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 Respondent CSXT's Response to Complainant's Cross 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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RESPONDENT CSXT'S RESPONSE TO COMPLAINANT'S CROSS 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 and 35 Ill. Admin. Code Section 101.516 respectfully files this response to the Complainant, People of the State of Illinois', cross motion for summary judgment.

The Board must grant a motion for summary judgment when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. 35 Ill.Admin. Code Section 101.516. The Board must consider the pleadings, exhibits and affidavits in the record in favor of CSXT and it may enter summary judgment only when it is clear and free from doubt that the People are entitled to judgment as a matter of law. *Wilder Binding Co. v. Oak Park Trust and Sav. Bank*, 135 Ill.2d 121, 552 N.E.2d 783 (1990). In addition, the Board must consider all the evidence before it strictly against the People and liberally in favor of CSXT. *Colvin v. Hobart Bros.*, 156 Ill.2d 166, 620 N.E. 2d 375 (1993).

Here, the People assert no material issues of disputed fact and fail to establish as a matter of law that the claims against CSXT satisfy the legal requirements of the alleged

causes of action. Therefore, the Board should enter summary judgment in CSXT's favor on all three counts alleged in the Complaint. The Board should further deny the People's request for a hearing to determine a civil penalty since CSXT did not violate any provisions of the Illinois Environmental Protection Act ("Act"). (415 ILCS 5/1 *et. seq.*)

ARGUMENT

I. Absent evidence in the record that the release caused contamination to waters of the State there can be no violation of Section 12(a) or Section 12(d) of the Act as a matter of law.

The law in Illinois is clear, absent evidentiary proof in the record that the release caused contamination to waters of the State, there can be no violation of Section 12(a) (415 ILCS 5/12(a)) or Section 12(d) of the Act (415 ILCS 5/12(d)). *See Jerry Russell Bliss, Inc., v. Illinois Environmental Protection Agency*, 138 Ill.App.3d 699, 485 N.E.2d 1154 (5th Dist. 1985); *see also People v. Hendricks*, PCB 97-31 (1998).

As stated in CSXT's motion for summary judgment, this case involves an accidental release of diesel fuel in an industrial rail yard which was immediately and successfully cleaned up. *See* Respondent's MSJ, Exhibit C; *see also* Respondent's MSJ, Exhibit D. The release at the Rose Lake Yard site merely impacted a small area of soil which was completely remediated consistent with the Act. *Id.* It is undisputed that there is no evidence in the record of any contamination to waters of the State (neither groundwater nor surface water) as a result of the release. *See* Respondent's MSJ at p. 3-4. Accordingly, the People's allegation that CSXT violated Section 12(a) and Section 12(d) of the Act fails as a matter of law.

On the day of the event, CSXT immediately hired Hulcher Professional Services ("HPS") to conduct an environmental site remediation to remove soil impacted by the

accidental release at the Rose Lake Yard site. *See* Respondent's MSJ at p. 2; Respondent's MSJ, Exhibit C at p. 2-3. Soil sampling performed by Hulcher to verify that the remediation was complete showed one soil sample with slightly elevated levels of a certain PAH. CSXT dispatched its environmental consultant, Arcadis, to the site to collect and analyze soil samples and groundwater to further demonstrate that the remediation was complete. All samples were determined to be below TACO Industrial/Commercial Tier I Remediation Objectives, including soil samples collected in the exact location of the S4 soil sample. *See* Respondent's MSJ, Exhibit C at p. 5-7; *see also* Respondent's MSJ, Exhibit D at p. 5-7. At the State's insistence, CSXT asked Arcadis to take additional samples in the area of the only identified exceedance. These samples were returned below the TACO soil and groundwater standards as well. Thus, the record here shows that the soil at the Rose Lake Yard site was completely remediated by Hulcher within 4 months of the release, consistent with the Act.

For purposes of determining whether the release violated Section 12(a) and Section 12(d) of the Act, there must be evidence in the record of contamination to the waters of the State. *See Bliss*, 138 Ill.App.3d 699, 485 N.E.2d 1154; *see also Hendricks*, PCB 97-31. In *Bliss*, the court held that "a principal draftsman of the Environmental Protection Act recognized that the mere presence of a potential source of water pollution on the land does not necessarily constitute a water pollution hazard." *Bliss*, 138 Ill.App.3d at 703-04; 485 N.E.2d at 1157. The court held that in order to find that the defendant violated Section 12(a) and Section 12(d) of the Act there must be proof in the record that contamination is "present in sufficient quantity or concentrations to constitute a water pollution hazard." *Bliss*, 138 Ill.App.3d at 703-04; 485 N.E.2d at 1157. Since in

Bliss, the People could not produce evidence of groundwater contamination, the court ruled that the defendant did not violate of Section 12(a) and Section 12(d) of the Act. *Id.* *See also People v. Hendricks*, PCB 97-31 (1998) (holding that without evidence of actual contamination to the waters of the State, the Board cannot find a violation of Section 12(a) of the Act).

It is undisputed that there is no evidence in the record of any water contamination at the Rose Lake Yard site. All groundwater samples collected and analyzed by Arcadis at the Rose Lake Yard site were either below laboratory detection limits for TACO contaminants or below TACO Tier I Class II groundwater Remediation Objectives. *See* Respondent's MSJ, Exhibit C at p.5-6 and Exhibit D at p. 5-6. The People's sole argument that there was a water pollution threat relies only on a single soil sample, S4, with a slightly elevated level of the constituent benzo (a) pyrene taken during HPS' site excavation and the People's unsupported hypothesis that the geologic conditions suggest that this single soil sample constitutes a threat of water pollution. As an initial matter, these hypotheses are not supported by any expert report or even by any statement by the IEPA. *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). Although the People attach several affidavits of IEPA personnel, including an IEPA geologist, none of these are directed to the possibility of water pollution.

The case primarily relied on by the People is *People of the State of Illinois v. John Chalmers d/b/a John Chalmers Hog Farm*, PCB 96-111 (2000). Yet, the *Chalmers*

decision is entirely distinguishable from the present matter because, in that case, the evidence in the record showed that the defendant caused actual contamination to waters of the State. *Id.* In *Chalmers,* an IEPA engineer collected surface water samples downstream from the Chalmers farm on two separate occasions and testified at a hearing that contaminated water flowed directly from the defendant's property. *Id.* Since the evidence in *Chalmers* case showed that for approximately two years several thousand gallons of livestock waste from the defendant's farm caused actual surface water contamination to a local stream, the Board held that the defendant violated Section 12(a) and Section 12(d) of the Act. *Id.*

Not only is the *Chalmers* case inapposite to the case here, it actually supports CSXT's position. In *Chalmers,* the Board clearly acknowledged the difference between a case where water pollution is documented and where it is not, stating that "the mere presence of a contaminant is insufficient to establish that water pollution has occurred or is threatened; it must also 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." (Citing *Bliss*, 138 Ill.App.3d 699, 485 N.E.2d 1154). Since the People have failed to make any showing that this single soil sample did or was likely to create a nuisance or impact the waters of the State in any way, the People's allegation that CSXT violated Section 12(a) and Section 12(d) fails as a matter of law.

The People's reliance on *Tri-County Landfill Co. v. Illinois Pollution Control Board*, 41 Ill.App.3d 249, 353 N.E.2d 316, and *People of the State of Illinois v. Petco Petroleum Corp.*, PCB 05-66 (2005), are similarly misplaced. In both cases, the People submitted specific data and testimony showing actual groundwater or surface water

contamination. Neither of these cases stand for the proposition that the People attempt to assert here that a slightly elevated level of PAH in a single soil sample at an active train yard supports a violation of Section 12(a) and 12(d) of the Act when sampling documents and environmental reports show that there is no actual groundwater contamination.

In the absence of any evidence in the record that CSXT caused actual contamination to waters of the State, the People attempt to argue for actionable water contamination by stating that the "geology of the Rose Lake Yard site consists of silty sand soils with groundwater between 2 to 3 feet below surface." Complainant's MSJ at p. 5. Not only is this argument unsupported by any technical testimony, it has already been rejected in far more egregious circumstances. In *Bliss*, the Court dismissed as legally irrelevant the People's claim that the defendant violated Section 12(a) and Section 12(d) of the Act because there the site had silty sand soils with artesian conditions that caused groundwater to rise up to the surface. *Bliss*, 138 Ill.App.3d at 704; 485 N.E.2d at 1158. The Court held that there can be no violation of Section 12(a) or Section 12(d) of the Act without evidentiary proof in the record that the release caused contamination to waters of the State. Here, it is undisputed that there is absolutely no evidence in the record that CSXT caused contamination to the waters of the State and the only impacts to soil at the site was completely remediated by CSXT consistent with the Act. *See* Respondent's MSJ; Exhibit 3 and Exhibit 4. Thus, as a matter of law the Board should deny the People's cross motion for summary judgment and hold that CSXT did not violate Section 12(a) and Section 12(d) of the Act.

II. As matter of law, the incident here cannot be considered an open dumping violation.

The statutory language of Section 21(a) of the Act does not support the People's allegation of an open dumping violation as a matter of law. As stated in the People's Motion for Summary Judgment, the People's only support for their open dumping claim is the undisputed fact that sampling after the immediate response action showed slightly elevated levels of two PAH compounds. The People argue that it is not the mere presence of these compounds which documents the claim, but the allegation that CSXT "left" these compounds in the soil for nine months. Even assuming that the People's unsupported assertions that these are components of fuel oil and evidence of the release are correct, the People do not dispute that CSXT performed no further remediation after the initial soil removal and that additional sampling at locations directed by the IEPA failed to show even those slightly elevated levels.

To prove open dumping the People must demonstrate the "consolidation of refuse from one or more locations at a disposal site." (415 ILCS 5/3.305) Yet the People have not and cannot point to one single case where the language of this definition was stretched to cover the utterly benign scenario here. Indeed, courts have held that if "waste is cleared away to another location before it is allowed to be dissipated back into the environment or emitted into air, or discharged into the water...the site cannot be regarded as [a] 'disposal site, and the prohibition against open dumping will not be triggered." *EPA v. Pollution Control Board*, 219 Ill.App.3d 975, 579 N.E.2d 1215 (5th Dist 1991). Here, CSXT's consultant immediately remediated the site by excavating the impacted soil from the release area. *See* Respondent's MSJ at p.2; Affidavit of John Broadus. Further sampling documented that all material was removed. In no way can

CSXT be accused of leaving contaminants in the soil at the site. Therefore, the People's basis for alleging an open dumping violation under Section 21(a) of the Act fails as a matter of law.

III. CSXT's Response to IEPA Correspondence is Irrelevant to any Showing of Alleged Violation of the Act

The Board may join CSXT in wondering why this case was filed in the first place. The undisputed facts show that CSXT had a small fuel oil release within the confines of an active train yard, that it immediately reported that release to IEMA, that it immediately remediated that release, and that further sampling documented that that the release had been remediated to the IEPA's satisfaction, all well before this complaint was filed. What is readily apparent is that the People's concern is not CSXT's immediate response to the release but the alleged lack of an immediate response to IEPA correspondence. In its initial complaint, the People alleged the correspondence sent by the IEPA and the lack of immediate response by CSXT but chose not to describe CSXT's actions in completing the remediation prior to the time the complaint was filed. The People then stated as a matter of law in response to CSXT's affirmative defenses, that this lack of immediate response did not, in and of itself, constitute a violation of the Act. *See* Complainant's Answer to Affirmative Defenses at p. 1. Yet in this motion the People rehash this correspondence record and devote its three affidavits solely to that issue, while failing to provide any technical support of its claims of water pollution or open dumping.

These correspondence issues are completely irrelevant to any finding of the Board with respect to the alleged violations. The People have already taken the legal position that the lack of timely response to IEPA correspondence is not a violation of the Act and nothing in the language of Sections 12(a), 12(d), or 21(e) suggests that timely

correspondence with the IEPA is an element of proving violations of those claims alleged here. While such correspondence might be relevant (although certainly not dispositive) with respect to the penalty factors listed in Section 33(a), these factors do not come into play until the Board finds that a violation has occurred. This correspondence record cannot and should not have any bearing on the Board's resolution of this motion.

IV. Even if the Board Determines that a Violation Occurred, It Could Not Issue a Penalty.

Even if the Board finds (against the weight of the facts and the law) that CSXT violated Section 12(a); Section 12(d); and Section 21(a) of the Act, no civil penalty should be issued against CSXT. It is an undisputed material fact that the site was completely remediated long before the People filed the instant Complaint against CSXT. *See* Respondent's MSJ at p. 2-5; *see also* Complainant's Answer to Affirmative Defenses at p. 1. According to the Illinois Supreme Court, when violations of the Act have ceased long before the People institute a case before the Board, it is inappropriate to impose a civil penalty because a penalty would be purely punitive and it would not aid in the enforcement of the Act. *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). While the Board is vested with broad discretionary powers in imposing penalties, the assessment may not be arbitrary. *Monmouth*, 57 Ill.2d 482, 313 N.E.2d 161 (1974); *Metropolitan Sanitary District v. Pollution Control Board*, 62 Ill.2d 38, 338 N.E.2d 392 (1975); *CPC International, Inc. v. Pollution Control Board*, 24 Ill.App.3d 203 (3rd Dist.

1974). Thus, because the site was completely remediated long before the People filed the instant Complaint, it would be arbitrary and contrary to longstanding Illinois case law for the Board to impose a civil penalty against CSXT in this matter.

Wherefore, CSXT respectfully requests that the Board (1) deny the People's cross motion for summary judgment; (2) deny the People's request for a hearing to determine a penalty against CSXT because CSXT did not violate any of the provisions of the Act; (3) enter summary judgment in CSXT's favor; and (4) dismiss all three 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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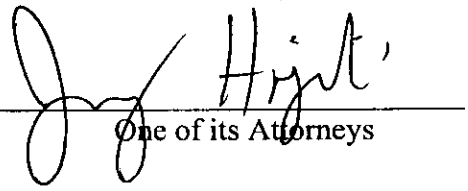
CERTIFICATE OF SERVICE

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