

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
CSX TRANSPORTATION, INC.,)
a Virginia corporation,)
)
Respondent.)

PCB 07-16
(Enforcement)

RECEIVED
CLERK'S OFFICE
FEB 26 2007
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

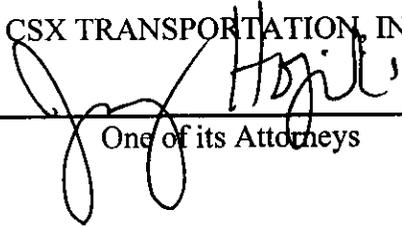
To: Kristen Laughridge Gale
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
188 West Randolph, 20th Floor
Chicago, IL 60601

Illinois Corporation Service Co.
801 Adlai Stevenson Drive
Springfield, IL 62701

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
Springfield, IL 62794-9274

Dorothy M. Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board Respondent's Motion for Summary Judgment on behalf of CSX Transportation, Inc. in the above-titled matter. A copy is hereby served upon you.

CSX TRANSPORTATION, INC.
By: 
One of its Attorneys

DATED: February 26, 2007

David L. Rieser
Jeremy R. Hojnicky
MCGUIREWOODS LLP
77 West Wacker Drive, Suite 4100
Chicago, Illinois 60601
(312) 849-8100

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

FEB 26 2007

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 07-16
) (Enforcement)
CSX TRANSPORTATION, INC.,)
a Virginia corporation,)
)
Respondent.

RESPONDENT CSXT'S MOTION FOR SUMMARY JUDGMENT

Respondent, CSX Transportation, Inc. ("CSXT"), by and through its attorneys, McGuireWoods LLP, and pursuant to 35 Ill. Admin. Code Section 101.516 respectfully moves for summary judgment on all counts alleged by the Complainant, People of the State of Illinois.

On September 12, 2006, the Complainant filed a three-count Complaint against CSXT alleging violations of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/1 *et. seq.*). Specifically, the People allege in Count I that CSXT violated Section 12(a) of the Act (415 ILCS 5/12(a)) by causing or allowing water pollution; in Count II the People allege that CSXT violated Section 12(d) of the Act (415 ILCS 5/12(d)) by creating a water pollution hazard; and in Count III the People allege that CSXT violated Section 21(a) of the Act (415 ILCS 21(a)) by causing or allowing open dumping. As a matter of law, none of the People's claims against CSXT satisfies the legal requirements of the alleged causes of action. There are no disputed material facts pertinent to this motion. Accordingly, the Board should enter summary judgment in CSXT's favor on all three counts alleged in the Complaint.

STATEMENT OF UNDISPUTED FACTS

1. On July 9, 2004, approximately 400-500 gallons of diesel fuel was accidentally released from a diesel fuel engine at the Rose Lake Yard CSXT facility located at 3900 Rose Lake Yard Road, East St. Louis, St. Clair County, Illinois. *See Complaint at p. 2.*
2. On the same day, July 9, 2004, CSXT retained the emergency response environmental contractor Hulcher Professional Services (“HPS”) of Centerville, Illinois to conduct emergency response and environmental remediation activities at the site. The initial response activities included the removal of soil with a backhoe, the placement of absorbent pads and booms, the installation of a drainage channel and the application of a bioremediation process to mitigate and immediately rectify the release. *See Affidavit of John Broadus which is attached herewith and incorporated herein; see also Environmental Remediation Report which is attached herewith and incorporated herein as Exhibit A at p. 2-3.*
3. On September 29, 2004, HPS prepared a *Scope of Work* to propose further remediation at the release area. A copy of the *Scope of Work* was submitted to the Illinois Environmental Protection Agency (“IEPA”). *See Affidavit of John Broadus.* The HPS *Scope of Work* is attached herewith and incorporated herein as Exhibit B.
4. On October 19 and 20, 2004, HPS returned to the site to implement the remediation activities described in the *Scope of Work*. Specifically, HPS performed additional soil excavation, flushed the site with a bioremediation

mixture and collected soil samples. *See* Affidavit of John Broadus; *see also* Exhibit A at p. 3-4.

5. On December 21, 2004, HPS prepared an *Environmental Remediation Report*. The report documented the extent of the emergency response and remediation activities performed at the site by HPS. A copy of the *Environmental Remediation Report* was submitted to the IEPA. *See* Affidavit of John Broadus; *see also* Exhibit A.
6. In January, 2005, CSXT retained the environmental contractor Arcadis to perform an additional site investigation and confirm that the emergency response and remediation activities performed by HPS successfully remediated the site. *See* Affidavit of Mr. Sid Glenn which is attached herewith and incorporated herein, *see also* *Response to Violation Notice, L-2005-01001* which is attached herewith and incorporated herein as Exhibit C at p. 1-7; *Closure Request and Response to Violation Notice, L-2005-01001*, which is attached herewith and incorporated herein as Exhibit D at p. 1-7.
7. On August 2, 2005, Arcadis conducted a site investigation by collecting soil borings and installing monitoring wells at the impacted site. Five soil samples were analyzed for benzene, toluene, ethylbenzene and total xylenes (“BTEX”), methyl tertiary butly ether (“MTBE”), and polynuclear aromatic hydrocarbons (“PAHs”). Laboratory analytical data indicated that all soil samples collected were below the Tiered Approach to Corrective Action (“TACO”) Industrial/Commercial Tier I Remediation Objectives. *See* Exhibit C at p. 5; *see also* Exhibit D at p.5.

8. On October 28, 2005, Arcadis conducted a groundwater sampling event. Groundwater samples collected at the site were analyzed for TACO contaminants. Analytical data indicated that nearly all of groundwater samples collected by Arcadis at the site were *below* the laboratory detection limits for TACO contaminants. Only a few groundwater samples detected extremely low levels of TACO contaminants and all of these samples were *below* the TACO Tier I Class II groundwater Remediation Objectives. *See* Exhibit C at p. 5-6 and at Table 3; *see also* Exhibit D at p. 5-6 and at Table 3
9. On February 23, 2006, prior to the filing of this Complaint, representatives of CSXT and Arcadis met with representatives of the Illinois Attorney General's Office and the IEPA. During the February 23, 2006 meeting, Arcadis and CSXT advised the Illinois Attorney General's Office and the IEPA that the release had been completely addressed and that there are no violations of the Act. At this meeting, representatives from the IEPA requested that additional soil samples be taken at the site to verify that state cleanup standards had been achieved during the initial site remediation. *See* Affidavit of Mr. Sid Glenn.
10. On April 14, 2006, the Illinois Attorney General's Office sent a letter to CSXT regarding IEPA's request for additional soil sampling at the site. The letter requested that samples be collected in a specific area identified as S4 in the HPS *Environmental Remediation Report*. The letter further stated that "two (2) soil samples collected from the original location of S4 should be sufficient to investigate whether contamination exists in that area." The April 14, 2006 letter is attached herewith and incorporated herein as Exhibit E.

11. On May 9, 2006, Arcadis conducted an additional soil investigation at the site. Arcadis collected two soil samples, SB-6 and SB-7, in the S4 location referenced in the letter sent by the Illinois Attorney General's Office. The analytical results from these two samples were determined to be below the TACO Industrial/Commercial Tier I Remediation Objectives. See Exhibit C at p. 5-7; see also Exhibit D at p. 5-7.
12. On June 1, 2006, on behalf of CSXT, Arcadis submitted a report to IEPA titled *Closure Request and Response to Violation Notice, L-2005-01001*. The report summarized the emergency response and remediation activities performed by HPS and the additional soil and groundwater investigation performed by Arcadis. The report reiterated that the site had been fully remediated and that all soil and groundwater samples collected at the site were below the TACO standards. See Exhibit C at p. 1-7; see also Exhibit D at p. 1-7.
13. On July 12, 2006, during a telephone conversation between Ms. Kathy Vieregge of the IEPA and Mr. Kevin Peterbus of Arcadis, Ms. Vieregge advised Mr. Peterbus that "she indicated to the Attorney General's Office that the incident number had appeared to have come back into compliance." See Affidavit of Mr. Kevin Peterbus which is attached herewith and incorporated herein. A telephone log of this conversation is attached herewith and incorporated herein as Exhibit F.
14. On September 12, 2006, the People filed the pending action against CSXT with the Board.

INTRODUCTION

This case involves an accidental release of a small amount diesel fuel in an industrial rail yard which was immediately, voluntarily and successfully cleaned up by CSXT.

On July 9, 2004, approximately 400-500 gallons of diesel fuel was accidentally released from a diesel fuel engine at a CSXT rail yard in East St. Louis, Illinois. CSXT immediately retained the emergency response contractor HPS to perform environmental site remediation the very same day of the accidental release. HPS immediately removed all visible evidence of any soil contamination and then returned to the site in October, 2004 to perform additional site remediation activities to ensure that the site was successfully cleaned up.

In January, 2005, CSXT retained the environmental contractor Arcadis to follow up on the work performed by HPS. Arcadis collected and analyzed soil and groundwater samples at the site in the area of the accidental release. All soil samples analyzed by Arcadis were *below* TACO Industrial/Commercial Tier I Remediation Objectives. Additionally, all groundwater samples analyzed by Arcadis were either *below* laboratory detection limits for TACO contaminants or *below* TACO Tier I Class II groundwater Remediation Objectives. Thus, Arcadis independently verified that the remediation performed by HPS was complete.

In February, 2006, prior to the filing of this Complaint, CSXT met with representatives of the IEPA and the Illinois Attorney General's Office. CSXT advised the IEPA and the Illinois Attorney General's Office that the remediation performed at the site was successful. The Illinois Attorney General's Office and the IEPA, however,

requested that CSXT collect two additional soil samples to confirm that there was no longer any contamination present at the site as a result of the accidental release. CSXT complied with this request and directed Arcadis to collect two additional soil samples in the location specified by the Illinois Attorney General's Office. These samples were determined to be below TACO Industrial/Commercial Tier I Remediation Objectives thereby again verifying that the accidental release was successfully cleaned up. CSXT shared the results demonstrating that the remediation was complete with the IEPA and the Illinois Attorney General's Office before the filing of this Compliant.

Despite the successful voluntary site remediation performed by CSXT, the Illinois Attorney General's Office filed the instant Compliant against CSXT. The Complaint includes a demand civil penalties and a cease and desist order against CSXT. As a matter of law, all three counts in the People's Complaint have no legal basis and accordingly CSXT respectfully requests that the Board enter summary judgment in favor of CSXT as to all three counts in the People's Complaint.

LEGAL STANDARDS

This motion seeks entry of summary judgment. According to the Board's regulations, "[A]ny time after the opposing party has appeared...a party may move the Board for summary judgment for all or any part of the relief." 35 Ill. Admin. Code Section 101.516. Under the Illinois Code of Civil Procedure set forth at 735 ILCS 5/2-1005, summary judgment is properly granted where the record on file "together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *See also, People v. Stonehendge, Inc.*, 288 Ill.App.3d 318, 680 N.E.2d 497 (2nd Dist. 1997). If the necessary factual issues in

dispute do not genuinely exist and the moving party is entitled to judgment as a matter of law, to require a trial would be contrary to the public policy expressed by the enactment of the summary judgment rules of procedure. *See, Int'l Harvester Co. v. Continental Cas. Co.*, 33 Ill.App.2d 467, 179 N.E.2d 833 (1st Dist. 1962).

ARGUMENT

- I. **Since CSXT completely remediated the release prior to the filing of the Complaint, the Complaint will not aid in the enforcement of the Act and is purely punitive.**

Illinois courts and the Board have consistently held that the primary purpose of the Environmental Protection Act is to aid in the enforcement of the Act and punitive considerations are secondary. *See, City of Monmouth v. Pollution Control Board*, 57 Ill.2d 482, 313 N.E.2d 161 (1974); *Southern Illinois Asphalt Company, Inc. v. Pollution Control Board*, 60 Ill.2d 204, 326 N.E.2d 406 (1975); *Harris-Hub Co. v. Pollution Control Board*, 50 Ill.App.3d 608, 365 N.E.2d 1071 (1st Dist. 1977); *Tri-County Landfill Company v. Pollution Control Board*, 41 Ill.App.3d 249, 353 N.E.2d 316 (2nd Dist. 1976). The Illinois Supreme Court has also held that the imposition of civil penalties is inappropriate when the violations had ceased long before the Environmental Protection Agency instituted an action before the Pollution Control Board based upon such violations. *Southern Illinois Asphalt Company, Inc. v. Pollution Control Board*, 60 Ill.2d 204, 326 N.E.2d 406 (1975).

There are no issues of material fact in dispute that CSXT completely remediated the release prior to the filing of the Complaint. As noted above, immediately following the release, CSXT retained HPS to conduct emergency response and remediation activities at the site. *See* Affidavit of John Broadus. Thereafter, CSXT retained Arcadis

to document that the remedial activities performed by HPS successfully brought the site within the TACO cleanup standards for soil and groundwater. *See* Exhibit C at p. 5-7; *see also* Exhibit D at p. 5-7.

On February 23, 2006, CSXT met with representatives of the Illinois Attorney General's Office and the IEPA prior to the filing of this Complaint and CSXT advised the People that the release has been completely addressed and that there are no on-going violations of the Act. *See* Affidavit of Mr. Sid Glenn. Following this meeting and at the request of the IEPA and the Illinois Attorney General's Office, Arcadis performed an additional soil sample investigation and again verified that the remediation performed at the site was successful. Furthermore, before the filing of this Complaint, Ms. Kathy Vieregge of the IEPA verbally advised Mr. Kevin Peterbus of Arcadis that the site appears to be in compliance with the Act. *See* Affidavit of Mr. Kevin Peterbus; *see also* Exhibit F. Therefore, whatever the People considered a violation of the Act had ceased long before the People initiated the pending action before the Pollution Control Board based upon such alleged violations.

Since CSXT fully addressed the release and demonstrated to both the Illinois Attorney General's Office and the IEPA that the site was within TACO soil and groundwater cleanup standards before the Complaint was filed, the People's allegations of violations of the Act and demand for civil penalties is purely punitive and therefore is contrary to the Illinois Supreme Court's ruling in *Southern Illinois Asphalt Company* and its progeny.

As Courts and the Board have held, "to penalize those who act in good faith would only discourage others who act in good faith from moving to correct their

violations.” *Harris-Hub Co. v. Pollution Control Board*, 50 Ill.App.3d 608, 365 N.E.2d 1071 (1st Dist. 1977) (citing *Employees of Holmes Brothers v. Merlan Inc.*, 2 Ill.P.C.B. Op. 405 (1971)). Here CSXT acted in good faith by voluntarily conducting an immediate site remediation and brought the site into compliance with TACO standards for soil and groundwater long before the People filed the pending action against CSXT. Thus, the People’s allegation that CSXT violated Section 12(a), Section 12(d) and Section 21(a) of the Act is entirely without merit as a matter of law and summary judgment should be granted in favor of CSXT as to all three of the counts alleged in the People’s Complaint.

II. There is no evidence in the record to support Counts I and II in the People’s Complaint and therefore the People’s allegations that CSXT violated Sections 12(a) and 12(d) of the Illinois Environmental Protection Act fails as a matter of law.

Section 12(a) of the Act provides, in pertinent part, that no person shall: “[c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois...” (415 ILCS 5/12(a)). Section 12(d) of the Act provides that no person shall: “[d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.” (415 ILCS 5/12(d)). The Board has stated that a “finding of a water pollution hazard [under Section 12(d)] requires a finding of the potential for the same effects as are involved in a finding of water pollution [under Section 12(a)]: creation of a nuisance or a rendering of waters to be harmful, detrimental, or injurious.” *See People of the State of Illinois v. Chalmers*, PCB 96-111 (2000). The Board has also held that absent evidentiary proof of particular quantities and concentrations of contaminants present in the groundwater, there can be no violations of Section 12(a) and Section 12(d) of the Act. *Id*; *see also Jerry Russell Bliss*,

Inc. v. Illinois Environmental Protection Agency, 138 Ill.App.3d 699, 485 N.E.2d 1154 (5th Dist. 1985); *People v. Hendricks*, PCB 97-31 (1998).

As the basis for alleging that CSXT violated Section 12(a) of the Act, the People state in the Complaint that “[r]esidual contamination of soil and/or subsurface strata may be a continuing source of further releases to the waters of the State, including groundwater.” (Complaint, Count I, Paragraph 17). Moreover, as the basis for alleging that CSXT violated Section 12(d) of the Act, the People state that “[b]y releasing diesel fuel at the Yard, the Respondent has created a water pollution hazard.” (Complaint, Count II, Paragraph 23). These allegations, however, are entirely without merit and fail as a matter of law because the incident at issue never impacted the waters of the State or otherwise created a nuisance or rendered waters to be harmful, detrimental or injurious. Without any evidence demonstrating that the release rendered the waters of the State to be harmful, detrimental or injurious, the People’s allegations that CSXT violated Section 12(a) and Section 12(d) of the Act fails as a matter of law.

There are simply no facts in the record that CSXT caused, threatened or allowed water pollution or a water pollution hazard that give rise to a violation of Sections 12(a) or 12(d) of the Act. On the same day of the release, CSXT retained HPS to conduct emergency response and remediation activities at the site. *See* Exhibit C at p. 2; *see also* Exhibit D at p. 2. CSXT further retained Arcadis to collect groundwater samples in the area of the release and verify that the remediation activities performed by HPS successfully remediated the site. *Id.* at p. 3-7. In the groundwater samples collected by Arcadis, and as reported to the IEPA before this Complaint was filed, all the groundwater samples collected and analyzed for TACO contaminants were either below laboratory

detection limits or below TACO Tier I Class II groundwater Remediation Objectives. *Id.* at p. 5-6. Thus, there is no evidence in the record that as a result of the accidental release groundwater was previously impaired, is currently impaired, or that there is any potential for future impairments to the waters of the State of Illinois.

Furthermore, on August 2, 2005, Arcadis collected and analyzed soil samples at the site. These soil sample results were determined to be below TACO Industrial/Commercial Tier I Remediation Objectives. *Id.* at 5-7. When the IEPA and the Illinois Attorney General's Office requested that two additional soil samples be collected to verify these results, CSXT complied and instructed Arcadis to collect the additional samples at the site. *Id.* Again, the results of these soil samples were below the TACO Industrial/Commercial Tier I Remediation Objectives. CSXT presented the results of these soil investigations in the *Response to Violation Notice, L-2005-01001* and *Closure Request and Response to Violation Notice, L-2005-01001* reports submitted to the IEPA and the Illinois Attorney General's Office before the filing of this Complaint. *Id.*

Thus, not only is there no evidence in the record of any water pollution or water pollution hazards, the soil investigation performed by Arcadis indicates that the emergency response and remediation activities performed at the direction of CSXT successfully remediated this site. As stated above, the Agency itself even corroborated this during a telephone conversation between Ms. Kathy Vieregge of the IEPA and Mr. Kevin Peterbus of Arcadis when Ms. Vieregge verbally stated that the site appears to be in compliance with the Act. *See* Affidavit of Kevin Peterbus, *see also* Exhibit F. Accordingly, the record is without any facts demonstrating that CSXT caused water

pollution or a water pollution hazard giving rise to a violation of Section 12(a) or 12(d) of the Act.

Courts and the Board have consistently held that absent evidentiary proof in the record of contaminants present in sufficient quantity or concentrations to constitute water pollution or a water pollution hazard there can be no violation of Sections 12(a) or 12(d) of the Act. *See Jerry Russell Bliss, Inc. v. Illinois Environmental Protection Agency*, 138 Ill.App.3d 699, 485 N.E.2d 1154 (5th Dist. 1985). In *Bliss*, also a case in which the People alleged water pollution and water pollution hazards at a rail yard but with facts far more egregious than the present matter, the court reversed the Board's ruling that the respondent violated Sections 12(a) and 12(d) of the Act because there was no evidence in the record of any impacts to waters of the State despite the fact that the defendant in *Bliss* intentionally released a toxic hazardous substance and performed no site cleanup. *Id.*

The *Bliss* case involved the following facts: In April, 1982, IEPA officials witnessed an employee of the Bliss Oil Company enter a rail yard and begin spraying a black liquid on the ground. *Id.*, 138 Ill.App.3d at 701, 485 N.E.2d at 1155. The IEPA officials took samples of the black liquid material and a laboratory analysis showed that the tested material contained over 10,000 parts per million of trichlorethylene, a contaminant listed by the Board as a toxic hazardous substance. *Id.* At trial, an IEPA geologist testified that the area where the spraying occurred is located approximately 1,200 feet from the Mississippi River and that the soil in the area of the release was prone to leaky artesian conditions, that is, water levels from below ground may tend to rise above the surface. *Id.* Like in the present matter, the People alleged that Bliss violated Sections 12(a) and 12(d) of the Act. *Id.*, 138 Ill.App.3d at 700, 485 N.E.2d at 1155.

The Circuit Court, however, concluded that the record was insufficient to establish that Bliss had violated Section 12(a) and Section 12(d) of the Act. *Id.*, 138 Ill.App.3d at 704, 485 N.E.2d at 1157. The court noted that “a principal draftsman of the Environmental Protection Act recognized that the mere presence of a potential source of water pollutants on the land does not necessarily constitute a water pollution hazard.” *Id.* The court further stated that “no effort was made to establish that this particular quantity and concentration of [contaminants] was likely to create a nuisance or to render the waters harmful, detrimental, or injurious.” *Id.* Thus, even in the face of intentional and willful conduct on the part of the defendant, the court, as a matter of law reversed the Board’s ruling that found Bliss guilty of violations of Section 12(a) and 12(d) of the Act because the People could not offer any evidence of actual impacts to the waters of the State caused by the defendant’s actions. *Id.*, 138 Ill.App.3d at 704, 485 N.E.2d at 1158.

As in *Bliss*, here the record is entirely without evidence showing any impacts whatsoever to the waters of the State. However, unlike *Bliss* where the defendant acted intentionally, performed no cleanup and was still found not liable for violations of Section 12(a) and Section 12(d) of the Act, the CSXT release was a *bone fide* accident and CSXT performed an immediate site remediation. As stated above, CSXT retained environmental contractors to conduct prompt emergency response and remediation, soil samples demonstrated that the site is in compliance with TACO Industrial/Commercial Tier I Remediation Objectives and all groundwater samples were either *below* laboratory detection levels for TACO contaminants or *below* TACO Tier I Class II groundwater Remediation Objections. Thus, as in *Bliss*, the People’s allegations that CSXT violated of Sections 12(a) and 12(d) of the Act are contrary to the manifest weight of the evidence

and the facts are insufficient to establish that the release at the Rose Lake Rail Yard created water pollution or a water pollution hazard.

Furthermore, in the case of *People v. Hendricks*, the Board found the defendant not liable for a violation of Section 12(a) of the Act when the defendant was alleged to have caused water pollution when fighting a tire fire and the People claimed that runoff contaminated a creek which flowed into the water source for the Town of Staunton, Illinois. *People v. Hendricks*, PCB 97-31 (1998). In *Hendricks*, the Board found that there was no evidence in the record establishing any adverse impacts on waters of the State and “without such evidence, the Board cannot find that runoff has rendered waters of the State harmful, detrimental, or injurious.” *Id.* Accordingly, without any evidence in the record of adverse impacts to the waters of the State, the Board ruled that the defendant could not be held liable for a violation of Section 12(a) of the Act. *Id.* In another case alleging a violation of Section 12(a) of the Act, the Board also held that “the mere presence of a contaminant is insufficient to establish that water pollution has occurred or is threatened; it must be shown that the particular quantity and concentration of the contaminant in question is likely to create a nuisance or render the waters harmful, detrimental, or injurious.” *See People v. Chalmers*, PCB 96-111 (2000).

Here, whatever diesel fuel was released due to the accident was immediately rectified by the emergency response and remediation activities performed at the site. Again, all groundwater samples collected by Arcadis at the Rose Lake Yard site indicated that the accidental release was fully addressed by the remediation activities performed by HPS long before the filing of this complaint. As such, the People can produce no evidence demonstrating that a particular quantity and concentration of the release in

question likely created a nuisance or rendered waters of the State harmful, detrimental, or injurious. Thus, according to the rulings in *Bliss*, *Hendricks* and *Chalmers*, the People's allegations that CSXT violated Section 12(a) and Section 12(d) fails as a matter of law.

Therefore, the Board should grant CSXT's motion for summary judgment as to Counts I and II of the People's Complaint which allege violations of Sections 12(a) and 12(d) of the Act.

III. Count III of the People's Complaint alleging an open dumping violation is contrary to policy behind Section 21(a) of the Act and therefore fails as a matter of law.

The People allege that CSXT violated Section 21(a) of the Act by "causing or allowing the release of diesel fuel at the Yard and leaving the contaminants in the soil..." (Complaint, Count III, Paragraph 20). Section 21(a) of the Act provides that no person shall: "[c]ause or allow the open dumping of any waste." (415 ILCS 5/21(a)). However, characterizing CSXT's accidental release and immediate site cleanup as an open dumping violation is contrary to the letter and spirit of Section 21(a) of the Act.

CSXT's accidental release cannot be considered open dumping under the statutory definition of the term. Under the Act, the term open dumping is the "consolidation of refuse from one or more sources at a disposal site." (415 ILCS 5/3.305). This definition requires the affirmative act of consolidating and disposing refuse, not the accidental release of a substance as in the present matter. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *See People ex rel. Ryan v. McFalls*, 313 Ill.App.3d 223, 728 N.E.2d 1152 (3rd Dist. 2000). Thus, the statutory language of Section 21(a) of the Act does not support the People's allegation of an open dumping violation in this instance as a matter of law.

Further, CSXT did not “leave the contaminants in the soil” as is stated in the People’s Complaint. (Complaint, Count III, Paragraph 20). It is an undisputed fact that on the day the release occurred CSXT retained HPS to immediately perform emergency response and environmental remediation activities which included the excavation of contaminated soil from the release area. *See* Affidavit of John Broadus. Thus, in no way can CSXT be accused of leaving contaminants in the soil at the site, and as such, the People’s basis for alleging an open dumping violation is misplaced.

Lastly, the purpose of Section 21 of the Act is to prohibit actions such as littering, illegal garbage disposal, operating a hazardous waste facility without a permit and failing to properly dispose of waste in a landfill. A review of Illinois case law and Board decisions indicates that these are the types of acts that are prosecuted by the State as open dumping violations. *See e.g. People ex rel. Ryan v. McFalls*, 313 Ill.App.3d 223, 728 N.E.2d 1152 (3rd Dist. 2000); *Wasteland, Inc. v. Illinois Pollution Control Board*, 118.App.3d 1041, 456 N.E. 964 (3rd Dist. 1983); *Miller v. Illinois Pollution Control Board*, 267 Ill.App.2d 160, 642 N.E.2d 475 (4th Dist. 1994).

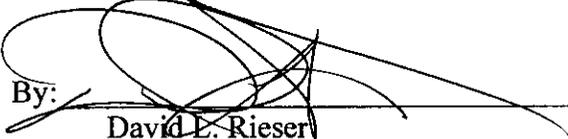
In contrast, the case currently before the Board involved a train accident. As a result of the accident, diesel fuel was released from the train’s engine and immediately upon becoming aware of the release CSXT retained emergency response professionals to clean up the site to comply with the state TACO standards. Certainly not every accidental release in the State of Illinois constitutes an open dumping violation, particularly when the company responsible for the release acted in good faith to immediately rectify the release. Thus, Count III of the People’s complaint which

characterizes CSXT's accidental release as an open dumping violation fails as a matter of law.

Wherefore, CSXT respectfully requests that the Board enter summary judgment in CSXT's favor in this matter and dismisses all counts alleged in the People's Complaint with prejudice.

Respectfully submitted,

CSX TRANSPORTATION, INC.

By: 

David L. Rieser
One of its Attorneys

Dated: 2/26/07

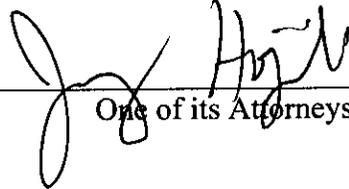
McGuireWoods LLP
77 West Wacker, Suite 4100
Chicago, IL 60601
Telephone: 312/849-8100

\4305432.5

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Respondent's Motion for Summary Judgment upon those listed on the attached Notice of Filing by first class mail, postage affixed.

CSX TRANSPORTATION, INC.

By:  _____
One of its Attorneys

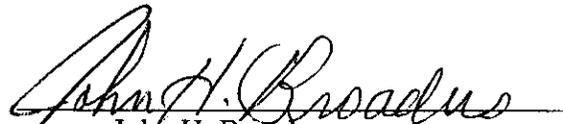
AFFIDAVIT

1. My name is John H. Broadus.
2. I am employed by Hulcher Services, Inc. (hereinafter "HSI") as a Project Manager. I am also a licensed Professional Engineer and a licensed Corrective Action Project Manager in the State of Texas.
3. On July 9, 2004, CSXT retained HSI to conduct emergency response and environmental remediation activities at the Rose Lake Yard CSXT facility located at 3900 Rose Lake Yard Road, East St. Louis, St. Clair County, Illinois.
4. I assisted in the preparation and have direct personal knowledge of the *Scope of Work, Proposal Number 9985-11*. The *Scope of Work, Proposal Number 9985-11* is dated September 29, 2004 and was prepared for Mr. Joseph W. Tupa of CSXT and a copy was provided to the Illinois Environmental Protection Agency. Attached hereto and made a part hereof as Exhibit A is a true and correct copy of the *Scope of Work, Proposal Number 9985-11*. If sworn as a witness, I can testify competently to the accuracy of Exhibit A.
5. On December 21, 2004, HSI prepared a report titled *Environmental Remediation Report (HSI Project Number PA 106810)* to document the emergency response and remediation activities performed at the site. I assisted in the preparation and have direct personal knowledge of the *Environmental Remediation Report*. Attached hereto and made part hereof as Exhibit B is a true and correct copy of the *Environmental Remediation Report*. If sworn as a witness, I can testify competently to the accuracy of Exhibit B.

FURTHER, Affiant sayeth not.

DATED: _____

2/13/07


John H. Broadus

AFFIDAVIT

1. My name is Sid Glenn.
2. I am employed as a Vice President for ARCADIS.
3. In January, 2005, CSX Transportation Inc. (hereinafter "CSXT") retained ARCADIS to perform site investigation, document the emergency response and remediation activities performed by Hulcher Professional Services and prepare reports to be submitted to the Illinois Environmental Protection Agency (hereinafter "IEPA") regarding the Rose Lake Yard, CSXT facility located at 3900 Rose Lake Yard Road, East St. Louis, St. Clair County, Illinois.
4. I was in a direct or supervisory capacity with respect to the work performed by ARCADIS on behalf of CSXT at the Rose Lake Yard site.
5. I assisted in the preparation and I have direct personal knowledge of the reports titled *Response to Violation Notice, L-2005-01001*, dated March 3, 2006 and *Closure Request and Response to Violation Notice, L-2005-01001*, dated June 1, 2006. Attached hereto and made a part hereof as Exhibit C is a true and accurate copy of the *Response to Violation Notice, L-2005-01001*. If sworn as a witness, I can testify competently to the accuracy of Exhibit C. Attached hereto and made a part hereof as Exhibit D is a true and accurate copy of the *Closure Report and Response to Violation Notice, L-2005-01001*. If sworn as a witness, I can testify competently to the accuracy of Exhibit D.
6. On February 23, 2006, I was present at a meeting between representatives of CSXT, ARCADIS, legal counsel for CSXT, IEPA and the Illinois Attorney General's Office. ARCADIS and CSXT presented documents and advised the Illinois Attorney General's Office and the IEPA that the release had been completely addressed and that no further action was required. At this meeting, representatives from the IEPA requested that a final report be submitted.
7. ARCADIS submitted to the IEPA and the Illinois Attorney General's Office the report titled *Response to Violation Notice, L-2005-01001*, dated March 3, 2006, which presented technical data and requested closure of this incident. The Illinois Attorney General's Office responded by requesting that two additional soil samples be collected in a letter dated April 14, 2006. ARCADIS collected the additional two soil samples and presented the results in the report titled *Closure Request and Response to Violation Notice, L-2005-01001*, dated June 1, 2006.
8. The results and the analysis of additional soil samples collected by ARCADIS in May and June of 2006 are set forth in Exhibit C and Exhibit D

FURTHER, Affiant sayeth not.

DATED: 2.23-07



Sid Glenn

V4447722.1

AFFIDAVIT

1. My name is Kevin Peterburs.
2. I am employed as a staff engineer for ARCADIS.
3. I have direct personal knowledge of work performed and reports prepared by ARCADIS on behalf of CSX Transportation Inc. (hereinafter "CSXT") regarding the Rose Lake Yard CSXT facility located at 3900 Rose Lake Yard Road, East St. Louis, St. Clair County, Illinois.
4. On July 12, 2006, I had a telephone conversation with Ms. Kathy Vieregge of the Illinois Environmental Protection Agency (hereinafter "IEPA") as a follow-up to the *Closure Request and Response to Violation Notice, L-2005-01001*, dated June 1, 2006, prepared by ARCADIS for CSXT and submitted to the IEPA.
5. In accordance with the procedures of the Chicago, Illinois office of ARCADIS to keep contemporaneous records of all telephone conversations made in the course of regularly conducted business activities, I prepared a record of the conversation between myself and Ms. Vieregge. Attached hereto and made a part hereof as Exhibit F is a true and correct copy of the telephone conversation record. If sworn as a witness, I can testify competently to the accuracy of Exhibit F.

FURTHER, Affiant sayeth not.

DATED:

2-23-07



Kevin Peterburs