ORIGINAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

May 10, 2007

The Honorable Dorothy Gunn
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. CSX Transportation, Inc.***
PCB No. 07-16

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a Notice of Filing and Reply Brief to Respondent's Response to Complainant's Cross Motion for Summary Judgment in regard to the above-captioned matter. Please file the originals and return file-stamped copies to me in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

Kristen Laughridge Gale
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

KLG/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant, ORIGINAL	)	
vs.	)	**PCB No. 07-16**
	)	**(Enforcement)**
CSX TRANSPORTATION, INC., a Virginia corporation,	)	
Respondent.	)	

NOTICE OF FILING

To: David L. Rieser
Jeremy R. Hojnicki
McQuire Woods, LLP
77 West Wacker Drive
Suite 4100
Chicago, IL 60601

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, REPLY BRIEF TO RESPONDENT'S RESPONSE TO COMPLAINANT'S CROSS MOTION FOR SUMMARY JUDGMENT, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
KRISTEN LAUGHRIDGE GALE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: May 10, 2007

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that I did on May 10, 2007, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and REPLY BRIEF TO RESPONDENT'S RESPONSE TO COMPLAINANT'S CROSS MOTION FOR SUMMARY JUDGMENT

To: David L. Rieser
Jeremy R. Hojnicki
McQuire Woods, LLP
77 West Wacker Drive
Suite 4100
Chicago, IL 60601

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

Kristen Laughridge Gale
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ORIGINAL

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**No. PCB 07-16**
	)	**(Enforcement)**
CSX TRANSPORTATION, INC., a Virginia corporation,	)	
	)	
	)	
Respondent.	)	

REPLY BRIEF TO RESPONDENT'S RESPONSE TO COMPLAINANT'S CROSS MOTION FOR SUMMARY JUDGMENT

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois ("People"), pursuant to Section 101.500 of the Illinois Pollution Control Board's ("Board") Procedural Rules, 35 Ill. Adm. Code 101.500 and by leave of the Board Hearing Officer, hereby replies to arguments and statements by the Respondent, CSX TRANSPORTATION, INC., in their Response Brief dated April 30, 2007:

a) Remediation of the diesel fuel release was remediated almost two years after the release, causing and threatening water pollution and creating a water pollution hazard.

Respondent asserts the untenable position that the diesel fuel release was remediated four months after the release of diesel fuel. As Respondent's own exhibit A shows, constituents of the diesel fuel, benzo (a) pyrene, benzo (b) fluoranthene, and indeno (1,2,3-cd) pyrene, were left in the soil at the diesel spill location in October 2004. In fact, the soil sample exceeded the Tier 1 soil remediation objective for industrial/commercial ingestion for benzo (a) pyrene. Then Respondent did nothing at the site for over nine months. By leaving contamination at the site

for over a year after the release, Respondent left contaminants in such proximity and quantity to the groundwater that they threatened the groundwater and potentially rendered the it harmful. Therefore, Respondent threatened and caused water pollution of the groundwater.

The TACO standards were created to set forth standards to evaluate the risk to human health and for adequate protection of the environment. 35 Ill.Adm.Code 742.100. In developing the remediation objectives, one of the key elements addressed is exposure routes, including groundwater ingestion. 35 Ill.Adm.Code 742.115. The groundwater ingestion exposure route includes migration from soil to groundwater. *Id.* The regulations therefore not only recognized that contaminants can migrate from soil to the groundwater, but based the remediation objectives upon that fact. Therefore, no affidavit supporting the statement that the presence of the contaminates in the silty soil where the groundwater is recorded at 2 to 3 feet below level surface (bls) is required. By the very nature that the soil sample contained contaminates above the TACO standard, there was a risk to the environment, specifically the groundwater. If however, the Board finds that an expert is required to show that the contaminants Respondent left in the soil migrated to the groundwater located at 2 to 3 feet bls, then the Board must find there is a material issue of fact.

The assertion that the groundwater samples taken by Respondent showed no contamination and therefore there was no contamination holds no merit. The groundwater samples were taken in October 2005, over a year after the release occurred. Therefore, the sample results merely show that the contaminates were no longer in the groundwater a year after the release of diesel fuel.

In *Jerry Bliss v. Environmental Protection Agency*, 138 Ill.App.3d 699, 704, 485 N.E.2d 1154, 1157 (1985), the Court stated that there was no effort by the State to show that the presence of the pollutants was likely to render the waters harmful. The People have made that

effort in this case. Respondent is improperly limiting the statutory language under the Act and the case law interpreting it. In *Bliss,* and other cases interpreting Section 12(a), including *People of the State of Illinois v. John Chalmers d/b/a John Chalmers Hog Farm*, PCB 96-111 (January 6, 2000), the standard is "likely to render the waters harmful." Contrary to Respondent's assertions, there is no requirement that there be evidence of contamination of waters of the State. What is required is evidence that contamination is present in sufficient quantity or concentration to likely create a nuisance or render the waters harmful, detrimental, and injurious. *Bliss* 138 Ill.App.3d at 704. Furthermore, the language in Section 12(a), 415 ILCS 5/12(a), states that "no person shall cause or threaten or allow the discharge of any contaminants into the environment..." The People have pled that "residual contamination of soil and/or subsurface strata may be a continuing source of further releases to the waters of the State, including groundwater" and that by releasing the diesel fuel, Complainant threatened and caused water pollution. Complainant's complaint, p. 3-4. People have shown that diesel fuel was released into the environment, that Respondents left constituents of the diesel fuel in the environment for over a year, that groundwater is located 2 to 3 feet below surface level and the soil is silty sand from 2 to 6 feet. The People have shown that Respondent had a release in such proximity and concentration potentially rendering the waters harmful, and threatening water pollution.

The severity of a release of diesel fuel is not a factor in determining a violation, and any assertion must be disregarded. The Act does not allow for a gradation of harm in evaluating whether a violation occurred. *ESG Watts, Inc. v. Illinois Pollution Control Board,* 282 Ill.App.3d 43, 668 N.E.2d 1015 (1996). That analysis is only proper for determining the size of the penalty. *Id.* By causing or allowing a release of diesel fuel and then knowingly leaving constituents of the fuel, benzo (a) pyrene, benzo (b) fluoranthene, and indeno (1,2,3-cd)

pyrene, in the soil, Respondent threatened water pollution. Therefore, Respondent threatened, caused or allowed water pollution in violation of Section 12(a) of the Act, 415 ILCS 12(a).

Respondent's statement that *Tri-County Landfill Co. v. Illinois Pollution Control Board*, 41 Ill.App.3d 249, 258, 353 N.E.2d 316, 324 (1976) stands for the position that it must be shown that there is actual groundwater contamination is a misrepresentation of that case. In fact, the court in *Tri-County* rejected the landfill's assertion that the Illinois EPA show that pollution of a lower aquifer will occur. *Id.* The Court held that a water pollution hazard, under Section 12(d) of the Act, 415 ILCS 12(d), is where "the conduct may endanger the safety of the citizens" and there is no assurance that it will not, although a change in conduct could make that assurance forthcoming. In this case, Respondent released 400-500 gallons of diesel fuel and then knowingly left constituents of the fuel, benzo (a) pyrene, benzo (b) fluoranthene, and indeno (1,2,3-cd) pyrene, in the soil for over a year, in a location where the groundwater is found at 2 to 3 feet bls. There is no assurance that this release of diesel fuel and leaving the pollutants in the soil, did not endanger the safety of the citizens. Therefore, Respondent caused and threatened a water pollution hazard in violation of 12(d) of the Act, 415 ILCS 5/12(d) (2004).

b. Respondent allowed contaminates to dissipate back into the environment, causing or allowing open dumping

Respondent caused a release of 400-500 gallons of diesel fuel, it then performed some excavation, but, as shown by their own sampling, the excavation was insufficient. Contaminants, benzo (a) pyrene, benzo (b) fluoranthene, and indeno (1,2,3-cd) pyrene, remained in the soil. However, instead following through on the remediation, Respondent left the contaminates in the soil and allowed them to dissipate back into the environment. The same analysis advanced in *EPA v. Pollution Control Board,* 219 Ill.App.3d 975, 579 N.E.2d

1215 (1991) applies here. Respondent did not clear away to another location all of the spilled diesel fuel. Instead, the constituents, as evidenced by Respondent's own confirmatory samples, were allowed to dissipate into the environment. The additional sampling directed by Illinois EPA whose results were below the TACO standards, was performed almost two years after the initial release.

Respondent again improperly tries to assert that its release of diesel fuel into the environment was benign. The Act does not allow for any consideration of the gradation of harm when evaluating a violation of the Act, only whether a violation occurred. The severity of a violation is only considered when determining a penalty for a violation. 415 ILCS 5/42 (2004). Respondent's repeated assertions regarding the severity of their violations of the Act must be ignored.

As in *EPA v. Pollution Control Board*, the diesel spill site became a disposal site when Respondent left the constituents of a waste, the diesel fuel, in the soil. Therefore, Respondent open dumped waste in violation of Section 21(a) of the Act, 415 ILCS 5/21(a) (2004).

c. Respondent's lack of due diligence and self-disclosure are not factors to consider when finding a violation of the Act

Respondent released 400-500 gallons of diesel fuel. Contamination remained at the site for at least a year, although remediation of the site was not confirmed until almost two years after the release. These are the only factors the Board should consider when determining whether a violation occurred. The People could not agree more with Respondent that Respondent's lack of self-disclosure and due diligence in remediating the site should not be part of the evaluation that a violation occurred. The People included those additional facts regarding Respondent's lack of diligence and self-disclosure to rebut all of Respondent's assertions that the site was properly remediated and it was diligent in that remediation.

Respondent need look no further then themselves to why this case was filed. Respondent released a waste into the environment and failed to properly remediate that release. Respondent seems to be asserting the position that as long as a violator informs the Illinois EPA that the remediation efforts they took were sufficient, even though the data shows otherwise, then the Illinois EPA should merely accept that assertion and not perform its statutory duty under the Act to investigate any violations of the Act. 415 ILCS 5/4 (2004).

d. Subsequent compliance is not a bar to finding a violation nor issuing a penalty

Section 33(a) of the Act, 415 ILCS 5/33(a) (2004), was amended in 1988 by Public Act 85-1041. 1988 Ill. Legis. Serv. P.A. 85-1041 (West). All of the cases that Respondent cites to shore up its position were issued the decade before Section 33(a) was amended. Section 33(a) explicitly prohibits the defense to finding a violation or imposing a penalty if a person subsequently complies with the violation. This is so clear that the Board repeatedly strikes that defense pursuant to Section 33(a) when the defense is asserted as an affirmative defense by a Respondent. See *People of the State of Illinois v. Chevron Environmental Services Co.*, PCB 02-03 (Nov. 6, 2003); *People of the State of Illinois v. Marc Development Corp. and Silver Glen Estates HomeOwners' Assoc.*, PCB 01-150 (July 26, 2001). The First District, citing Section 33(a), has also disregarded a Respondent's claim that subsequent compliance barred the finding of a violation and the imposition of penalty. *Discovery South Group, Ltd. v. Pollution Control Bd.* 275 Ill.App.3d 547, 656 N.E.2d 51, 211 Ill.Dec. 859, (1st Dist. 1995).

The Board has issued and a Court has upheld a penalty for past violations. In *Modine Manufacturing Co. v. Pollution Control Board*, 193 Ill.App.3d 643, 549 N.E. 1379 (1990), Modine made the same contention as Respondent. Modine contended that a penalty would not aid in the enforcement of the Act because it was no longer in violation of the Act at the time the

complaint was filed with the Board. *Id.* The Court disagreed. *Id* The Court not only found that penalties may be imposed for wholly past violations, but upheld the Board's decision to impose a penalty. *Id.*

Furthermore, all of the decisions Respondent cites pre-date Section 42(h) of the Act, 415 ILCS 5/42(h) (2004). By the addition of the 42(h) factors, even if compliance is achieved, a penalty may still be necessary. *ESG Watts, Inc. V. Illinois Pollution Control Board*, 282 Ill.App.3d 43, 668 N.E.2d 1015 (1996). The deterrent effect of penalties on the violator and other potential violators is a legitimate goal for the Board to consider. *Id* at 52.

Regardless the issue before the Board is not whether the Respondent eventually remediated the release nor the amount of penalty to be assessed. The issue is whether the respondent violated the Act when it released 400-500 gallons of diesel fuel threatening water pollution, creating a water pollution hazard, and open dumping waste. By Respondent's own admission and exhibits, as well as the People's exhibits, the evidence shows that Respondent released pollutants into the environment threatening water pollution and creating a water pollution hazard in violation of Section 12(a) and 12(d) and caused or allowed open dumping in violation of Section 21(a). The material facts proving these violations and liability in this case are not in dispute.

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board enter a final order:

A) Granting Complainant's motion for summary judgment;

B) Finding that the Respondent, CSX TRANSPORTATION, INC., violated Sections 12(a), 12(d), and 21(a) of the Act, 415 ILCS 5/21(a), (d), 21(a) (2004);

C) Schedule hearing to determine the penalty for Respondent's violations under Section 33 and 42 of the Act, 415 ILCS 5/33, 42 (2004).

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
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