee through empirical studies and attorney affidavits. Therefore, based on the evidence presented to this Court and Michigan law,

the Court awards attorney fees of $80.00 per hour for the work completed by Elaine Fishoff and $100.00 per hour for work completed by Andrew Prins and Dannelle Allison-Yokom. This results in a total of $1,875 in attorney fees and costs of litigation related to the Galien Filling Station, $1,050 in attorney fees and costs of litigation related to the John's Pro Filling Station, $1,150 in attorney fees and costs of litigation related to the Strefling Bulk Plant, and $16,650 in attorney fees and costs of litigation related to the multi-site costs.

Civil Fines

Plaintiff is seeking a fine of $100 for each day Defendants violated Sections 21307, 21311a, or 21309a, dating from February 4, 2008 thru November 4, 2012. Plaintiff is seeking a civil fine for a total of 1,736 days in which Defendants were not in compliance. This Court agrees with Plaintiff that each day not in compliance with the statutes, constitutes a new violation. Therefore, the three year statute of limitations does not begin to run until Defendants are no longer in violation of the statutes.

The "free product" that escaped into the environment has resulted in unacceptable risks to public health, safety, and welfare. Defendants' assertion that they could not afford the cleanup is not a valid defense anywhere in the law. When evaluating the totality of this case, this Court determines that $50 per day is a reasonable civil fine in this matter. However, the environmental concerns and the accumulating fines and costs in this matter could have significantly been reduced by the actions of Plaintiff. All of the violations found by Plaintiff have been occurring since at least 2002. Some date back to 1996. Plaintiff had the authority and the resources to take action to stop the "free product" at each site from continuing to contaminate additional soil and groundwater, yet did not file this action until February 4, 2011. Only now is Plaintiff moving to have the sites cleaned up and the costs passed along to Defendants. Due to the inaction of

Plaintiff, this Court will reduce the civil fine for each day to $1 per violation after the filing of this case, as it was obvious to Plaintiff that Defendants were unwilling or unable to comply with the statutes and Plaintiff also let the contamination continue.

In regard to the Galien Filling Station, this Court assesses a civil fine of $54,900 for the first 1,098 days and $638 for the remaining 638 days since this matter was filed, for violation of Section 21307. This Court also assesses $55,538 for the 1,736 days Defendants have been in violation of Section 21311a, and an additional $55,538 for the 1,736 days Defendants have been in violation of Section 21309a. This Court assesses a total of $166,614 as a civil fine against Defendants for violations occurring at the Galien Filling Station.

In consideration of John's Pro Filling Station, this Court assesses a civil fine of $54,900 for the first 1,098 days and $638 for the remaining 638 days since this matter was filed, for violation of Section 21311a. The Court further assesses $55,538 for 1,736 days of violations of Section 21309a. This Court assesses a total of $111,076 as a civil fine against Defendants for violations occurring at John's Pro Filling Station.

There were two confirmed releases at the Strefling Bulk Plant. For the first release, this Court assesses a civil fine of $54,900 for the first 1,098 days and $638 for the remaining 638 days since this matter was filed, for violation of Section 21311a. This Court also assesses $55,538 for the 1,736 days Defendants have been in violation of Section 21309a. For the second release, this Court assesses $55,538 for the 1,736 days Defendants were in violation of Section 21311a. The Court further assesses $55,538 for 1,736 days Defendants violated Section 21309a. This Court assesses a total of $222,152 as a civil fine against Defendants for violations occurring at the Strefling Bulk Plant. The total civil fine to be paid by Defendants is $499,842 for violations occurring at all three of the properties involved in this matter.

Administrative Penalties

This Court has previously ruled that Defendant is liable to MDNRE for administrative penalties due to their failure to submit the statutorily reports required under Part 213. This Court stands by its previous ruling that the claim for administrative penalties is timely and based on a plain reading of the law each day of non-compliance is a new violation, causing a new claim to accrue.

Under the NREPA, a FAR must be completed by a liable party within 365 days after a release has been discovered. This Court has already determined that Defendants have failed to submit the reports in a timely manner and have to date, not submitted them.

Section 21313a provides that:

> (1) Beginning on the effective date of the 2012 amendatory act that amended this section, except as provided in subsection (6), and except for the confirmation provided in section 21312a(2) if a required submittal under section 21308a, 21311a, or 21312a(1) is not provided during the time required, the department may impose a penalty according to the following schedule:
>
> (a) Not more than $100.00 per day for the first 7 days that the report is late.
> (b) Not more than $500.00 per day for days 8 through 14 that the report is late.
> (c) Not more than $1,000.00 per day for each day beyond day 14 that the report is late.

Plaintiff seeks to impose a penalty for the period between September 20, 2006 and January 18, 2007 for all three sites. In accordance with Section 21313a, in regard to the Galien Filling Station, Plaintiff assessed $700 in penalties for days one thorough seven, $3,500 in penalties for days eight though 14, and $106,000 for days 15 through 120. This is a total of $110,200. For the Strefling Bulk Plant, Plaintiff assessed penalties of $525 in penalties for days one thorough seven, $2,625 in penalties for days eight though 14, and $79,500 for days 15 through 120. This is a total of $82,650. For John's Pro Filling Station, Plaintiff assessed penalties of $525 in penalties for days one thorough seven, $2,625 in penalties for days eight

though 14 and $79,500 for days 15 through 120. This is a total of $82,650. The total penalty for all three sites is $275,500.

In reviewing the law and the evidence presented to this Court, this Court finds the amount is reasonable considering the circumstances and the long period of time this violation has continued. This Court finds $275,500 to be reasonable for Defendants failure to submit a FAR for the three sites between September 20, 2006 and January 18, 2007, and awards this amount to Plaintiff as administrative penalties.

THEREFORE, IT IS ORDERED that Plaintiff is entitled costs of corrective action from Defendants totaling $44,414.78.

IT IS FURTHER ORDERED that Plaintiff is entitled to $20,625 in attorney fees from Defendants.

IT IS FURTHER ORDERED that Defendants pay $499,842 in civil fines for violations extending 1,736 days.

IT IS FURTHER ORDERED that Plaintiff is entitled to administrative penalties from Defendants of $275,500. In compliance with MCR 2.602(A)(3), this Court finds that this decision resolves the last pending claims and closes the case.

IT IS SO ORDERED.

Rosemarie E. Aquilina

Hon. Rosemarie E. Aquilina (P37670)
Court of Claims Judge

PROOF OF SERVICE

I certify that I have served the above order upon the Plaintiff and Defendants by placing a copy of the Order in sealed envelopes addressed to the attorney of each party and deposited for mailing with the United States Mail at Lansing, Michigan on December 21, 2012.

Luke Goodrich

Luke A. Goodrich (P72090)
Law Clerk