ILLINOIS POLLUTION CONTROL BOARD
July 12, 2007

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

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

The Board has received cross-motions for summary judgment in this enforcement action from the People of the State of Illinois's (People) and CSX Transportation, Inc. (CSX). Both parties agree that there are no genuine issues of material fact and the proceeding is ripe for summary judgment. The Board has reviewed the record and arguments by the parties and agrees that summary judgment is appropriate. The Board grants the People's motion and finds that CSX violated Sections 12(a), (d) and 21(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (d), and 21(a) (2006)). The Board also finds that a civil penalty is not warranted; however, the Board will order CSX to cease and desist from future violations. The Board declines to award attorney's fees and costs.

PROCEDURAL BACKGROUND

On September 12, 2006, the People filed a three-count complaint against CSX (Comp.). The Board accepted the complaint for hearing on September 21, 2006. According to the complaint, respondent violated Section 12(a) of the Act (415 ILCS 5/12(a) (2006)) by causing or allowing water pollution, Section 12(d) of the Act (415 ILCS 5/12 (d) (2006)) by creating a water pollution hazard, and Section 21(a) of the Act (415 ILCS 5/21(a) (2006)) by causing or allowing open dumping. The People ask the Board to order respondent to cease and desist from further violations and to pay civil penalties and attorney fees and costs.

On February 26, 2007, CSX filed a motion for summary judgment (CSX Mot.) and on March 29, 2007, the People filed a response (P.Resp.) and a cross-motion for summary judgment (P.Mot.). CSX filed a response to the cross-motion for summary judgment on April 30, 2007 (CSX Resp.) and a reply to the People's response (CSX Reply) on the same date. The People filed a reply on May 15, 2007 (P.Reply).

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483,

693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Both the parties agree that the facts in this proceeding are not in dispute and summary judgment is appropriate. Mot. at 6; Ag. Mot. at 2. The parties argue that the issues involve only questions of law, specifically the interpretation of Section 57.8 of the Act (415 ILCS 5/57.8 (2006)). The Board has reviewed the filings and agrees with the parties that there are no issues of material fact and summary judgment is appropriate.

FACTS

On July 9, 2004, approximately 400 to 500 gallons of diesel fuel was accidentally released from a diesel fuel engine at the CSX Rose Lake Yard located at 3900 Rosedale Road, East St. Louis, St. Clair County (the site). Comp. at 2. The release impacted an area approximately 75 feet long and 12 feet wide. CSX Mot. at Exh. A and C. CSX retained Hulcher Professional Services (Hulcher) on July 9, 2004, to conduct emergency response and environmental remediation activities at the site. CSX Mot. at Broadus Affidavit. The initial response included removal of soil, placement of absorbent pads and booms, the installation of a drainage channel, and the application of a bioremediation process. *Id*. and CSX Mot. at Exh. A and B. On September 29, 2004 Hulcher submitted a Scope of Work to propose remediation of the site, including the initial response to the Illinois Environmental Protection Agency (IEPA). *Id*. and CSX Mot. at Exh. A.

On October 11, 2004, the IEPA mailed a letter to CSX inviting CSX to enter the site into a Site Remediation Program-SRP (voluntary program). P.Mot at Exh. 3 and Purseglove Affidavit. The IEPA sought this step so the IEPA could review and approve remediation work as necessary. *Id*.

Hulcher returned on October 19 and 20, 2004, to the site to implement the remediation activities described in the Scope of Work approved by the IEPA. CSX Mot. Broadus Affidavit and Exh. A at 3. Hulcher performed additional soil excavation and flushed the site with a mixture of water and a bioremediation solution. CSX Mot. At 2-3. After the fluids were removed from the trenches, Hulcher took six confirmatory soil samples from the bottom (S1, S3, S4, and S6) and sides (S2 and S5) of the excavation. Exh A at 4. One sample, S7, was taken from the rolloff box for waste profiling purposes. The samples were analyzed for a number of parameters including polynuclear aromatic hydrocarbons (PAHs) and volatile organic compounds. *Id.*

On December 21, 2004, Hulcher prepared an Environmental Remediation Report. CSX Mot. at Broadus Affidavit; Exh. A. A copy of the Environmental Remediation Report was sent to the IEPA. *Id*.

On December 30, 2004, an IEPA inspector, Kathy Vieregge, performed a non-financial records review of the release. P.Mot. at Exh. 5 and Vieregge Affidavit. Ms. Vieregge reviewed all the documents submitted to the IEPA by CSX and "found that confirmation soil samples S4 and S7 exceeded" background carcinogenic PAH concentrations applicable to St. Clair County. Sample S4 exceeded background concentration for benzo(a)pyrene, benzo(b)fluoranthene and indeno(1,2,3-cd)pyrene and Sample S7 exceeded background concentration for benzo(b)fluoranthene. *Id*. Ms. Vieregge indicated that additional remediation work was required to complete and document remediation. *Id*. On January 3, 2005, the IEPA sent a violation notice to CSX. P.Mot at Exh. 6.

In January, 2005, CSX contacted environmental contractor Arcadis to perform additional site investigation and confirm that the emergency response had successfully remediated the site. CSX Mot. at Glenn Affidavit. On August 2, 2005, Arcadis conducted a site investigation by collecting five soil borings and subsequently converting those borings into monitoring wells at the site. CSX Mot. at Exh. C, pg. 5. The soil borings were completed to a depth 16 feet below surface levels. *Id*. The monitoring wells were constructed with a 10-foot screen set from 2 to 1 feet below the surface. Arcadis took soil samples from each boring and analyzed them for benzene, toluene, ethyl benzene, total xylenes (BTEX) and methyl tertiary butyl ether (MTBE) and PAHs. *Id*.

The results of the soil analysis were compared to the Industrial/Commercial Tiered Approach to Corrective Action Objectives (TACO) Tier 1 BTEX and PAHs remediation objectives and PAHs Metropolitan Statistical Area (MSA) background concentrations greater than Tier 1 remediation objectives. CSX Mot. at Exh. C, pg. 6. Soil samples with concentrations of PAHs that fell below the background concentration for MSA but above the Tier 1 remediation objectives were not considered to pose a health risk. *Id*. The analytical results indicate all five samples (MW-1 through MW-5) were below Tier remediation objectives for BTEX, MTBE and PAHs. CSX Mot. Exh. C at 6.

Arcadis notes that only one sample, Sample S4 taken by Hulcher in October 2004, exceeds the Tier 1 remediation objectives. *Id*. Sample S4 exceeds the MSA background concentration of 2.1 mg/kg for benzo(a)pyrene at 3.2 mg/kg and the construction worker inhalation remediation objective of 1.8 mg/kg for naphthalene at at 2.3 mg/kg. *Id*. Arcadis notes that sample S4, which was collected from the bottom of one of the trenches, may be a potentially saturated soil sample. Further, Arcadis states that it evaluated Hulcher's S4 sample result by collecting soil sample MW-3 in the source release area. The analytical data for MW-3 indicate that the levels for PAHs were below Tier 1 remediation objectives within the spill area. *Id.*

On October 28, 2005, Arcadis conducted groundwater sampling at the site. CSX Mot. at Exh. C., pg. 6. Groundwater samples were collected from each monitoring well and analyzed for BTEX. *Id*. The analytical results were compared to TACO Tier I Class II groundwater

remediation objectives and indicated that all five samples concentrations were below BTEX laboratory detection limits. CSX Mot. at Exh. C., pg. 7. The samples did indicate low concentrations of PAHs in three samples, but the concentrations were below TACO Tier I Class II groundwater remediation objectives. *Id*.

On February 23, 2006, prior to filing this complaint the People and the IEPA met with representatives of Arcadis and CSX. CSX Mot. at Glenn Affidavit. Arcadis indicated that the site had been remediated and there were no violations of the Act. *Id*. The IEPA sought additional soil samples to verify that the site met the State standards. *Id*. The People formally requested additional soil samples by letter dated April 14, 2006. CSX Mot. at Exh. E.

On May 9, 2006, Arcadis conducted additional soil sampling at the site. CSX Mot. at Exh. C, pg. 5-7 and Exh. D., pg. 5-7. The results from the additional sampling indicated that the samples were below the TACO Industrial/Commercial Tier I remediation objectives. *Id*. Arcadis submitted to IEPA a report detailing the results of the additional testing. *Id*.

On July 12, 2006, a telephone conversation took place between an employee of Arcadis and an employee of the IEPA. CSX Mot. at Peterbus Affidavit. IEPA indicated that the Attorney General's Office had been informed that the site was in compliance. *Id*. On September 12, 2006, this complaint was filed.

LEGAL BACKGROUND

Section 3.305 of the Act defines "Open Dumping" as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305 (2006).

Section 3.545 defines "Water Pollution" as:

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545 (2006).

Sections 12(a) and (d) of the Act provide that no person shall:

(a) Cause 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, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard. 415 ILCS 5/12(a) and (d) (2006).

Section 21(a) of the Act provides that no person shall "cause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2006).

Section 33(a) provides:

> After due consideration of the written and oral statements, the testimony and arguments that shall be submitted at the hearing, or upon default in appearance of the respondent on return day specified in the notice, the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances. It shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation, except where such action is barred by any applicable State or federal statute of limitation. In all such matters the Board shall file and publish a written opinion stating the facts and reasons leading to its decision. The Board shall immediately notify the respondent of such order in writing by registered mail. 415 ILCS 5/33(a) (2006).

Section 33(c) provides:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
> (ii) the social and economic value of the pollution source;
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
> (v) any subsequent compliance. 415 ILCS 5/33(c) (2006).

Section 42(h) provides:

> In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

(1) the duration and gravity of the violation;
(2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
(3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
(4) 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;
(5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
(6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
(7) whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent. 415 ILCS 5/42(h) (2006).

CSX'S MOTION FOR SUMMARY JUDGMENT

The Board will first summarize the issues raised in the motion of CSX for summary judgment. First the Board will summarize CSX's motion, then the People's response. Finally the Board will summarize the reply of CSX.

CSX's Motion

CSX first argues that the release was completely remediated before the filing of the complaint and therefore, the complaint will not aid in the enforcement of the Act. Second, CSX asserts that there is no evidence in the record which supports a finding of violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006). And third, CSX's maintains that the allegation of open dumping is contrary to the policy behind Section 21(a) of the Act (415 ILCS 5/21(a) (2006) and therefore fails as a matter of law.

Site Has Been Completely Remediated

CSX asserts that Illinois courts and the Board have consistently held that a primary purpose of the Act is to aid enforcement of the Act. Mot. at 8, citing City of Monmouth v. PCB, 57 Ill.2d 482, 313 N.E.2d 161 (1974); Southern Illinois Asphalt Company v. PCB, 60 Ill.2d 204, 326 N.E.2d 406 (1975); Harris-Hub Co. v. PCB, 50 Ill. App. 3d 608, 365 N.E.2d 1071 (1st Dist. 1977); Tri-County Landfill Company v. PCB, 41 Ill. App. 3d, 353 N.E.2d 316 (2nd Dist. 1976). CSX Mot. at 8. CSX maintains that the Illinois Supreme Court has held that a penalty is inappropriate when the violations have ceased "long before" the IEPA instituted an action based on the violations. CSX Mot. at 8, citing Southern Illinois Asphalt.

CSX argues that there are no material issues of fact in dispute since CSX completely remediated the site prior to the enforcement action being filed with the Board. CSX Mot. at 8. CSX points out that immediately following the release, Hulcher was contacted to conduct emergency response and remediation activities at the site. *Id*. CSX then retained Arcadis to document the remedial activities and demonstrate that compliance had been achieved at the site. CSX Mot. at 8-9. CSX argues that the IEPA was informed of testing results and agreed that the site appears to be in compliance with the Act. CSX Mot. at 9. Based on the facts, CSX opines that the People knew that any violation had ceased prior to filing the complaint with the Board. *Id*. Therefore, CSX maintains that the request for civil penalties is "purely punitive" and contrary to the holding in Southern Illinois Asphalt. *Id*.

CSX argues that the courts have held that penalizing those acting in good faith would discourage others from acting in good faith in moving to correct violations. CSX Mot. at 9-10, citing Harris-Hub Co.. CSX asserts that CSX 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" this complaint. CSX Mot. at 10. CSX maintains that thus, the People's allegations are entirely without merit and CSX is entitled to summary judgment as a matter of law on all counts. *Id*.

Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006))

CSX argues that the Board's prior decisions require that to find a violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2006)) a finding must be made of the potential for the same effects as are involved with a finding of water pollution violations of Section 12(a) of the Act (415 ILCS 5/12(a) (2006)). CSX Mot. at 10, citing People v. Chalmers, PCB 96-111 (Jan. 6, 2000). CSX asserts that prior Board decisions have also held that absent evidentiary proof of particular quantities and concentrations of contaminants in groundwater, there can be no violations of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). *Id*. and citing Jerry Russell Bliss, Inc. v. IEPA, 138 Ill. App. 3d 699, 485 N.E.2d 1154 (5th Dist 1985); People v. Hendricks, PCB 97-31 (June 17, 1998).

CSX argues that the allegations in the complaint are without merit because the incident did not impact the waters of the State or otherwise create a nuisance or render the waters to be harmful, detrimental, or injurious. CSX Mot. at 11. CSX asserts that without evidence that the release rendered the waters of the State to be harmful, detrimental, or injurious, the People's

allegations that CSX violated Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)) must fail as a matter of law. *Id*.

CSX argues that there are no facts in the record which support a finding of violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). CSX Mot. at 11. CSX maintains that on the day of the release Hulcher was retained to conduct emergency response and clean-up at the site. *Id*. Arcadis was then retained to verify that the remediation activities by Hulcher had successfully remediated the site and as a part of that verification both soil and groundwater samples were taken. *Id*. CSX asserts that "all the groundwater samples collected and analyzed" were either below laboratory detection limits or the TACO Tier 1 Class II groundwater remediation objectives. CSX Mot. at 11-12. CSX argues that based on these facts there is no evidence that groundwater was impaired or is now or could be impaired in the future. CSX Mot. at 12.

CSX further argues that the soil samples taken by Arcadis indicate that the site has been successfully remediated. CSX Mot. at 12. According to CSX, all soil samples were determined to be below TACO industrial/commercial Tier 1 remediation objectives. *Id*. Therefore, CSX argues that there is no evidence in the record of any water pollution or water pollution hazard at the site. *Id*.

CSX maintains that the courts and the Board have consistently held that absent evidentiary proof of contamination in sufficient concentrations to constitute water pollution or a water pollution hazard there can be no finding of violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). CSX Mot. at 13. In support of this proposition, CSX relies on Bliss and maintains that in that case, the court reversed the Board's finding of violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). *Id*. CSX asserts that the Board was reversed because the record contained no evidence of any impacts to waters of the State. *Id*.

According to CSX, Bliss involved intentional and willful conduct on the part of the respondent. CSX Mot. at 14. However, the court found that the evidence was not sufficient to establish a violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). *Id*. CSX notes that the court referred to writings by "a principal draftsman" of the Act who noted that the "mere presence of a potential source of water pollutants on the land" does not necessarily constitute a water pollution hazard. *Id*. CSX maintains that as in Bliss, there is no evidence in this record showing impacts of the release on waters of the State. *Id*.

In addition to Bliss, CSX relies on Hendricks to support the argument that a violation cannot be found. CSX Mot. at 15. CSX maintains that in Hendricks the Board found that there was no evidence of adverse impacts on the water, and without such evidence, the Board could not find a violation of water pollution. *Id*. CSX argues that the Board found that without evidence of adverse impacts the waters of the State a respondent cannot be held liable for a violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). *Id*.

CSX also cites Chalmers for the proposition that mere presence of a contaminant is insufficient to establish water pollution has occurred or been threatened. CSX Mot. at 15. CSX

argues that in Chalmers the Board found that the quantity and concentration of the contaminant is such that a nuisance is likely to be created or the waters rendered harmful. *Id*.

CSX asserts that whatever diesel fuel was spilled was immediately remediated by the emergency response. CSX Mot. at 15. Further, CSX maintains that the groundwater samples taken at the site indicate that the spill was fully addressed by the remediation activities. *Id*. Therefore, CSX argues, the People cannot produce any evidence demonstrating that the quantity or concentration of the contaminant was sufficient to create a nuisance or render the waters harmful. CSX Mot. at 15-16.

Open Dumping in Violation of Section 21(a) of the Act

CSX argues that the People's allegation that the accidental release and immediate site cleanup is "open dumping" is contrary to the letter and spirit of Section 21(a) of the Act (415 ILCS 5/21 (a) (2006)). CSX maintains that under the Act, "open dumping" is defined as the "consolidation of refuse from one or more sources at a disposal site." CSX Mot. at 16, citing 415 ILCS 5/3.305 (2006). CSX asserts that this definition requires an affirmative act of consolidation and disposal of refuse, not an accidental release. *Id*. CSX opines that a cardinal rule of statutory construction is to ascertain and give effect to the intern of the legislature and the statute does not support the People's allegation. CSX Mot. at 16, citing People *ex rel.* Ryan v. McFalls, 313 Ill. App. 3d 223, 728 N.E.2d 1152 (3rd Dist. 2000).

CSX also takes issue with the allegation that the contaminants were left in the soil. CSX Mot. at 17. CSX argues that the facts are undisputed that the day of the release CSX retained Hulcher for an emergency response and environmental remediation at the site. *Id*. Thus, CSX asserts in no way can CSX be accused of leaving contaminants in the soil at the site and the People's basis for the allegation is misplace. *Id*.

CSX opines that the purpose of Section 21 of the Act (415 ILCS 5/21 (2006) 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. CSX Mot. at 17. CSX cites several cases, which CSX argues illustrate the types of acts prosecuted by the State for open dumping violations. *Id*. CSX contrasts those cases with the fact here that involve a train accident resulting in diesel fuel being released from the train's engine and CSX's immediate response. *Id*. CSX states: "[c]ertaintly 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." *Id*.

People's Response

The People respond that a release did occur which resulted in open dumping and caused or threatened groundwater contamination. Next the People argue that subsequent compliance is not a bar to the finding of a violation. Finally, the People assert that the State is not estopped from claiming a violation of the Act. The Board will summarize each of those arguments below.

A Release Occurred Resulting in Open Dumping and Causing or Threatening Groundwater Pollution

The People argue that CSX "cherry-picked" and "misled" in the presentation of facts in the motion for summary judgment. P.Resp. at 4. The People assert that CSX admits that there was a release of 400-500 gallons of diesel fuel at the CSX Rose Lake Yard and that even after Hulcher's remediation, contamination remained at the site. *Id*. The People point to Table 2 and Exhibit C from CSX's motion and note that that evidence indicates that contamination remained at the site. *Id*. The People maintain that sample S4 showed contamination for benzo(a)pyrene, benzo(b)fluoranthene, and indeno(1,2,3-cd)pyrene and showed exceedances for the Tier 1 soil remediation objective for industrial/commercial ingestion for benzo(a)pyrene. *Id*.

Furthermore, the People assert that the geology of the site shows groundwater at two to three feet below land surface and the soil is silty sand. P.Resp. at 5. The People argue that the contamination remained in the soil for nine months and thereby caused or threatened water pollution. *Id*. The People maintain that open dumping also occurred because the contamination remained in place for over nine months. *Id*.

Subsequent Compliance

The People argue that subsequent compliance is not a bar to a finding of violation. P.Resp. at 5. The People note that Section 33(a) of the Act states that subsequent compliance is not a defense and not a bar to assessment of civil penalties. P.Resp. at 5, citing 415 ILCS 5/33(a) (2006). The People also note that the Board has repeatedly held that subsequent compliance is not a defense for finding a violation. P.Resp. at 5. The People argue that in Modine Manufacturing Co. v. PCB, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (1990), Modine made a similar argument regarding civil penalties not aiding the enforcement of the Act. P.Resp. at 5-6. The People argue that the court declined to find that civil penalties could not be imposed for wholly past violations of the Act. P.Resp. at 6. The People assert that the issue before the Board is not whether CSX later remediated the site, but whether CSX violated the Act when the diesel fuel was released. *Id*.

Estoppel

The People assert that any "claim implied or otherwise inferred" that the State is estopped because of statements made by an IEPA investigator is without merit. P.Resp. at 6. The People argue that the elements for estoppel are not present and that the IEPA did not make any misrepresentations to CSX regarding final samples at the disposal site. *Id*.

CSX Reply

CSX reiterates the argument that the mere presence of a potential source of water pollution on land does not constitute a violation of Section 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). CSX Reply at 1. CSX maintains that the People have not presented any evidence documenting the allegation that the release caused or threatened groundwater contamination. CSX Reply at 2. CSX contends that the sole support for the People's contention

is a single soil sample with compounds slightly above the Tier 1 industrial/commercial remediation objectives. *Id.* Further, CSX argues that the People did not offer any evidence of actual impact to the waters of the State based on CSX's actions. CSX Reply at 4.

CSX contends that the People did not substantively respond to CSX's argument that open dumping occurred. CSX Reply at 4. CSX maintains that the evidence relied upon by the People is the single soil sample and the People's contention that the "pollution" remained in the soil for 9 months. *Id*.

CSX notes that the People do not dispute that the site has been completely remediated. CSX Reply at 5. Instead, CSX asserts that the People rely on Section 33(a) of the Act (415 ILCS 5/33(a) (2006)) and the premise that compliance is not a defense to an allegation of violation. *Id*. However, CSX contends that "over 30 years of Illinois case law" has consistently held that as a matter of law it is inappropriate to impose a civil penalty when violations have ceased before and the People institute action. *Id*.

PEOPLE'S MOTION FOR SUMMARY JUDGMENT

The Board will first summarize the issues raised in the motion of the People for summary judgment. The Board will summarize People's motion, then the CSX's response. Finally the Board will summarize the reply of the People.

People's Motion

The People argue first that CSX caused water pollution. Second the People argue that CSX created a water pollution hazard. The third argument is that CSX allowed open dumping. Lastly the People argue that knowledge is not an element of the violations. The Board will address each of these arguments in turn.

Water Pollution

The People argue that CSX discharged 400-500 gallons of diesel fuel and allowed contaminants to remain in the soil so as to cause water pollution at the site. P.Mot. at 6. The People assert that CSX misquotes the definition of water pollution as set forth by the Board in Chalmers. *Id*. The People maintain that the Chalmers decision stated that to establish water pollution "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." P.Mot. at 6-7, citing Chalmers. The People assert that this language is also contained within the definition of water pollution in the Act. P.Mot. at 7, citing 415 ILCS 5/3/545 (2006). The People note that in Chalmers the Board found that water pollution had occurred on five separate occasions. P.Mot. at 7.

The People assert that the release occurred on July 9, 2004, and responsive action was taken. P.Mot. at 7. The People note that on October 20, 2004, samples were taken and analyzed with results showing that one soil sample contained exceedances of background contamination. P.Mot. at 7-8. The IEPA received these results on December 4, 2004 and the IEPA requested

additional remediation work. P.Mot. at 8. The People point out that the next time CSX's consultants were at the site was on August 5, 2005, over nine months from the date that the confirmation samples were taken. P.Mot. at 8. The People assert that the pollutants were therefore in the soil for at least a year and even the August 5, 2005 sampling did not show that pollutants were no longer at the site. *Id*. The People maintain that the IEPA asked for further testing and those samples were taken on May 9, 2006. *Id*.

The People maintain that CSX cannot tell the IEPA or the Board the depth of the confirmatory samples taken on October 20, 2004. P.Mot. at 9. However, the People point out that CSX's exhibits indicate that groundwater is at two to three feet and the shallow soil is silty sand from two to six feet. *Id*. The People argue that the exhibits further demonstrate that from July 9, 2004, until at least May 9, 2006, pollutants remained in the soil. *Id*. The People assert that CSX's contention that the spill never impacted groundwater is without merit since the sampling cannot support that contention. *Id*. The People maintain that the sampling only indicates that the groundwater showed no impacts when CSX sampled groundwater over a year after the spill. *Id*.

The People argue that they have shown that diesel fuel was released into the environment. P.Mot. at 9. The People assert that the contaminants remained in the soil for over a year and groundwater is located two to three feet below surface level. *Id*. Furthermore, the soil is silty sand from two to six feet. *Id*. The People argue that they have shown that CSX released contaminates in sufficient quantity and concentration likely to render the groundwater harmful. *Id*.

Water Pollution Hazard

The People assert that pursuant to Section 12(d) of the Act (415 ILCS 5/12(d) (2006)), creation of a water pollution hazard occurs where the conduct may endanger the safety of the citizens and there is no assurance that the conduct will not, although a change in conduct could make that assurance. P.Mot. at 10, citing Tri-County. The People maintain that the Board has reasserted that a water pollution hazard occurs when a respondent may have acted to endanger the citizens of the State. P.Mot. at 10, citing People v. Petco Petroleum Corp., PCB 05-66 slip. op. 3 (Feb. 3, 2005). The People maintain that the Board found a violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2006)) in Chalmers because respondent deposited contaminants upon the land. P.Mot. at 11, citing Chalmers.

In this case, the People maintain that the release occurred and confirmatory samples showed the soil contained contaminants that exceeded background contamination of St. Clair County. P.Mot. at 11. Further, the People argue that the samples indicate that the soil contamination exceeded the Tier 1 soil remediation objective for industrial/commercial ingestion for benzo(a)pyrene. *Id*. The People assert that the groundwater was found two to three feet below the surface and the soil from two to six feet is silty sand. *Id*. The People argue that there is no assurance that CSX's release and leaving the contaminants in the soil did not endanger the safety of the citizens. *Id*. Therefore the People maintain that by releasing diesel fuel and leaving contaminants in the soil, CSX created a water pollution hazard. *Id*.

Open Dumping

The People argue that the Board has found leaking gasoline from tanks can constitute open dumping and that substances leaked and contaminated soils are wastes under Section 21(a) of the Act (415 ILCS 5/21(a) (2006)). P.Mot. at 11, citing Universal Scrap Metals, Inc. v. Flexi-Van Leasing, Inc., PCB 99-149 (Apr. 5. 2001); People v. State Oil Company, PCB 97-103 (Aug. 19, 1999). The People maintain that open dumping occurs when waste is consolidated at a disposal site that is not a sanitary landfill and the diesel fuel released is a waste as that term is defined in the Act. P.Mot. at 11-12, citing 415 ILCS 5/3.535 (2006). Furthermore, the People assert that the diesel spill site is not a sanitary landfill. P.Mot. at 12. The People rely on the court's decision in IEPA v. PCB, 219 Ill. App. 3d 975, 579 N.E.2d 1215 (1991) as support for this assertion. *Id*. In that case the court reversed a decision by the Board that the building demolished and then burned at the demolition site was not "open dumping" under the Act. *Id*. The court found that the demolition debris was waste, that waste was consolidated from at least one source, and the site was not a sanitary landfill. P.Mot. at 12, citing IEPA v. PCB.

The People maintain that CSX left pollutants in the soil as evidenced by CSX's own exhibits. P.Mot. at 12. The People note that the confirmatory samples exceeded the Tier 1 soil remediation objective for industrial/commercial ingestion for benzo(a)pyrene that is a constituent of diesel fuel. *Id*. After the confirmatory samples were taken, the People contend that CSX did nothing at the diesel spill site for over nine months. P.Mot. at 12-13. The People assert that CSX spilled or leaked a waste on land and allowed the waste to dissipate back into the environment. P.Mot. at 13. The People argue that as in IEPA v. PCB, the diesel spill site became a disposal site that is not a sanitary landfill and as a result CSX caused or allowed open dumping pursuant to Section 21(a) of the Act (415 ILCS 5/21(a) (2006)). *Id*.

Intent not an Element for Finding Violation

The People assert that CSX's claim that the release of the diesel fuel was an accident has no impact on finding a violation. P. Mot. at 13. The People rely on Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 308 N.E.2d 829 (1974) to support the proposition that "intent or scienter is not an element to be established in finding a violation" of the Act. *Id*.

CSX's Response

CSX asserts that the Board must consider the pleadings, exhibits and affidavits in favor of CSX and may only enter summary judgment when the record establishes that the People are entitled to judgment as a matter of law. CSX Resp. at 1, citing Wilder Binding Co. v. Oak Park Trust and Saving Bank, 135 Ill.2d 121, 552 N.E.2d 783 (1990). CSX further argues that the Board must consider the evidence strictly against the People and liberally in favor of CSX. CSX Resp. at 1, citing Colvin v. Hobart Brothers, 156 Ill.2d 166, 620 N.E.2d 375 (1993). CSX maintains that the People have failed to establish as a matter of law that the claims against CSX satisfy the legal requirements of the alleged violations. CSX Resp. at 1-2.

Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006))

CSX argues that absent evidence of actual contamination of the groundwater, the People cannot establish a violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a) and (d) (2006)). CSX Mot. at 1 citing Bliss and Hendricks. CSX asserts that the release "merely impacted a small area of soil" that was remediated completely consistent with the Act. CSX Resp. at 2. CSX maintains that there is no evidence in the record of contamination to the waters of the State. *Id*. CSX notes that after Hulcher completed remediation, only one soil sample had "slightly elevated levels of certain PAH." CSX Resp. at 3. After further investigation and ground water sampling, CSX contends that the samples demonstrate that remediation was complete as all samples were below Tier 1 industrial/commercial remediation objectives. *Id*. CSX opines that based on the record, the soil was completely remediated by Hulcher within four months of the release. *Id*.

CSX contends that the People's argument relies solely on a single soil sample and the People's unsupported "hypothesis" that the geologic conditions suggest that the single soil sample is a threat to groundwater. CSX Resp. at 4. CSX asserts that this "hypothesis" is not supported by any expert report or even by any statement from the IEPA. CSX Resp. at 4,citing Matteson WHP Partnership v. Martin's of Matteson, PCB 97-121 (June 22, 2000). CSX concedes that the People have provided several affidavits; however, CSX contends none of the affidavits are directed to the possibility of water pollution. CSX Resp. at 4.

CSX takes issue with the People's reliance on Chalmers. CSX Resp. at 5. CSX argues that Chalmers is inapposite to this case and actually supports CSX's position. *Id*. CSX notes that in Chalmers, the evidence in the record showed that the defendant caused actual contamination to the waters of the State and the Board noted the difference between a case where pollution is documented and where water pollution is not. *Id*. CSX also distinguishes the cases relied upon by the People in Tri-County and Petco. *Id*. CSX argues that in both those cases specific data and testimony showed actual groundwater or surface water contamination. CSX Resp. at 5-6.

Open Dumping

CSX argues that the statutory language of Section 21(a) of the Act (415 ILCS 5/21(a) (2006)) does not support the People's allegation of open dumping. CSX Resp. at 7. CSX asserts that the sole support for the allegation is the elevated levels of two PAH compounds in one soil sample for nine months. *Id*. Even assuming the People's contentions are correct, CSX argues that the People do not dispute that no additional remediation was performed after Hulcher's initial cleanup and the additional sampling sought by the IEPA failed to show even those slight elevated levels of PAH compounds. *Id*.

CSX asserts that to prove open dumping, the People must demonstrate that there was a consolidation of refuse from one or more locations at the disposal site. CSX Resp. at 7, citing 415 ILCS 5/3.305 (2006)). However, CSX maintains that the People cannot point to a single case where the definition of open dumping has been "stretched to cover the utterly benign scenario" that is underlying this complaint. CSX Resp. at 7. CSX argues that the courts have held that if waste is cleared away before the waste dissipates back into the environment the site cannot be regarded as a disposal cite. CSX Resp. at 7, citing IEPA v. PCB. CSX contends that

the consultant immediately remediated the site by excavating the impacted soil and sampling documented that the material was removed. CSX Resp. at 7. Thus, CSX asserts that "in no way can CSX be accused of leaving contaminants in the soil" and the People's allegation of open dumping must fail. CSX Resp. at 7-8.

Penalty

CSX argues that even if the Board finds a violation, no civil penalty should be assessed against CSX. CSX Resp. at 9. CSX asserts that any penalty that would be assessed would be purely punitive and would not aid in the enforcement of the Act. *Id*. CSX concedes that the Board is vested with broad discretionary powers in imposing a penalty, but argues imposing a penalty in this instance would be arbitrary. *Id*. CSX maintains that because the site was completely remediated long before the People filed the complaint, it would be contrary to longstanding Illinois case law to impose a penalty. CSX Resp. at 10.

People's Reply

The People reiterate that contamination was left in the soil after the spill in October 2004 and the People base this contention on CSX's exhibit. P.Reply at 1. The People maintain CSX left contamination in such proximity and quantity to groundwater that CSX threatened the groundwater and potentially rendered the groundwater harmful. P.Reply at 2. The People argue that the TACO standards were developed to evaluate risk to human health and for adequate protection of the environment. *Id*. The People state that a key element addressed was exposure routes including groundwater ingestion and the groundwater ingestion routes includes migration from soil to groundwater. *Id*. Therefore, the People maintain that no affidavit is necessary supporting the statement that the mere presence of contaminants in silty soil with groundwater two to three feet below the surface is necessary to establish a violation. *Id*. However, the People argue that if the Board finds an expert is required, then there would be an issue of material fact and summary judgment should be denied. *Id*.

The People take issue with CSX's contention that since the October 2005 samples showed no contamination, there was no contamination. P.Reply at 2. The People argue that the sample merely show that one year after the spill, contamination was not in the groundwater. *Id*. The People also take issue with CSX's reliance on Bliss and maintain that CSX has limited the statutory language and that the standard is whether the contamination is likely to render waters harmful. P.Reply at 3. In this case, the People assert that the complaint includes pleadings that the residual contamination of soil may be a continuing source of a release to the waters of the State. *Id*. Therefore, the People assert that the evidence supports a finding of violation. *Id*.

The People argue that the severity of the spill is not a factor in determining a violation. P.Reply at 3. The People assert that the Act does not allow for gradation of harm in determining if a violation occurred; rather this evaluation is only appropriate in determining a penalty. *Id*.

The People agree that CSX performed some excavation; however, the People assert that based on the sampling performed by CSX, the excavation was insufficient. P.Reply at 4. The People argue that after receiving the sampling results rather than perform additional remediation

CSX left the contaminates in the soil and allowed them to dissipate into the environment. *Id*. The People maintain that the same analysis performed in IEPA v. PCB applies in this situation. P.Reply at 4-5. The People contend that CSX did not clear away the contamination to another location and the contaminants dissipated into the environment. P.Reply at 5.

The People disagree with CSX's position regarding the case law on penalties and subsequent compliance. P.Reply at 6. The People note that the cases cited by CSX were decided prior to amendments to Section 33(a) of the Act (415 ILCS 5/33(a) (2006)) and Section 33(a) specifically prohibits compliance as defense to finding a violation or imposing a penalty. *Id*. Furthermore, the cases cited by CSX were decided prior to the addition of Section 42(h) of the Act (415 ILCS 5/42(h) (2006)), according to the People. P.Reply at 7. The People maintain that the Board has issued and the courts affirmed penalties for past violations. P.Reply at 6, citing Modine Manufacturing Co. v. PCB, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (1990).

DISCUSSION

Before the Board can address the arguments of the parties, the Board must first determine that summary judgment is appropriate. The Board finds that summary judgment is appropriate. The parties agree that there are no genuine issues of material fact. Further, the record contains evidence sufficient for the Board to rule on each of the alleged violations. Therefore, the Board will grant summary judgment. The following discussion will explain the Board's findings on each of the issues.

Section 12(a) of the Act, Water Pollution

Section 3.545 of the Act (415 ILCS 5/3.545 (2006)) defines water pollution to include a discharge of any contaminant into any water of the State that will or is likely to render such waters harmful or detrimental or injurious to public health. Section 12(a) of the Act (415 ILCS 5/12(a) (2006)) prohibits any person from causing, allowing, or threatening a discharge of any contaminant so as to cause or tend to cause water pollution. Thus, to find a violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2006)), the Board must find that a contaminant was discharged or threatened to be discharged that is likely to render waters harmful, detrimental or injurious to public health.

In this case, the Board finds that the undisputed facts are that 400-500 gallons of diesel fuel were spilled at the Rose Lake Yard. After remediation of the site a soil sample, S4, contained contaminants in amounts that exceeded the background carcinogenic PAH concentrations and the TACO remediation objectives for ingestion and worker inhalation. Sample S4 was taken in October 2004. Although sampling taken almost a year later indicated that no additional exceedances were detected, the sample taken in October 2004 did prove such exceedances.

The People argue that the geology and hydrology of the site are such that the contaminants would migrate to the groundwater and render the groundwater potentially injurious to public health. CSX maintains that mere presence of contaminants does not equate with a finding of violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2006)). CSX's relies on Bliss

and Hendricks for this position. The Board has reviewed the language of the Act and the cases cited by the parties. Based on the evidence in this record and a careful review of the Act and case law, the Board finds that CSX violated Section 12(a) of the Act (415 ILCS 5/12 (2006)).

The record is clear that a spill occurred and that contaminants remained in the soil after remediation. Further, the record establishes that groundwater is at two to three feet below the surface and the soil is silty sand from two to six feet. The Board finds that the hydrology and geology of the site establish that migration is likely from soil to groundwater. Further, groundwater monitoring data indicates the presence of PAHs at low concentrations. Thus, the Board finds that a contaminant was discharged to the waters of the State. Next the Board must determine if the discharge will or is likely to render such waters harmful or detrimental or injurious to public health.

The Board's regulations have established soil remediation objectives based on ingestion and inhalation. Exposure above the remediation objective levels would be hazardous to human health. *See* Tiered Approach To Corrective Action Objectives 35 Ill. Adm. Code 742, R97-12 (June 5, 1997). The soil sample S4, contained contaminants that exceeded those levels. Therefore, the Board finds that the preponderance of the evidence establishes that the groundwater at the site was threatened to a degree that would be injurious to public health. The Board thus finds that CSX violated Section 12(a) of the Act (415 ILCS 5/12(a) (2006)) and grants the People's motion for summary judgment on this count.

The Board is not convinced that the findings in Bliss and Hendricks support the position of CSX on a finding of violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2006)). First, Bliss deals with a finding of violation for creation of a water pollution hazard, not water pollution and is therefore factually distinguishable on this point and will be discussed below. Second, in Hendricks, the Board found that the record was "devoid of any evidence establishing the effects" of the runoff from fighting the fire at the site. Hendricks, PCB 97-31, slip op. 19. The Board found no evidence that the runoff impacted the waters of the State and therefore the Board found that the record did not support a finding of water pollution. *Id*. As discussed above, in this case the record does establish that contaminants were left in soil in proximity to groundwater and the contaminants were at levels that posed a potential risk. Therefore, Hendricks does not support CSX's position in this proceeding.

Section 12(d) of the Act, Water Pollution Hazard

To find a violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2006)), the Board must find that a contaminant is placed on land in such a place and manner as to create a water pollution hazard. As stated above, the Board finds the hydrology and geology of the site would allow migration of the contaminants left in the soil to groundwater. For the same reasons as discussed above, the Board also finds a violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2006)) and grants the People's motion for summary judgment on this count.

The Board has reviewed Bliss and Hendricks and finds that CSX's reliance on these two cases is misplaced. The court in Bliss did find that mere presences of a potential source of water pollution was not sufficient to constitute a water pollution hazard. Bliss, 138 Ill. App. 3d at 704.

The court went on to note that no effort was made to establish the quantity and concentration of the contaminant that was likely to create a nuisance or render the waters harmful, detrimental, or injurious. *Id*. In this case the evidence does establish that soil contamination at S4 exceeded the background carcinogenic PAHs concentrations and the remediation objectives for ingestion and worker inhalation for certain contaminants. The Board has found through the rulemaking process that exceedances of those levels are potentially dangerous to public health. Therefore, unlike the Bliss case, here the record does establish the quantity and concentration of the contaminant that was likely to create a nuisance or render the waters harmful, detrimental, or injurious. Therefore, CSX's reliance on Bliss is misplaced.

As to Hendricks, an allegation of water pollution was included in that case and Hendricks is factually distinguishable on this point. Hendricks was discussed above under the allegation of water pollution.

Section 21(a) of the Act, Open Dumping

The People allege that the sampling at S4 indicates that contamination remained after the remediation and that the contamination was allowed to dissipate into the environment in violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2006)). CSX maintains that this allegation that the accidental release of diesel fuel and immediate site cleanup is open dumping is contrary to the letter and spirit of Section 21(a) of the Act (415 ILCS 5/21(a) (2006)).

Open dumping is defined as the consolidation of refuse from one or more sources at a disposal site that is not a landfill. 415 ILCS 5/3.305 (2006). In IEPA v. PCB, the court rejected a finding by the Board that the demolition of buildings that were immediately set on fire did not constitute open dumping. IEPA v. PCB, 219 Ill. App. 3d at 978. The court relied on the phrase "at a disposal site" in the definition of open dumping and found that had the buildings been removed to another site before dissipating back into the environment, the demolition site would not have been a disposal site. IEPA v. PCB, 219 Ill. App. 3d at 979.

In this case contamination was left on site for over a year and was allowed to dissipate into the environment. Therefore, based on IEPA v. PCB, CSX's actions did constitute open dumping under the Act. The Board therefore finds that CSX violated Section 21(a) of the Act (415 ILCS 5/21(a) (2006)) and grants the People's motion for summary judgment on this count.

Penalties

Having found that CSX violated Sections 12(a), (d) and 21(a) of the Act (415 ILCS 5/12(a), (d) and 21(a) (2006)), the Board must now determine appropriate penalties in this case. In evaluating the record to determine the appropriate penalty, the Board considers the factors of Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2006)). CSX argues that no penalty should be assessed as a penalty will not aid in the enforcement of the Act. CSX relies on numerous cases to support the argument that no penalty is appropriate. The People seek an order to cease and desist, civil penalties, and attorney's fees and costs. The People argue that CSX relies on cases decided prior to amendments to Sections 33(a) and 42(h) of the Act (415 ILCS 5/33(a) and 42(h) (2006)).

The Board agrees that the cases relied upon by CSX are cases decided prior to changes to the Act. The changes include a specific note that subsequent compliance is not a defense and a provision that allows the Board to impose penalties to deter future violations. The Board finds that the cases cited by CSX are not instructive in this case. However, in this case a review of the record and the factors in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2006)) convinces the Board that a civil penalty is not appropriate in this case.

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) (2006). 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).

The record is also clear that no economic benefit was achieved by CSX and that CSX diligently acted to cleanup a spill at the site. *See* 415 ILCS 5/42(h)(2) and (3) (2006). CSX notified the IEPA of the spill and provided information concerning the cleanup to IEPA in timely fashion. Further, CSX also did additional sampling to establish that ultimately the site had been remediated. *See* 415 ILCS 5/42(h)(6) (2006).

Pursuant to Section 42(h)(5) of the Act (415 ILCS 5/42(h)(5) (2006), the Board is authorized to consider prior adjudicated violations when formulating a civil penalty. The Board notes that on June 7, 2007, the Board accepted a stipulation between CSX and the People in which CSX did not admit the alleged violations but agreed to pay a civil penalty. *See* People v. CSX Transportation, Inc., PCB 06-51 (June 7, 2007). However, the Board finds that the violations in PCB 06-51 were adjudicated nearly concurrently with the present case, occurred at a different location, and were based upon a distinctly different set of facts. Therefore the Board finds that the June 7, 2007 opinion and order does not change the Board's decision not to assess a penalty in this case.

Based on CSX's prompt action after an accidental spill to cleanup the site of the spill, the Board finds that no civil penalty is necessary to deter future violations of the Act. The Board further finds that no economic benefit occurred to CSX because of the failure to remediate the exceedances found at the sampling site S4 especially as the release has been remediated. The Board finds that no civil penalty is warranted in this case; however the Board will order CSX to cease and desist from further violations.

This opinion constitutes the Board's findings of fact and conclusions of law.

CONCLUSION

The Board grants the People's motion for summary judgment as there are no material issues of fact and the People are entitled to judgment as a matter of law. The Board therefore denies CSX's motion for summary judgment. The Board finds that CSX violated Sections 12(a), (d) and 21(e) of the Act (415 ILCS 5/12(a), (d) and 21(e) (2006)). The Board further finds after

careful review of the record that a civil penalty is not warranted in this proceeding and therefore does not assess one. The Board will direct CSX to cease and desist from future violations. The Board also declines to award attorney's fees and costs to the People.

ORDER

1. The Board grants the motion for summary judgment filed by the People of the State of Illinois and finds that CSX Transportation, Inc. violated Sections 12(a), (d) and 21(e) of the Act (415 ILCS 5/12(a), (d) and 21(e) (2006)). The Board denies CSX's motion for summary judgment

2. The Board assesses no civil penalty.

3. The Board directs CSX to cease and desist from future violations.

4. The Board declines to award attorney's fees and costs to the People of the State of Illinois.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 12, 2007, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board