BEFORE THE
INDIANA BOARD OF TAX REVIEW

BP PRODUCTS NORTH AMERICA INC.	)	On Appeal of Determination
	)	of the Department of Local
Petitioner,	)	Government Finance
	)	
v.	)	Petitions: Numerous
	)	
DEPARTMENT OF LOCAL	)	Lake County, North Township
GOVERNMENT FINANCE,	)	
	)	
Respondent.	)	

LAKE COUNTY ASSESSOR,	)	
	)	On Appeal of Determination
Petitioner,	)	of the Department of Local
	)	Government Finance
v.	)	
	)	Petition: 45-026-02-9-3-00057A
DEPARTMENT OF LOCAL	)	
GOVERNMENT FINANCE,	)	Lake County, North Township
	)	
Respondent.	)	

FINAL DETERMINATION FINDINGS AND CONCLUSIONS

The Indiana Board of Tax Review (the Board) issues this determination in the above matter. It finds and concludes as follows:

I. ISSUES PRESENTED

1. The Board addresses the following three restated issues presented by the parties:

I. Whether the Department of Local Government Finance's use of the Deloitte & Touche Study denied BP Products of North America, Inc. ("BP") due process of law.

II. Whether the Department of Local Government Finance properly assessed the land value of the BP Parcels at $28,250,100.

III. Whether BP is entitled to an equalization adjustment for its 2002 real property assessment.

II. PROCEDURAL BACKGROUND AND FACTS

A. Procedural History:

2. In 2001, the Indiana General Assembly directed the Department of Local Government Finance ("the Department" or "the DLGF") to assess all Lake County industrial facilities with an estimated true tax value greater than twenty-five million dollars ($25,000,000). Ind. Code § 6-1.1-8.5.

3. The DLGF identified four properties in Lake County that met the requirements of the statute: (1) BP's refinery in Whiting; (2) International Steel Group's integrated steel mill in East Chicago; (3) Ispat Inland, Inc.'s integrated steel mill in East Chicago; and (4) United States Steel Corporation's integrated steel mill in Gary. *Lake County Ex. 12 at 3.*

4. Early in July 2003, the DLGF sent letters to the tax departments of the four facilities notifying them of the DLGF's statutory responsibility to assess their respective properties and requesting certain assessment data. *Id.* The requested assessment data consisted of maps, plats, construction data, appraisals that had been conducted on the property, sales of comparable properties, and any other information the taxpayers thought was relevant. *Id.* Later in July 2003, the DLGF sent a follow-up letter again requesting assessment data from each tax department. *Id.* The DLGF also notified the tax departments that it would be contacting them regarding dates and times to conduct on-site meetings and tours of their respective facilities. *Id.*

5. Pursuant to Ind. Code § 6-1.1-8.5-8, on December 31, 2003, the DLGF issued a preliminary determination assessing the real property (land, buildings, and site improvements) contained on a number of parcels located at 1801 to 1945 131st Street, Whiting, Lake County, Indiana, which includes BP's Whiting Refinery. For purposes of this Final Determination Findings and Conclusions, the Board will refer to the land portion of this property as the "Parcels" and to the property as a whole, including improvements, as the "subject property."

6. The DLGF derived its valuation of the land portion of the assessment from an appraisal conducted by Deloitte & Touche ("Deloitte & Touche Study") that was commissioned in connection with the sale of the Ispat Inland, Inc. ("Ispat") integrated steel mill. *Tr. 827 (Barrow); Lake County Ex. 12 at 1-2.* The DLGF concluded that the actual sale price of the land in the Ispat transaction, as allocated by the Deloitte and Touche Study, was an adequate measure of industrial land on the south shore of Lake Michigan. *Id.* The DLGF's preliminary determination assessed the Parcels at $28,250,100, or $19,000 per acre, and the remaining real property ("BP Improvements") at $60,340,700. The DLGF gave BP and the Lake County Assessor ("Lake County") an opportunity to provide additional information on the assessment.

7. On or about March 26, 2004, Lake County filed its Petition for Review of the DLGF's Action, Petition No. 45-026-02-9-3-00057A (the "Lake County Petition").

8. On March 29, 2004, BP filed its Petitions for Review of the DLGF's Action, Petition Nos. 45-026-02-9-3-00001 through 45-026-02-9-3-00056 (the "BP Petitions") challenging the assessment of the Parcels.

9. The Board consolidated all petitions into one appeal (the "Consolidated Petitions") and set the matter for hearing to begin the week of March 27, 2005.

10. On or about March 15, 2005, BP, Lake County, and the DLGF filed their Stipulation of Facts ("Stipulation"), which the Board accepted. Pursuant to the Stipulation, the parties to this action stipulated that the true tax value of the BP Improvements as of March 1, 2002, is $60,340,700 – the amount determined by the DLGF. *Stipulation of Facts, at 1*. Accordingly, for purposes of this litigation, the parties do not challenge the assessed value of the BP Improvements. The parties further stipulated that the Parcels contain a total of 1,487 acres of land. *Id*. The parties, however, did not stipulate regarding the land value of the Parcels. *Id.* Additionally, BP expressly did not waive its claims that the subject property (land and/or improvements) is assessed at a level of value that is higher than the common level of assessment for other tangible property in Lake County and/or that the Parcels (land and/or improvements) are entitled to receive an equalization adjustment. *Id. at 1-2*.

11. Additionally, the parties, together with Ispat, entered into a Joint Stipulation and Protective Order (the "Protective Order"), which Board entered on March 15, 2005. Pursuant to the Protective Order: (a) the Deloitte & Touche Study cannot be used for any purpose other than in connection with the hearings in this case and in a case involving the assessment of real property owned by U.S. Steel; (b) any party offering the study as evidence or otherwise utilizing the study is required to designate it as confidential, and the study shall not be made part of the public record; and (c) whenever the study is introduced in such proceedings, the portions of those proceedings concerning the study shall be conducted under circumstances such that only those persons authorized to have access to the study are present. *Joint Stipulation and Protective Order, at 1-2*.

12. In accordance with the limitations set forth in the Protective Order, the parties entered the Deloitte & Touche Study into evidence. The DLGF also entered into the record as its Exhibit "A" a summary of the land sales and adjustments made as part of the Deloitte & Touche Study. Counsel for the DLGF represented that she had Ispat's permission to do so. *Tr. 830 (Sheperd).*

B. The Hearing:

13. Pursuant to Ind. Code §§ 6-1.1-8.5-11 and 6-1.1-15-4 through 6-1.1-15-8, the Board conducted a hearing on the Consolidated Petitions on March 28 – March 30, 2005, and May 23, 2005. Terry G. Duga, Commissioner and David Pardo, Senior Administrative Law Judge, presided at the hearing. The first three days of the hearing related to the issues concerning valuation of the Parcels. The May 23, 2005, hearing related solely to BP's equalization claims. The Board will consider all issues collectively herein.

14. Lake County was represented by Brian P. Popp, LASZLO & POPP, PC, Charles C. Meeker, Jay Butler, and Charles R. Raynal, IV, PARKER, POE, ADAMS & BERNSTEIN LLP, and John S. Dull, Lake County Attorney.

15, Jeffrey T. Bennett and Hamish S. Cohen, BINGHAM MCHALE, LLP, represented BP.

16. Nandita G. Shepherd represented the DLGF. Subsequent to the hearing, Ms. Sheperd withdrew her appearance and Ms. Amber Merlau St. Amour entered her appearance on behalf of the DLGF.

17. The following persons were sworn as witnesses and presented testimony at the hearing:

a. For Lake County: Sherry Stone, Jerry J. Kulik, and Anthony J. Uzemack.

b. For BP: Jerrold F. Janata, Kurt Barrow, Robert Toniolo, Nick A. Tillema, John Connolly, Gregg Manzione, Lisa Smith, John Nichols, and Richard H. Hoffman.

c. For the DLGF: Kurt Barrow, and Dr. Elbert B. Whorton, Jr.

18. In addition, the parties each identified and submitted exhibits at the hearing. Lists of those exhibits are included as appendices to these findings and conclusions. *See Lake County Exhibits (Appendix A), BP Exhibits (Appendix B), and DLGF Exhibits (Appendix C).* Exhibits highlighted in bold were admitted into evidence. The remaining exhibits were identified, but were not admitted into evidence.

C. Background Facts

19. The subject property consists of improvements, including an oil refinery known as the BP Whiting Refinery, and land located at 1801 – 1945 131st Street, Whiting, East Chicago and Hammond, Lake County, Indiana.

20. The Board did not conduct an on-site inspection of the subject property.

21. For 2002, the DLGF assessed the Parcels at $28,250,100 ($19,000 per acre).

22. BP contends that the Parcels should be assessed at $14,350,977. BP further contends that it is entitled to an equalization adjustment of 4.2%, reducing the total assessment of the subject property to $71,554,627.

23. Lake County contends that the Parcels should be assessed at $67,000,000 ($45,000 per acre). Lake County further contends that BP is not entitled to an equalization adjustment.

24. The DLGF contends that the current assessment is correct and that BP is not entitled to an equalization adjustment.

III. QUALIFICATIONS OF WITNESSES

A. For Lake County:

25. Sherry Stone. Ms. Stone is employed by the Lake County Assessor's Office as Director of Real Estate. She has worked for the Lake County Assessor for 13 years. In the course of her duties, she has become familiar with approximately one-hundred (100) appeals filed in Lake County regarding the 2002 real property reassessment.

26. Jerry J. Kulik. Mr. Kulik is a real estate appraiser who is employed by Jerry J. Kulik & Company, LLC. He has an associate's degree in civil engineering from Purdue University – Calumet, a bachelor's degree in finance from Indiana University and a master's degree in finance from Loyola University of Chicago. Mr. Kulik has been performing appraisals for approximately 19 years, and he is a licensed real estate appraiser in Indiana and Illinois. Although he has appraised properties in Lake County, he has previously appraised only one oil refinery, which was much smaller than the Whiting Refinery. The Board accepted Mr. Kulik as an expert in the appraisal of real estate subject to the stipulation that he is not an expert in the areas of environmental science, hydrology, chemical engineering or the petroleum industry.

27. Anthony J. Uzemack. Mr. Uzemack is a real estate appraiser and the owner of Appraisal Systems, which is located in Park Ridge, Illinois. Mr. Uzemack has worked as an appraiser since approximately 1977. He holds the MAI designation and he is a member of the Appraisal Institute and a certified instructor for the Appraisal Foundation. Mr. Uzemack has had very limited prior experience in assessing refineries. The Board accepted Mr. Uzemack as an expert in the appraisal of real property, subject to the stipulation that he is not an expert in areas of environmental science, hydrology, chemical engineering or the petroleum industry.

B. For BP:

28. Jerrold F. Janata. Mr. Janata is the Chief Executive Officer of International Appraisal Company, a position he has held for 35 years. In this position, Mr. Janata has performed appraisals in France, Portugal, Great Britain, and all fifty (50) states within the United States. He is licensed as a real estate appraiser in New Jersey, Tennessee, Michigan, and Indiana, and he is a member of the American Society of Appraisers, Senior Member, Real Property Urban. Additionally, he has authored numerous books and articles relating to appraisal practice, and he recently completed the

3rd Edition of *Property Taxation* for the Institute for Professionals in Taxation. He has a bachelor's degree in political science from Queens College in the City of New York, a master's degree in finance from Iona College of New Rochelle in New York, and a juris doctorate from Fordham University School of Law in New York. The Board accepted Mr. Janata as an expert appraiser.

29. Kurt Barrow. Mr. Barrow is a graduate of Illinois State University with a degree in economics. He was an appraiser for the Illinois Department of Local Government Affairs, and he eventually became Deputy Director of the Illinois Department of Revenue with oversight duties for the property taxation functions of that agency. Mr. Barrow has been employed by an appraisal firm and has operated his own appraisal firm. Mr. Barrow has appraised real estate ranging from single-family homes to complex industrial properties. Mr. Barrow served for five years as Education Director for the International Association of Assessing Officials. Mr. Barrow has been employed as the Director of the Assessment Division of the DLGF since April 1998, other than for a period of approximately seven (7) months in 2001. In that position, Mr. Barrow was responsible for oversight of assessments in the State of Indiana and for providing training on the use of the 2002 Real Property Assessment Manual ("Manual") and the Real Property Assessment Guidelines for 2002-Version A ("Guidelines") to assessment officials throughout the state. Mr. Barrow is a principle author of the Manual and Guidelines. The Board accepted Mr. Barrow as an expert in the fields of assessment administration and Indiana's Assessment Manual and Guidelines.

30. Robert Toniolo. At all relevant times, Mr. Toniolo was employed as a Senior Property Tax Representative for BP. He has held that position since 2001. From 1998 until his employment with BP, Mr. Toniolo was a tax representative. In his current position, Mr. Toniolo is responsible for dealing with issues relating to valuation review and other property tax assessment issues, including dealing with local assessment officials. Mr. Toniolo worked extensively with Mr. Jim Hemming of the DLGF when the DLGF completed BP's 2002 assessment, including working with Mr. Hemming during his numerous visits to the subject property in 2003. Additionally, Mr. Toniolo visited the Parcels in November of 2004 and recorded a video depicting the Parcels.

31. Nick A. Tillema. Mr. Tillema is a real estate appraiser who is employed by the Access Group. Prior to his current employment, Mr. Tillema owned his own company, Nick A. Tillema & Associates. He has worked as a real estate appraiser since 1977. Mr. Tillema has a bachelor's degree in finance from Indiana University, a master's in business administration from Arizona State University, and a juris doctorate from Indiana University. He is affiliated with the Appraisal Institute, National Realtors and several other professional organizations. Mr. Tillema teaches real estate at Indiana University in Indianapolis and pre-licensing education and continuing education for appraisers through the Appraisal Institute. Mr. Tillema also teaches for the Access Group, and he has conducted resource education and real estate certification programs in Indianapolis. Finally, Mr. Tillema is certified through the Appraisal Foundation as an instructor on the Uniform Standards of Professional Appraisal Practice ("USPAP"). Mr. Tillema has appraised various types of property, including residential, commercial and

industrial. Mr. Tillema also performs litigation services for Access Group. The Board accepted Mr. Tillema as an expert in the field of real estate appraisal.

32. John J. Connolly. Mr. Connolly is currently the Executive Vice President of Nationwide Consulting Company, a position he has held for approximately a year and a half. For the prior twenty-eight (28) years, he was a Senior Vice President and CFO of Nationwide Consulting. Mr. Connolly has been an appraiser since 1973. Since that time, he has appraised approximately twelve (12) refineries, including two in Indiana. Mr. Connolly is a Senior Instructor for the American Society of Appraisers, a position he has held in since 1984, and he is a Certified Member of the Institute of Property Taxation. Mr. Connolly is licensed in Indiana, Tennessee, Colorado, Maine, and New Jersey. In addition to appraising refineries from around the country, Mr. Connolly has been involved with the appraisal of other petroleum related facilities, including facilities in close proximity to the Parcels. The Board accepted Mr. Connolly as an expert in the appraisal of industrial, petroleum and refinery properties.

33. Gregg Manzione. Mr. Manzione is a real estate appraiser and a member of the Appraisal Institute. He has been an appraiser for approximately twenty (20) years, during which time he has been employed by Nationwide Consulting Company. He graduated from Ohio University with a degree in business communication. Mr. Manzione holds an MAI designation and is a licensed real estate sales person. During the course of his career, Mr. Manzione has been very active in appraising petroleum assets, spending approximately eighty (80) to ninety (90) percent of his time valuing petroleum related properties. He devotes the remainder of his time to appraising other industrial facilities. Mr. Manzione has worked in approximately forty-five (45) to forty-eight (48) states as well as in Australia, St. Croix, Guatemala and Puerto Rico. The Board accepted Mr. Manzione as an expert in the appraisal of industrial and petroleum facilities.

34. Lisa Smith. Ms. Smith was the Environmental Business Manager for the Whiting Refinery from 2001 – 2002. In that position, she had several duties, all which were associated with the environmental remediation efforts at the Whiting business unit. Those efforts included assuring compliance with existing consent decrees and agreed orders. Ms. Smith has a Bachelor of Science degree in environmental science and political science from Cornell College. She also worked for the Illinois EPA as a Project Manager in its water program for three (3) years and for the United States EPA in conjunction with its Superfund Program prior to working at BP's Whiting facility.

35. John Nichols. Mr. Nichols currently is employed by BP America, Inc., which is the parent company of BP, as Manager of Property Taxes for Downstream Chemical and Corporate Facilities. In that position, Mr. Nichols is responsible for BP's facilities in the lower forty-eight (48) states, including refineries, chemical plants, lube plants, pipelines, truck terminals, retail service stations, and corporate facilities. Mr. Nichols is responsible for compliance issues relating to property taxation, and he ensures that BP is in compliance with all applicable state and local laws. Mr. Nichols has been employed by BP for approximately twenty (20) years. Mr. Nichols has a bachelor's

degree from Ohio State University in business administration and he is a CMI (Certified Member of the Institute) of IPT in the field of property tax administration.

36. Richard H. Hoffman. Mr. Hoffman is a real estate appraiser and consultant who is employed by Appraisal Research Corporation. He has been involved in property valuation, computer software, and equalization studies for approximately thirty (30) years, mostly in consultation roles for local government services. Mr. Hoffman has a bachelor's degree in business administration from Bowling Green University and master's degrees in business administration and economics from Ohio State University. Additionally, he has participated in numerous educational programs with the International Association of Assessing Officers, the Appraisal Institute, and the Society of Real Estate Appraisers. Mr. Hoffman is a senior member of the American Society of Appraisers, a Certified Assessor Evaluator, a member of the Appraisal Institute and a Counselor of Real Estate. During the course of his career, Mr. Hoffman has completed approximately four hundred (400) to five hundred (500) sales assessment ratio studies, and he was part of the committee system (serving as the Super Chair for at least two years) during the development of 1999 IAAO Standards. The Board accepted Mr. Hoffman as an expert in the fields of mass property tax appraisal, equalization and the preparation of sales assessment ratio studies.

C. For the DLGF:

37. Kurt Barrow. *See, supra* .

38. Elbert B. Whorton, Jr., Ph.D. Dr. Whorton is employed by the University of Texas Medical School as a full professor of biostatistics and quantitative epidemiology. He has worked for the university for approximately 30 years. Dr. Whorton graduated from Baylor University, majoring in mathematics and physics. He has a master degree in biostatistics and biomathematics from Tulane University and a Ph.D. in biostatistics in epidemiology from Oklahoma State University. Mr. Whorton has performed work for a committee to evaluate property value studies in Texas. He also has performed equalization work for the states of Florida and Vermont. Finally, he has served as an *ad hoc* member of the Technical Standards Committee with the International Association of Assessing Officers ("IAAO"). The Board accepted Dr. Whorton as an expert in the field of equalization.

IV. ADMINISTRATIVE REVIEW AND BURDEN OF PROOF

39. By statute, the DLGF was assigned the responsibility of assessing the Parcels. *See* Ind. Code § 6-1.1-8.5-8. Both BP and the Lake County Assessor had the right to appeal the assessment determination of the DLGF. *See* Ind. Code § 6-1.1-8.5-11. Accordingly, the DLGF is the "assessing official" whose determination is under review, while the Lake County Assessor and BP are the "petitioners" challenging the assessment.

40. A petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect,

and specifically what the correct assessment would be. *See Meridian Towers East & West v. Washington Twp. Assessor,* 805 N.E.2d at 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

41. A prima facie case "is a case in which the evidence is `sufficient to establish a given fact and which if not contradicted will remain sufficient."' *GTE North, Inc. v. State Bd. of Tax Comm'rs,* 634 N.E.2d 882, 887 (Ind. Tax Ct. 1994); *Clark,* 694 N.E.2d at 1233-35 (quoting *Thorntown Tel. Co. v. State Bd. of Tax Comm'rs,* 629 N.E.2d 962, 964 (Ind. Tax Ct. 1994)).

42. Once a petitioner has established a prima facie case, the burden shifts to the assessing official (here, the DLGF) to rebut the petitioner's evidence. *See American United Life Ins. Co. v. Maley,* 803 N.E.2d 276, 281 (Ind. Tax Ct. 2004). Thus, for example, "when a [petitioner] presents a prima facie case of the existence of obsolescence and introduces evidence quantifying its affect on the property's value, the [DLGF] cannot simply ignore such evidence. Instead, 'when a [petitioner] offers probative evidence, that evidence must be dealt with in some meaningful manner."' *Canal Square Ltd. Partnership v. State Bd. of Tax Comm'rs,* 694 N.E.2d 801, 805 (Ind. Tax Ct. 1998)(quoting *Clark,* 694 N.E.2d at 1235).

43. The DLGF is the agency charged with defining true tax value under Indiana Law. *See* Ind. Code § 6-1.1-31-7(d). Our Supreme Court has directed all courts to "give great weight" to an administrative agency's interpretation of a statute when (1) the interpreting agency is charged with the duty of enforcing the statute being interpreted, and (2) the interpretation is not inconsistent with the statute itself. *See, e.g., LTV Steel Co. v. Griffin,* 730 N.E.2d 1251, 1257 (Ind. 2000); *State Bd. of Registration for Professional Engineers v. Eberenz,* 723 N.E.2d 422 (Ind. 2000); *State Bd. of Tax Comm'rs v. Two Market Square Assoc. Ltd. Partnership,* 679 N.E.2d 882 (Ind. 1997); *Indiana Dep't of State Revenue v. Bulkmatic Transport Co.,* 648 N.E.2d 1156, 1158 (Ind. 1995). Consequently, the Board must give deference to the DLGF's interpretation of true tax value.

44. While the Board must give deference to the DLGF's reasonable interpretation of its statute and regulations, the Board is not required to give deference to factual findings of the DLGF. In that respect, the Board is not in the same position as a court of law. A court's review of an agency action is limited by the separation of powers clause found in Article III Section 1 of the Indiana Constitution. *See Uhlir v. Ritz,* 255 Ind. 342, 264 N.E.2d 312 (1970). The Board, being an administrative body, is not restricted by the separation of powers clause. The Board therefore may weigh the evidence and substitute its opinion for that of the DLGF.

V. DISCUSSION OF ISSUES ON REVIEW

Issue I

Whether the Department of Local Government Finance's use of the Deloitte & Touche Study denied BP due process of law

45. BP argues that the DLGF's use of the Deloitte & Touche Study as the basis for its assessment violated BP's due process rights. BP bases its claim on grounds that it was limited in its access to and use of that document due to confidentiality concerns asserted by Ispat.

46. BP, however, negotiated and entered into the Protective Order. It did so without the intervention of the Board. In fact, BP specifically requested the Board to refrain from intervention while it negotiated an agreement. *Tr. 371 (Duga)***.** BP first raised its dissatisfaction with the Protective Order in its pre hearing brief, filed on March 24, 2005. *BP Products North America's Pre-Hearing Brief, at 3*. At that time, BP argued that the Protective Order and an Agreement of the Parties Regarding Deloitte & Touche Study ("Ispat Agreement") deprived it of due process. *Id.* BP alleged that under the Protective Order and Ispat Agreement, BP's counsel was not permitted to share the Deloitte & Touche Study with its client, much less use such information freely at trial. *Id*.[1]

47. BP's argument that the agreement into which it voluntarily entered denied it due process is without merit. The agreement was of BP's own making. A party cannot take advantage of an error that it commits, invites or that is the natural consequence of its own conduct. *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005). BP argues that it had no choice but to enter into the Protective Order**,** because the Board could neither provide a copy of the Deloitte & Touche Study nor require Ispat or the DLGF to provide a copy due to Indiana's confidentiality statutes. BP contends that it was put in an untenable position and that it had to make the best deal it could or face having to prepare its case without any access whatsoever to the Deloitte & Touche Study. BP bases its argument on the assumption that Ispat would have filed an interlocutory appeal of a Board Order compelling production of the Deloitte & Touche Study.

48. This argument is not well taken. The Board had the authority to issue an administrative subpoena to Ispat and to enforce that subpoena had Ispat failed to comply. *See* Ind. Code § 6-1.5-5-9 ("In order to obtain information that is necessary to the Indiana board's conduct of a necessary or proper inquiry, the Indiana board or a board administrative law judge may . . . subpoena and examine books or papers that are in the hands of any person."). Moreover, BP's argument is speculative, at best. BP assumes that the Board would have required it to proceed to hearing while such an interlocutory appeal was pending and that, were Ispat successful in such an appeal, the Board would

[1] BP did not attach a copy of the Ispat Agreement to its pre-hearing brief or to BP Products North America's Second Objection, which it filed the first day of the hearing in this matter. Moreover, while BP listed the Ispat Agreement as Exhibit 12 in its final exhibit list, it did not offer that agreement as evidence at the hearing in this matter. *See BP Products North America's Final Statement of Contentions, Defenses, Witnesses and Exhibits, at 7*. Consequently, the terms of the Ispat Agreement are not before the Board.

have required BP to proceed without any access to the Deloitte & Touche Study. BP's assumptions in this regard are unfounded. The Board might well have been receptive to BP's claims had BP taken appropriate steps to attempt to compel production of the Deloitte & Touche Study.

49. Based on the foregoing, the Board finds that the DLGF's use of the Deloitte & Touche Study did not deprive BP of due process of law.

Issue II

Whether the Department of Local Government Finance properly assessed the land value of the Parcels at $28,250,100

A. Lake County's Position

50. Jerry J. Kulik and Anthony J. Uzemack appraised the land, buildings and improvements, and storage tanks at BP's Whiting Refinery. *Lake County Ex. 11; Tr. 37 (Kulik).* Kulik and Uzemack prepared a complete summary appraisal of the Whiting Refinery ("Kulik Appraisal"), which contains their opinion of value of the subject property. *Tr. 41-42 (Kulik); Lake County Ex. 11.* Mr. Kulik arrived at an opinion of value for the Parcels of $45,000 per acre for a total land value of $66,915,000, and Mr. Uzemack concurred in that opinion. *Tr. 88-90 (Kulik); Tr. 233 (Uzemack); Lake County Ex. 11, at 130.*

51. Mr. Uzemack summarized the market value-in-use of the Parcels as follows:

> The $45,000 per acre … is a sound value. It reflects not only what we anticipate the market would do with a consolidated whole 1,487 acre parcel situated where it is, logistically superior because of all the different routes that feed into it, both rail, truck transport, automobile, water; to amass and assemble that size of an industrial parcel under – under a contiguous formation under one ownership with the complements of the heavy industrial zoning and the real jewel of refinery use, I don't think you'll find that anywhere else in the Midwest, and to try to site a property like that today with the personalities that would have to be addressed, very few people would want that size of an industrial facility producing petroleum products in their backyard, so this is truly – the wealth of the property comes, we express it at 45,000 an acre.

Tr. 233-34 (Uzemack).

52. Mr. Kulik consulted brokers familiar with the southeast Chicago and northwest Indiana markets for industrial land and buildings in arriving at his opinion of value. *Tr. 49 (Kulik).* Mr. Kulik also consulted the 2002 Real Property Assessment Manual, and used an appraisal date of March 1, 2002, and a valuation date of January 1, 1999. *Lake County Ex. 11, at 14.* Mr. Kulik and Mr. Uzemack visited the subject

property on September 21-22, 2004. *Lake County Ex. 11, at 15*. Mr. Kulik undertook a detailed study of the community in which the Parcels are located. *Tr. 53-54 (Kulik); Lake County Ex. 11, at 20-42*.

53. To perform his land sales analysis, Mr. Kulik gathered data regarding sales of as many industrial properties as he could find that were located in close proximity to the Parcels – i.e., Northwest Indiana and Southeast Chicago within approximately five miles of the Parcels. *Tr. 60-61 (Kulik).* Mr. Kulik also relied upon his own appraisal files, telephone conversations with experienced brokers, and information from the offices of the Cook County Assessor and Cook County Auditor. *Tr. 66-68 (Kulik).* Mr. Kulik also verified sales through speaking to the parties to the transactions at issue. *Id.* Mr. Kulik visited every site and photographed each property he relied upon in completing his analysis. Where possible, he walked the site. *Id.* Mr. Kulik's appraisal report provides a summary of the comparable sales he considered, and it includes adjustments he made to the sale prices to account for what he viewed as relevant differences between the comparable properties and the Parcels. *Id.; Lake County Ex. 11, at 126*.

54. The properties Mr. Kulik relied upon in his comparable sales analysis ranged in size from 5.01 acres to 206 acres. *Tr. 60-64, 76 (Kulik); Lake County Ex. 11, at 103-126*. Mr. Kulik included properties in that size range because "there are no 1,000 plus acre sites available, everything is built up, and … the sales that are in closest proximity to the subject property do provide an indication of the market value of the subject property." *Tr. 76 (Kulik).* In fact, Mr. Kulik testified, "if you go farther afield from the subject property, most of your large land sales are going to be agricultural related or they're going to be a sale that will have a substantial location adjustment." *Tr. 105 (Kulik).* Mr. Kulik testified that it was appropriate to consider Chicago sales as well as northwest Indiana sales because the Chicago industrial market is homogeneous with the northwest Indiana market. *Tr. 65 (Kulik).*

55. Three of the comparable properties relied upon by Mr. Kulik had water access. *Tr. 74 (Kulik)*. To calculate an appropriate adjustment to the sale prices of properties without such access, Mr. Kulik conducted a paired sales analysis, comparing sale no. 5 to the average of sale nos. 2 and 3. *Id.* Mr. Kulik adjusted the sale prices of the properties lacking water access upward by 23% as a result of his paired sales analysis. *Id.; Lake County Ex. 11, at 128*.

56. Mr. Kulik also made adjustments to account for permits and zoning approvals already in place that allow a refinery to be operated on the Parcels. *Tr. 77-78 (Kulik); Lake County Ex. 11, at 126, 129.* He referred to those adjustments as "entitlement" adjustments. *Id*. Mr. Kulik testified that an entitlement adjustment ranging between 10% and 50% is appropriate, "depending upon the property itself and the complexity and the difficulty of the development." *Tr. 77 (Kulik).*

57. After application of adjustments, the comparable properties examined by Mr. Kulik sold for between $21,883 per acre and $132,125 per acre. *Tr. 79 (Kulik); Lake*

County Ex. 11, at 126. The mean sale price of those properties was $56,284 per acre, and the median price was $41,218 per acre. *Lake County Ex. 11, at 129*. Mr. Kulik therefore concluded to a value of $45,000 per acre, which yielded a total land valuation of $66,915,000 (1,487 acres x $45,000 per acre). *Tr. 88-90 (Kulik); Lake County Ex. 11, at 129-30*. Mr. Kulik estimated the value of the Parcels as of March 1, 2002, and he concluded that the same value was appropriate as of January 1, 1999, because "the market has been relatively static within that area." *Tr. 90 (Kulik)*.

58. Anthony J. Uzemack engaged in a sales comparison approach to provide "a reasonableness check of the value estimated in the Cost Approach …." *Lake County Ex. 11, at 195; See also Tr. 211 (Uzemack)*. In doing so, Mr. Uzemack consulted industry sources such as brokers in the oil refinery industry, trade publications, public filings by the companies involved in the sale of oil refineries, and other information available to him. *Tr. 210-11 (Uzemack).*

59. Mr. Uzemack compared the Whiting Refinery to twelve other refineries in terms of complexity factors and equivalent distillation capacities. *Lake County Ex. 11, at 168-91*. The complexity factor is a calculation that measures the sophistication of the processes at oil refineries and their ability to manufacture a range of products. *Tr. 214 (Uzemack)*. The higher the complexity factor of a refinery, the higher the price a purchaser is likely to pay. *Tr. 214-15, 227-28 (Uzemack)*. The equivalent distillation capacity is determined by multiplying the complexity factor by the number of barrels a refinery can produce daily. *Tr. 215 (Uzemack)*. According to a report prepared by an appraiser for BP, the complexity factor for the Whiting Refinery is **[NUMBER REDACTED]** which, according to Mr. Uzemack, is "superior, in its upper tier or momentum." *Tr. 216-17, 237-38 (Uzemack)*.[2]

60. Based on the sales comparison approach, Mr. Uzemack valued the entire Whiting Refinery operation at $830 million. *Tr. 229 (Uzemack); Lake County Ex. 11, at 195*. Mr. Uzemack consulted with experts in the refinery industry to determine what portion of that amount should be attributed to real property. *Tr. 230-31 (Uzemack)*. Those experts described a "rule of thumb" whereby 60% to 75% of that amount would be attributable to refinery equipment. *Lake County Ex. 11, at 185; Tr. 231 (Uzemack)*. Mr. Uzemack felt BP's own asset listing for the Whiting Refinery confirmed the applicability of the industry rule of thumb. *Tr. 868 (Uzemack)*. Mr. Uzemack used the industry rule of thumb to allocate the $830 million value determined under the sales comparison approach between real property and equipment. That allocation indicated a real property value of between $208 and $332 million. *Tr. 231 (Uzemack); Lake County Ex. 11, at 195*.

61. Mr. Uzemack's sales comparison approach corroborated the land value indicated by the cost approach. If one were to take the lowest real estate value indicated by the sales comparison approach of $208 million and to deduct from that the stipulated

[2] Mr. Uzemack first testified that the complexity factor was 12.5. *Tr. 216-17 (Uzemack)*. Mr. Uzemack's subsequent testimony and the Kulik Appraisal, however, make clear that Mr. Uzemack utilized a complexity factor of **[NUMBER REDACTED]**. *Lake County Ex. 11, at 85; see also Tr. 237-38 (Uzemack).*

improvements value of approximately $60.3 million, the remainder would be $147.7 million. According to Lake County, this confirms that Mr. Kulik's appraised land value of $66,915,000 (based on $45,000 an acre) was conservatively reasonable.

62. Finally, Lake County's appraisers did not deduct environmental clean-up costs from the value of the Parcels. Mr. Kulik testified that parties to a sale typically handle environmental contamination through indemnification agreements and that such issues do not impact land value. *Tr. 92-93, 191 (Kulik).* The contamination caused by BP and its predecessors does not hamper BP or a similar user from utilizing the land for purposes of refining petroleum. Moreover, BP's liability for cleaning-up contamination exists separate and apart from its continued use of the Parcels. Because BP – a financially viable party - is liable for the cleanup of the Parcels whether it continues to use the site or not, and because the contamination does not impair BP's use of the site, such contamination does not reduce the value-in-use of the Parcels.

B. Discussion of Lake County's Position.

63. The 2002 Real Property Assessment Manual ("Manual") defines the "true tax value" of real property as "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference at Ind. Admin. Code tit. 50 r. 3.3-1-2). A taxpayer may use evidence consistent with the Manual's definition of true tax value, such as appraisals that are relevant to a property's market value-in-use, to establish the actual true tax value of a property. *See* MANUAL at 5. Thus, a taxpayer may establish a prima facie case for a change in assessment based upon an appraisal that quantifies the market value-in-use of a property through use of generally recognized appraisal principles. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 479 (Ind. Tax Ct. 2003)(holding that the taxpayer established a prima facie case of entitlement to a 74% obsolescence depreciation adjustment based on an appraisal quantifying the improvements' obsolescence through the cost and income capitalization approaches).

64. One such generally recognized method of appraisal is the sales comparison approach. That approach "estimates the total value of the property directly by comparing it to similar, or comparable, properties that have sold in the market." MANUAL at 2; *See also, Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 469 (Ind. Tax Ct. 2005). Another generally recognized method is the cost approach, which is based upon "the assumption that potential buyers will pay no more for the subject property . . . than it would cost them to purchase an equally desirable substitute parcel of vacant land and construct an equally desirable substitute improvement." MANUAL at 13.

65. The Manual further provides that for the 2002 general reassessment, a property's assessment must reflect its value as of January 1, 1999. MANUAL at 4. This provision has significant consequences for appraisals performed substantially after that date. In order for such an appraisal to constitute probative evidence of a property's true tax value, there must be some explanation as to how the appraisal relates to the property's

market value as of January 1, 1999. *See Long* 821 N.E.2d at 471 (holding that an appraisal indicating a property's value for December 10, 2003, lacked probative value in an appeal from a 2002 assessment)

66. Lake County submitted an appraisal performed by licensed appraisers who asserted that they followed the Uniform Standards of Professional Appraisal Practice ("USPAP"). Moreover, Lake County's appraisers utilized the sales comparison and cost approaches to value, both of which are recognized under the Manual as approaches that are generally accepted within the appraisal profession. MANUAL at 3. In addition, although the Kulik Appraisal estimates the market value of the Parcels as of March 1, 2002, Mr. Kulik related the appraised value to the market value of the Parcels as of January 1, 1999, through his testimony that "the market has been relatively static within that area." *Tr. 53-54 (Kulik); Lake County Ex. 11, at 20-42.*

67. Thus, Lake County met its burden of production by coming forward with evidence, which if not impeached or contradicted, would be sufficient to entitle it to relief. Nonetheless, based upon the evidence as a whole, including BP's detailed impeachment both of the Kulik Appraisal and of the testimony of Lake County's appraisers, the Board finds that the Kulik Appraisal lacks sufficient reliability and credibility to establish an error in the current assessment. The Board sets forth below its reasons for reaching this conclusion.

1. Mr. Kulik's sales comparison analysis

68. The comparative sales analysis performed by Mr. Kulik in support of his valuation of the Parcels under the cost approach suffers from numerous flaws and omissions that deprive it of probative weight.

69. First, Mr. Kulik based his adjustments to the sale prices of comparable properties largely on conjuncture. For example:

a. Mr. Kulik made large (23%) adjustments to the sale prices of several comparable properties to account for their lack of water access. Mr. Kulik, however, could not testify regarding why the access of the Parcels to the Indiana Harbor Ship Canal ("Canal") significantly aided the operation of a refinery. Mr. Kulik could not identify what items BP loaded into barges at the Canal. *Tr. 101-102 (Kulik).* Additionally, although BP demonstrated that the Canal was not deep enough to bring in ships, Mr. Kulik did not know what the draft of BP's dock was, or what size vessel it could accommodate. *Tr. 730 (Smith); Tr. 124 (Kulik).* **[SENTENCE REDACTED]** In order to dredge the Canal, one would need to create a confined disposal facility on the property, because the Canal is heavily polluted and it is creating a plume of pollution out into Lake Michigan. *Tr. 730 (Smith).*

b. Although Mr. Kulik made upward adjustments to the sale prices of comparable properties based upon the lack of rail access, he did not know whether

BP obtained any shipments by rail. *Tr. 105-108 (Kulik).* **[REMAINDER OF PARAGRAPH REDACTED]**

c. Mr. Kulik based a substantial adjustment, which he termed an "entitlement adjustment," on the fact that BP has permits allowing it to operate a refinery. *Lake County Ex. 11, at 126, 129.* Lake County, however, offered no evidence as to what those permits are, or how such permits would be required for construction of buildings of the type located on the Parcels. Mr. Kulik testified that he had conducted no analysis as to whether permits were necessary to engage in refinery operations or whether such permits would have been available to his comparable properties. *Tr. 109 (Kulik).*

d. The comparable properties relied upon by Mr. Kulik were small. Some of those properties were as small as 5 acres, and the largest was 206 acres. *Tr. 177 (Kulik); Lake County Ex. 11, at 103-25*. The Parcels, by contrast, are 1,487 acres. At best, that is a difficult comparison to make. *Tr. 295 (Janata).* The soundness of such a comparison is particularly questionable where, as here, there were sales of large tracts of industrial land in Indiana and the Midwest, such as those relied upon in the **[REMAINDER OF SENTENCE REDACTED]** *See BP Ex. 4, at 1, 11*. At a minimum, it would be necessary to make well-supported adjustments to account for such a size disparity. Mr. Kulik, however, treated all of his comparable properties identically in terms of magnitude for purposes of making his size adjustment. *Tr. 177 (Kulik); Lake County Ex. 11, at 125*. Mr. Kulik determined such adjustment simply by comparing the sale price of comparable no. 3 (5.01 acres) to that of comparable no. 4 (50.01 acres). *Lake County Ex. 11, at 107-08, 129.* On cross-examination, however, Mr. Kulik testified that there was no market evidence to support identical treatment of parcels of sizes varying from 5 to 206 acres. *Tr. 177 (Kulik).*

e. The Board therefore finds that Mr. Kulik did not adequately support several of the adjustments he applied to the sale prices of the purportedly comparable properties identified in his appraisal.

70. Second, although Mr. Kulik testified that he determined that the median of the adjusted sale prices of his comparable properties ($45,000) was a suitable value for the Parcels, the actual median of his adjusted sale prices was $41,200. *Tr. 183 (Kulik).* Mr. Kulik justified this increase of almost $4,000 per acre by suggesting that the Parcels were "worth a little bit more than the median." *Id.* Mr. Kulik provided no factual basis to support his opinion in that regard.

71. Third, the data used by Mr. Kulik in his analysis of comparable properties was suspect. For example:

a. Mr. Kulik stated that his comparable no. 7 had a purchase price of $25,000 per acre. *Tr. 138 (Kulik); Lake County Ex. 11, at 114-15*. That property, like the subject property, suffered from environmental contamination, and its pre-

cleanup purchase price in 1998 was $13,000 per acre. *Tr. 138-40 (Kulik); Lake County Ex. 11, at 115*.

b. Mr. Kulik did not speak with anyone at USX Corporation regarding the Solo Cup sale, which he utilized as his comparable sale no. 9. *Tr. 148-49 (Kulik); Lake County Ex. 11, at 118-19*. Mr. Kulik reported that USX Corporation sold the Solo Cup site for $76,268 per acre. *Lake County Ex. 11, at 118*. An attorney involved in the sale informed Mr. Kulik that the transaction involved some "TIF" financing, but would not comment further due to confidentiality concerns. *Id. at 118-19*. Mr. Kulik adjusted the sale price downward by approximately ten percent (10%) to $68,641 in order to account for such financing. *Id. at 126; Tr. 85-86 (Kulik)*. The actual net value of that sale, however, was $17,700 per acre. *Tr. 310-11 (Janata)*. The Board recognizes Mr. Kulik's testimony that he used the Solo Cup sale merely as additional confirmation of values and that he would have come to the same conclusion of value without examining that sale. *Tr. 86-87 (Kulik)*. Nonetheless, Mr. Kulik's utilization of the Solo Cup sale with only a 10% adjustment to its sale price casts at least some doubt upon his comparable sales analysis generally and undermines the overall credibility of his appraisal.

2. Mr. Uzemack's sales comparison analysis

72. Mr. Uzemack's sales comparison analysis also suffers from credibility problems. First, Mr. Uzemack utilized the complexity factor of **[NUMBER REDACTED]** from an appraisal valuing the Whiting Refinery as of 1999 rather than the complexity factor of **[NUMBER REDACTED]** that Mr. Uzemack himself had computed. He did so because he felt that "Mr. Connolly might have better coverage of the facts." *Tr. 237-38 (Uzemack).* That **[NUMBER REDACTED]** complexity factor, however, was developed in 1999 – three years prior to the assessment date at issue in this appeal. *Tr. 564 (Connolly)*. BP lost several process units and took down some other facilities between 1999 and 2002, which reduced the Whiting Refinery's complexity factor to **[NUMBER REDACTED]** *Tr. 564-65; 595 (Connolly)*. Under these circumstances, Mr. Uzemack's use of an old complexity factor, particularly when that factor conflicted so dramatically with his own calculations, casts serious doubt upon the reliability of Mr. Uzemack's opinion of value.

73. This is particularly true given the central role that the erroneous complexity factor played in Mr. Uzemack's analysis. Mr. Uzemack determined the Whiting Refinery's "complexity barrels per day" (which he also referred to as "equivalent distillation capacity") by multiplying Mr. Connelly's complexity factor of **[NUMBER REDACTED]** by the number of barrels per day produced by the Whiting Refinery. *Tr. 214-15, 237-38 (Uzemack); Lake County Ex. 11, at 193-95.* Mr. Uzemack then determined a range of sale prices as a function "price per complexity barrel" for the comparable refineries. *Tr. 214-15 (Uzemack); Lake County Ex. 11, at 193-95.* Mr. Uzemack determined that a number near the upper limit of that range - **[NUMBER REDACTED]** per complexity barrel - would be appropriate to use in valuing the subject

property. *Lake County Ex. 11, at 193-95*. Mr. Uzemack multiplied the **[NUMBER REDACTED]** per complexity barrel price by the number of complexity barrels per day produced by the Whiting Refinery to arrive at his proposed value for the Whiting Refinery. *Id.*

74. Mr. Uzemack did not visit any of the refineries he used in his comparable sales analysis, nor did he verify any of the sale information for those refineries. *Tr. 562-63*.

75. Mr. Uzemack's analysis also demonstrates that his understanding of the Whiting Refinery specifically, and the petroleum industry generally, is so limited as to render his valuation suspect. For example:

a. One of the aspects considered in valuing a refinery is the crude slate that a particular refinery may run. *Tr. 773-74 (Nichols)*. Not all crudes are created equal – some are thicker, sour and some are lighter, sweeter. *Id.* They also have different sulfur contents. *Id.* Mr. Uzemack, however, did not consider the fact that the Whiting Refinery suffers from diseconomies of scale in that it lacks the capability of running exclusively on less expense heavy crude oil. *Tr. 567-68 (Connolly)*. In addition to the Whiting Refinery's ability to process cheaper heavy crude oil, it also must process the more expensive light crude, thereby resulting in a higher net price per barrel at the refinery. *Tr. 774-75 (Nichols)*. At the 2002 assessment date, for example, sweet light crude was selling for $48 per barrel, and sour, heavy crude was selling for $28 per barrel. Accordingly, the Whiting Refinery paid a premium on approximately **[NUMBER REDACTED]** of the barrels it processed, *i.e.*, the light sweet crude. *Tr. 568-69 (Connolly).* This created an approximately **[NUMBER REDACTED]** disadvantage per day compared to refineries that have the technology to process cheaper, heavy, sour crude alone. *Tr. 776 (Nichols)*. The Whiting Refinery has competitors that are able to run entirely on considerably less expensive sour, heavy crude. *Tr. 775-76 (Nichols)*. In fact, two other refineries located within fifty (50) miles of the Whiting Refinery can run entirely on heavy crude. *Tr. 774-75 (Nichols)*.

b. The Whiting Refinery's ability to produce reformulated gasoline is not actually a competitive advantage as claimed by Mr. Uzemack, because all Midwestern refineries are required by law to do so. *See Lake County Ex. 11, at 89; Tr. 574 (Connolly)*.

76. The steps Mr. Uzemack took to separate the value of the real property from his total valuation further detract from the credibility of his opinion of the value of the Parcels.

a. When asked if he knew whether he had removed the value of intangibles in allocating a portion of the overall value of the Whiting Refinery to real estate, Mr. Uzemack responded "good question." *Tr. 256-57 (Uzemack)*. Mr.

Uzemack, however, admitted that BP's brand name is an intangible having value. *Id.*

b. Mr. Uzemack predicated his valuation on his "rule of thumb" that approximately 60% to 75% of the overall value of a refinery is attributable to refinery equipment. *Tr. 230-31 (Uzemack)*. Although his "rule of thumb" resulted in adjustments in the hundreds of millions of dollars, Mr. Uzemack could not cite to his source for that rule of thumb, other than to say that he obtained it from someone in the "business," or from the work product of "one of the appraisers [he] read." *Tr. 230-31, 255-56.*

77. Given the facts described above, the Board finds that Mr. Uzemack's opinion of value based upon his sales comparison analysis is unreliable and not supported by adequate data.

3. Environmental contamination

78. The Kulik Appraisal suffers from an additional flaw. The Lake County appraisers predicated their appraisal on the assumption that no environmental conditions existed at the Parcels that would cause a loss of value. *Tr. 110 (Kulik); Lake County Ex. 11, at 11*. As set forth, *infra*, BP demonstrated that the Parcels contain significant environmental contamination that negatively affects their market value-in-use. Consistent with prevailing case law and testimony from the expert witnesses proffered by BP and the DLGF, eligible buyers would pay less for contaminated land than for otherwise comparable uncontaminated land. Consequently, the Board finds that Lake County's experts should have considered environmental contamination in arriving at their opinion of value for the Parcels, and that their failure to do so seriously detracts from the weight to be accorded to their opinion of value.

4. Janata review appraisal

79. Jerry Janata, the Chief Executive Officer of International Appraisal Company, prepared an appraisal review report of the Kulik Appraisal. Mr. Janata rejected the Kulik Appraisal's land value conclusions for many of the same reasons discussed by the Board, *supra*. The Board sets forth the following summary of Mr. Janata's review separately from its prior discussion, however, because it finds Mr. Janata to be a highly credible witness.

a. The Kulik Appraisal did not provide adequate support for its adjustments to the sale prices of purportedly comparable properties. For example, the Kulik Appraisal contained a major (+ 23%) adjustment for "water access." *BP Ex. 4 at 10*. This adjustment resulted in an unsupported increase in land value of $12.5 million. *Id.* Similarly, the Kulik Appraisal provided only vague support for its 25% "entitlement" adjustment. *BP Ex. 1, at 12*. That unsupported adjustment resulted in an increase of $11,383,000 to the Kulik Appraisal's proposed land value. *Id*.

b. The purportedly comparable properties utilized by the Kulik Appraisal were small. Moreover, the Kulik Appraisal's analysis of the sale price of at least one of those properties (Solo Cup) was fundamentally flawed. *Id. at 11*. In addition, the Kulik Appraisal provides no satisfactory explanation for the basis underlying its size adjustments. *Id*.

c. It was inappropriate and unreasonable for the Kulik Appraisal not to consider potential contamination at the Parcels or the costs to clean up such contamination. *BP Ex. 4 at 13.* Although the Kulik Appraisal includes comments on environmental contamination for each of its twelve (12) comparable properties, it gives absolutely no weight to sub-soil remediation issues at the Parcels and makes no adjustments for environmental contamination. *BP Ex. 4, at 13*. Mr. Janata concluded, "environmental problems existing at the subject property impact significantly on value, and it was inappropriate not to consider potential contamination as relevant." *BP Ex. 4, at 18*.

d. The difficulty of isolating and analyzing specific data resulted in an extremely wide value conclusion in the Kulik Appraisal's sales comparison analysis. This was compounded by the application of an unsupportable value for the machinery and equipment with reliance on an "industry rule of thumb." *BP Ex. 4, at 24*.

80. Mr. Janata concluded that it was his "firm belief" that the Kulik Appraisal's opinion of value is not reasonable and would have been substantially lower if the above issues were properly considered. *See BP Ex. 4, at 2*.

5. Adjustment to January 1, 1999, value

81. Finally, Mr. Kulik did not adequately explain his failure to adjust his opinion of value for the Parcels to reflect their market-value-in-use as January 1, 1999. Mr. Kulik simply testified that there was no need to adjust the appraised value, because the market had been "relatively static" in the Parcels' area. *Tr. 90 (Kulik)*. Mr. Kulik did not cite to any support for his conclusion. *Id*. Given that lack of support, Mr. Kulik's explanation is not particularly compelling. This is especially true in light of the fact that all of the other experts in this case adjusted their values to January 1, 1999.

82. Based on the foregoing, the Board finds that the Kulik Appraisal lacks credibility or probative value, and therefore, that Lake County has failed to show that the DLGF's assessment is invalid.

C. BP's Position:

1. Summary

83. The DLGF used better information to arrive at its $19,000 per acre valuation than the information used by Lake County to arrive at its $45,000 per acre value.

84. Nonetheless, the DLGF itself admits that it valued the land of the four major industrial taxpayers in Lake County, including the Parcels, in a "one size fits all" manner based on the confidential Deloitte & Touche Study. Deloitte & Touche, however, performed that study to value only one taxpayer's property – Ispat's.

85. Moreover, while the DLGF rightly was concerned about environmental contamination at the Parcels, its $19,000 per acre rate did not account for any such contamination.

86. BP submitted two appraisals, one by Access Valuation, LLC (the "Access Appraisal") and one by the Nationwide Consulting Company, LLC (the "Nationwide Appraisal"). BP devoted a significant amount of time both at the hearing and in its post-hearing filings addressing the overall land valuations set forth in those appraisals. Ultimately, however, BP bases its request for relief not on the overall land value conclusions set forth in those appraisals, but upon the Nationwide Appraisal's quantification of the effect of environmental contamination on the market value-in-use of the Parcels. Thus, BP requests that the Board simply deduct the amount of that quantification - **[NUMBER REDACTED]** - from the DLGF's assessment of the Parcels. *See BP Post-Hearing Brief, at 3, 56, 67.*

2. Access and Nationwide Appraisals generally

87. The Access Appraisal values the Parcels at $7,000,000 as of March 1, 2002. Trending that value back to January 1, 1999, yields a true tax value of $6,432,300. *BP Ex. 11, at 69*; *BP Post-Hearing Brief, at 25.*

88. The Access Appraisal breaks the Parcels into four classifications. *Id. at 42-49; Tr. 494-97 (Tillema).* The Access Appraisal aimed its approach at more precisely capturing differences in the respective characteristics of the various lots comprising the Parcels. More specifically, the Access Appraisal separates the Parcels into the following categories: (1) vacant industrial land with a harbor; (2) vacant industrial land in a flood zone; (3) vacant industrial land with water frontage; and (4) vacant industrial land. *BP Ex. 11, at 42-49; Tr. 494-97 (Tillema).* Mr. Tillema, who performed the Access Appraisal, valued these four categories separately. *Id.* Mr. Tillema then added the values of those four categories of land and arrived at a total land value of $6,920,000 (rounded to $7,000,000). *BP Ex. 11, at 49; Tr. 508 (Tillema*).

89. The DLGF's Assessment did not account for any of these considerations, all of which affect the value of the Parcels. This is true even though the DLGF was aware that portions of the Parcels include marshes and wetlands, which Mr. Barrow admitted might have a different value than land sitting under machinery. *Tr. 399 (Barrow).*

90. The Nationwide Appraisal was compiled by Messrs. Manzione and Connolly, both of whom have considerable experience in the assessment and appraisal of refineries. *BP Ex. 9, at 188-94; Tr. 615-21 (Manzione); Tr. 554-60 (Connolly).* The Nationwide Appraisal values the Parcels at $15,840,000 as of March 1, 2002. Trending that value to January 1, 1999, yields a true tax value of $15,350,000. *BP Ex. 9, at 60; BP Post-Hearing Brief, at 25.*

91. The Nationwide Appraisal relies upon the sales of six (6) comparable properties, which post-adjustment, ranged in value from approximately $11,000 per acre to $26,644 per acre. *BP Ex. 9, at 44-60; Tr. 653 (Manzione).* The appraisal does not adjust the sale prices of any of the comparable properties by more than an aggregate of approximately thirty-five percent (35%). *Tr. 653 (Manzione).* Based on this analysis, the Nationwide Appraisal determined that the Parcels, if uncontaminated, were worth approximately $20,000 per acre - a figure that generally corroborates the DLGF's unadjusted value of $19,000 per acre. *BP Ex. 9, at 59-60; Tr. 658 (Manzione); Tr. 379-80, 394-95 (Barrow).* That $20,000 per acre value, however, was only a first step. The Nationwide Appraisal then applied an adjustment to quantify the effect of environmental contamination on the market value of the Parcels. *Tr. 658 (Manzione).* The Nationwide Appraisal's treatment of environmental contamination is discussed *infra*.

3. Assessments of nearby properties

92. Mr. Nichols conducted a survey and provided evidence of the assessed value of properties adjacent to the Parcels as reflected on the Lake County Assessor's website. These properties were assessed by a private firm, Cole Layer Trumble ("CLT"), which the DLGF described as having done a "remarkable job" in assessing the properties. *Tr. 404-05 (Barrow).* Mr. Nichols testified that numerous properties near the Parcels were similar to the Parcels in use and character. All of the properties in Mr. Nichols' survey were located in North Township and all were either adjacent to the Parcels and/or owned by other petroleum companies. *Tr. 757 (Nichols).*

93. The adjacent properties ranged in assessed value from approximately $1 per acre to approximately $19,500 per acre. *Tr. 760 (Nichols); BP Rebuttal Ex. 1.* Excluding the $1 per acre land and any exempt land, the median assessment of these properties was $12,919 per acre and the average assessment was $13,047 per acre. *Id.*

94. The highest locally assessed adjacent property surveyed was that of U.S. Gypsum, which borders the canal next to the Parcels' southeast corner (the "boot heel"). *Tr. 765-66 (Nichols).* Even this property, with water access identical to that of the Parcels, was assessed at an average of only $17,500 per acre. *Id.* While such assessment

provides some support to the DLGF's computation of $19,000 per acre (pre-environmental adjustment), it also demonstrates that the $19,000 per acre is a high-end figure among nearby locally assessed industrial tracts. Moreover, that rate is applicable only to the most valuable portions of those properties, such as the portions with water access. *Id.*

4. Environmental Contamination

95. The Parcels are substantially impacted by environmental degradation. The cost of monitoring this degradation alone has a negative effect on the value of the Parcels - an effect that should have been reflected in BP's assessment per the DLGF's own guidelines.

96. The primary focus of BP's remediation efforts at the Parcels is to contain and control an underground oil plume, *i.e.*, a large free-phase hydrocarbon plume that is floating on the groundwater table at the Parcels. *Tr. 712-13 (Smith).* Additionally, there are post-closure activities on some solid waste management units and there are investigation and assessment activities on subsurface soils. *Id.* The post-closure activities include the closure of a storm water basin, which was closed-out in the 1990's under an agreement with the United States Environmental Protection Agency (the "EPA") and the Indiana Department of Environmental Management ("IDEM"). *Tr. 713-14 (Smith).* That agreement requires BP to monitor the site for thirty (30) years, twenty (20) of which remain. *Id.* BP also entered into a consent decree with the EPA requiring BP to close and monitor a spent bender (catalyst) waste pile. *Id.* BP is further responsible for the "J&L" property, which is located on the Parcels. *Tr. 715-16 (Smith).* Problems at the J&L property include construction debris, petroleum contamination in the soil, and other contamination. *Id.*

97. BP utilizes a network of fourteen hundred (1,400) monitoring wells at the Parcels. *Tr. 718-19 (Smith).* Those wells go through semi-annual monitoring to measure the depth of free-phase hydrocarbons or floating oil on the groundwater table. *Id.* A team of technicians monitors the performance of BP's recovery control systems. *Id.* There is a network of eighty-five (85) different containment and control systems throughout the Parcels. *Id.* BP also devotes at least a portion of its wastewater treatment system's capacity to meeting BP's environmentally related legal obligations. *Tr. 721 (Smith).*

98. The monitoring wells are visible throughout the Parcels. *Tr. 719 (Smith).* Additionally, BP's legal monitoring and remediation efforts are governed and evidenced by public documents such as the 1995 Agreed Order between BP and IDEM (the "Agreed Order") and a Resource Recovery and Conservation Act ("RCRA") financial assurances document ("RCRA Document"), which guarantees that BP will pay remediation costs relating to its storm water surge basin and spent bender waste pile. *Tr. 721-23, 731-32*; s*ee also, BP Ex. 7, passim.*

99. The DLGF was aware of the environmental issues at the Parcels when it assessed the subject property. Mr. Barrow testified that, based on his and Mr. Jim Hemming's initial site visit, "it was apparent that there was soil contamination on the site just from a cursory onsite visit." *Tr. 821 (Barrow).* In fact, the DLGF acknowledged that the Parcels were known to be contaminated, and that contamination must be accounted for in valuing land. *See Lake County Ex. 12, at 8; Tr. 397-98 (Barrow).* Although Mr. Barrow did not receive any specific environmental information from BP, he could not dismiss the possibility that such information was provided to Mr. Hemming during his site visits. *Tr. 820 (Barrow).* The DLGF admitted that BP's environmental information relating to the Parcels was publicly, readily available, and that IDEM retains considerable public environmental records relating to the Parcels. *Tr. 853-55 (Barrow).* The DLGF could have obtained such information from IDEM's offices, which are located in the same building and on the same floor as the DLGF's offices. *Tr. 397-98 (Barrow).*

100. Despite this information, the DLGF did not account for any environmental contamination in its assessment of the Parcels. The DLGF based its assessment of the Parcels on the Deloitte & Touche Study. *Lake County Ex. 12, at 2.* Mr. Barrow, however, testified that, after reviewing the Deloitte & Touche Study and related documents, he believed that the Deloitte & Touche Study made no environmental adjustments to land value. *Tr. 380, 382, 835 (Barrow).* Any adjustment for environmental conditions in the Deloitte & Touche Study was passed on only to the improvement values of the other three "big four" taxpayers. *Lake County Ex. 12, at 7-8.* The DLGF did not pass this adjustment on to BP's assessment, because the DLGF did not assess BP's improvements based on the Deloitte & Touche Study. *Id.*

101. Ultimately, BP has multiple, concurrent liabilities stemming from the environmental degradation of the Parcels. *Tr. 734 (Smith).* Potential future liabilities also exist at the site, because BP has not completed an environmental assessment of all of the Parcels. *Tr. 736-37 (Smith).* As required by law, BP "provisions" for environmental liability. *Tr. 742 (Smith).* **[REMAINDER OF PARAGRAPH REDACTED]**

102. Mr. Tillema did not apply an adjustment for environmental remediation costs directly to the land value; rather, he reflected such adjustment in his overall reconciliation of value. *Tr. 482-86 (Tillema).* Mr. Tillema agreed that application of an adjustment directly to the land value also would be appropriate. *Id.* Mr. Tillema testified that he would attribute approximately ½ to ¾ of his environmental adjustment to the land. *Tr. 511-12 (Tillema).*

103. The Nationwide Appraisal determined an environmental deduction to the value of the Parcels. *Tr. 658-59; BP Ex. 9, at 59-60.* Mr. Manzione based that deduction on the fact that it costs at least **[NUMBER REDACTED]** million per year to maintain and monitor subsoil remediation at the Parcels. *Id.* In fact, the actual costs range from **[NUMBER REDACTED]** *Id.* The Nationwide Appraisal also determined that it would take at least ten years subsequent to the date of valuation to complete remediation. *Tr. 658-59 (Manzione).*

104. The Nationwide Appraisal took a ten-year present value timeframe to account for the costs of maintaining and monitoring subsoil remediation projects on the theory that a prudent property owner would set aside a reserve fund to pay these costs. *Id.; BP Ex. 9, at 59-60.* Because BP may pay for its maintenance and monitoring programs with pre-tax dollars, the Nationwide Appraisal adjusted its **[NUMBER REDACTED]** per year figure downward by **[NUMBER REDACTED]** which equated to **[NUMBER REDACTED]** per year over a ten-year period. *Tr. 659-60; BP Ex. 9, at 59-60.* The Nationwide Appraisal then determined how much would have to be set aside to provide that amount on an annual basis growing at a conservative investment rate of five percent (5%). *Id*. Based on these figures, the Nationwide Appraisal concluded that the set-aside amount would have to be **[NUMBER REDACTED]**, which would be an appropriate environmental deduction to the value of Parcels to account for environmental contamination. *BP Ex. 9, at 60; Tr. 659-62 (Manzione).*

D. Discussion of BP's Position:

105. BP submitted two appraisals performed by licensed appraisers[3] who asserted that they followed the Uniform Standards of Professional Appraisal Practice ("USPAP"). Both of BP's appraisals utilized the cost approach to value, which is a generally accepted approach within the appraisal profession. MANUAL at 3. Moreover, although BP's appraisals both estimate the market value of the Parcels as of March 1, 2002, they adjust those estimates to reflect values for the subject property as of January 1, 1999. *BP Ex. 9, at 174*; *BP Ex. 11, at 2, 69-70.*

106. Thus, BP met its burden of production by coming forward with evidence, which if not impeached or contradicted, would be sufficient to entitle it to relief. Based on the evidence as a whole, however, the Board finds that the Access Appraisal submitted by BP lacks sufficient reliability and credibility to establish either that the DLGF's assessment was erroneous or what the correct assessment should be. The Board reaches a similar conclusion with regard to the Nationwide Appraisal's valuation of the Parcels in an unimpaired state, because the appraiser, Mr. Manzione, did not adequately support his adjustments to the sale prices of purportedly comparable properties.

107. Nonetheless, the Board finds that BP established that the DLGF erred in assessing the Parcels by failing to account for the effect of environmental contamination on the market value-in-use of the Parcels. The Board further finds that the Nationwide Appraisal quantified the effect of that contamination in the amount of **[NUMBER REDACTED]**. The Board, however, rejects BP's request to deduct the entire **[NUMBER REDACTED]** from the assessed land value of the Parcels, because to do so would result in a total assessment for the subject property that is more than **[NUMBER REDACTED]** lower than the overall opinion of value set forth in either appraisal offered by BP. The Board therefore finds that the assessment of the Parcels should be reduced by $6,740,800, resulting in a total land value of $21,509,800. When combined with the Stipulation of the parties concerning the value of the BP Improvements, this reduces the

[3] Although Mr. Manzione is not licensed in Indiana, he is a state certified appraiser in New Jersey. *BP Ex. 9, at 192.*

total assessment of the subject property to an amount equal to, but not below, the overall opinion of value set forth in the Nationwide Appraisal.

The Board sets forth its reasons for reaching these conclusions below.

1. Access Valuation Appraisal

108. Mr. Tillema of Access Valuation admitted that he had never appraised an oil refinery before appraising the Whiting Refinery. *Tr. 517 (Tillema).* He does not purport to have expertise in appraising refineries. *Tr. 550-51 (Tillema).*

109. Mr. Tillema underestimated the land value by artificially breaking-up the refinery's land and failing to value the land based upon its current use. Every other appraiser, including both of BP's witnesses who claimed expertise in valuing refineries and other petroleum related facilities, valued the Parcels as a single economic unit. *Lake County Ex. 12, at 8; Lake County Ex. 11, at 130; BP Ex. 9, at 59.* Those appraisers recognize that even portions of the Parcels that are currently vacant are useful to refinery operations by providing storm-water detention capacity and management flexibility for expanding or changing operations. *Tr. 117-19 (Kulik).*

110. The Board recognizes Mr. Janata's testimony that the Access Appraisal's approach of breaking the Parcels into different categories was a "better detailed approach to the valuation problem presented." *Tr. 300 (Janata).* Mr. Janata, however, acknowledged that he was not retained to critique the Access Appraisal and that he did not formally review it. *Tr. 314 (Janata).* The Board therefore assigns little weight to Mr. Janata's testimony on this point.

111. The Board also finds substantial problems with the Access Appraisal aside from its flawed premise of valuing the Parcels under separate categories rather than as a single economic unit.

112. Mr. Tillema compared a 90-acre portion of the Parcels that is located in a flood zone mainly to recreational and residential properties. *Tr. 530 (Tillema).* None of those purportedly comparable properties was even used for industrial purposes, much less being appropriate for use in the operation of a refinery, and Mr. Tillema made no adjustment for that fact. *Id.*

113. Mr. Tillema characterized approximately 60 acres of the Parcels as "industrial waterfront," although without improvement to make the waterfront usable. *See BP Ex. 11, at 47.* He compared this portion of the Parcels with sites in Florida, Illinois and Ohio that were far from the real estate market in which the Parcels are located. *Tr. 532 (Tillema).* Mr. Tillema did not bother to inspect any of those purportedly comparable sites. *Id.; see also, BP Ex. 11, at 47.* As far as Mr. Tillema knew, none of those sites had pipeline access**.** *Tr. 532-536 (Tillema).* Mr. Tillema made no adjustments to account for the purportedly comparable properties' lack of pipeline access despite the value of such access to the use of the Parcels as a refinery. *Id.*

Moreover, Mr. Tillema did not even determine if a refinery could be built on the purportedly comparable sites. *Id.*

114. Mr. Tillema valued the vast majority of the Parcels as industrial land without waterfront access, and his treatment of this portion of the Parcels had by far the biggest influence on his opinion of value. *Tr. 536 (Tillema); see also, BP Ex. 11, at 47.* To value this portion of the Parcels, he used three distant properties in California, Colorado, and Nevada. *BP Ex. 11, at 48.* None of those sites was even close to the real estate market influencing the value in use of BP's land. By contrast, BP's other appraisers admitted that good appraisal practice would be to look at sales from the same real estate market as subject property. *See Tr. 668 (Manzione).* Moreover, none of those sites offered use amenities similar to those found at the Parcels. Mr. Tillema doubted that the California site had pipeline access. *Tr. 537 (Tillema).* Mr. Tillema did not even determine if a refinery could be built on that site. *Tr. 537-39 (Tillema).* Similarly, insofar as Mr. Tillema knew, the Colorado and Nevada sites lacked pipeline access, and he did not know whether the zoning laws would permit a refinery to be built on those sites. *Tr. 539-40 (Tillema).*

115. Mr. Tillema's failure to account for his comparable properties' lack of pipeline access is particularly detrimental to the Access Appraisal's reliability. BP's own witnesses provided evidence concerning the significance of pipeline access to a refinery. Mr. Nichols testified that the Whiting Refinery receives most of its crude through a pipeline, and that it sends out the majority of its gasoline through a pipeline. *Tr. 787-89 (Nichols).* Mr. Nichols likened the pipeline system to an interstate highway and testified that the Whiting Refinery has access to an eleven (11) state area through that system. *Tr. 777-778 (Nichols).* Moreover, Mr. Connolly testified that transporting oil by pipeline is a fairly cost effective approach. *Tr. 577 (Connolly).*

116. In short, even aside from his unsupported decision to value different portions of the Parcels separately, Mr. Tillema made little effort to determine the extent to which the properties upon which he relied in reaching his opinion of value were truly comparable to the Parcels. Mr. Tillema similarly made little effort to adjust the sale prices of those purportedly comparable properties to account for relevant differences between those properties and the Parcels. Consequently, the Board gives no weight to the opinion of value set forth in the Access Appraisal.

2. Nationwide Appraisal

a. Lake County's Objection to the admission of the Nationwide Appraisal and Manzione's testimony

117. Lake County objected to Mr. Manzione's testimony on grounds that he was not a licensed appraiser in Indiana. *Tr. 622-29.* Lake County further objected to the admission of the Nationwide Appraisal, because Manzione actually prepared the appraisal while Mr. Connolly, who is licensed in Indiana, played only a tangential role. In support of its objection, Lake County pointed to Ind. Code § 25-34.1-8-12(a)(1)(A), which makes it a Class B infraction for an unlicensed individual to perform the acts of a licensed real estate appraiser. *Tr. 580-81, 621-22.*

118. The Board has not found, nor have the parties cited, any Indiana case dealing with the precise issue before it – whether the testimony and work product of an unlicensed but otherwise qualified appraiser must be excluded from evidence. The majority of cases from other jurisdictions, however, hold that such testimony may be admitted into evidence. *See, e.g., In re Marriage of Yager*, 155 Ore. App. 407, 963 P.2d 137 (1998); *Hutchinson v. Town of Andover*, 49 Conn. App. 788, 715 A.2d 831 (1998); *State v. Taylor*, 721 S.W.2d 541, 551 (Tex. Ct. App. 1986). *But see*, *Lee Gardens Ltd. Partnership v. Arlington County*, 250 Va. 534, 463 S.E.2d 646 (1995).

119. Those decisions are in keeping with Indiana law, pursuant to which the decision of whether to admit the testimony of a proffered expert rests within the sound discretion of the trial court. *City of Hammond v. Indiana Harbor Belt R.R. Co.*, 175 Ind. App. 644, 373 N.E.2d 893, 898 (1978). In exercising its discretion, a court must decide whether the scientific, technical, or other specialized knowledge possessed by the proffered expert will assist the trier-of-fact in understanding the evidence or determining a fact in issue. *See* Ind. Evid. Rule 702(a). The *Indiana Harbor Belt* court decided a question closely analogous to the issue before the Board – whether the Indiana Public Service Commission erred in allowing an unlicensed engineer to testify before it. 373 N.E.2d at 898. Relying largely upon the discretion afforded to trial courts and administrative agencies in the admission of opinion evidence, the court found that the commission did not err in admitting the testimony of the unlicensed engineer. *Id.*

120. Lake County, however, argues that the Board should exclude Mr. Manzione's testimony and the Nationwide Appraisal under the "fruit of the poisonous tree" doctrine. Lake County apparently reasons that, even if an unlicensed appraiser may testify in a proceeding before the Board, Mr. Manzione's testimony and the Nationwide Appraisal both stem from Mr. Manzione's illegal act of appraising land in Indiana. According to Lake County, exclusion of the evidence at issue in this case would further the dual objectives underlying the fruit of the poisonous tree doctrine: (1) deterrence of unlawful conduct, and (2) preservation of the judicial integrity of courts. *Lake County's Post-Hearing Brief Concerning Value in Use of Land, at 23* (citing *Cain v. State*, 594 N.E.2d 835, 839 (Ind. Ct. App. 1992)).

121. The Board is not persuaded by Lake County's "fruit of the poisonous tree" argument. First, it is not entirely clear that Mr. Manzione violated the licensing statute in working on the Nationwide Appraisal, given that he worked under the auspices of Connolly, who was licensed in Indiana. Moreover, the fruit of the poisonous tree doctrine is inapplicable to an administrative proceeding before the Board. The fruit of the poisonous tree doctrine is simply an application of the exclusionary rule first announced in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed.2d 652 (1924). *Reich v. Minnicus,* 886 F.Supp. 674, 681 (S.D. Ind. 1993). The exclusionary rule is a "judicially created means of *deterring illegal searches and seizures*" in violation of the Fourth and Fourteenth Amendments to the United States Constitution. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 118 S.Ct. 2014, 2019, 141 L.Ed.2d 344, 351 (1998) (emphasis added). Lake County completely looses the rule from its moorings in attempting to apply it to exclude evidence obtained in violation of a licensing statute. What's more, Lake County urges such an extraordinary expansion of the exclusionary rule without citing to any authority supporting that proposition. Indeed, courts have been reluctant to extend the scope of the exclusionary rule outside of criminal proceedings, even when the illegal act sought to be deterred is an unconstitutional search and seizure. *See Id.* ("We have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.").

122. The Board therefore finds that Mr. Manzione's lack of an Indiana appraiser's license does not automatically exclude him from testifying before the Board, nor does it require exclusion of the Nationwide Appraisal. The Board finds that by virtue of his education, knowledge and experience, Mr. Manzione may render an opinion that will assist the Board in addressing the proper valuation of the Parcels. The Board therefore admits both Mr. Manzione's testimony and the Nationwide Appraisal over Lake County's objection.

b. Reliability of Nationwide Appraisal concerning the market value-in-use of the Parcels in an uncontaminated state

123. The Board nonetheless finds that the Nationwide appraisal does not provide adequate support for its adjustments to the sale prices of purportedly comparable properties. Consequently, the appraisal does not provide reliable evidence of the market value-in-use of the Parcels in an uncontaminated state.

124. Mr. Manzione compared the Parcels to six (6) other industrial sites, only four of which involved actual sales. *See BP Ex. 9, at 55.* Like Mr. Tillema, Mr. Manzione ignored the location benefits of pipeline and water access. Instead, he reached the flawed conclusion that "[t]he comparables are considered equal if they have adequate vehicle access." *BP Ex. 9, at 57.*

125. Mr. Manzione also failed to explain the basis for adjustments he made to the sale prices of his comparable properties, such as his size adjustments of twenty-five percent (25%) and thirty percent (30%). *See BP Ex. 9, at 55.* Mr. Manzione admitted that he based all of his adjustments on "judgment calls." *Tr. 696-698 (Manzione).*

According to Mr. Manzione, he explained how he arrived at his adjustments on page 57 of the Nationwide Appraisal. That portion of the appraisal contains the following exposition:

> Each of the comparables used in this analysis are smaller tracts of land, which range from 14.84 acres to 206 acres. Since smaller parcels will command a higher unit value (when all other factors are equal), it is necessary to apply a size discount factor to the comparables.
>
> The size discount for large land parcels mirrors the market's logic similar to comparing the unit cost of a cup of sugar with a ton of sugar. The marketplace dictates that larger quantities (a ton verses a cup) will command a lower unit value. In the case of the land analysis, the smaller sized comparables require downward adjustments (on a per unit basis) to be in parity with the subject.

BP Ex. 9 at 57. While this generally explains the need to adjust for differences between the sizes of parcels being compared, it does nothing to explain how Mr. Manzione arrived at the figures of twenty-five percent (25%) and thirty percent (30%) as appropriate factors by which to make such adjustments in this case.

126. The Board recognizes that, at some level, all appraisals are based upon the judgment of the appraiser. That judgment, however, must be informed by something, and the degree to which an appraiser is able to articulate the basis underlying his exercise of judgment greatly affects the probative value of his expert opinion. Here, Mr. Manzione was unable to articulate any basis to support the size adjustments he made to the sale prices of the purportedly comparable properties upon which he based his opinion of value.

3. Environmental Contamination

127. At the end of the day, BP does not rely upon the ultimate opinions of value contained in the Access and Nationwide appraisals, but on how those appraisals account for the effects of environmental contamination on the market value-in-use of the Parcels. BP ultimately requests that the Board simply deduct **[NUMBER REDACTED]** from the DLGF's assessment of the Parcels. *See BP Post-Hearing Brief, at 55, 67-68.* That deduction represents the amount Mr. Manzione calculated that a prudent owner would have to set aside to pay for known costs of maintaining and monitoring the subsoil remediation at the Parcels for a ten-year period. *BP Ex. 9, at 59-60*. As set forth below, the Board finds that the DLGF erroneously failed to account for significant environmental contamination in assessing the Parcels, and that BP presented sufficient evidence to quantity the effect of such contamination on the market value-in-use of the Parcels.

a. DLGF's failure to account for contamination in assessing the Parcels

128. The undisputed evidence in this case demonstrates that the Parcels suffer from significant environmental contamination. The Parcels have an underground oil plume as well as other substantial contamination issues. *Tr. 712-37 (Smith).* The DLGF's own witness acknowledged the existence of contamination at the Parcels. *See Tr. 821 (Barrow)* ("It was apparent that there was soil contamination on the site just from a cursory on-site visit."). These contamination issues have created substantial monitoring and remediation costs based, in part, on agreed orders between BP and the EPA and IDEM. *Tr. 713-721 (Smith)*; *see also, BP Ex. 7, passim.* Additionally, there are post-closure activities on some solid waste management units and there are investigation and assessment activities on subsurface soils. *Id.* Potential future liabilities also exist because BP has not completed an environmental assessment of all of the Parcels. *Tr. 736-37 (Smith).*

129. The contamination at the Parcels is widespread and expensive. It costs between **[NUMBER REDACTED]** per year to maintain and monitor subsoil remediation at the Parcels. *Tr. 658-59(Manzione).* The contamination described by BP's witnesses therefore necessarily affects the market value-in-use of the Parcels. This conclusion is supported by the testimony of several of the expert witnesses. *See Tr. 658-62 (Manzione); Tr. 397(Barrow); Tr. 297-99 (Janata); see also Lake County Ex. 12, at 2* ("Large portions of the land underlying the integrated steel mills have potential environmental contamination that would require remediation to make them usable in the market. This has a negative effect upon the marketability and value of the land."*).* It is also supported by the majority of courts that have addressed the question. *See, e.g., Boekeloo v. Bd. of Review of the City of Clinton*, 529 N.W.2d 275, 278 (Iowa 1995).[4]

130. Despite the undisputed evidence of significant and costly contamination, the DLGF did not account for the effects of such contamination in assessing the Parcels. The Deloitte & Touche Study forms the sole basis of the valuation of the Parcels. *Lake County Ex. 12, at 2.* That study, however, did not allocate any environmental degradation against the value of Ispat's land. *Lake County Ex. 15, at 27; Tr. 380-94, 835 (Barrow)*("I believe there was not any adjustment made for environmental conditions. In my reading of the narrative after the questions you asked yesterday and then reviewing this document [DLGF Ex. A] I see nowhere were there was an adjustment made."). Instead, the Deloitte & Touche Study allocated environmental contamination to **[NUMBER REDACTED]** *Lake County Ex. 15, at 27.* The other "big four" taxpayers in Lake County arguably received an indirect adjustment for environmental contamination,

[4] "[T]hose courts which have faced this issue have usually acknowledged that environmental contamination has an adverse effect on property values or have concluded that the assessor must at least consider the effect of contamination on the fair market value of the property. *E.g., Reliable Elec. Finishing Co. v. Board of Assessors*, 410 Mass. 381, 573 N.E.2d 959, 960 (Mass. 1991); *Inmar Assocs., Inc. v. Borough of Carlstadt* 549 A.2d 38, 41 (N.J. 1988); *B.P. Oil Co. v. Board of Assessment*, 159 Pa. Commw. 414, 633 A.2d 1241, 1243 (Pa. Commw. Ct. 1993); *see Westling v. County of Mille Lacs*, 512 N.W.2d 863, 866 (Minn. 1994). Both common sense and the record made here convince us that these courts are correct. In the typical case, environmental contamination will have some adverse effect on the value of the contaminated property**."** *Id.*

because the DLGF used the Deloitte & Touche Study to assess both their land and improvements. The DLGF, however, did not use the Deloitte & Touche Study to assess the BP Improvements. Thus, BP received no deduction whatsoever to account for the substantial environmental contamination at the Parcels.

131. The DLGF's failure to account for environmental contamination at the Parcels appears to have been the result of inadvertence, but it constitutes error nonetheless. BP therefore established a prima facie case that the current assessment of the Parcels is incorrect.

b. Quantification of effects of contamination on the Parcels' market value-in-use

132. BP also presented evidence to quantify the effect of the environmental contamination on the market value-in-use of the Parcels. The Nationwide Appraisal quantifies the effect of contamination by calculating the amount that a prudent property owner must set aside to cover the costs of maintaining and monitoring the known subsoil remediation efforts at the Parcels over the next ten (10) years. *Tr. 658-63 (Manzione); BP Ex. 9, at 59-60*. In doing so, Mr. Manzione used conservative cost estimates and accounted for the owner's likely use of pre-tax dollars in paying for costs of maintaining and monitoring subsoil remediation efforts. *Id.* Ultimately, Mr. Manzione concluded that a property owner would have to set aside **[NUMBER REDACTED]** to account for such future remediation costs. *Id.* According to Mr. Manzione, that amount would be an appropriate deduction to account for the impact of the environmental contamination on the market value-in-use of the Parcels. *Id.*

133. As set forth above, the Board does not find the Nationwide Appraisal to be a reliable indication of the overall market value-in-use of the Parcels. The Board bases that conclusion largely upon Mr. Manzione's failure to explain the basis for his adjustments to the sale prices of the comparable properties upon which he relied in his analysis. Nonetheless, the Board finds that Mr. Manzione explained in detail the basis for his determination of an appropriate environmental deduction. The Board therefore finds that BP established a prima facie case demonstrating that the DLGF's assessment of the Parcels erroneously fails to account for the effects of environmental contamination and quantifying the amount by which such environmental contamination reduces the market value-in-use of the Parcels.

c. DLGF rebuttal

134. The DLGF offered no specific rebuttal of BP's evidence concerning environmental contamination. Instead, the DLGF asserts that the Board owes deference to its assessment because it applied its own reasonable interpretations of the relevant statutes and rules in assessing the Parcels. As set forth at paragraph 43, *supra*, the Board agrees that it owes deference to the DLGF's reasonable interpretation both of the statutes it is authorized to interpret and enforce and of the rules that it adopts in doing so. The Board, however, disagrees with the DLGF's assertion that it owes deference to factual

findings of the DLGF, such as DLGF's assessment of the Parcels. In that respect, the Board is not in the same position as a court of law. A court's review of an agency action is limited by the separation of powers clause found in Article III Section 1 of the Indiana Constitution. *See Uhlir v. Ritz*, 255 Ind. 342, 264 N.E.2d 312 (1970). The Board, being an administrative body, is not restricted by the separation of powers clause. The Board therefore may weigh the evidence and substitute its opinion for that of the DLGF.

135. Even if the Board owed deference to the factual determinations of the DLGF, the DLGF would not be entitled to such deference in this case. The DLGF acknowledges both that environmental contamination impacts the value of land and that, in applying the $19,000 per acre rate from the Deloitte & Touche Study to the Parcels, the DLGF did not account for the Parcels' environmental contamination. Thus, the DLGF did not reasonably apply its own interpretation of the relevant statutes and administrative rules in assessing the Parcels.

d. Lake County rebuttal

136. Lake County attempts to rebut BP's evidence by arguing that the contamination does not hamper BP or any similar user from operating a refinery at the Parcels and that BP's liability for cleaning up that contamination exists separate and apart from its continued use of the Parcels. *Lake County's Post Hearing Brief Concerning Value in Use of Land, at 27.* With regard to the former claim, Lake County points to the fact that most of the contamination is subsurface and that the only areas where there are environmentally related "closures" are areas not currently used for refinery processing. *Id.* As to the latter claim, Lake County asserts that BP, a financially viable party, is liable for clean-up costs relating to existing contamination regardless of whether it continues to use the Parcels. Although Lake County does not explain the significance of BP's liability and its financial viability, it presumably contends that a prospective buyer would not factor potential environmental liability into its bid price, because BP would remain primarily liable for any costs associated with the contamination.

137. Lake County cites to no authority for its claim that the contamination does not have any impact on the market value-in-use of the Parcels simply because the contamination does not actively impair refinery processes. While the experts may have disagreed regarding how to account for contamination in valuing the Parcels, no expert in this case credibly testified that contaminated land has the same utility as pristine land. Put another way, given the choice between usable contaminated land and usable uncontaminated land, a reasonable purchaser would pay more for the latter. *See, Northeast Ct. Economic Alliance, Inc. v. ATC Partnership*, 256 Conn. 813, 776 A.2d 1068, 1081 (2000)("[I]t is a fiction that in an open market, a willing buyer . . . would pay $5 million for [a] contaminated property when he or she could pay $5 million for a nearly identical parcel without contamination."). In fact, even fully remediated land may carry a "stigma" that reduces its market value. *See, Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 92 (Ind. Ct. App. 1995) (citing *In re Paoli R.R. Yard Litigation*, 35 F.3d 717, 796-97 (3rd Cir. 1994)). Moreover, the purchase of contaminated land carries at least some risk of liability. *See Trident Investment Mgmt., Inc. v. Amoco Oil Company*,

194 F.3d 772, 773 & 779 (7th Cir. 1999).[5] Lake County's reliance on BP's primary liability and financial viability as a complete offset to that risk is misplaced. Even if, as Lake County asserts, BP is financially viable today, there is no guarantee that BP will remain so in the future.

138. Lake County further contends that, even if a deduction for environmental contamination were appropriate in a value-in-use appraisal, such deduction should be taken from the value of improvements rather than from the value of land. *Lake County's Post-Hearing Brief, at 30-31.* Lake County points to the fact that both the **[PORTION OF SENTENCE REDACTED]** and the Access Appraisal applied their environmental deductions to improvements. *Lake County Ex.* **[NUMBER REDACTED]**, *at 14-15, 27; BP Ex. 11, at 43, 67.* Lake County further points to Section 6.2 of the *Standard on the Valuation of Property Affected by Environmental Contamination* (2001) ("Assessing Standard") promulgated by the International Association of Assessing Officers ("IAAO"). The Assessing Standard provides that, if an assessor uses the cost approach to judge the impact of contamination, the "cost to cure a problem . . . should be considered a form of functional or economic obsolescence of *improvements*." *Lake County's Post-Hearing Brief, at 31* (quoting Assessing Standard, at § 6.2.1)(emphasis added).

139. In essence, Lake County appears to be arguing that BP waived any claim it might otherwise have had to a reduction in value for contamination by stipulating to the value of the BP Improvements. Such a position is supported neither by the Stipulation of the parties nor by the record as a whole. The undisputed evidence demonstrates that the DLGF's assessment of the subject property did not account for environmental contamination at the subject property. It would be promoting form over substance to deny BP a reduction to the overall value of the subject property to which it otherwise would be entitled simply because that deduction is not applied in what Lake County views to be the most appropriate place.

140. Finally, Lake County contends that, even if environmental contamination has some effect on the market value-in-use of the Parcels, it is impermissible to quantify that effect simply by deducting a taxpayer's projected monitoring or remediation costs from what the Parcels' market value would be absent such contamination. In support of that proposition, Lake County cites to portions of USPAP Advisory Opinion 9 (AO-9) and to *Dana Corp. v. Dept. of Local Gov't Fin.*, No. 49T10-9906-TA-133, 2003 Ind. Tax LEXIS 70 (Ind. Tax Ct. July 25, 2003), an unpublished memorandum decision of the Indiana Tax Court. *See* 792 N.E.2d 634 (denoting *Dana Corp*. as an unpublished memorandum decision).

[5] "Commercial purchasers of real property are acutely aware that they must learn about and protect themselves against liability for any possible environmental contamination that may taint a parcel of land. The rules imposed by statutes such as the Resource Conservation and Recovery Act of 1976 … and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 …, make it clear that an incautious buyer would at least be purchasing a lawsuit, and at most be purchasing a potentially enormous clean-up bill, if it fails to address these risks ex ante." 194 F.3d at 773.

141. Pursuant to the Indiana Tax Court Rules, "[u]nless specifically designated 'For Publication,' such written memorandum decisions shall not be published and shall not be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case." Ind. Tax Court Rule 17. Consequently, Lake County's citation of *Dana Corp.* is a violation of the Rules of the Indiana Tax Court, and the Board cannot rely upon that decision in its analysis.

142. Even if *Dana Corp*. could be viewed as precedent, it is distinguishable from the facts of the instant case. In *Dana Corp*., a fact witness for the taxpayer estimated the cost of remediating the taxpayer's land to be between $3.7 million and $4.6 million. *Dana Corp.*, 2003 LEXIS 70, at * 4-5. The taxpayer argued that such evidence established the effect of the contamination on the subject land and that, because the costs of remediation exceeded the use value of the land, the taxpayer was entitled to a negative influence factor of 95%. *Id*. The Court found that the taxpayer's purported quantification of the effects of the contamination amounted to a mere conclusory opinion and lacked probative value. *Id*. at * 5. In reaching its holding, the Court noted that, although the rules of the State Board of Tax Commissioners ("State Board") did not provide a method for valuing contaminated property, other jurisdictions recognized various techniques for doing so. The Court cited to four cases as examples. *Id.* at * 5, n. 3. In two of those cases, courts upheld valuations of expert witnesses who, like Mr. Manzione in this case, quantified the effects of contamination by subtracting the costs of remediation from the value of the land in an uncontaminated state. *See Commerce Holding Corp. v. Bd. of Assessors of Town of Babylon*, 88 N.Y.2d 724, 673 N.E.2d 127, 131, 649 N.Y.S.2d 932 (N.Y. Ct. App. 1996) (upholding valuation which included deduction for environmental contamination in amount of outstanding cleanup costs); *Westling v. County of Mille Lacs*, 543 N.E.2d 91, 93 (Minn. 1996) (upholding lower court's assignment of zero value to property based upon appraiser's subtraction of costs to cure and "stigma" from value of land as uncontaminated). The Court also cited to two cases in which courts rejected the opinions of experts who based their valuations on subtracting remediation costs from the uncontaminated value of land. *Inmar Assocs., Inc. v. Borough of Carlstadt*, 549 A.2d 38 (N.J. 1988); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001). Thus, the Tax Court did not reject the use of cost of remediation as a method of quantifying the effect of environmental contamination on the market value-in-use of a property out-of-hand. Instead, it required a showing of how such a methodology was related to a property's market value. The Nationwide Appraisal and Mr. Manzione's testimony thus provide what was missing in *Dana Corp*. – expert testimony that such a methodology is an appropriate means by which to quantify the effect of environmental contamination on the market value-in-use of contaminated land.

143. The Court's holding in *Dana Corp*. aside, Lake County also relies upon two of the published decisions cited in *Dana Corp*. in support of its position that deduction of the costs of remediation is impermissible method by which to quantify the effect of environmental contamination on the market value-in-use of land. *Inmar Assocs., supra; Garvey Elevators, supra.* While those cases generally support Lake

County's position, Lake County ignores numerous cases from other jurisdictions adopting a contrary position. *See, e.g., Commerce Holding Corp., supra; Westling, supra; E.I. Du Pont de Nemours & Co. v. Douglas County Bd. of Equalization*, 75 P.3d 1129, 1130-32 (Co. Ct. App 2003)(affirming Board of Equalization's use of cost of remediation as deduction from value of contaminated property); *In re Camel City Laundry Co.*, 123 N.C. App. 210, 472 S.E.2d 402, 407 (1996) (upholding valuation based, in part, on deduction of present worth of amortized costs of cleanup); *B.P. Oil Co. v. Bd. of Assessment Appeals of Jefferson County*, 159 Pa. Commw. 414, 633 A.2d 1241, 1243 (Pa. Commw. Ct. 1993) (finding that the taxpayer. introduced sufficient evidence to overcome prima facie validity of assessment, where appraiser valued property in contaminated state by subtracting cost of curing contamination from unimpaired value of property).

144. The Board agrees that simply deducting the costs of monitoring and maintaining subsoil remediation is an imperfect methodology by which to quantify the effect of environmental contamination on the market value-in-use of contaminated real estate. As the above-cited cases amply demonstrate, however, there is no consensus on what a perfect methodology may be. Even the USPAP advisory opinion cited by Lake County is couched in qualified terms: "the appraiser must recognize that the value of an interest in impacted or contaminated real estate *may not* be measurable simply by deducting the remediation or compliance cost estimate from the opinion of value as if unaffected . . . . The appraiser should also be aware that the market *might not* recognize all estimated costs as having an effect on value." *Advisory Opinion No. 9, DLGF Ex. 1, at 149*(emphasis added).

145. Given this state of uncertainty, the Board finds that Mr. Manzione's quantification is at least some evidence of the effect of environmental contamination on the market value-in-use of the Parcels. Any tendency of Mr. Manzione's methodology to overstate the effect of such contamination may be offset somewhat by the fact that he did not include any deduction based upon environmental "stigma." Moreover, this case does not present the extreme scenario pointed to by Lake County and recognized by some courts, in which deducting the costs of remediation would lead to a negative value for a property that currently is being used to produce income. *See Lake County Post-Hearing Brief Concerning Value in Use of Land, at 29*; *Commerce Holding Corp*, 88 N.Y.2d at 732, n. 5 ("The use of this method would be disfavored, for example, when the property is capable or productive use, but the high cleanup costs yield a negative property value."). In light of the foregoing, and of the fact that neither Lake County nor the DLGF offered any alternative quantification, the Board finds that BP presented sufficient evidence to quantify the effect of the environmental contamination on the market value-in-use of the Parcels.

146. That being said, BP's request that the Board simply deduct **[NUMBER REDACTED]** from the assessed value of the Parcels would result in a windfall to BP. Such a deduction, when combined with the stipulated value of the BP Improvements, would yield a total assessed value **[NUMBER REDACTED]**. BP's own experts, however, estimated the total value of the subject property to be $80,845,000, and

$81,850,000 respectively. In order to avoid such windfall, and in recognition of the fact that a dollar-for-dollar reduction based upon costs of remediation is open to question, the Board finds that the assessment of the Parcels should be reduced by $6,740,800. When combined with the Stipulation of the parties concerning the value of the BP Improvements, this reduces the total assessment of the subject property to an amount equal to, but not below, the overall opinion of value set forth in the Nationwide Appraisal.

4. Conclusion

147. The Access Appraisal suffers from fundamental flaws that render it unreliable as an indicator of the market value-in-use of the Parcels. While the Nationwide Appraisal is more reliable, it does not sufficiently explain its comparable sales analysis. Nonetheless, BP established that the Parcels suffer from environmental contamination that negatively affects their market value-in-use and that the DLGF did not account for such contamination in its assessment of the Parcels. BP further submitted probative evidence to quantify the effect of such environmental contamination upon the market value-in-use of the Parcels. Nonetheless, in order to avoid a windfall to BP that is unsupported by the appraisals and testimony of its own experts, the Board finds that the assessment of the Parcels should be reduced only by the amount of $6,740,800.

E. DLGF's Position:

148**.** The DLGF argues that it reasonably interpreted the relevant statutes and its own rules in assessing the Parcels. Consequently, the Board owes the DLGF's interpretation deference. Moreover, the DLGF argues that BP and Lake County bore the burden of establishing a prima facie case that the DLGF's assessment was unsupported by substantial evidence, was arbitrary or capricious, constituted an abuse or discretion or exceeded the DLGF's statutory authority. *See Department of Local Government Finance's Proposed Findings of Fact and Conclusion of Law on the Issue of Land Value, at 11 ("Lake County Findings").* The DLGF asserts that neither BP nor Lake County met its burden.

F. Discussion of DLGF's Position

149. The Board has already explained its reasons for determining that Lake County failed to sustain its burden of proof. Consequently, the Board need not address the DLGF's specific arguments in that regard. The same is true with regard to the reliability of the appraisals submitted by BP. The Board has already explained its reasons for finding that those appraisals are not reliable other than with regard to the Nationwide Appraisal's treatment of environmental contamination. The Board therefore need not address the DLGF's specific arguments concerning why those appraisals do not establish a prima facie case.

150. Moreover, the Board has already discussed the DLGF's contentions regarding the amount of deference that the Board owes to its interpretation of relevant

statutes and rules and to its factual determinations. *See* ¶¶ 43-44, 134-135, *supra*. As explained above, the Board finds that it does not owe deference to the DLGF's factual determinations, and even if it did, the DLGF's assessment was not reasonable in light of its failure to account for environmental contamination in its assessment of the Parcels.

Issue III

Whether BP is entitled to an equalization adjustment for its 2002 real property assessment

A. BP's Position:

1. Equalization studies

151. The parties presented three sales-assessment ratio studies to the Board: (1) the Cole Layer Trumble Study prepared as part of the general assessment pursuant to the requirements of Ind. Admin. Code tit. 50, r. 14 (the "CLT Study"); (2) the Indiana Fiscal Policy Institute study completed by the firm of Almay Gloudemans Jacobs & Denne (the "IFPI Study"); and (3) the Review and Analysis of Property Tax Equalization in North Township, Lake County, Indiana Regarding 2002 Assessments prepared by BP's equalization expert, Richard H. Hoffman ("Hoffman Report").

152. Neither the DLGF nor Lake County submitted any independent sales-assessment ratio studies to the Board, although the DLGF's expert, Dr. Whorton, did submit a critique of the three studies identified above ("Whorton's Report"). Ultimately, the CLT Study, the IFPI Study and the Hoffman Report found a common level of assessment for improved residential property in North Township of 99.52%, 95.8%, and 90.57%, respectively. *Tr. 1088 (Barrow); DLGF Ex. 4, at 2; BP Ex. 15, at 6; Tr. 943 (Hoffman); BP Ex. 14, at 19.* Additionally, the IFPI Study and the Hoffman Report both indicated that that coefficient of dispersion ("COD") was beyond normally accepted performance standards.

153. Mr. Hoffman first became involved in BP's ongoing appeals out of Lake County when BP's previous expert, Dr. Manson, died prior to the 2002 reassessment. *Tr. 900 (Hoffman).* Mr. Hoffman took Dr. Manson's data, reconstituted it, and found that both he and Dr. Manson had determined that, prior to the general reassessment, the common level of assessment in Lake County was between 20% and 30%. Mr. Hoffman concluded that the reassessment resulted in major improvements, but that the common level of assessment of improved residential property in North Township was still only 90.57 for assessment year 2002. *Tr. 927 (Hoffman).* He further determined that the COD for developed residential property in Lake County was 26.62. *BP Ex. 14, at 12-13.*

154. Mr. Hoffman testified that the next reassessment would begin approximately a decade from the assessment at issue in this matter. *Tr. 909 (Hoffman).* Market values of property in Indiana generally will increase over time, as will corresponding market value-in-use values. *Tr. 911-12 (Hoffman).* Assessment levels,

however, will remain constant until the next reassessment. *Id.* Thus, the common level of assessment will drop steadily until the next reassessment. *Id.* Consequently, Mr. Hoffman engaged in an analysis that was forward looking, gauging circumstances as of the official lien date of March 1, 2002, rather than as of the valuation date of January 1, 1999. *BP Post-Hearing Brief, at 34-35.* This is somewhat different from the purpose of 50 IAC 14, which is to provide a preliminary look at the uniformity in a county before the DLGF passes judgment on an assessor's work. *Tr. 929 (Hoffman).*

155. In developing his study, Mr. Hoffman gathered data reported in the Multiple Listings Service ("MLS") from 2001-2003 and the first quarter of 2004. *Tr. 931-32 (Hoffman).* Mr. Hoffman and Dr. Manson previously had conducted independent studies and determined that the MLS data represented a fair and reasonable place from which to extract a sample. *Id.* By contrast, the CLT Study used solely sales disclosure forms (which both sides acknowledge can be inaccurate) while the IFPI Study utilized both MLS and sales disclosure data. *Tr. 934 (Hoffman).*

156. In addition to determining the common level of assessment, two out of the three sales-assessment-ratio studies presented in this case determined the COD of residential, commercial and industrial property in North Township. The COD is a measure of how uniform the assessments are in relationship to the sales data. It describes how close to the median an assessor's results are. *Tr. 935-36 (Hoffman); Tr. 1059-60 (Barrow).* Generally, an assessor wants a low COD, because the smaller the COD, the more probable it is that property owners are being treated in a uniform and fair fashion. *Id.*

157. Ultimately, Mr. Hoffman found that on March 1, 2002, "the common level of assessment in North Township was 90.57." *Tr. 943 (Hoffman).* He also testified to his belief that the common level of assessment will decrease to about 88.69 for 2003, and will continue to decrease as long as Indiana's market remains approximately "where it is today." *Id.* Mr. Hoffman also found that the COD of 26.62 was unacceptably high and well outside the range set forth in the *Standard on Ratio Studies*, Approved July 1999 International Association of Assessing Officers ("IAAO Standard"), thereby reflecting an unacceptably inequitable treatment of parcels. *Tr. 940 (Hoffman).*

158. The DLGF expressed concerns regarding the Hoffman Study, and BP expressed concerns regarding the CLT Study. The DLGF argued that Mr. Hoffman did not time-adjust the sales upon which he based his study to January 1, 1999, values and that, although Mr. Hoffman's study sample was sufficiently large, he should have taken additional steps to verify his data. *Tr. 1057-58 (Barrow); Tr. 1151-1152 (Whorton).* Similarly, both the DLGF and BP noted that the CLT Study utilized only sales disclosure forms, which can be inaccurate. *BP Ex. 15, at 6-7.* The IFPI Study also found evidence of "sales chasing" in at least two Lake County townships under the CLT study.

159. Both the DLGF and BP, however, acknowledged that the IFPI Study was a "quality work product." *Tr. 919 (Hoffman); Tr. 1165 (Whorton).* In fact, the DLGF's expert, Dr. Whorton, testified that the IFPI Study was "the most reliable" of the three

studies presented to the Board. *Tr. 1165 (Whorton).* The IFPI Study established a common assessment level of 95.8% for residential improved property in North Township. Additionally, the IFPI Study determined that the common assessment level for industrial improved property, the class of property most similar to the subject property, was 82.5%, which is beyond acceptable range under the IAAO Standard. Moreover, the IFPI Study found CODs of 16.5% for residential improved property, 27.6% for commercial improved property and 40.1% for industrial improved property in North Township.

2. Entitlement to equalization adjustment

160. Article 10 section 1 of the Indiana Constitution ("Property Taxation Clause") requires: (1) [u]niformity and equality in assessment; (2) uniformity and equality as to rate of taxation; and (3) a just valuation for taxation. The purpose of these constitutional requirements is to distribute the burden of taxation upon the principles of uniformity, equality, and justice. *Majestic Star Casino, LLC v. Blumemburg*, 817 N.E.2d 312, 328 (Ind. Tax. 2004)(quoting *Florer v. Sheridan*, 36 N.E. 365, 369 (Ind. 1894)). Moreover, the Equal Protection Clauses of the Fourteenth Amendment and the Indiana Constitution would entitle BP to the relief it seeks, even if the Property Taxation Clause did not do so.

161. Two Indiana Supreme Court cases, *Indiana Dep't of Local Gov. Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222 (Ind. 2005) ("*Commonwealth Edison II*) and *Attorney General v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005)("*Miller Citizens"*), also support the propositions that taxpayers are entitled to individualized relief based upon a lack of uniformity and equality of assessments, and that such relief is available for "any inequity." *BP Post-Hearing Brief, at 57-58.*

162. Sales-assessment-ratio studies have long been recognized by Indiana and other states as the appropriate benchmark for measuring the need for equalization. In fact, the DLGF's own regulations require sales assessment ratio studies. *See* 50 IAC 14-2-1. Following the seismic shift in the standard for assessment in Indiana, the relevance of sales-assessment ratio studies cannot be ignored.

163. Thus, it is appropriate to use sales assessment ratio studies prepared in accordance with the IAAO Standard for the purpose of "[adjusting] assessments on appealed property to the common level [of assessment], provided that such level is outside the range of acceptability specified in Section 14.1." *1999 IAAO Standard, Section 2.3.3, BP Ex. 14, app. D at 3*.

164. Collectively, the various requirements under Section 14 of the IAAO Standard make clear that the standard was meant to be applied in various jurisdictions, and that its provisions should be conformed to the requirements of state law. Thus, the IAAO Standard, when conformed to the requirements of Indiana law, entitles a taxpayer such as BP to uniformity and equality of assessments with other taxpayers both within and outside of its property classification. Most importantly, the law allows for redress in connection with *any inequity*. In this case, while the various sales assessment ratio

studies differ somewhat in their specific details and conclusions, the prevailing weight of the evidence demonstrates that several of the performance standards set forth in the IAAO Standard were not met in Lake County as of the 2002 reassessment. Accordingly, it is appropriate in this case that "corrective measures should be taken, or equalization procedures imposed." *BP Post-Hearing Brief, at 64.*

165. While Mr. Hoffman's Report and the IFPI Study reached differing conclusions as to common level of assessment in North Township, they did so only because they time-adjusted sale prices to different dates. In fact, their data are remarkably consistent apart from that difference. Thus, the IFPI Study seems to be the actual common ground on which each of the parties stands.

166. BP acknowledges that the Board would have difficulty dispensing entirely with 50 IAC 14, which contemplates a time-adjustment to January 1, 1999. BP therefore requests an equalization adjustment to conform the assessment of the subject property to the common level ratio for residential real property in North Township, as determined by the IFPI Study.

167. The IFPI Study found that the median assessment ratio was 95.80%, - the one parameter that is within the IAAO Standard's accepted range. However, the IFPI Study found CODs of 16.5% for residential improved property, 27.6 % for commercial improved property and 40.1% for industrial improved property in North Township. All of these figures are well beyond the IAAO's accepted limits. The DLGF has acknowledged that such data call for corrective measures, and even the IAAO Standard provides that when performance standards such as COD are exceeded, "equalization procedures [should be] imposed." *1999 IAAO Standard Section 14, BP Ex. 14, app. D at 33.* Accordingly, equalization is appropriate to correct the inequity demonstrated by the IFPI Study.

168. Thus, BP argues that it established through unrebutted evidence its entitlement to a 4.2% equalization adjustment. This adjustment would conform BP's assessment to the median assessment ratio[6] of 95.8 % established by the IFPI Study.

B. Discussion of BP's Position

1. *Commonwealth Edison case*

169. As noted by BP, the Indiana Supreme Court recently discussed the burden of proof borne by a taxpayer seeking an individualized equalization adjustment. The Court concluded that although taxpayers have no constitutional right to individual equalization, they have a statutory right to show that their "property taxes were higher than they would have been had other property been properly assessed." *Commonwealth Edison II,* 820 N.E.2d at 1226.

[6] BP uses the terms "median ratio" and "common level of assessment" interchangeably.

170. In *Commonwealth Edison II*, the taxpayer compared the assessed values of certain residential and commercial properties in Lake County with the fair market values of those properties and found that such properties were assessed well below fair market value. *Id*. The taxpayer then asserted that the assessed value of its own property, as determined by the State Board, equaled its fair market value. The taxpayer asked for an adjustment to the assessment of its property so that such assessment would bear the same ratio to its fair market value as the ratio of assessed value to market value for other property in Lake County. *Id*.

171. The Court rejected the taxpayer's claim essentially on grounds that the taxpayer was comparing apples to oranges. During the years in question in that case, Indiana did not assess property based upon market value, but rather upon the State Board of Tax Commissioner's regulations. *Id*. at 1229. Thus, if certain classes of property had been "systematically underassessed" as the taxpayer claimed, it was because assessors had determined the true tax value of such property to be less than it would have been had the assessors properly applied the assessment regulations, not because such property was assessed for less than fair market value. *Id.* at 1229-30. Consequently, the taxpayer's use of fair market value as the standard by which to measure uniformity was not relevant to the determination of its entitlement to an adjustment. *Id.* Instead, the taxpayer was required to show that the assessment of the taxpayer's property in proportion to its TTV was not uniform and equal to the assessed valuation of other taxable property in the County in proportion to the TTV of that property. *Id*. at 1230.

172. Under Indiana's current system, however, true tax value is defined as "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference at 50 IAC 2.3-1-2). Thus, it appears that a taxpayer asserting the type of claim contemplated under *Commonwealth Edison II* must determine the ratio of the subject property's assessment to its market value-in-use and compare that ratio to the ratio of assessment to market value-in-use for other property in the geographic area being examined.

2. <u>BP's position</u>

173. BP relies upon two equalization studies in support of its claim – the Hoffman Report and the IFPI study.[7] In light of BP's ultimate request, which is based upon the findings contained in the IFPI Study, the extent to which BP continues to rely upon the Hoffman Report is unclear. Nonetheless, BP devoted a significant amount of time to Mr. Hoffman's report both in its post-hearing brief and at the hearing in this matter. The Board therefore addresses both the Hoffman Report and the IFPI Study.

a *The Hoffman Report*

[7] BP also introduced evidence of the assessed value of neighboring properties. *BP Rebuttal Ex. 1*. BP, however, did not introduce any evidence that those assessed values were lower than the true tax values of the neighboring properties. In fact, BP's witness on this issue testified that he assumed the assessed values of those properties equaled their market values- in-use. *Tr. 1040-41 (Nichols)*.

174. The Board finds that the Hoffman Report does not establish a prima facie case that BP is entitled to an equalization adjustment. The Board makes this finding for essentially two reasons. First, the Hoffman Report does not time-adjust the sale prices used in its analysis to the relevant valuation date of January 1, 1999. Second, the report calculates a common level of assessment that is within the range of acceptability under the IAAO Standard.

i. *Failure to adjust sales to January 1, 1999, values*

175. Under *Commonwealth Edison II*, a taxpayer seeking an equalization adjustment based upon a disparity in assessment ratios must use ratios that compare assessments to true tax value ("TTV"). *See Commonwealth Edison II*, 820 N.E.2d at 1230. TTV for the March 1, 2002, assessment at issue in this case is based on a property's market value-in-use as of January 1, 1999. MANUAL at 4; *Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005); *see also, Lake County Ex. 10, at 12; Tr. 1051-52 (Barrow).* Consequently, in order to engage in a meaningful comparison for purposes of equalization, both the numerator (assessed value) and the denominator (TTV) in the ratios being compared must be based upon January 1, 1999, values.

176. Mr. Hoffman used sales data from 2001-2003 and the first quarter of 2004 in preparing his report. He did not adjust those sale prices to reflect January 1, 1999, values.[8] *Tr. 1005-06, 1008 (Hoffman)*. Mr. Hoffman, however, compared those unadjusted sale prices to assessments based on a January 1, 1999, valuation date in calculating a common level of assessment (median ratio) for improved residential property in North Township. *BP Ex. 14, at 4. Tr. 1005 (Hoffman).* He did so because he aimed his study at comparing assessments to "full value" on the "tax lien date March 1, 2002." *BP Ex. 14, at 4. See also Tr. 1005 (Hoffman).*

177. Mr. Hoffman therefore compared assessments to "full value" - a value concept different from TTV. As explained above, this is precisely the type of analysis rejected by the Supreme Court in *Commonwealth Edison II*.[9] *Tr. 1055, 1070 (Barrow)*. Moreover, Mr. Hoffman's methodology also violates the very IAAO Standard upon which he relied in preparing his report. Mr. Barrow, who in addition to being a member of the IAAO has taught the IAAO course on equalization, testified that to be consistent with the IAAO Standard, one would need to collect sales around the time of the assessment valuation date, January 1, 1999, or to consider time-adjusting sale prices for sales occurring at a later date. *Tr. 1046, 1053 (Barrow).* Dr. Whorton, who was involved

[8] To the extent that he did adjust sale values in any of his calculations, Mr. Hoffman adjusted those values to March 1, 2002. *Tr. 1008 (Hoffman); BP Ex. 14, app. B at 2.*

[9] To the extent BP is challenging the use of the January 1, 1999, valuation date in the definition of True Tax Value, BP has waived that challenge because it did not raise that challenge in its petitions. In any event, there is no basis for such a challenge. "True tax value does not mean fair market value." Ind. Code. § 6-1.1-31-6(c); 6-1.1-31-7(d). True tax value is the "value determined under the rules" of the DLGF. I.C. § 6-1.1-31-6(c). The Indiana Constitution circumscribes the power of the DLGF to define true tax value by ensuring that true tax value provides a meaningful measure of property wealth. *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998). The evidence is undisputed that time adjustments of assessments to January 1, 1999, are based on meaningful data related to real world value used all the time by appraisers. *See Tr. 1096 (Hoffman)*

in drafting the IAAO Standard, agreed. *Tr. 1123-24, 1151 (Whorton); see also, DLGF Ex. 7, at 13-14*.

178. BP attempts to justify Mr. Hoffman's use of unadjusted sale prices on grounds that the common level of assessment decreases each year between general reassessments. This is because property generally increases in value over time while assessments remain static at 1999 values. According to BP, the requirement that Indiana's system of property taxation reflect "real world values" is a continuing one, and taxpayers are entitled to equalization adjustments as the common level of assessment continues to drop – that is to say as market values become further and further divorced from January 1, 1999, values.

179. Even if BP were correct in its interpretation of the requirements of Indiana law on this point, that interpretation would be of little use to BP in this case. First, as discussed *infra*, the 90.57% common level of assessment found by Mr. Hoffman falls within the permissible range under both the IAAO Standard and 50 IAC 14. Consequently, BP would not be entitled to an equalization adjustment even if Mr. Hoffman were correct in not adjusting sale prices to January 1, 1999, values. Moreover, it is not entirely clear that Mr. Hoffman's premise – that property values in Lake County will continue to increase thereby causing the common level of assessment to decrease each year – holds true. Kurt Barrow testified that residential property taxes increased for the Northern one-third of Lake County following the 2002 reassessment. *Tr. 1098 (Barrow)*. Mr. Barrow indicated that the DLGF had heard talk from realtors that the tax increases had negatively impacted values, although he acknowledged that he had not yet seen any "quantitative number" showing that impact. *Tr. 1099 (Barrow)*.

180. Second, it is likely that the assessment to "full value" ratio of the subject property would be less than 100% if, like the other properties examined by Mr. Hoffman, its "full value" were viewed from the perspective of March 1, 2002. In the Access Appraisal, BP's own witness used a factor of 91.89% to adjust his appraisal from a value on March 1, 2002, to a value as of January 1, 1999. *BP Ex. 11, at 69-70*. Thus, using BP's own evidence, the ratio of assessment to "full value" for the Parcels would have been within 1.5% of the common level of assessment found by Mr. Hoffman.[10]

181. Finally, BP's use of 90.57% as the benchmark for its proposed equalization adjustment is not even supported by the testimony and report of its own expert. That figure is what Mr. Hoffman found to be the common level of assessment when he used sales solely from 2002 without adjusting those sale prices to reflect March 1, 2002, values. When Mr. Hoffman used a larger sample – sales from 2002 through the first quarter of 2004 - and actually adjusted the sale prices to March 1, 2002, values, he found a common level of assessment of 99%. *Tr. 1008-09 (Hoffman)*; *BP Ex. 14, app B at 2*.

[10] Interestingly, BP did not seek to apply its proposed equalization adjustment to the March 1, 2002, market value-in-use of the subject property. Instead, it asked the Board to multiply Mr. Hoffman's common level of assessment (90.57%) by what it deemed to be the market value-in-use of the subject property as of January 1, 1999. *See, BP Ex. 16*; *see also BP Post-Hearing Brief, at 67*.

ii. *The common level of assessment is within the range permitted by the IAAO Standard*

182. Even if one takes Mr. Hoffman's conclusions at face value, it is not self evident that they support BP's claim for an equalization adjustment. Mr. Hoffman arrived at a common level of assessment for improved residential property within North Township of 90.57%. The DLGF and Lake County argue that such a level is within the range permitted by 50 IAC 14-6-1(a) and the IAAO Standard, and that BP therefore is not entitled to any adjustment. BP, however, argues that such a reading of the IAAO Standard is unduly technical. According to BP, an individual taxpayer is also entitled to an equalization adjustment under the IAAO Standard whenever the COD for a class of property exceeds the range specified by that standard. Moreover, BP argues that the IAAO Standard must be applied in conformance with the laws of individual jurisdictions – something the IAAO Standard itself explicitly recognizes. According to BP, both Indiana law and the United States Constitution entitle a taxpayer to an equalization adjustment to correct *any inequity* - not just common levels of assessment that fall outside of the range permitted under the IAAO Standard. *See BP Post-Hearing Brief, at 63-64*.

183. To answer this question, it is first necessary to determine more precisely what a taxpayer must prove in order to demonstrate its entitlement to an equalization adjustment. In *Commonwealth Edison II*, the Indiana Supreme Court laid to rest any doubt regarding whether an individual taxpayer is entitled to base a claim on grounds that its taxes "were higher than they would have been had other property been properly assessed." 820 N.E.2d at 1226-27. The Court found that for a utility such as Commonwealth Edison, Indiana Code Section 6-1.1-8-30 provided such authority, and that Indiana Code Section 6-1.1-15 provided that authority for taxpayers generally. *Id*. As discussed *supra*, the Court also shed light on the tools (ratios of assessments to TTVs) with which a taxpayer bringing such a claim show a lack of uniformity and equality in assessments. The Court, however, did not answer the question of what, if any, particular level of inequality would entitle a taxpayer to relief or specifically how that relief should be quantified. The statutes to which the Court cited for the proposition that individual taxpayers may bring claims based upon inequity of assessment govern appeal procedures generally and shed little if any light on those questions.

184. The DLGF points to its equalization rule (50 IAC 14) and BP points to the IAAO Standard as supplying the answer to this important question. It is not entirely clear, however, that the cause of action recognized by the Indiana Supreme Court in *Commonwealth Edison II* – the right to an adjustment where a taxpayer's tax liability is higher than it would have been had other property been assessed properly - is the same as "equalization" in the sense discussed by the IAAO Standard and the DLGF's equalization rule.[11] In fact, the *Commonwealth Edison II* Court appeared to endorse the position that

[11] While the DLGF's equalization rule and the IAAO Standard are designed to measure the accuracy and uniformity of assessments, they do not necessarily measure the specific effect of the lack of accuracy or uniformity on an individual's tax burden. For example, the primary calculation relied upon by BP as the measure for its requested "equalization adjustment" is the median assessment ratio or, as BP refers to it the "common level of assessment." Under the IAAO Standard, however, the "median ratio" is simply a measure of central tendency. *BP Ex. 14, App. D at 19.* That ratio "is the middle ratio when the ratios are arrayed in order of magnitude." *Id.* It says nothing about the total amount of

the statute and administrative rule on equalization proceedings (Indiana Code Section 6-1.1-14-5 and 50 IAC 14) govern class-wide relief only and do not authorize a taxpayer to seek an individualized adjustment to its assessment. *See* 820 N.E.2d at 1226.

185. Nonetheless, the *Commonwealth Edison II* Court recognized that a taxpayer might establish entitlement to an adjustment through comparing the ratio of assessment to TTV for its property to the ratio of assessment to TTV for other property in the county. *Id.* at 1230. That is largely what both the DLGF's equalization rule and the IAAO Standard measure. Thus, although the DLGF's equalization rule does not set forth the *procedures* to be used for addressing individualized claims for equalization, that rule and the IAAO Standard incorporated therein, provide at least one substantive measurement by which a taxpayer may prove its entitlement to an adjustment. Put another way, the DLGF's equalization rule and the IAAO Standard provide the level by which to measure when a statistical disparity results in an actionable lack of uniformity and equality in assessment.

186. Consequently, the Board finds that a taxpayer such as BP may demonstrate entitlement to an adjustment of its assessment under Indiana law where it would be entitled to such an individualized adjustment under the IAAO Standard. If a taxpayer relies upon the IAAO Standard, however, the taxpayer is bound by the limitations of that standard. Thus, a taxpayer is not entitled to an adjustment to correct statistical disparities where the IAAO Standard itself does not call for such adjustment.[12]

187. The Board rejects BP's arguments to the contrary. BP relies upon the following statement from *State ex rel. Attorney General v. Lake Superior Court* 820 N.E.2d 1240 (Ind. 2005)(*"Miller Citizens")*: "[T]he law permits an appeal of a property owner's assessments even if the basis of that appeal is an incorrect assessment of other properties. The law thus affords a remedy for *any inequity*." 820 N.E.2d at 1254 (citing *Commonwealth Edison II*, 2005 Ind. LEXIS 31 *6)(emphasis added). At most, that statement is *dictum*. Moreover, it does not necessarily even support the proposition for which BP cites it. The Court made that statement in the context of addressing whether Ind. Code Section 6-1.1-4-35 (2004) could act as curative legislation allowing the DLGF to conduct the reassessment of Lake County despite the purported unconstitutionality of Ind. Code Section 6-1.1-4-32 (2004). *Miller Citizens*, 820 N.E.2d at 1253-1255.[13] The

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assessed value represented by properties assessed above or below the median ratio. Thus, proof that common level of assessment of residential property is 90.57% may say something about the lack of accuracy an overall assessment, but it does little to *quantify* the effect of such inaccuracy on a given taxpayer's tax burden. The same is true with regard to the COD – the other statistical measurement upon which BP rests its claim.

[12] This would not prohibit a taxpayer from showing, through other means, that comparatively lower assessments of other property caused its tax liability to be higher than it would have been had that other property been properly assessed. Mr. Hoffman's report, however, does not address that question. As explained in the preceding footnote, the median ratio and COD are not particularly useful statistics by which to measure the effect of the assessment of other properties on the tax burden of the subject property. Moreover, Mr. Hoffman focused almost exclusively on single-family residential sales. While those sales may represent the majority of sales transactions in North Township, Mr. Hoffman agreed that they would not produce most of North Township's assessed value. *Tr. 1193 (Hoffman).* Thus, any underassessment in residential real estate could have been balanced by an over assessment in other classes of real property.

[13] The statement at issue is contained in what amounts to a plurality decision on the question of whether Ind. Code § 6-1.1-4-35 amounts to curative legislation. Two members of the Court did not reach that question, and one dissented. *See Miller Citizens*, 820 N.E.2d at 1257 (Sullivan, J., concurring), 1259-61 (Rucker, J., dissenting).

Court simply was contrasting the effect on Lake County of allowing an equalization adjustment as a remedy to an individual taxpayer with the effect of upsetting the entire fiscal structure of Lake County, which, in the Court's eyes, could have been the result if the Ind. Code Section 6-1.1-4-35 were not viewed as curative legislation. *Id.* at 1254-55. The Board therefore does not read the Court's use of the term "any inequity" as passing upon the question at issue in this case.

188. The Board finds BP's general citation to the Indiana and United States constitutions equally unavailing. The *Commonwealth Edison II* Court explicitly rejected the notion that the Property Taxation Clause of the Indiana Constitution entitles an individual taxpayer to the relief sought by BP in this case. The Court reiterated its earlier holding in *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998)("*Town of St. John V*") that "the Property Taxation Clause of the Indiana Constitution does not establish a substantive right to individual assessments evaluating property wealth, nor does it mandate the consideration of independent property wealth evidence in individual tax appeals." *Commonwealth Edison II*, 820 N.E.2d at 1227 (quoting *Town of St. John V*, 702 N.E.2d at 1043). Thus, the *Commonwealth Edison II* Court held that "*while there is no state constitutional right to 'an equalization adjustment,*' a taxpayer is not foreclosed from pursuing any equalization adjustment provided by existing statute or regulation." 820 N.E.2d at 1227 (emphasis added).

189. BP's argument under the Equal Protection Clauses contained in Article 1 section 23 of the Indiana Constitution and the Fourteenth Amendment to United States Constitution fares no better. As an initial matter, BP does not make an argument under Ind. Const. Art. 1 § 23 separate and apart from its argument under the Fourteenth Amendment. The Indiana Supreme Court, however, has explained that, "[t]here is no settled body of Indiana law that compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under Indiana Section 23 and that Section 23 should be given independent interpretation and application." *Collins v. Day* 644 N.E.2d 72, 75 (Ind. 1994). Consequently, BP has waived its state constitutional argument. *See Brown v. State* 744 N.E.2d 989, 995 (Ind. Ct. App. 2001)("Brown, having not provided this court with a separate analysis of the state equal protection challenge, has thereby waived his state constitutional argument."). As to BP's argument under the Fourteenth Amendment, the Tax Court rejected a similar claim in *Commonwealth Edison I*, a holding left untouched by the Indiana Supreme Court in *Commonwealth Edison II*. *Commonwealth Edison v. Dep't of Local Gov't Fin. ("Commonwealth Edison I")*, 780 N.E.2d 885, 887, n.2 (Ind. Tax Ct. 2002); *Commonwealth Edison II*, 820 N.E.2d at 1228.

190. The Board therefore must determine whether the IAAO Standard entitles an individual taxpayer to an adjustment where the median ratio of assessment of one class of property within a township is 90.57%. The Board finds that it does not.

191. Section 2.3.3 of the IAAO Standard provides that a ratio study may be used to adjust assessments on appealed properties to the common level of assessment (median ratio) within an appropriate stratum, "provided that such level is outside of the

range of acceptability specified in section 14.1." *BP Ex. 14, app. D at 3.* Section 14.1, in turn, provides that for direct equalization, "the overall level of appraisal of the jurisdiction and each major class of property . . . should be between 0.90 and 1.10 (within +/- 10 percent of the statutorily required level of assessment) . . . although jurisdictions may set more stringent standards" *BP Ex. 14, app D at 34.* Thus, the IAAO Standard, on its face, does not call for an adjustment to an individual parcel based upon a common level of assessment (median ratio) of 90.57%.

192. BP, however, argues that the IAAO Standard also calls for equalization measures to be taken when the COD falls outside the parameters established under Section 14.1. *BP Post-Hearing Brief at 62-63.* Mr. Hoffman determined a COD of 26.62 for residential improved property in North Township based upon 2002 sales. This exceeds the acceptable level of 15.0 set forth in the IAAO Standard. *BP Ex. 14 at 12; BP Ex. 14, app. D at 35*. BP argues that the IAAO Standard therefore permits the application of an equalization adjustment to the subject property.

193. BP is mistaken in its reading of the IAAO Standard. The IAAO Standard does contemplate equalization measures when CODs for various classes of property fall outside of specified ranges. Those measures, however, involve reappraisal of properties within the nonconforming classifications; they do not include the application of adjustment factors to bring individual properties to the median ratio. *See IAAO Standard Section 14.2, BP Ex. 14, app. D at 35* ("Assuming the existence of an adequate and representative sample, if the uniformity of appraisal is unacceptable, *reappraisal* should be undertaken regardless of the level of appraisal.") (emphasis added).

194. This makes sense in light of the differences between what the median ratio and the COD actually measure. The median ratio is a measure of central tendency indicating that there are as many ratios above the median point as below it. *See IAAO Standard Section 7.3.1, BP Ex. 14, app. D at 21.* The COD, by contrast, measures, "the average percentage deviation from the median." *Section 15 IAAO Standard, BP Ex. 14, app. D at 37*. Where a COD is low, adjustment of an individual property's ratio of assessment to the median ratio tends to promote uniformity and equality because other assessments within the classification, on average, are closely related to that ratio. Where the COD is high, however, adjustment of a subject property's ratio to the median ratio is simply an adjustment to a point, with little guarantee that the property is being treated similarly to most other properties within a classification. *See Tr. 1154 (Whorton)*("If the COD is outside the loop, it really suggests a lot of the variability, the trending is not going to do it, so it doesn't matter where the median is per se.").

b. IFPI Study

195. Apparently in recognition of the above described problems with Mr. Hoffman's report, BP argues that: "[a]t the end of the day . . . Mr. Hoffman's Report and the IFPI Study, in particular, both tell the same story; that is, while they reached differing conclusions as to common level ratio in North Township, they did so only because they time-adjusted to different dates, and in fact, their data is remarkably consistent apart from

that difference." *BP Products North America Inc.'s Post-Hearing Brief at 66*. Thus, BP argues for an adjustment based upon the common level of assessment for residential property in North Township reported by the IFPI Study. *Id.*

196. As an initial matter, BP's position is somewhat inconsistent with the testimony of its own expert, who expressed concerns both with the IFPI Study's use of sales disclosure forms as its source for sales information and with its exclusion of "multiple sales." *See Tr. 921-24 (Hoffman)*. Regardless, BP's reliance on the IFPI Study fails because that study finds a countywide common level of assessment for improved residential property of 96.5%, as well as a common level of assessment for improved residential property within North Township of 95.8%. *BP Ex. 15, at 6-7*. Each of those numbers is within the range allowable under the IAAO Standard. Moreover, while the IFPI study found COD's for each of those classifications that do not meet IAAO standards, the IAAO does not call for individualized adjustments to correct such disparities. *See* ¶¶ 193-94, *supra*. BP also cites in passing Dr. Whorton's breakdown of the IFPI Study, in which he found a common level of assessment of 82.5% for industrial improved property. *DLGF, Ex. 7, at Table 1, Part A.* Notably, that figure appears to have been based upon a total of three (samples), and Dr. Whorton listed a COD of 40.1, a figure well outside the allowable range under the IAAO Standard. Thus, like the Hoffman Report, the IFPI Study does not identify a disparity for which the IAAO Standard recognizes the adjustment of individual assessments as a remedy.

197. Based on the foregoing, BP failed to establish a prima facie case of entitlement to an "equalization adjustment."

C. DLGF/Lake County's Position

198**.** As explained above, the Board finds that BP failed to establish a prima facie case of entitlement to an equalization adjustment. Consequently, the Board need not address the claims of the DLGF and Lake County in opposition to BP's request.

VI. CONCLUSIONS

Issue I

Whether the Department of Local Government Finance's use of the Deloitte & Touche Study denied BP due process

199. The Board finds that the DLGF's use of the Deloitte & Touche Study did not deprive BP of due process of law. BP premises its argument on the fact that, pursuant to the Protective Order regarding the Deloitte & Touche Study, it was limited in its access to and use of the very document upon which the DLGF based its assessment of the Parcels. BP, however, voluntarily entered into those agreements. To the extent that they deprived BP of any rights, that deprivation is of BP's own making.

Issue II

Whether the Department of Local Government Finance properly assessed the land value of the Parcels at $28,250,100

200. Lake County met its burden of production by coming forth with evidence, which if not impeached or contradicted, would be sufficient to entitle it to relief. Nonetheless, based upon the evidence as a whole, including detailed impeachment both of Lake County's appraisal and of the testimony of its appraisers, the Board finds that the appraisal lacks sufficient reliability and credibility to establish an error in assessment.

201. BP similarly met its burden of production by coming forth with evidence, which if not impeached or contradicted, would be sufficient to entitle it to relief. Based upon the evidence as a whole, including detailed impeachment of the two appraisals submitted by BP and the testimony of its appraisers, the Board finds that the appraisals are not sufficient to establish the market value-in-use of the Parcels in an uncontaminated state.

202. The Board, however, finds that the DLGF's assessment of the Parcels is in error to the extent that it fails to account for the effect of environmental contamination on the market value-in-use of the Parcels. The Board further finds that BP presented sufficient evidence to quantify the effect of such contamination on the market value-in-use of the Parcels. The Board, however, does not allow the full amount of that deduction as quantified by BP's expert, because to do so would result in an overall value for the subject property that is substantially less than the amount determined by either of BP's expert witnesses. Consequently, the Board finds that BP is entitled to a reduction of $6,740,800 from the current assessment to account for the effects of contamination.

Issue III

Whether BP is entitled to an equalization adjustment for its 2002 real property assessment

203. BP failed to establish a prima facie case of entitlement to an equalization adjustment. The study conducted by BP's equalization expert, Richard H. Hoffman, suffers from numerous shortcomings, including the fact that Mr. Hoffman compared assessed values to non time-adjusted sale prices in determining a common level of assessment for residential property in North Township. Moreover, even if Mr. Hoffman's methodology were otherwise sound, he found a common level of assessment that was within the acceptable range under the IAAO Standard. While Mr. Hoffman found a coefficient of dispersion that was outside the acceptable range specified in the IAAO Standard, the IAAO Standard does not call for such a lack of uniformity to be corrected by adjustments to individual assessments.

204. BP also relies upon the IFPI Study, which found a common level of assessment of 95.8% for improved residential property in North Township. Once again, that falls within the acceptable range under the IAAO Standard. Consequently, the IFPI Study does not support BP's claim for an equalization adjustment.

205. For the reasons stated above, the BP Petitions are granted in part and denied in part. Lake County's Petition is denied in its entirety.

IT IS THEREFORE ORDERED**,** that the land portion of the assessment of the Parcels be reduced to a total of $21,509,300.

_____ _____

Date Terry G. Duga, Commissioner
Indiana Board of Tax Review

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Trial Rules are available on the Internet at <http://www.in.gov/judiciary/rules/trial_proc/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.

Appendix A—Lake County's Exhibits

EXHIBIT	DESCRIPTION	IDENTIFIED/ADMITTED TRANSCRIPT PAGE
2	**Preliminary Certification dated 12/17/03**	12
3	**Karras Letter dated 1/29/04**	13
4	**Final Determination dated 3/1/04**	15
5	**Form 139L dated 3/26/04**	16
6	**Letter of County Assessor dated 3/26/04**	17
7	**Refinery Technical Tour Outline**	198
8 all	**Whiting Business Unit**	198
9-a to e	**BP Whiting Refinery Web Pages**	198
10	**2002 Real Property Assessment Manual**	46
11	**Complete Summary Appraisal by Kulik**	42
12	**DLGF Report dated July 2004**	95
13	**Deloitte & Touche Vol. I dated 7/16/98**	199
14	**Deloitte & Touche Vol. II dated 7/16/98**	200
15	**Deloitte & Touche Vol. IV dated 7/16/98**	200
16	**Corrective Action Agreed Order**	200
17	**Financial Assurance docs dated 3/25/02**	200
18	**BP's Response to Second Set of Interr.**	201
19	**Permit Application dated 5/15/94**	201
24A	Solo Cup Special Warranty Deed	Identified at 672, admitted as part of Kulik's report which is exhibit 11
27A	Preliminary Analysis BP Amoco Refinery Whiting Facility File No. 7143	Identified at 593

Appendix B—BP's Exhibits

EXHIBIT	DESCRIPTION	IDENTIFIED/ADMITTED TRANSCRIPT PAGE
1	**Indiana Property Assessment Guidelines**	405
2	**Indiana 2002 Property Assessment Manual**	405
3	**DLGF Valuation of Lake County Facilities Greater than $25M in Value for the 2002 General Assessment, July 2004**	410
4	**International Appraisal Co. Appraisal Review**	286
5	**Amoco, Whiting Indiana Property Map**	416
6	**DVD Tour of Parcels**	416
7	**Letter from Charles Raynal to Hamish Cohen dated 12/1/04 with Document Production 00867 to 01029**	116
8	**Letter from Cohen to Raynal dated 11/11/04**	740
9	**Nationwide Consulting Complete Appraisal of BP Whiting Refinery**	581 and 629
10	**Solo Cup Company Redevelopment Agreement**	657
11	**Tillema Summary Appraisal Report of Complete Appraisal Analysis**	467
14	**Hoffman Review and Analysis of Property Tax Equalization**	899
15	**Indiana Property Tax Equalization Study dated 2/19/05**	918
16	**Equalization Calculation**	981
27	**Comparative Real Estate Market Statistics**	963
28	**Summary of Assessed Values for Industrial Properties in North Township in Close Proximity to BP's Whiting Refinery**	1040-41
29	**USGS Survey Data of BP Facility (available from the Internet)[14]**	972
30	**Volumes I and II of Dr. Whorton's Deposition**	1172
Rebuttal 1	**Printed Pages from Lake County's Assessor's Web Site**	27

[14] This is the description used by BP and Lake County in their post-hearing submissions. BP's describes the exhibit as "Satellite Maps of property adjacent to BP Products North America's real property at issue" on it exhibit list. *See BP Products North America's Equalization Exhibits*.

Rebuttal 2	Equalization Rule – 50 IAC 14-1-1	Identified at 1084

Appendix C—DLGF's Exhibits

EXHIBIT	DESCRIPTION	IDENTIFIED/ADMITTED TRANSCRIPT PAGE
1	**USPAP**	196
A	**Confidential Ispat Document**	830
4	**CLT's Equalization Study**	1064
5	**Crowe Chizek's Report**	1067
6	**Whorton Curriculum Vitae**	1101
7	**Whorton's Review and Analysis of Three Property Tax Equalization Ration Studies**	1113

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