

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
<b>Complainant,</b>	)	
	)	
v.	)	PCB NO. 17-45
	)	
MAGNA TAX SERVICE CO., INC.,	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FILING**

To: Claire Manning and William D. Ingersoll, Brown, Hay & Stephens, LLP  
205 South Fifth Street, Suite 700, P.O. Box 2459, Springfield, IL 62705-2459

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Notice of Filing and Complainant's Motion for Leave to Reply, a copy of which is herewith served upon you.

Respectfully submitted,

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

By: s/Rachel Medina  
Rachel Medina, #6297171  
Assistant Attorney General  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031

Dated: July 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017, I served a true and correct copy of the Notice of Filing and Complainant's Motion for Leave to File Reply via electronic mail to:

William D. Ingersoll  
wingersoll@bhslaw.com

Claire Manning  
cmanning@bhslaw.com

Carol Webb  
Carol.Webb@Illinois.gov

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN, Attorney General of the  
State of Illinois,

BY: s/Rachel Medina  
Rachel Medina  
Assistant Attorney General  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706  
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<b>MAGNA TAX SERVICE CO., INC.,</b>	)	
	)	
<b>Respondent.</b>	)	

**COMPLAINANT'S MOTION FOR LEAVE TO REPLY**

Complainant, PEOPLE OF THE STATE OF ILLINOIS ("Complainant" or "the State"), hereby requests the Hearing Officer grant Complainant leave to reply to the Response to Complainant's Motion to Strike Respondent's Affirmative Defenses ("Response") filed by Respondent, MAGNA TAX SERVICE CO., INC. ("Respondent" or "Magna"):

1. On February 2, 2017, the State filed its Complaint in the above matter.
2. On May 2, 2017, the Hearing Officer granted Magna an extension of time to file its Amended Affirmative Defenses and required that Complainant file its motion pertaining to affirmative defenses by June 8, 2017.
3. On June 7, 2017, in compliance with the May 2, 2017 Hearing Officer Order, the State filed with the Board a Motion to Strike Respondent's Affirmative Defenses.
4. On June 22, 2017, Magna filed its Response.
5. Magna's Response incorrectly presents the circumstances controlling the Board's consideration of the State's Motion to Strike. For example, Magna first asserts that the State has

omitted relevant background information, related to Magna's communications with the Illinois Environmental Protection Agency ("Agency") that preceded this action, but then Magna itself portrays those communications inaccurately and incompletely. Further, Magna mischaracterizes facts alleged in the Complaint.

6. Magna's mischaracterizations of the Agency's positions will materially prejudice the Agency, if the Agency is not allowed to reply. Accordingly, the Complainant respectfully requests to file a reply, which is attached to this motion.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
by LISA MADIGAN,  
Attorney General of the  
State of Illinois

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

BY:   
RACHEL R. MEDINA  
Assistant Attorney General

Attorney ID No. 6297171  
500 South Second Street  
Springfield, Illinois 62706  
217/782-9034  
RMedina@atg.state.il.us  
ebs@atg.state.il.us  
Dated: 7-5-17

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	
Complainant,	)	
	)	
v.	)	PCB NO. 17-45
	)	
MAGNA TAX SERVICE CO., INC.,	)	
	)	
Respondent.	)	

**COMPLAINANT’S REPLY IN SUPPORT OF  
MOTION TO STRIKE RESPONDENT’S AFFIRMATIVE DEFENSES**

The PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois (“Complainant” or “State”), hereby replies to the Response to Complainant’s Motion to Strike Affirmative Defenses (“Response”) filed by Respondent, MAGNA TAX SERVICE CO., INC. In support of this Reply, the Complainant states as follows:

**I. Magna Violated the Act Through Its Delay in Investigating and Remediating a Release at its Site**

In order to clarify and provide a complete record, it is necessary to correct Magna’s incorrect statements that: 1) the State has a “desire to punish Magna Tax for electing to proceed under the [Leaking Underground Storage Tank (“LUST”) Program (Title XVI of the Act, 415 ILCS 5/57 et seq.)]” (Response at 4); and that 2) the Complaint does not allege any time period during which Magna “refused to act to address the release” that is the subject of this action (Response at 3).

First, Magna attaches to its Response a copy of the May 2, 2012 Violation Notice (“VN”) sent by the Illinois Environmental Protection Agency (“Illinois EPA”) to Magna, apparently in support of its assertion that the State is omitting relevant background regarding Magna’s options for addressing the release. What Magna fails to mention is that, following the VN, on August 2, 2012, Magna proposed a Compliance Commitment Agreement (“CCA”) for investigation and clean-up of the material identified in Illinois EPA’s inspections. And, shortly thereafter, on August 22, 2012, the Illinois EPA sent a proposed CCA to Magna, consistent with Magna’s proposal. *See* Exhibit A, p.5.<sup>1</sup>

Notably, the terms of the proposed CCA required that Magna mobilize equipment; remove contaminated soil; complete the excavation of contaminated soil and verify compliance with cleanup objectives under the Tiered Approach to Corrective Action Objectives (“TACO”); submit a completion report; and provide advance notice to Illinois EPA of site activities. To be sure, the CCA **did not** require Magna to enter any specific program, either the Site Remediation Program (“SRP”) (Title XVII of the Act, 415 ILCS 5/58 et seq.) or the LUST program. Magna’s statement that the State seeks to “punish” Magna for cleaning up its site through the LUST program instead of the SRP is therefore baseless.

To the contrary, the State filed this action due to Magna’s extended failure to clean up its site, at all. As noted in the Complaint, Magna conducted some site activities related to the release on August 23, 2012 and September 5, 2012. But, then, instead of opting to proceed under the proposed CCA, the terms of which **Magna itself had proposed**, and move forward with further site investigation, Magna did nothing for an entire year, between September 6, 2012 and

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<sup>1</sup> The State does not agree that the VN has any relevance to the present Motion. Nevertheless, the State submits the subsequently proposed CCA to demonstrate Magna’s misrepresentation of Illinois EPA’s earlier position regarding permissible processes for site clean-up.

September 13, 2013. Contrary to Magna's assertion that the State does not allege any facts which "demonstrate" that Magna "refused" to act, the Complaint indicates the specific dates that Magna conducted its initial investigations, which reflect a 12-month gap of activity from 2012 to 2013. (See Complaint, Count I, ¶¶ 10, 11, and 13). Only after its September 2013 investigation did Magna opt to proceed with entering into the LUST program.

Magna's extended failure to remediate or even investigate a documented release at its site violated the Act and warrants the assessment of civil penalties and an order to cease and desist from any further violations.

**II. Magna Now Concedes That Section 58.9 is Not Applicable to the Subject Release, Demonstrating the Insufficiency of its Affirmative Defense I**

Magna has apparently lost track of the language in its Affirmative Defense I, which sought to "bar" through the "application of limitations on liability in Section 58.9," 415 ILCS 5/58.9 (2016) ("Section 58.9"), any requirement for "the removal and proper disposal" of the constituents alleged to be at the Site (Amended Affirmative Defenses, Affirmative Defense ("Aff. Def.") I ¶ 6). The Complaint specifically identifies the relevant constituent as a "dark liquid" material which was identified by the Illinois EPA on multiple occasions in the "Contaminated Area," where, ultimately, an underground storage tank ("UST") was found. (Complaint, Count I, ¶¶ 7-8, 10, and 11.)

Now, Magna specifically concedes in its Response that:

1. once it concluded its investigation, "it became evident that the release was from a UST" and "was eligible for coverage and reimbursement under Title XVI of the Act (Leaking Underground Storage Tank or "LUST" Program)" (Response ¶ II.2); and

2. that it is not attempting to assert the proportionate share provision contained in Section 58.9 to the release from the UST (Response ¶ II.4).

The State and Magna apparently agree, then, on the central point: the clean-up of the release from the UST **is not** subject to the proportionate share provisions contained in Section 58.9 of Title XVII of the Illinois Environmental Protection Act (“Act”). 415 ILCS 5/58.9 (2016). Magna claims that perhaps the LUST provisions were not applicable at the time the VN was issued. However, it is irrelevant that it took many months before Magna determined that the origin of the release was a UST, and for Magna to enter the UST program. Magna’s violations of the Act did not end at the time of the VN, but continued long after. At the time Magna attempted to raise Section 58.9 as an affirmative defense, the site indisputably was subject to the LUST regulations, and Magna could not assert Section 58.9 as an affirmative defense. *State Oil Co. v. People*, 352 Ill. App. 3d 813, 817 (2d Dist. 2004). Magna’s violations of the Act subject it to both civil penalties and an order to cease and desist from further violations.<sup>2</sup> Magna’s Affirmative Defense I should be stricken.

**III. Affirmative Defense II is Insufficient Because the 2008 Focused NFR Letter Does Not Extend to A Release or Condition Which Was Not Investigated As Part of the “Approved Remedial Action” and Was Not A “Specified Recognized Environmental Condition”**

Section 58.10 provides that a No Further Remediation Letter (“NFR Letter”) only “signifies a release from further responsibilities under this Act in performing the approved remedial action.” 415 ILCS 5/58.10 (2016). The approved remedial action that ultimately led to the issuance of the 2008 focused NFR Letter for the subject site was specifically for the purpose of

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<sup>2</sup> Indeed, Magna would be subject to civil penalties even if Section 58.9 were to apply. See *People v. Inverse Investments, L.L.C.*, PCB 11-79 (Feb. 16, 2012), slip op. at 10 (“Proportionate share liability cannot prevent a finding of violation or the imposition of a civil penalty . . .”).



addressing a solvent release and not for the purpose of investigating any and all potential site conditions. It would have been impossible for the SRP remedial action to have included a separate underground storage tank that Magna did not even identify until 2013, 5 years after Illinois EPA's issuance of the focused NFR Letter.

The 2008 focused NFR Letter specifically states that it serves as *prima facie* evidence with respect to the "specified recognized environmental conditions." *See* Amended Affirmative Defenses, Exhibit A (2008 NFR Letter), p. 11.<sup>3</sup> It is self-evident that a condition that was not discovered until some 5 years after a focused NFR Letter was issued does not fall within the definition of a "recognized environmental condition" at the time the focused NFR Letter was issued.

Further, it would be unconscionable to create an incentive for landowners, vis-à-vis a focused NFR Letter, to cause or allow additional or new contamination from a newly discovered environmental condition just because similar constituents—caused by an entirely different set of environmental conditions---were once remediated at the site in the past. If Magna truly believed the 2008 focused NFR Letter served as a defense to avoid remediating the newly discovered contamination at its site, Magna then dispelled any such notion by entering into the LUST program, which itself is a mechanism for obtaining an NFR Letter. *See* 415 ILCS 5/57.10 (2016). Magna's Affirmative Defense II should be stricken.

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<sup>3</sup> *See* 35 Ill. Adm. Code 740.610 ("If the remediation site includes a portion of a larger parcel of property or if the [Remedial Applicant] has elected to limit the recognized environmental conditions and related contaminants of concern to be remediated, or both, the No Further Remediation Letter shall be limited accordingly by its terms.").


**IV. Conclusion**

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order striking the Respondent's Affirmative Defense I and Affirmative Defense II and granting any other relief the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
by LISA MADIGAN,  
Attorney General of the  
State of Illinois

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

BY:   
RACHEL R. MEDINA  
Assistant Attorney General

Attorney ID No. 6297171  
500 South Second Street  
Springfield, Illinois 62706  
217/782-9034  
RMedina@atg.state.il.us  
ebs@atg.state.il.us  
Dated: 7-5-17



In addition, the proposed CCA is not subject to amendment or modification prior to execution by Magna Tax Service Co, Inc. and the Illinois EPA. Any amendment or modification to the proposed CCA by Respondent prior to execution by Magna Tax Service Co, Inc. and the Illinois EPA shall be deemed a rejection of the proposed CCA by operation of law. The proposed CCA may only be amended subsequent to its effective date, in writing, and by mutual agreement between the Illinois EPA and Magna Tax Service Co, Inc.

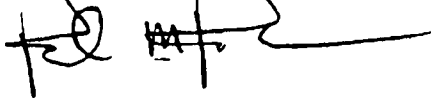
Written communications, including a signed and dated CCA or a notice that the respondent rejects the proposed CCA, should be directed to:

Illinois EPA - Bureau of Land #24  
Attn.: Paul Purseglove  
1021 North Grand Avenue East  
Springfield, Illinois 62794-9276

Please include the Violation Notice Number L-2012-01027 and the Site Identification Number 0290255010 on all written communications.

Questions regarding this matter should be directed to Deanna Carlock at 217/278-5800.

Sincerely,



Paul M. Purseglove, Manager  
Field Operations Section  
Bureau of Land

Enclosure - Proposed CCA

bcc: Illinois EPA Bureau Paul Purseglove  
Illinois EPA FOS Deanna Carlock  
Illinois EPA DLC Kyle Davis  
Illinois EPA Bureau Records Unit

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: )  
)  
LPC# 0290255010 – Coles County )  
Magna Tax Service Co. Inc. )  
Dennis Ballinger, Agent )  
Compliance File )  
)  
) ILLINOIS EPA VN L-2012-01027  
) BUREAU OF LAND  
)

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**COMPLIANCE COMMITMENT AGREEMENT**

**I. Jurisdiction**

**This Compliance Commitment Agreement (“CCA”) is entered into voluntarily by the Illinois Environmental Protection Agency (“Illinois EPA”) and Magna Tax Service Co, Inc.**

1. (“Respondent”) (collectively, the “Parties”) under the authority vested in the Illinois EPA pursuant to Section 31(a)(7)(i) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/31(a)(7)(i).

**II. Allegation of Violations**

2. Respondent owns a former industrial site at 120 N 14<sup>th</sup>, Mattoon, Illinois 61938.
3. Pursuant to Violation Notice (“VN”) L-2012-01027, issued on May 2, 2012, the Illinois EPA contends that Respondent has violated the following provisions of the Act and Illinois Pollution Control Board (“Board”) Regulations:
  - a) Section 12(a) of the Act
  - b) Section 12(d) of the Act
  - c) Section 21(a) of the Act
  - d) Section 21(d)(1) of the Act
  - e) Section 21(d)(2) of the Act
  - f) Section 21(e) of the Act
  - g) Section 722.111 of 35 Ill. Adm. Code

h) 812.101(a) of 35 Ill. Adm. Code

### **III. Compliance Activities.**

4. On August 6, 2012, the Illinois EPA received Respondent's response to VN L-2012-01027, which included proposed terms for a CCA. The Illinois EPA has reviewed Respondent's proposed CCA terms, as well as considered whether any additional terms and conditions are necessary to attain compliance with the alleged violations cited in the VN.
5. Respondent agrees to undertake and complete the following actions, which the Illinois EPA has determined are necessary to attain compliance with the allegations contained in VN L-2012-01027:
  - a) By September 30, 2012, mobilize equipment and personnel to the site and commence the removal of the contaminated soil from the site.
  - b) By October 30, 2012, complete the excavation of contaminated soil and collect samples to verify that a proper cleanup which complies with the industrial/commercial objectives as found in the Tiered Approach to Cleanup Objective ("TACO") have been met.
  - c) By November 20, 2012, submit a completion report to Illinois EPA including receipts for the disposal of the contaminated soils and media.
  - d) Provide advance notice to Illinois EPA so supervision of the excavation work can be done. At minimum, Ms. Carlock shall be given 72 hours notice.

### **IV. Terms and Conditions**

6. Respondent shall comply with all provisions of this CCA, including, but not limited to, any appendices to this CCA and all documents incorporated by reference into this CCA. Pursuant to Section 31(a)(10) of the Act, 415 ILCS 5/31(a)(10), if Respondent complies with the terms of this CCA, the Illinois EPA shall not refer the alleged violations that are the subject of this CCA, as described in Section II above, to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violations occurred. Successful completion of this CCA or an amended CCA shall be a factor to be

weighed, in favor of the Respondent, by the Office of the Illinois Attorney General in determining whether to file a complaint on its own motion for the violations cited in VN L-2012-01027.

7. This CCA is solely intended to address the violations alleged in Illinois EPA VN L-2012-01027. The Illinois EPA reserves, and this CCA is without prejudice to, all rights of the Illinois EPA against Respondent with respect to noncompliance with any term of this CCA, as well as to all other matters. Nothing in this CCA is intended as a waiver, discharge, release, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the Illinois EPA may have against Respondent, or any other person as defined by Section 3.315 of the Act, 415 ILCS 5/3.315. This CCA in no way affects the responsibilities of Respondent to comply with any other federal, state or local laws or regulations, including but not limited to the Act, the Board Regulations, and any applicable permits.
8. Pursuant to Section 42(k) of the Act, 415 ILCS 5/42(k), in addition to any other remedy or penalty that may apply, whether civil or criminal, Respondent shall be liable for an additional civil penalty of \$2,000 for violation of any of the terms or conditions of this CCA.
9. This CCA shall apply to and be binding upon the Illinois EPA, and on Respondent and Respondent's officers, directors, employees, agents, successors, assigns, heirs, trustees, receivers, and upon all persons, including but not limited to contractors and consultants, acting on behalf of Respondent, as well as upon subsequent purchasers of Respondent's property.
10. In any action by the Illinois EPA to enforce the terms of this CCA, Respondent consents to and agrees not to contest the authority or jurisdiction of the Illinois EPA to enter into or enforce this CCA, and agrees not to contest the validity of this CCA or its terms and conditions.
11. This CCA shall only become effective:
  - a) If, within 30 days of receipt, Respondent executes this CCA and submits it, via certified mail, to:

Illinois EPA - Bureau of Land #24  
Attn.: Paul Purseglove  
1021 North Grand Avenue East  
Springfield, Illinois 62794-9276

and



b) Upon execution by all Parties.

**Please Note:** If Respondent fails to execute and submit this CCA within 30 days of receipt, via certified mail, this CCA shall be deemed rejected by operation of law.

12. Pursuant to Section 31(a)(7.5) of the Act, 415 ILCS 5/31(a)(7.5), this CCA shall not be amended or modified prior to execution by the Parties. Any amendment or modification to this CCA by Respondent prior to execution by all Parties shall be considered a rejection of the CCA by operation of law. This CCA may only be amended subsequent to its effective date, in writing, and by mutual agreement between the Illinois EPA and Respondent's signatory to this CCA, Respondent's legal representative, or Respondent's agent.

**AGREED:**

**FOR RESPONDENT:**

BY: \_\_\_\_\_  
Signature of Respondent or  
Authorized Representative

DATE: \_\_\_\_\_

\_\_\_\_\_  
Print or Type Name of Respondent  
or Authorized Representative and Title

**FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY:**

BY: \_\_\_\_\_  
Paul M. Purseglove, Manager  
Field Operations Section  
Bureau of Land

DATE: \_\_\_\_\_

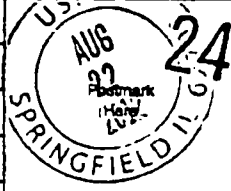
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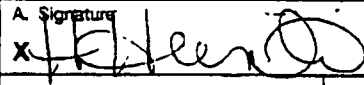
0290255010 - Coles County  
 Prop CCA for VN L-2012-01027  
 Magna Tax Service Co., Inc.  
 Dennis Ballinger, Agent  
 119 W. William St., Suite 300  
 Decatur, IL 62523

See Reverse for Instructions

SEP 28 2012

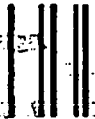
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<p><b>SENDER: COMPLETE THIS SECTION</b></p> <ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul> <p>1. Article Addressed to:</p> <p style="text-align: center;">0290255010 - Coles County                  Prop CCA for VN L-2012-01027                  Magna Tax Service Co., Inc.                  Dennis Ballinger, Agent                  119 W. William St., Suite 300                  Decatur, IL 62523</p> <p>2. Article Number                  (Transfer from service label)</p>	<p><b>COMPLETE THIS SECTION ON DELIVERY</b></p> <p>A. Signature                  x  <input type="checkbox"/> Agent  <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name)                  H Hunter</p> <p>C. Date of Delivery                  8/23/12</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes                  If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type  <input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail  <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise  <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
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