BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 16-61
	)	(Enforcement – Air)
AMSTED RAIL COMPANY, INC.,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

Jamie D. Getz
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on this 9th day of February 2016, the following was filed with electronically with the Illinois Pollution Control Board: **Respondent Amsted Rail Company, Inc.'s Motion for Leave to File a Reply**, which is attached and herewith served upon you.

AMSTED RAIL COMPANY, INC.

By: *s/Elizabeth S. Harvey*
One of its attorneys

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CERTIFICATE OF SERVICE

I, the undersigned, state that a copy of this notice and the above-described document were served electronically upon all counsel of record on February 9, 2016.

s/Elizabeth S. Harvey

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	)	
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MOTION FOR LEAVE TO FILE A REPLY

Respondent AMSTED RAIL COMPANY, INC. (Amsted), by its attorneys Swanson, Martin & Bell, LLP, moves the Board or its hearing officer for leave to file a reply in support of Amsted's motion to dismiss Counts I through VI of the complaint.

1. This motion is brought pursuant to Section 101.500(e) of the Board's procedural rules. That section allows for a reply to prevent material prejudice.
2. Much of the Attorney General's response is devoted to the wrong issue. Further, the cases cited by the Attorney General are irrelevant or distinguishable.
3. Amsted seeks to avoid being materially prejudiced by clarifying the State's misapplication of Amsted's motion and the case law.
4. Amsted's reply (enclosed as Exhibit A) is limited to claims made in the Attorney General's response. Amsted's reply does not restate arguments in its motion to dismiss, nor does it raise new arguments.

WHEREFORE, Amsted Rail Company, Inc. moves the Board or its hearing officer to allow the filing of the enclosed reply, to prevent material prejudice, and for such other relief as the Board or its hearing officer deems appropriate.

Respectfully submitted,

AMSTED RAIL COMPANY, INC.

By: _____
One of its attorneys

Dated: February 9, 2016

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REPLY IN SUPPORT OF MOTION TO DISMISS COUNTS I, II, III, IV, V, and VI

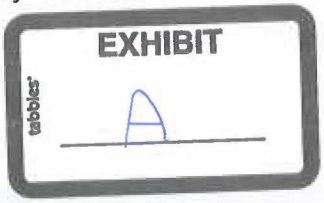
Respondent AMSTED RAIL COMPANY, INC. (Amsted), by its attorneys Swanson, Martin & Bell, LLP, replies in support of its motion to dismiss Counts I, II, III, IV, V, and VI of complainant's complaint. The violations alleged in those counts are barred by the statute of limitations.

ARGUMENT

Amsted moved to dismiss Counts I through VI of the complaint because complainant was aware those causes of action accrued more than five years before the complaint was filed. Amsted's motion to dismiss demonstrates that a five-year statute of limitations applies to this enforcement action brought by the Attorney General because the State is attempting to enforce a private interest. (Motion at pp. 4-8.) This reply is limited to rebutting the claims made in the Attorney General's response.

The Attorney General argues the wrong issue.

Amsted and the Attorney General agree that the five-year statute of limitations in Section 13-205 of the Code of Civil Procedure does not apply when the State seeks to enforce a public interest. Amsted's motion specifically "...recognizes the Board has held that the statute of limitations will not preclude an enforcement action brought by the State on behalf of a *public interest*." (Motion at p.4.)(emphasis in original). The Attorney General



misunderstands the gist of Amsted's argument. The Attorney General spends most of its response citing cases where the statute of limitations was not applied because the State was enforcing a public interest. These arguments are unnecessary: Amsted agrees there is no statute of limitations where the Attorney General is enforcing a public interest. However, that is not what is at issue here. Reduced to its essence, the Attorney General argues – contrary to case law – there is never a statute of limitations on lawsuits brought by the State. That is not Illinois law. This case presents the circumstances where the statute of limitations does apply.

Amsted's motion to dismiss demonstrates the five-year statute of limitations set forth in Section 13-205 applies where the complainant, including the Attorney General, is enforcing a private interest. In this case, the allegations of Counts I through VI involved non-substantive, stale, paper-related claims which were corrected – and which the State knows were corrected--more than five years ago. In this case, the interests sought to be enforced in Counts I through VI are private interests, not public interests. (*See* Motion at pp. 4-8.) Therefore, the five-year statute of limitations applies to Counts I through VI.

The Board has recognized that Section 13-205 can be applicable to enforcement cases.

The Board has recognized that the five-year statute of limitations set forth in Section 13-205 may be raised in enforcement actions. The Attorney General asserts that Amsted's citation to *Union Oil Company v. Barge-Way Oil Company, Inc.*, PCB 98-168 (January 7, 1999) is misplaced because Union Oil was a private party and here, the State is a public entity. The Attorney General misunderstands Amsted's argument. Amsted agrees that *Union Oil* involved a private party and that Section 13-205 may be applicable to actions between private parties. (Response at p. 5.) Amsted cited *Union Oil* because it

demonstrates that Section 13-205 has applicability in enforcement cases. (Motion at p. 4.) Both *Union Oil* and *Caseyville Sport Choice LLC v. Erma I. Sieber*, PCB 08-30 (October 16, 2008) (cited by the Attorney General) involve private parties. In both cases, the Board noted Section 13-205, and analyzed the substance of the statute of limitations claim. If Section 13-205 is never applicable to an enforcement action, there would have been no need for analysis of the statute of limitations. Whether or not a particular action is barred by Section 13-205 depends on the facts of the case, including the interests to be protected – not simply the status of the complainant. The Board's decision history consistently indicates that a statute of limitations (here Section 13-205) can be applicable to enforcement actions, in certain circumstances. In this case, because the State is enforcing a private right – not a public right – Section 13-205's five-year statute of limitations is applicable.

The issue is whether the State seeks to enforce a public or a private interest.

The critical question in determining whether a statute of limitations applies is whether the government seeks to enforce a public interest. (Motion at pp. 4-5.) Illinois law is clear that a "public" interest is required to avoid application of the statute of limitations to stale claims. *Pielet Bros. Trading, Inc. v. Pollution Control Board*, 110 Ill.App.3d 752 (5th Dist. 1982) does not stand for the proposition there is never a statute of limitations applicable to enforcement actions brought by the State. Indeed, the appellate court specifically recognized that the question is whether the State is asserting public rights or private rights:

> [T]he question is whether the State...is asserting public rights...or private rights....Here, the Agency...seeks to protect the *public's right*...." (emphasis added.)
>
> *Pielet Bros.*, 110 Ill.App.3d at 758.

The appellate court reaffirmed long-standing Illinois law that a statute of limitations does apply – even to government action – unless that action involves enforcement of a public interest.[1] The Attorney General's response never disputes that a "public" interest is the applicable test whether the statute of limitations can apply. The Attorney General's response is largely that "all" State action enforces a public interest; therefore, no statute of limitations applies. However, this ignores the Illinois Supreme Court's limitation regarding a "public right" (*Clair v. Bell*, 378 Ill. 128, 130 (statute of limitations applies to State actions if it involves private rights)), and ignores the appellate court's limitation regarding a "public right" (*Pielet Bros.*, 110 Ill.App.3d at 758). If there were no statute of limitations on government action, the express requirement of a "public right" would not exist in the case law. Clearly something more is required to avoid the statute of limitations than plaintiff's status as a government agency – otherwise there is no purpose for the requirement of a "public right."

In addition to affirming that a "public right" must be involved, the *Pielet Bros.* case involved ongoing violations regarding dangerous activities which resulted in unattended fires and acres of exposed waste. *Pielet Bros.*, 110 Ill.App.3d at 753. Those ongoing violations presented a continuing threat to public health and safety. It was reasonable and consistent with Illinois law that the *Pielet Bros.* court rejected a statute of limitations defense in the face of violations occurring within the applicable limit and resulting in ongoing, substantive violations of public interests, like preventing further fires and protecting public health. Given the nature of the ongoing health and safety violations, the *Pielet Bros.* court found the State was enforcing the public's right to a safe and clean environment from

[1] For a sampling of Illinois case law, see the cases cited in Amsted's Motion to Dismiss, pages 5-7.

ongoing regulatory violations – which the State knew about but failed to previously enforce. Consequently, the statute of limitations did not prevent the State from enforcing a public interest, such as prevention of fires and air pollution. *Id.* at 758.

In contrast, the violations alleged in Counts I through VI of this case are stale, wholly-past, paper-related violations, which were identified in 2008 and 2009, and which the State knows have long since been corrected.[2] Counts I through VI do not allege threats to public health or violations of substantive environmental regulations. There must be some applicability of the statute of limitations – unless this Board holds that all alleged violations of the Act involve a "public interest." Counts I through VI must be dismissed as there is no public interest in enforcing wholly past, document-related violations which the Agency knows were corrected long ago.

The Attorney General's arguments miss the point.

The Attorney General's response misses the point of Amsted's motion, and cites case law that is irrelevant and distinguishable. The heart of the Attorney General's response is its claim, repeated like a mantra, that the Board has already decided there is no statute of limitations in enforcement actions brought by the State pursuant to Section 31 of the Environmental Protection Act. This is curious because the complaint does not allege its action is brought under Section 31. Therefore, the argument is not applicable to this case. Further, even assuming, *arguendo*, the complaint is brought pursuant to Section 31, the cases cited are irrelevant to the motion. The cases do not involve the analysis of

[2] The Attorney General states that civil penalties for paperwork violations are necessary to encourage voluntary compliance. Amsted agrees that civil penalties can be applied to paperwork violations. However, such an action must be brought within five years.

a private interest versus a public interest or the application of the Section 13-205 statute of limitations to private interests.

People v. John Crane, Inc., PCB 01-76 (May 17, 2001), did not involve the five-year statute of limitations set forth in Section 13-205, or any other statute of limitations established by law. In *John Crane*, the respondent argued that the State's failure to issue notice of violation within 180 days of discovering the alleged violation acted as a statute of limitations on an enforcement action. The Board properly rejected that claim, finding the 180-day requirement of Section 31 is the beginning of a pre-referral negotiation process – not a statute of limitations. *John Crane*, slip op. at 5. The case did not consider the applicability of the Section13-205 statute of limitations or whether the interest at issue was public or private.

Caseyville Sport did not involve the Attorney General, although it did involve two private parties and Section 13-205's five-year statute of limitations. Critically, the Board did not find that Section 13-205 never applies in enforcement actions. Instead, the Board recognized Section 13-205, but ruled the "discovery rule" did not bar the suit, based on the pleadings. *Caseyville Sport*, slip op. at 4. Further, the *Caseyville Sport* language confirms Amsted's statement of law regarding the requirements of a "public interest": "a statute of limitations will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the *public's interest*." *Caseyville Sport*, slip op. at 3 (emphasis added). Amsted agrees there is no statute of limitations where the State seeks to enforce a public interest. In the instant case, however, the State seeks to enforce a private right. In the instant case, the applicable statute of limitations is five years, as set forth at Section 13-205.

Land and Lakes Company v. Village of Romeoville, PCB 91-7 (February 7, 1991), is simply irrelevant. In *Land and Lakes,* the Board considered whether to allow the Will County State's Attorney to intervene in an appeal of a denial of landfill siting approval. The case did not involve a statute of limitations, nor did it involve an enforcement action. Additionally, the Attorney General was not a party to that case.

CONCLUSION

The issue presented in Amsted's motion is whether there is a statute of limitations when the State brings an action to enforce a private right. Counts I through VI reflect private interests, and are thus subject to the five-year statute of limitations in Section 13-205.

The question on a motion to dismiss is whether the pleadings, taken in the light most favorable to the non-movant, demonstrate there are facts which, if proved, would entitle the non-movant to relief. *People v. Professional Swine Management,* LLC, PCB 10-84 (February 2, 2012), *citing Beers v. Calhoun*, PCS 04-204 (July 22, 2004). Counts I through VI of the complaint, on their face, allege only violations which accrued prior to November 16, 2010, five years before the filing of the complaint. There are no factual disputes about the date the cause accrued. Counts I through VI should be dismissed.

Respectfully submitted,

AMSTED RAIL COMPANY, INC.

By: *s/ Michael J. Maher*
One of its attorneys

Dated: February 9, 2016

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