ILLINOIS POLLUTION CONTROL BOARD
March 15, 2007

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois partnership, individually as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title and Trust Company, as trustee under trust 3291, dated December 15, 1981,	)	
Complainant,	)	
v.	)	PCB 07-44
	)	(Citizens Enforcement – Land, Water)
The BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, a Delaware corporation,	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

On December 4, 2006, Indian Creek Development Company, an Illinois Partnership, Individually as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title and Trust Company, as trustee under trust 3291, dated December 15, 1981 (Indian Creek) filed a citizens enforcement case against the Burlington Northern Santa Fe Railway Company, a Delaware corporation (Burlington).

In its complaint, Indian Creek alleges that Burlington violated Sections 12(a), (d); and 21(e), of the Environmental Protection Act (Act) (415 ILCS 5/12(a),(d); and 21(e) (2004)). Indian Creek further alleges that Burlington committed these violations by causing and allowing the discharge of diesel fuel contaminants on Burlington's property in 1993; threatened, caused and allowed the discharge of diesel fuel contaminants through migration to other parts of the property; threatened and eventually caused and allowed the ongoing discharge of contaminants onto the soil and into the groundwater; causing and allowing the deposited contaminants to move, migrate, and deposit onto other portions of the property.

On January 10, 2007, Burlington filed a motion to dismiss, accompanied by a memorandum in support of its motion. Indian Creek filed a response to the motion to dismiss on February 6, 2007. Indian Creek also filed a motion to set a briefing schedule on January 16, 2007.

For reasons more fully explained below, the Board denies the motion to dismiss, determines that the complaint is neither duplicative nor frivolous, and accepts the complaint for hearing.

REGULATORY BACKGROUND

Both the Act and the Board's procedural rules require that, for complaints filed by citizens, the Board shall schedule a hearing unless it determines that the complaint is "duplicative" or "frivolous." 415 ILCS 5/31(d)(1) (2004); 35 Ill. Adm. Code 103.212(a). No later than 30 days after service of the complaint, respondents may file a motion alleging that a citizen's complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

The Board's procedural rules provide that "'[d]uplicitous' or 'duplicative' means the matter is identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. "A complaint would be duplicitous if another action was pending between the same parties, alleging substantially the same violations, before another tribunal with power to grant the same relief as the Board." Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises, PCB 92-80, slip op. at 2 (July 30, 1992). The Board may dismiss any complaint as "duplicitous" that raises claims identical or substantially similar to another action. *Id*., citing WIPE v. PCB, 55 Ill. App. 3d 475, 480 (1st Dist. 1977).

The Board's procedural rules provide that "'frivolous' means "a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202.

MOTION TO DISMISS

In its motion, Burlington moves the Board to dismiss as duplicative the complaint filed by Indian Creek. Mot. at 1. Burlington asserts that this matter arises out of the purported release of diesel fuel as a result of a January 20, 1993 collision between two trains on Burlington property in the vicinity of Indian Creek's facility. *Id*.

Burlington argues that the Illinois Attorney General's Office (AGO) and the State's Attorney of Kane County (County) filed a lawsuit against Burlington in the Circuit Court of Kane County alleging violations of the Act and seeking cleanup of the diesel fuel, and that the Circuit Court of Kane County entered a consent order addressing the very same types of relief sought by Indian Creek in this action. Mot. at 2. Burlington contends that the complaint duplicates the Kane County lawsuit and requests the same types of relief as that provided in the consent order. *Id*. Specifically, Burlington asserts that the circuit court case addressed the very same railroad incident, involved the same respondent, and provided for the cleanup of the same environmental conditions. Mem. at 1.

Burlington argues that by filing the instant complaint, Indian Creek is attempting to circumvent the consent order, disregarding the detailed and comprehensive resolution previously reached between the State and Burlington and ordered by the Circuit Court of Kane County.

Mem. at 1. Thus, asserts Burlington, the complaint is duplicative and should be dismissed by the Board. Mem. at 1-2.

Burlington argues that the complaint is brought by Indian Creek in its capacity as a private attorney general, whereas the actual attorney general brought the county lawsuit. Mem. at 4. Burlington asserts that it is the defendant/respondent in both the complaint and the county lawsuit, and that there is no substantive difference between this action and the county lawsuit brought by the State. *Id.*

Burlington maintains that under the consent decree, it assumed full responsibility for the cleanup, paid a civil penalty, agreed to cease and desist from future violations of the Act, and agreed to stipulated penalties in the event of failure to comply with the consent order. Mem. at 5. Further, Burlington argues that the consent order fully addresses the release of diesel fuel at and from the its property, and that the consent order moots Indian Creek's arguments as the violations and resulting environmental conditions have already been fully addressed by the Circuit Court of Kane County. *Id.*

The complaint seeks relief, contends Burlington, which is contradictory to the response actions mandated by the consent order. Mem. at 6. For instance, asserts Burlington, the consent order requires that Burlington maintain its diesel fuel containment and recovery system, meet Illinois Environmental Protection Agency (Agency) closure criteria and submit various work plans and closure reports for Agency approval, but the complaint requests that Indian Creek or the Board (not the Agency) select the means of remediation and set the cleanup criteria at background levels. *Id.*

Burlington argues that Indian Creek is acting as a "private attorney general" in bringing its citizen's enforcement claims under the Act, but that these claims duplicate the claims made by the AGO and the State's Attorney of Kane County, and that Burlington should not be subject to enforcement claims in two separate actions by plaintiffs and complainants who are acting in the same capacity. Mem. at 7.

RESPONSE TO MOTION TO DISMISS

Initially, Indian Creek filed a motion to set a briefing schedule for its response to the motion to dismiss. In the motion, Indian Creek asked that the Board grant it twenty-one days up to and including February 6, 2007, to respond to the motion to dismiss and memorandum filed by Burlington. Mot. to Sched. at 2. Burlington did not respond to the motion to set a briefing schedule.

If a party files no response to a motion within 14 days, the party will be deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d). The Board grants Burlington's motion, and accepts its response to the motion to dismiss.

In its response, Indian Creek asserts that the instant complaint is not in any way duplicative, and that it is does not seek to circumvent the consent order in that its property was not known to be impacted by the contamination at the time the consent order was entered, and

was not, regardless, a party to the consent order. Resp. at 1-2. Indian Creek argues that Burlington shows a blatant disregard for the consent order itself, as it now attempts to avoid Board action in an apparent effort to sidestep its responsibility to remediate the environmental contamination on its property which has migrated and continues to migrate to and contaminate Indian Creek's property. Resp. at 2.

Nonetheless, contends Indian Creek, Burlington asks the Board to sit back and ignore the ongoing environmental contamination of Indian Creek's property based on a consent order that allows remediation, should Burlington eventually submit a remediation plan and obtain Agency approval. Resp. at 3. Indian Creek argues that this would be essentially discretionary on the Agency's part. *Id*. However, Indian Creek contends, the consent order does not even require remediation of Burlington's own property which is and is alleged to be the source of the contamination at issue. *Id*.

Indian Creek asserts that the consent decree expressly denies rights of third parties and precludes enforcement by third parties such as Indian Creek. Resp. at 3. Further, argues Indian Creek, at the time of the consent decree, contamination was not known to exist on the Indian Creek property even though Burlington had an obligation to investigate the extent of contamination. Resp. at 4. Indian Creek asserts that its previous counsel sued Burlington in circuit court but was unable to enforce the Act there and certainly could not enforce the consent order. *Id*.

Indian Creek argues that Burlington asks the Board to deny not just a member of the public, but a property owner, access to the primary tribunal vested with the authority to enforce the Act, and that to do so would turn the Board decision here into one which contravenes the express purpose of the Act - the interests of innocent property owners. Resp. at 6

Indian Creek argues that similar violations occurring at different times are not duplicative, particularly where the complainant was not a party to the circuit court consent decree. Resp. at 10. Finally, Indian Creek asserts that conditions have changed in the 14 years since the original release and the 12 years since the entry of the consent order. Resp. at 11.

MOTION FOR LEAVE TO FILE A REPLY

On February 21, 2007, Burlington filed a motion for leave to file a reply to Indian Creek's response, accompanied by a reply. In the reply, Burlington asserts that Indian Creek's repeated references to the claimed inaction on Burlington's part completely misrepresent the facts of the matter and materially prejudices Burlington. Mot. For Leave at 2. Burlington contends that Indian Creek's response brief goes well beyond simply rebutting or responding to the arguments, paints a set of facts that are not true, and that fairness dictates that Burlington be given the opportunity to respond and set the record straight. *Id*. Burlington requests that the Board grant this motion and deem the attached reply brief filed *instanter*. Mot. For Leave at 3.

OBJECTION TO MOTION FOR LEAVE TO FILE

Indian Creek objects to the motion for leave to file, arguing that the only thing that results in material prejudice to the Burlington is the truth, and that what Burlington asks for leave to file rebuts noting and changes nothing. Obj. at 1. Indian Creek asserts that the reply shows only that 14 years after the initial release that subsequently contaminated Indian Creek's property and despite the ongoing flow of contaminants onto and under Indian Creek's property as alleged in the complaint, Burlington continues its tap dance. *Id.* Indian Creek contends that the only thing that Burlington seeks to accomplish is to delay and perhaps to avoid its responsibility to remediate the Indian Creek property. Obj. at 2. Indian Creek concludes that the reply is another failed attempt to show alleged diligence. Obj. at 4.

BURLINGTON'S REPLY

Burlington maintains that it diligently pursued investigation and remediation of any diesel fuel released from its property as a result of the subject train collision, and has submitted a proposed remediation plan and draft pilot test study work plan to the Agency and to Indian Creek. Reply at 1. Burlington argues that after finding contamination on its property, Indian Creek sought unreasonable sums from Burlington for access to its property. Reply at 2.

Further, asserts Burlington, Indian Creek's brief describes nothing new and provides no legal support for its argument that its case should not be dismissed. Reply at 2. Instead, Burlington contends the sole argument is that the response activities are taking too long, despite the fact that it claims that it did not identify contamination on its property until 2000 and refused to allow access for more than a year. Reply at 3. Burlington notes that there is no time exception to the Board rules regarding duplicative actions, nor is there any legal basis to circumvent the consent order. *Id.*

Burlington argues that it has extensively investigated Indian Creek's property and has submitted to a plan to initiate remediation of the property, and that by dismissing this proceeding; the Board would not circumvent its role under the Act. Reply at 3-4. Finally, Burlington asserts that the Board is being asked to ignore that fact that the very violations and environmental conditions alleged in the complaint have already been addressed by the Illinois Attorney General and the State's Attorney of Kane County in the Kane County lawsuit, and that the consent order resulting from that lawsuit governs the response action with respect to Indian Creek's property. Reply at 8. Thus, argues Burlington, the complaint should be dismissed. *Id.*

DISCUSSION

Initially, the Board must determine whether to accept Burlington's reply to Indian Creek's response. Pursuant to the Board's procedural rules, replies are not permitted except as permitted by the Board to prevent material prejudice. 35 Ill. Adm. Code 101.500(e). The Board finds that material prejudice will be prevented if the reply is accepted. Accordingly, the Board grants Burlington's motion for leave to file, and accepts the reply.

In deciding a motion to dismiss, the Board considers all well-pleaded facts contained in the pleading as true**,** and draws all inferences from the facts in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001); Shelton v. Crown, PCB 96-53 (May 2, 1996); Krautsak v. Patel, PCB 95-143 (June 15, 1995); Miehle v. Chicago Bridge and Iron Co., PCB 93-150 (Nov. 4,1993). The Board takes all well-pleaded allegations as true in determining a motion to dismiss. Import Sales Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991); *see also* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150. In addition, dismissal of the complaint is proper only if it is clear that no set of facts could be proven that that would entitle complainant to relief. *See* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150.

The Board denies Burlington's motion to dismiss. While the complaint does concern the same railroad incident and involve the same respondent as the Kane County lawsuit, neither the parties nor the violations are the same. As noted earlier, a complaint is duplicative if another action is pending between the same parties, alleging substantially the same violations, before another tribunal with power to grant the same relief as the Board." Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises, PCB 92-80, slip op. at 2 (July 30, 1992).

In this instance, it is undisputed that Indian Creek was not a party to the Kane County lawsuit, and was not a party to the consent agreement therein. While both complaints allege violations of Section 12(a) and (d) of the Act, the instant complaint also alleges a violation of Section 21(e) of the Act. The violations in the instant complaint were discovered during a November 2000 excavation of Indian Creek's property. The violations alleged in the instant complaint are ongoing violations concerning the alleged migration of contamination from Burlington's property to Indian Creek's property. Although the migration may be caused by the 1993 incident at the basis of the Kane County lawsuit, the allegations arising therein would constitute new and separate violations.

When considering the facts in the complaint as true, and drawing all inferences in favor of Indian Creek, the Board finds this matter is not duplicative. Accordingly, the motion to dismiss is denied.

Nothing further in the record persuades the Board that this matter is duplicative or frivolous, and the Board accepts this case for hearing.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, including any civil penalty, for the alleged violations.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2004). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an ongoing violation, if any, and,

second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

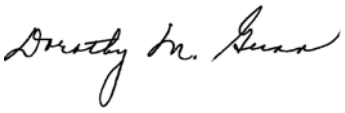
With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure 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."

Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). An SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, including whether to impose a civil penalty, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any, including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance, and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 15, 2007, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board