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STATE OF ILLINOIS  
Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

July 19, 2007

The Honorable Dorothy Gunn  
Illinois Pollution Control Board  
James R. Thompson Center, Ste. 11-500  
100 West Randolph  
Chicago, Illinois 60601

Re: ***People v. CSX Transportation, Inc.***  
**PCB No. 07-16**

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a Notice of Filing and Complainant's Motion for Reconsideration in regard to the above-captioned matter. Please file the originals and return file-stamped copies to me in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

  
Kristen Laughridge Gale  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031

KLG/pp  
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
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JUL 23 2007  
STATE OF ILLINOIS  
Pollution Control Board

PEOPLE OF THE STATE OF )  
ILLINOIS, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 CSX TRANSPORTATION, INC., a )  
 Virginia corporation, )  
 )  
 Respondent. )

PCB No. 07-16  
(Enforcement)

NOTICE OF FILING

To: David L. Rieser  
McQuire Woods, LLP  
77 West Wacker Drive  
Suite 4100  
Chicago, IL 60601

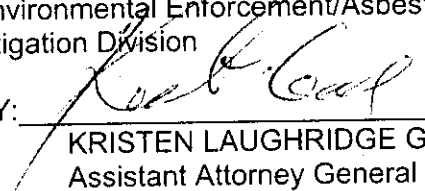
PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S MOTION FOR RECONSIDERATION, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY:   
KRISTEN LAUGHRIDGE GALE  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: July 19, 2007

## CERTIFICATE OF SERVICE

I hereby certify that I did on July 19, 2007, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instrument entitled COMPLAINTANT'S MOTION FOR RECONSIDERATION

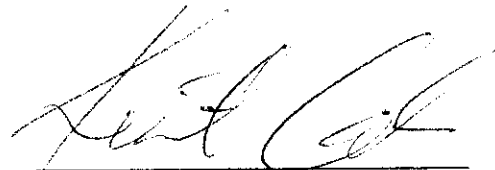
To: David L. Rieser  
McQuire Woods, LLP  
77 West Wacker Drive  
Suite 4100  
Chicago, IL 60601

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
Suite 11-500  
100 West Randolph  
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794



Kristen Laughridge Gale  
Assistant Attorney General

This filing is submitted on recycled paper.

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JUL 23 2007

STATE OF ILLINOIS  
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
vs. )  
)  
CSX TRANSPORTATION, INC., a )  
Virginia corporation, )  
)  
Respondent. )

No. PCB 07-16  
(Enforcement)

**COMPLAINANT'S MOTION FOR RECONSIDERATION**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 101.520 and 101.902 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.520, 101.902 hereby moves for Reconsideration of the Illinois Pollution Control Board's July 12, 2007 Order, and states as follows:

1. The Board's July 12, 2007 Order found Respondent, CSX Transportation, Inc. in violation of Sections 12(a), 12(d) and 21(a) of the Act, 415 ILCS 12(a), (d), 21(a) (2006). However, the Board, without the request from either party and without any briefing from either party, proceeded to evaluate a penalty under Section 42(h) of the Act, 415 ILCS 5/42(h) (2006), and decided that a civil penalty is not warranted. Plaintiff respectfully asserts that the Board has erred.

2. For a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. "The purpose of a motion for reconsideration is to inform the trial court of (1) newly discovered evidence previously unavailable at the time of the original hearing, (2) changes that have occurred in the law since the original hearing, or (3) errors in the court's

earlier application of the law.” *Weidner v. Midcon Corp.* 328 Ill.App.3d 1056, 1061, 767 N.E.2d 815, 820, 263 Ill.Dec. 89, 94 (5th Dist., 2002). In this case, the People respectfully asserts that the Board erred in its application of the law.

3. The issue of the amount of civil penalty for violations of the Act was not properly a part of either motion for summary judgment and therefore not properly before the Board. The Board raised and evaluated the issue *sua sponte*. It is an error for a court to raise *sua sponte* an issue that was not raised in any of the motions. *Johnson v. Decatur Park District*, 301 Ill.App.3d 798, 704 N.E.2d 416, 235 Ill. Dec. 67 (4th Dist., 1999). In *Johnson*, the defendant moved for summary judgment on two issues regarding the duty to warn, which the trial court denied. *Id.* at 76. However, the trial court raised another issue regarding agency on its own and granted the defendant’s motion based upon the finding that there was no agency. *Id.* The appellate court reversed the trial court’s ruling because the plaintiffs had no notice that this issue would be raised. *Id.* Furthermore, it is an abuse of discretion if a court makes a decision on an issue *sua sponte* although no motion is pending at that time. *Sanchez v. City of Chicago*, 352 Ill.App.3d 1015, 817 N.E.2d 1068, 288 Ill.Dec. 418 (1st Dist., 2004), *Peterson v. Randhava*, 313 Ill.App.3d 1, 246 Ill.Dec. 75, 729 N.E.2d 75 (1st Dist., 2000). In both *Sanchez* and *Peterson*, the motions in front of the courts were regarding motions for sanctions under Rule 137; however, the courts instead made a *sua sponte* decision for summary judgment. *Id.* Both decisions were reversed because plaintiff was prejudiced by the court’s failure to follow summary judgment procedures. *Id.* “By its very nature a *sua sponte* ruling deprives a party of notice and an opportunity to raise objections because the court acts on its own and without any warning.” *Peterson* at 13. Finally, Board Member Thomas E. Johnson dissented from the Board’s finding that the Respondent, First Choice Construction, Inc., admitted facts contained in the complaint because the People did not ask for the admissions in a motion. *People v. J&S*

*Companies, Inc. and First Choice Construction, Inc.* PCB 06-33 (June 15, 2006). “The majority’s *sua sponte* decision to find that First Choice admitted the allegations in the complaint is neither necessary nor appropriate at this time.” *People v. J&S Companies, Inc.* PCB 06-33 (June 15, 2006).

4. In none of the pleadings in the record submitted by either part are the Section 42(h) factors to determine a civil penalty briefed or discussed. The only time the civil penalty factors are mentioned is in the People’s motion for summary judgment, which states that “the only material issues of genuine facts are those which determine the penalty under Section 42(h), such as Respondent’s due diligence to comply with the Act including its response and lack thereof to Illinois EPA’s requests for information, and Respondent’s failure to self disclose its violations of the Act.” P.Mot. at 13. In its request for relief, the People explicitly requested that the Board schedule a hearing to determine a penalty for Respondent’s violations under Sections 33 and 42 of the Act, 415 ILCS 5/33, 42 (2006). P.Mot. at 14. The People reasserted this request for relief in the reply to respondent’s response to the People’s summary judgment. P.Reply at 8. While not directly addressing the People’s request for a hearing to determine a penalty, by proceeding to evaluate the Section 42(h) factors the Board summarily denied the People’s request without a reason or explanation.

5. In its opinion, the Board failed to evaluate all of the Section 42(h) factors and to consider the factors under Section 33(c) of the Act, 415 ILCS 5/33(c), 42(h) (2006), when determining the penalty, as it stated it must do. Board Order at 18 and 19. The record had not yet been made for these evaluations.

6. It was improper for the Board to evaluate the Section 42(h) factors *sua sponte*, without a request or notice to either party, and without allowing either party to brief the factors. *Johnson*, 235 Ill. Dec. at 76. The only issue in front of the Board from both parties was whether

the Respondent violated the Act when it released pollutants into the environment, which the Board evaluated and made a decision upon. Therefore, the People respectfully requests that the Board vacate its decision regarding the civil penalty and grant the People's original request and schedule a hearing to determine the penalty for Respondent's violations under Sections 33 and 42 of the Act, 415 ILCS 5/33, 42 (2006).

7. The Board appears to have evaluated this case as an interpretation of Section 57.8 of the Act, 415 ILCS 5/57.8 (2006). Board Order at 2. Section 57.8 of the Act is regarding the Underground Storage Tank Fund; payment; options for State payment; deferred correction election to commence corrective action upon availability of funds. The release in this case was not from an underground storage tank, the Respondent is not seeking payment from the Underground Storage Tank Fund. Therefore, the Board's evaluation interpreting Section 57.8 of the Act, 415 ILCS 5/57.8 (2006), is misplaced.

8. The People also note that there are two other typographical errors in the July 12, 2007 Order. On page 19 and 20 in the conclusion, the Respondent is found to have violated Section 21(e) of the Act, 415 ILCS 5/21(e) (2006), however, the People claimed and the Board found that Respondent was in violation of 21(a), 415 ILCS 5/21(a) (2006). The People respectfully requests that these errors be remedied.

**WHEREFORE**, Complainant, People of the State of Illinois, respectfully request that the Board GRANT the Motion for Reconsideration due to justified claims of legal error for deciding on the civil penalty *sua sponte*, vacate its decision regarding the civil penalty, and grant the People's original request and schedule a hearing to determine the penalty for Respondent's violations under Sections 33 and 42 of the Act, 415 ILCS 5/33, 42 (2006).

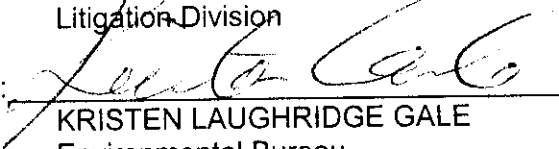
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,  
Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY:

  
KRISTEN LAUGHRIDGE GALE  
Environmental Bureau  
Assistant Attorney General

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