

RECEIVED
CLERK'S OFFICE

AUG 06 2007

STATE OF ILLINOIS
Pollution Control Board

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

To: Kristen Laughridge Gale
Assistant Attorney General
Environmental Bureau
500 South Second Street
Springfield, IL 62706

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 CSXT's Response to Complainant's Motion for Reconsideration in the above-titled matter. A copy is hereby served upon you.

CSX TRANSPORTATION, INC.

By: 

One of its Attorneys

DATED: August 6, 2007

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

RECEIVED
CLERK'S OFFICE

AUG 06 2007

STATE OF ILLINOIS
Pollution Control Board

**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)**

**RESPONDENT CSXT'S RESPONSE TO COMPLAINANT'S
MOTION FOR RECONSIDERATION**

Respondent, CSX Transportation, Inc. ("CSXT"), by and through its attorneys, McGuireWoods LLP, and pursuant to 35 Ill. Admin. Code Section 101.520 and 101.902, respectfully files this Response to the Complainant, People of the State of Illinois' ("People"), Motion for Reconsideration ("Motion") and states as follows:¹

On July 12, 2007, the Illinois Pollution Control Board ("Board") ruled on Respondent CSXT's Motion for Summary Judgment and Complainant's Cross Motion for Summary Judgment, both of which had been fully briefed. The Board granted the People's Cross Motion for Summary Judgment, finding that CSTX violated various provisions of the Act, 415 ILCS 12(a), (d), 21(a) (2006), but held that a civil penalty was not warranted, and did not assess one. The People filed their Motion for Reconsideration alleging that the Board acted improperly in failing to assess a civil penalty against CSTX, and did so *sua sponte*, without a hearing or the necessary review of each of the statutory

¹ CSXT files this brief in response to Complainant's Motion without waiver of its right to appeal the Board's July 12, 2007 Order under the law. See 35 Ill. Adm. Code 101.520(c), and *Freedom Oil Company v. Illinois Pollution Control Board*, 275 Ill.App.3d 508, 512, 655 N.E. 2d 1184, 1188 (4th Dist. 1995).

factors. As will be discussed below, the People’s Motion must fail because it does not raise any additional evidence or a change in the law; the Board did not rule on the issue of civil penalties *sua sponte* because the parties properly and repeatedly briefed the issue before the Board; and even if the Board did act *sua sponte*, it did so properly because the Board has broad latitude in deciding whether to hold a hearing and in weighing the necessary factors to determine whether to issue civil penalties. For these reasons, the Motion must be denied.

ARGUMENT

I. The Board Must Deny The People’s Motion For Reconsideration Because It Presented No New Evidence Or A Change In The Law.

Motions for reconsideration are generally disfavored, and are only appropriate when the movant puts forth factors including new evidence or a change in the law, to conclude that the Board’s decision was in error. *Des Plaines River Watershed Alliance v. Illinois Environmental Protection Agency*, PCB 04-88 (July 12, 2007) (internal citations omitted). The purpose of such a motion is to bring to the Board’s attention “newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court’s previous application of the existing law.” *Id.* at *1, quoting *Korogluyan v. Chicago Title & Trust Company*, 213 Ill.App.3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). In *Des Plaines*, the movant argued that the Board applied an incorrect standard of review and shifted the burden of proof. In ruling on the motion to reconsider, the Board addressed these issues only for the sake of clarity but did not address the remaining arguments because the movants “provided no new evidence or a change in the law that would indicate that the Board’s [order] was in error.” *Id.*

The People point out that courts have echoed this position on motions for reconsideration by citing *Weidner v. Midcon Corporation*, 328 Ill.App.3d 1056, 1061, 767 N.E.2d 815, 820 (5th Dist. 2002). There, the court held that the trial court properly denied plaintiffs' motion to reconsider because plaintiffs "presented no new facts that were not available at the time of the hearing on defendants' motion to dismiss and made no claim that there had been a change in the law," and simply presented prior arguments. *Id.* The same is true in the present case--all issues are the before the Board and are contained in the record, which has not changed. The People do not offer any new evidence or changes in the law, and therefore, the Board should follow its recent ruling in *Des Plaines* and the holding of *Weidner*, and deny the People's Motion.

II. The People's Attempt To Categorize The Board's Order As An Improper *Sua Sponte* Decision Fails Under Illinois Law.

The People label the Board's July 12, 2007 Order a *sua sponte* determination for which the People had no notice or an opportunity to respond. In pursuit of this untenable position, the People put forth several cases and cite a dissenting Board opinion in an attempt to analogize to wholly different factual scenarios.

First, the People cite *Johnson v. Decatur Park District*, 301 Ill.App.3d 798, 704 N.E.2d 416 (4th Dist. 1998). In *Johnson*, the trial court, raised and ruled on an issue which had not been argued or briefed in granting defendant's motion for summary judgment. The appellate court reversed because the plaintiff had no notice that this issue would be raised nor had an opportunity to prepare an argument or review the record on this issue. *Id.* at 811-812. In the present case, the People cannot similarly claim surprise because the parties briefed the issue of whether the Board ought to issue a civil penalty against CSXT. See CSXT's Motion for Summary Judgment (CSXT Mot. 8-9); the

People's Response (P. Response 5-6); CSTX's Reply (CSX Reply 5-6); CSXT's Response to People's Cross Motion for Summary Judgment (CSTX's Response 9-10); and the People's Reply (P. Reply 6-7). Needless to say, both parties repeatedly addressed the issue of whether the Board ought to issue a civil penalty against CSTX, and the People cannot now claim surprise as to the issue.

The People also reference *Sanchez v. City of Chicago*, 352 Ill.App.3d 1015, 817 N.E.2d 1068 (1st Dist. 2004) and *Peterson v. Randhava*, 313 Ill.App.3d 1, 729 N.E.2d 75 (1st Dist. 2000). In both cases, the courts converted motions for sanctions to motions for summary judgment *sua sponte*, and disposed of the matters. Both cases were reversed because the courts did not provide notice or an opportunity to respond in writing. However, as has already been discussed, the parties in the instant matter have extensively briefed the issue of whether a civil penalty is an appropriate remedy.

Courts have repeatedly held that where the parties have notice of the issues the court is addressing and an opportunity to respond, the court is not acting on its own. *See Perry v. Minor*, 319 Ill.App.3d 703, 710, 745 N.E.2d 113, 119 (1st Dist. 2001) (Court distinguished *Peterson*, holding that third party defendant was properly dismissed because opposing party had an opportunity to respond); *Agnew v. Shaw*, 355 Ill.App.3d 981, 823 N.E.2d 1046 (1st Dist. 2005) (Court distinguished *Peterson*, holding that the trial court did not improperly grant a *motion in limine*, the parties presented motions and the court did not convert these motions to motions for summary judgment, which would have disposed of the case.)

Finally, the People quote from the dissenting opinion of Board Member Thomas Johnson in *People v. J&S Companies, Inc.*, PCB 06-33 (August 17, 2006), in which Mr.

Johnson stated that he disagreed with the majority's finding that one of the defendants admitted certain facts, without the necessary motion before the Board. Again, reliance upon this reasoning is misplaced. In the instant case, the issue of civil penalties is before the Board and was thoroughly addressed by the parties throughout their numerous briefs. Therefore, the People cannot claim surprise and that the Board denied them an opportunity to respond. As a result, the People's Motion must be denied.

III. Even If The Board Agrees That Its Decision Was Made *Sua Sponte*, It Has The Legal Authority To Do So.

The Board has broad discretion in making the necessary assessments to determine the imposition of civil penalties. *Slager v. Pollution Control Board*, 96 Ill.App.3d 332, 339, 421 N.E.2d 929, 934 (1st Dist. 1981) (internal citations omitted). A Board order will not be overturned unless it is clearly arbitrary, capricious or unreasonable. *ESG Watts, Inc. v. Illinois Pollution Control Board*, 282 Ill.App.3d 43, 50-51, 668 N.E.2d 1015, 1020 (4th Dist. 1996). The People cannot and have not argued the Board's Order was clearly arbitrary, and the Order should stand.

Numerous examples exist in which the Board acts on its own. *See In the Matter of: Site-Specific Rulemaking for the Sanitary District of Decatur, Illinois*, R85-15 (April 10, 1986) (Board held that it "has the authority and duty to impose conditions, *sua sponte*, on any relief it grants."); *Illinois Environmental Protection Agency v. Celotex Corporation*, PCB 79-145 (December 5, 1986), *aff'd* by *Illinois Environmental Protection Agency v. Celotex Corporation*, 168 Ill.App.3d 592, 522 N.E.2d 888 (3rd Dist. 1988) (Board *sua sponte* dismissed with prejudice numerous counts of the complaint against defendant as a discovery sanction.); and *Stephen A. Smith v. City of Champaign*, PCB 92-55 (October 16, 1992) (Board affirmed itself on petitioners' motion for

reconsideration and held that it properly decided, *sua sponte*, not to conduct a factual review of the record.) Therefore, even if the Board agrees that it was acting *sua sponte* in handing down its decision that civil penalties were not warranted, because of the broad authority it has to determine civil penalties and make rulings *sua sponte*, it acted appropriately and now should deny the People's Motion.

IV. The Board Properly Denied The People's Request For A Hearing.

The People also complain that the Board summarily dismissed its request for a hearing on the matter. However, the Board has considerable leeway in determining whether to hold hearings regarding its rulings on penalties. *Site-Specific Rulemaking* at *1 (Board held that because it can condition any relief it grants, "to hold otherwise, or to even imply otherwise, would effectively incapacitate the Board by requiring additional hearings to be held in many, if not most of its cases and proceedings.") *See also Ogle County Board v. Pollution Control Board*, 272 Ill.App.3d 184, 197, 649 N.E.2d 545, 554-55 (2d Dist. 1995) (Where Board reversed county's landfill expansion because county did not comply with the Act's notice provisions and only raised the issue to the county the afternoon before the hearing, denying county's requests for additional time and another hearing, court affirmed Board's decision because it was not an abuse of discretion.) The People do not identify any additional facts to be addressed or tried at hearing. In its complaint and affidavits in support of its motion, the People identified the entire course of CSXT's conduct in dealing with the IEPA, excluding CSXT's efforts to actually remediate the site. No factual dispute has been raised as to any of those issues. Therefore, it is impossible to discern what purpose a hearing would serve. The Board did

not improperly deny the People's request for a hearing, and the People's Motion must fail.

V. The Board Has Discretion In Considering The Factors In Determination Of Civil Penalties.

Finally, the People argue that the Board did not properly consider the Section 42(h) and Section 33(c) factors and that the record had not yet been made for these evaluations. First, the basis for the People's underlying action, lack of cooperation with the Agency, is not a 33(c) factor and should therefore not be considered as a factor in determining whether a civil penalty is appropriate.

Further, despite the People's argument to the contrary, the entire record is before the Board, and no factual dispute exists as to what events transpired, which led to the action. The materials are before the Board in their entirety and have been admitted. Therefore, the record is complete and as such, the Board may make its determination based upon it.

In addition, a simple reading of the Board's Order shows that it did address each of the Section 33(c) factors and each of the Section 42(h) factors except 42(h)(4). (Order at 18-19). In analyzing each of the 33(c) factors, the Board found that:

The character and degree of injury is slight as the spill occurred at an industrial site and the evidence indicates that the site was successfully remediated. *See* 415 ILCS 5/33(c)(i) and 42(h)(1). The source is suited to the location and has economic value and because the spill was accidental, the technical practicality of reducing discharges is not a factor. *See* 415 ILCS 5/33(c)(ii), (iii), and (iv) (2006). Further, the evidence is clear that subsequent compliance has occurred. *See* 415 ILCS 5/33(c)(v) (2006).

(Order at 19).

Similarly, the Board discussed each of the Section 42(h) factors except 42(h)(4). *Id.* Section 42(h)(4) states, "the amount of monetary penalty which will serve to deter


further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act.” 415 ILCS 5/42(h)(4) (2006). Without specifically addressing this factor and citing to it, the Board did note that because the spill was accidental, a fine would not prevent or reduce discharges. Therefore, a civil penalty would have no deterrent effect. This exact reasoning ought to be and likely was applied to the fourth factor of Section 42 and would indicate the same outcome by the Board.

Whether the Board specifically cited to the Section 42(h)(4) factor or not, the courts have upheld the Board’s wide latitude in considering the factors for determining a civil penalty. *ESG Watts* at 54 (“The Board is allowed wide discretion under section 42(h) of the Act to consider *any* factor in aggravation or mitigation of the penalty.”) (emphasis added). Therefore, under any analysis, Board appropriately considered the factors upon which it based the Order, and the People’s Motion must fail.

Wherefore, CSXT respectfully requests that the Board deny the People’s Motion for Reconsideration.

Respectfully submitted,

CSX TRANSPORTATION, INC.

By: 
One of its Attorneys

Dated: 8/6/07

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

V4682225.2

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.)

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Respondent's CSXT's Response to Complainant's Motion for Reconsideration upon those listed on the attached Notice of Filing by first class mail, postage prepaid.

Respectfully submitted,

CSX TRANSPORTATION, INC.

By: 

One of its Attorneys

Dated: August 6, 2007

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