BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board Reply to Complainant's Response to Respondent CSXT'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: April 30, 2007

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REPLY TO COMPLAINANT'S RESPONSE TO 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 101.500 respectfully replies to the Complainant, People of the State of Illinois', response to CSXT's motion for summary judgment.

In their response, the People agree that there are no disputed material facts but insist that additional facts, culled from the same reports filed by CSXT, support their theories of CSXT's liability. But these additional facts demonstrate further that the People's claims fail as a matter of law. Therefore, the Board should enter summary judgment in CSXT's favor on all three counts alleged in the Complaint.

ARGUMENT

I. There is no evidence in the record of any contamination to waters of the State as a result of the release.

Under Illinois law, the mere presence of a potential source of water pollution on the land does not constitute a violation of Section 12(a) and Section 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). Absent evidentiary proof of particular quantities and concentrations of contaminants in the groundwater or evidence that otherwise render the waters of the State harmful, detrimental or injurious, there can be no violation of Section 12(a) and Section 12(d) of the Act. *Id.*; *see also People v. Hendricks*, PCB 97-31 (1998). Here, the People have not presented any evidence documenting the allegation that the release caused or threatened groundwater contamination. Thus, the People's allegations that CSXT violated Section 12(a) and Section 12(d) of the Act fails as a matter of law.

The People have failed to allege in its Complaint or state in its response to CSXT's motion, any facts which support their allegation that the release caused groundwater contamination or otherwise rendered the waters of the State harmful, detrimental or injurious. The People do not dispute that CSXT remediated the release and that the soil and groundwater sampling documented that there is no contamination associated with the release. The People do not dispute that the groundwater samples collected by Arcadis documented that all groundwater samples at the site were below the TACO Tier I Class II groundwater Remediation Objectives.

The People's sole support of their allegation is a single soil sample, S4, collected by Hulcher Professional Services ("HPS") that is slightly elevated above the TACO Industrial/Commercial Tier I Remediation Objectives. The People do not dispute that further samples at this same location taken at IEPA's direction show no exceedances and that no further remediation needed to be performed. Thus, the People identify no issue of disputed fact nor any undisputed fact that supports their claim that groundwater contamination occurred or was threatened at the Rose Lake Yard site as a result of the release. Since there is no evidence in the record of any groundwater contamination,

according to the holding in *Bliss*, the People's allegation that CSXT violated Section 12(a) and Section 12(d) of the Act fails as a matter of law.

The People further allege, without providing any evidence of actual groundwater contamination, that CSXT caused or threatened water pollution because the geology of the site shows that groundwater is 2 to 3 feet below the surface and the soil is silty sand. As an initial point, while the description of the geology is contained in the Arcadis report, attached as Exhibit C in Respondent's motion for summary judgment, the conclusion that the conditions result in a threat to groundwater is not supported by any affidavit, expert or otherwise. Although the People include the Affidavit of IEPA geologist Kathy Vieregge, she only attests to documents that she reviewed and sent. In the absence of any expert support, the claim that the geology supports a threat of groundwater contamination from the one PAH finding should be ignored by the Board. *See Matteson WHP Partnership v. Martin's of Matteson*, PCB 97-121 (2000), affirmed in part, *James W. Martin, et al. v. IPCB and Matteson WHP Partnership*, No. 1-00-2513 (1st Dist. 2001) (holding that without the minimum technical requirements to demonstrate groundwater contamination there cannot be a violation of Section 12(a) of the Act).

Similar arguments concerning the geology of a site when there was no evidence of groundwater contamination were summarily dismissed by the court in *Bliss*. In *Bliss*, samples showed soil contamination of over 10,000 parts per million of trychlorethylene, a contaminant listed by the Board as a hazardous substance. *Bliss,* 138 Ill.App.3d at 702-04; 485 N.E.2d at 1156-58. At trial, an IEPA geologist testified that the area where the dumping 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 tend to rise above the surface. *Id.* The court reversed the Board's ruling that Bliss violated Sections 12(a) and Sections 12(d) of the Act despite the identified soil contamination and geologic testimony. The People did not offer any evidence of actual impacts to the waters of the State based on the defendant's actions. *Id.*

The Court's finding in *Bliss* requires the Board to find no violations here as well. Not only is there little or no soil contamination here, there is no testimony to support a finding that what little there might have been in the soil resulted in groundwater pollution or a threat to groundwater. As a result, the People's allegation that CSXT violated Section 12(a) and Section 12(d) of the Act fails as a matter of law and summary judgment should be granted in favor of CSXT.

II. The People did not respond substantively to CSXT's argument that Count III of the People's Complaint alleging an open dumping violation under Section 21(a) of the Act fails as a matter of law.

CSXT's motion for summary judgment asserted that Count III of the People's Complaint which alleges that CSXT violated Section 21(a) of the Act is misplaced because, as a matter of law, the accidental release and immediate site cleanup cannot be considered open dumping under the statutory definition of the term. The People failed to address CSXT's argument in its response to CSXT's motion for summary judgment in any substantive manner, stating only the open dumping occurred because "pollution remained in the soil for over 9 months." The evidence of this "pollution" is the single PAH sample which slightly exceeded the TACO standards when sampled in October, 2005 but was not detected in later sampling. Open dumping is defined in the Act as "the consolidation of refuse from one or more sources at one disposal site... ." (415 ILCS 5/3.35). The People have not demonstrated how this low level of material, not identified

in further sampling and not the subject of any remediation could constitute "open dumping" or support a claim that contamination remained in the soil as a result of CSXT's alleged inaction. Since that is the only basis for the People's claim of open dumping, CSXT's motion should be granted and this claim should be dismissed.

III. The People do not dispute the material fact that CSXT completely remediated the release prior to the filing of the Compliant.

CSXT's motion for summary judgment, including its attached affidavits and exhibits sets forth in detail that the release at the Rose Lake Yard site was completely remediated long before the People filed the instant Complaint. The People do not, because they cannot, dispute this material fact and therefore as a matter of law, all three counts in the People's Complaint must be dismissed.

In the response to CSXT's motion for summary judgment, the People cite Section 33(a) of the Act which states that, "[i]t shall not be a defense to findings of violations of the provisions of this Act, any rule or regulations adopted under this Act...or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation..." 415 ILCS 5/33(a). However, in over 30 years of Illinois case law interpreting the Environmental Protection Act, the Illinois Supreme Court, Circuit Courts and the Pollution Control Board have all consistently held that as a matter of law it is *inappropriate to impose a civil penalty* when violations had ceased long before the People institute an action before the Board. *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).

Courts have further held that even when there "is no question that [a defendant] violated the Environmental Protection Act...a fine should not necessarily be imposed once a violation has been found." *City of Moline v. Pollution Control Board*, 133 Ill.App.3d 431, 478 N.E.2d 906 (3rd Dist. 1985). (holding that even when the record before the Board reveals a seriously troubled and environmentally harmful operation, a penalty is inappropriate when the violations were substantially under control at the time the complaint was filed). Similarly, in *Chicago Magnesium Casting Company v. Illinois Pollution Control Board*, the court held that "the evidence does show a violation of the Act...[b]ut no complaint was filed against Chicago Magnesium at that time." *Chicago Magnesium*, 22 Ill.App.3d 489, 317 N.E.2d 689 (1st Dist. 1974). In *Chicago Magnesium*, the People delayed two and a half years after the violation to file a complaint and by then the company had been in compliance for almost 6 months. *Id.* The court held that "under the circumstances, the imposition of a civil penalty will in no way aid in the enforcement of the Act" and the court vacated the Board's order imposing a civil penalty. *Id.*

It is undisputed that CSXT remediated 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. *See* Complainant's Answer to Affirmative Defenses at p. 1. The instant Complaint will not aid in the enforcement of the Act and is purely punitive, and therefore it would be inappropriate to impose a civil penalty against CSXT in this matter. To hold otherwise would be contrary

to longstanding Illinois Supreme Court precedent. *See City of Monmouth*, 57 Ill.2d 482, 313 N.E.2d 161 (1974); and *Southern Illinois Asphalt Company, Inc.*, 60 Ill.2d 204, 326 N.E.2d 406 (1975).

As Courts and the Board have long held, "to penalize those who act in good faith would only discourage others who act in good faith from moving to correct their violations. *See 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)). 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 as to all three counts alleged in the People's Complaint.

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: April 30, 2007

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Reply to Complainant's Response to Respondent CSXT'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