



DALEY MOHAN GROBLE

a professional corporation of attorneys

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CLERK'S OFFICE

DEC 10 2013

Direct: 312-422-0315
ssullivan@daleymohan.com

STATE OF ILLINOIS
Pollution Control Board

Sean M. Sullivan

December 10, 2013

Via Overnight Delivery

Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

PLB 14-81



ORIGINAL

Re: ***BNSF Railway Company v. Indian Creek Development Company
and JB Industries, Inc.***

Dear Sir or Madam:

This firm represents Claimant BNSF Railway Company ("BNSF") in the referenced matter. Enclosed are an original and ten copies of BNSF's Complaint for Allocation of Proportionate Responsibility and Certificate of Service (with attached Notice to Respondents). I would appreciate it if you would file the original and return a file-stamped copy of each to me in the enclosed self-addressed stamped envelope. We will file the receipts for the messenger deliveries to respondents as soon as they are available.

If you have any questions or need anything else, please feel free to contact me. Thank you for your assistance.

Very truly yours,

Sean M. Sullivan

Enc.

cc. Indian Creek Development Company
JB Industries, Inc.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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DEC 10 2013
STATE OF ILLINOIS
Pollution Control Board

_____))
 BNSF RAILWAY COMPANY, f/k/a The)
 Burlington Northern and Santa Fe Railway)
 Company,)
)
 Complainant,)
)
 vs.)
)
 INDIAN CREEK DEVELOPMENT)
 COMPANY, an Illinois Partnership, individually)
 and as beneficiary under trust 3291 of the Chicago)
 Title and Trust Company dated December 15, 1981)
 and the Chicago Title & Trust Company, as trustee)
 under trust 3291, dated December 15, 1981, and)
 JB INDUSTRIES, INC.,)
)
 Respondents.)
 _____)

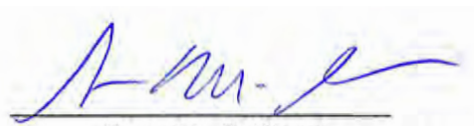
14-81
PCB-13-_____

CERTIFICATE OF SERVICE

I, Sean M. Sullivan, an attorney, certify that on December 10, 2013, I served the attached formal complaint and notice on the respondents by messenger service (receipts to be filed with the Clerk later) at the addresses listed below:

Indian Creek Development Company
601 North Farnsworth Avenue
Aurora, IL 60505
(630) 851-9444

JB Industries, Inc.
601 North Farnsworth Avenue
Aurora, IL 60505
(630) 851-9444



Sean M. Sullivan
Daley Mohan Groble, P.C.
55 West Monroe Street/Suite 1600
Chicago, IL 60603
(312) 422-9999

NOTICE TO RESPONDENT

NOTE: THIS STATEMENT MUST BE INCLUDED IN THE SERVICE OF THE FORMAL COMPLAINT ON THE RESPONDENT

INFORMATION FOR RESPONDENT RECEIVING FORMAL COMPLAINT

Please take notice that today I filed with the Clerk of the Illinois Pollution Control Board (Board) a formal complaint, a copy of which is served on you along with this notice. You may be required to attend a hearing on a date set by the Board.

Information about the formal complaint process before the Board is found in the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.*) and the Board's procedural rules (35 Ill. Adm. Code 101 and 103). These can be accessed at the Board's Web site (www.ipcb.state.il.us). The following is a summary of some of the most important points in the Act and the Board's procedural rules. It is provided for general informational purposes only and does not constitute legal advice or substitute for the provisions of any statute, rule, or regulation:

Board Accepting Formal Complaint for Hearing; Motions

The Board will not accept this formal complaint for hearing if the Board finds that it is either "duplicative" or "frivolous" within the meaning of Section 31(d) of the Act (415 ILCS 5/31(d)) and Section 101.202 of the Board's procedural rules (35 Ill. Adm. Code 101.202). "Duplicative" means that an identical or substantially similar case is already pending before the Board or in court. See 35 Ill. Adm. Code 103.212(a) and item 10 of the formal complaint.

"Frivolous" means that the formal complaint seeks relief that the Board does not have the authority to grant, or fails to state a cause of action upon which the Board can grant relief. For example, the Board has the authority to order a respondent to stop polluting and pay a civil penalty, to implement pollution abatement measures, or to perform a cleanup or reimburse cleanup costs. The Board does not have the authority, however, to award attorney fees to a citizen complainant. See 35 Ill. Adm. Code 103.212(a) and items 5 and 9 of the formal complaint.

If you believe that this formal complaint is duplicative or frivolous, you may file a motion with the Board, within 30 days after the date you were served with the complaint, requesting that the Board not accept the complaint for hearing. The motion must state the facts supporting your belief that the complaint is duplicative or frivolous. Memoranda, affidavits, and any other relevant documents may accompany the motion. If you need more time than 30 days to file a motion alleging that the complaint is duplicative or frivolous, you must file a motion for an extension of time within 30 days after service of the complaint. A motion for an extension of time must state why you need more time and the amount of additional time you need. Timely filing a motion

alleging that the complaint is duplicative or frivolous will stay the 60-day period for filing an answer to the complaint. See 35 Ill. Adm. Code 103.204, 103.212(b).

All motions filed with the Board's Clerk must include an original, nine copies, and proof of service on the other parties. Service may be made in person, by U.S. mail, or by messenger service. Mail service is presumed complete four days after mailing. See 35 Ill. Adm. Code 101.300(c), 101.302, 101.304.

If you do not respond to the Board within 30 days after the date on which the complaint was served on you, the Board may find that the complaint is not duplicative or frivolous and accept the case for hearing. The Board will then assign a hearing officer who will contact you to schedule times for telephone status conferences and for hearing. See 35 Ill. Adm. Code 103.212(a).

Answer to Complaint

You have the right to file an answer to this formal complaint within 60 days after you receive the complaint. If you timely file a motion alleging that the complaint is duplicative or frivolous, or a motion to strike, dismiss, or challenge the sufficiency of the complaint, then you may file an answer within 60 days after the Board rules on your motion. See 35 Ill. Adm. Code 101.506, 103.204(d), (e), 103.212(b).

The Board's procedural rules require the complainant to tell you as respondent that:

Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney. 35 Ill. Adm. Code 103.204(f).

Necessity of an Attorney

Under Illinois law, an association, citizens group, unit of local government, or corporation must be represented before the Board by an attorney. In addition, an individual who is not an attorney cannot represent another individual or other individuals before the Board. However, even if an individual is not an attorney, he or she is allowed to represent (1) himself or herself as an individual or (2) his or her unincorporated sole proprietorship. See 35 Ill. Adm. Code 101.400(a). Such an individual may nevertheless wish to have an attorney prepare an answer and any motions or briefs, and present a defense at hearing.

Costs

In defending against this formal complaint, you are responsible for your attorney fees, duplicating charges, travel expenses, witness fees, and any other costs that you or

your attorney may incur. The Board requires no filing fee to file your answer or any other document with the Board. The Board will pay any hearing costs (*e.g.*, hearing room rental, court reporting fees, hearing officer expenses).

If you have any questions, please contact the Clerk's Office at (312) 814-3629.

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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

_____)
 BNSF RAILWAY COMPANY, f/k/a The)
 Burlington Northern and Santa Fe Railway)
 Company,)
)
 Complainant,)
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 vs.)
)
 INDIAN CREEK DEVELOPMENT)
 COMPANY, an Illinois Partnership, individually)
 and as beneficiary under trust 3291 of the Chicago)
 Title and Trust Company dated December 15, 1981)
 and the Chicago Title & Trust Company, as trustee)
 under trust 3291, dated December 15, 1981, and)
 JB INDUSTRIES, INC.,)
)
 Respondents.)
 _____)

14-81
PCB-13-_____

COMPLAINT FOR ALLOCATION OF PROPORTIONATE RESPONSIBILITY

Complainant, BNSF Railway Company, formerly known as The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys, Daley Mohan Groble, P.C., as its Complaint against Respondents Indian Creek Development Company, an Illinois Partnership, individually and as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title & Trust Company, as trustee under trust 3291, dated December 15, 1981 ("ICDC") and JB Industries, Inc. ("JB Industries"), alleges as follows:

Parties

1. Complainant Contact Information:

BNSF Railway Company
c/o Daley Mohan Groble, P.C.
55 West Monroe Street
Suite 1600
Chicago, IL 60603
(312) 422-9999

2. Names and Addresses of Respondents:

Indian Creek Development Company
601 North Farnsworth Avenue
Aurora, IL 60505
(630) 851-9444

JB Industries, Inc.
601 North Farnsworth Avenue
Aurora, IL 60505
(630) 851-9444

Background

3. On February 9, 1996, BNSF entered into a Consent Decree with the People of the State of Illinois, the Illinois Attorney General and the Illinois Environmental Protection Agency (“IEPA”) to provide for further investigation and remediation of locomotive diesel fuel that spilled on BNSF’s property from a train collision occurring on January 20, 1993. A copy of the Consent Order is attached hereto as Exhibit A.

4. In or about November 2000, ICDC completed excavations through the concrete floor of one of its buildings located on its property located to the south of BNSF’s right-of-way near to the area of the 1993 train collision (the “ICDC Site”). The ICDC Site is located at the premises commonly known as 1500 Dearborn Avenue, Aurora, IL 60505. ICDC claims that when conducting the excavation, it discovered the presence of diesel fuel which it alleges to be fuel that migrated to its property from the original 1993 train collision and spill.

5. On November 18, 2006, BNSF entered into an Amendment to the Consent Order. A copy of the Amendment to Consent Order is attached hereto as Exhibit B.

6. Under the Amendment to the Consent Order, the defined “site” for investigation and remediation was expanded to include “all properties and media . . . not owned or under the control of (BNSF) impacted by the diesel fuel release that resulted from the January 20, 1993 collision, including but not limited to, the property owned by (ICDC) which is on the southern boundary of the (BNSF railroad tracks) and the sediments of Indian Creek, but only to the extent such properties or media are impacted by diesel fuel contamination resulting from the January 20, 1993 collision.”

7. Indian Creek runs in a generally east to west direction through the ICDC property, and eventually flows into the Fox River in Aurora, Illinois.

8. In February 2013, ICDC excavated a sanitary sewer line on the ICDC Site. ICDC claims that when so doing, it discovered the presence of diesel fuel which it alleges to be fuel that migrated to its property from the original 1993 train collision and spill.

ICDC's Pending Actions

9. On December 4, 2006, ICDC filed a complaint before the Illinois Pollution Control Board (“PCB”) (the “PCB Complaint”) in which it alleged that – as a result of the 1993 train collision and diesel release – BNSF violated §§ 12(a), 12(d) and 12(e) of the Illinois Environmental Protection Act (the “Act”). The PCB Complaint remains pending.

10. In the PCB Complaint, ICDC requests, among other things: (1) that BNSF be required to remediate the ICDC Site “to background levels” and to a level not less than “applicable residential standards;” (2) that ICDC and its consultants be permitted to monitor the remediation of the BNSF property and the ICDC Site; and (3) that BNSF be required to

reimburse ICDC for all costs and expenses incurred related to investigation and remediation of the BNSF property and the ICDC Site, including the fees of consultants and experts.

11. On November 9, 2007, ICDC filed a complaint against BNSF in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, in which it seeks damages and injunctive relief related to the 1993 train collision and diesel spill (the "State Court Lawsuit"). The State Court Lawsuit remains pending.

12. JB Industries is an affiliate or related entity to ICDC (with common or overlapping ownership and control), and has been a principal tenant and occupier of the ICDC Site since 1982.

Request for Allocation of Responsibility

13. Pursuant to the Consent Order and the Amendment to the Consent Order, BNSF has spent large sums of money to investigate the presence of locomotive diesel fuel resulting from the January 20, 1993 train collision on ICDC's property and remediate it. BNSF has paid large sums of money to obtain access to ICDC's property to do so; and it has paid or incurred large sums of money to consultants retained by ICDC to monitor BNSF's investigation. BNSF has also paid large sums of money to IEPA to reimburse IEPA for the costs of work it has performed as part of the investigation and remediation efforts. BNSF will be required to continue, well in to the future, to pay large sums of money for investigation and remediation activities under the Consent Order and the Amendment to the Consent Order.

14. On information and belief, to the extent that there have been, or will be, positive findings of petroleum constituents in excess of IEPA standards found on the ICDC Site, they are likely to be from sources other than the January 20, 1993 collision and diesel fuel spill on BNSF's property, including sources for which Respondents are responsible.

15. In this action, BNSF seeks an allocation of Respondents' proportionate share of responsibility for costs associated with contaminants present on the ICDC Site.

History and Environmental Events at ICDC Site

16. Pursuant to the Consent Order and the Amendment to the Consent Order, BNSF continues to investigate the presence and sources of petroleum constituents and other contaminants at the ICDC Site, and has thereby gained knowledge concerning certain present and historical uses of the ICDC Site, as well as records of environmental releases or events occurring on the site.

17. The ICDC property has a history of heavy industrial activity for over a century that included blacksmithing, machine shops, wood working, grinding, polishing, a coal house, steaming, bonding, lumber storage and dry kiln, warehouses, erecting houses, pump house paint shops, tool shops, various staging and storage areas, sand blasting, welding, dust collection, assembly and shipping buildings. Recent historical investigations of the property reveal the presence of oil tanks, gas tanks and oil reservoirs over the years.

18. The ICDC Site is currently occupied by tenants engaged in light to heavy industrial activities including, but not limited to, auto repair and service centers, metal fabrication, welding, car detailing, painting, resin and plastics manufacturing including color additive technology, lawn and garden equipment service center, warehousing and assembly.

19. Various petroleum products (predominantly lubricating oils) are present at the ICDC Site. Hazardous materials present at the site include: Mono Ethanol Amine; Derakane Momentum 411-350 Epoxy (Vinal Ester Resin); Industrial Purple Cleaner and Degreaser; Mobil DTE Oil (lubricating oil); Mobil Velocite Oil (lubricating oil); Leahy-Wolf AW Hydraulic Lubricants #32, 46, 68, 100, 150 and 220; Styrene; Methyl methacrylate; Phosphoric acid;

Hydrofluoric acid; Sodium hydroxide; Wallower Oil Company WS7350 (coolant/lubricant) and ECOBase Waterproofing membrane.

20. Tenants at the ICDC Site include, or recently included, the following:

(a) JB Industries manufactures equipment used in the installation of air conditioning equipment. Its processes include machining, paint, brazing, assembly, caustic cleaning and screw machine operations.

(b) Craftsman Tool manufactures injection molding dies, molds and equipment. Its processes include metal working, polishing, EDM, welding and finishing.

(c) Action Metals is a custom metal cutting shop. Its processes include flame cutting, abrasive cutting, metal working and various finishing processes.

(d) Hevco MFG manufactures aftermarket mower decks. Its processes include metal working, grinding, abrasive finishing, paint and assembly.

(e) Barnco fabricates metal sheds for farms and industry. Its processes include metal cutting, iron working, assembly and finishing.

(f) R&R Iron Works is an iron fabricator. Its processes include cutting, abrasive blasting, welding, brazing, soldering and painting.

21. Historical records available to date disclose numerous environmental releases at the ICDC Site including, but not limited to, the following:

(a) Mid-States Express Trucking Company, March 2006: release of diesel fuel;

(b) Universal Equipment, February 1988: blue waste paint or solvent leak;

(c) Best Blast Corporation, September 1990: improper handling of paint wastes and hazardous materials.

(d) Clark Equipment, May 1974: air emissions for 10,000-gallon diesel fuel tank and 15,000-gallon hydraulic oil tank.

(e) JB Industries, April 1982: spill of PCBs.

22. BNSF or its consultants have observed widespread staining and numerous pools of what appeared to be petroleum products and/or hazardous substances throughout several of the tenant spaces of the ICDC Site. Heavy staining was observed throughout the concrete surface in the main manufacturing area along the northern portion of the ICDC Site. The concrete ground surface in those areas displayed various patches and cracks and "Oil Absorbent" was placed on the concrete surface surrounding equipment, drums, totes and tanks in the areas.

Petroleum Constituents at the ICDC Site Did Not Come From the 1993 Collision

23. BNSF's investigation pursuant to the Consent Order and the Amendment to the Consent Order has established that petroleum constituents and other contaminants present at the ICDC Site are not diesel fuel and/or otherwise did not come from the 1993 train collision.

24. On July 11, 2011, as part of its investigation under the Amendment to the Consent Order, consultants retained by BNSF recovered samples of sediment from Indian Creek at four locations on ICDC property (labeled S-7, S-8, S-9 and S-10), and at locations both upstream and downstream from ICDC's property. Three of the four samples taken on ICID property contained concentrations of polynuclear aromatic hydrocarbons (PAHs) in excess of the of IEPA's Baseline Sediment Clean-up Objectives for Petroleum Products. In particular, sediment sample S-07, located at the east end of ICDC's property across from an industrial building, and S-09, located near the exit points of four culverts from two different ICDC buildings, contained concentrations of PAHs of up to 11 and 17 PAHs in excess of Baseline Remediation Objectives.

25. The PAHs found in the sediment samples taken from Indian Creek on ICDC property could not have migrated from the January 20, 1993 diesel fuel spill on BNSF's property. The locations where the sediment samples were taken are up-gradient and/or cross-gradient from the location of the January 20, 1993 diesel fuel spill. Additionally, numerous soil samples have been taken from the ground, and numerous groundwater monitoring wells have been installed, at locations between the area of the January 20, 1993 diesel fuel spill and the location of the sediment samples from Indian Creek on ICDC's property; but none of those locations have revealed concentrations of PAHs that exceed applicable IEPA environmental clean-up objectives.

26. Forensic chemical analysis of liquid and soil samples from the ICDC Site indicates that the petroleum constituents found at the site are heavy fuel oil, not diesel fuel. For example:

(a) Liquid samples taken from monitoring wells over various periods exhibit biomarkers that are found in heavy fuel oil, but do not exist in diesel fuel because they are removed from diesel during distillation.

(b) Liquid samples taken from monitoring wells over various periods exhibit hydrocarbon ranges consistent with heavy fuel oil and not diesel fuel.

(c) Variations in the heavy fuel oil constituents found in soil samples taken from various locations on the site indicate that they come from different releases.

(d) Soil samples taken from the sanitary sewer line excavation exhibit compositions that are consistent with heavy fuel oil and not diesel fuel.

27. Upon review of the forensic chemical analysis submitted by BNSF, IEPA has acknowledged that "it is clear there is a heavy fuel oil present at the site." IEPA, however, has

required BNSF to conduct further investigation because of the possibility that a fraction of the petroleum constituents at the site could be “weathered diesel fuel.”

Respondents’ Violations of Illinois Environmental Protection Act

28. Section 21(e) of the Act, 415 ILCS 5/21(e), provides that no person shall “dispose, treat, store or abandon any waste . . . except at a site or facility which meets the requirements of the Act and of regulations and standards thereunder.”

29. “Waste” is defined in the Act to include any “discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations . . . “ 415 ILCS 5/3.535.

30. Section 12(a) of the Act provides that no person shall

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.

415 ILCS 5/12(a).

31. Section 12(d) of the Act provides that no person shall “deposit any contaminants upon the land in such a place and manner so as to cause a water pollution hazard.” 415 ILCS 5/12(d).

32. Liability for pollution of land or water under the Act extends to any person who has control of the source of the pollution or who owns or controls the premises where the pollution occurs.

33. Respondents have caused or allowed contaminants as described previously in the sediments of Indian Creek on its property and is therefore in violation and liable under the aforesaid provisions Act.

34. Respondents have, on information and belief, caused or allowed other contaminants into the ground, soil and ground water on the ICDC Site alone or in combinations with contaminants from other sources; and are therefore in violation and liable under the aforesaid provisions Act.

35. The presence of environmental contaminants caused or allowed by Respondents on the ICDC Site is a continuing violation and will continue unless and until abated by order of the Pollution Control Board.

Respondents' Liability for Contribution

36. Section 22.2d(f) of the Act provides that

“any person may seek contribution from any other person who is liable for the costs of response actions under this Section. In resolving contribution claims, the Board or court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”

415 ILCS 5/22.2d(f).

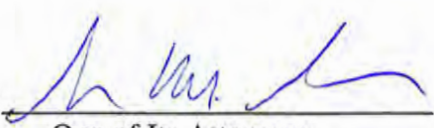
37. BNSF has been wrongfully required by IEPA to investigate and remediate contaminants on the ICDC Site when, in fact, Respondents are the parties responsible for the presence of those contaminants; and, BNSF has expended substantial sums of money to do so.

38. BNSF is entitled to a judgment in its favor and against Respondents in an amount equal to all of the costs that BNSF has incurred to investigate and remediate the ICDC Site. Alternatively, BNSF is entitled to a judgment in its favor and against Respondents in an amount commensurate with Respondents' comparative responsibility for the presence of contaminants on the ICDC Site.

WHEREFORE, Claimant, BNSF Railway Company, respectfully requests that Judgment be entered in its favor and against Respondents, Indian Creek Development Company and JB Industries, Inc. in an amount equal to the costs that BNSF has incurred to investigate and

remediate ICDC's property. Alternatively, BNSF is entitled to a judgment in its favor and against ICDC in an amount commensurate with ICDC's comparative responsibility for the presence of contaminants on its property.

BNSF RAILWAY COMPANY

By: 
One of Its Attorneys

Pam Nehring
Sean M. Sullivan
Jennifer Schuch
DALEY MOHAN GROBLE, P.C.
55 West Monroe Street
Suite 1600
Chicago, Illinois 60603
(312) 422-9999

EXHIBIT A

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS
CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. JAMES E. RYAN, Attorney)
General of the State of Illinois)
and ex rel. DAVID R. AKEMANN,)
State's Attorney of Kane)
County,)

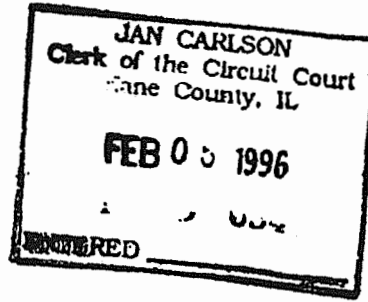
Plaintiff,)

vs.)

BURLINGTON NORTHERN RAILROAD)
COMPANY, a Delaware corporation,)
SOUTHERN PACIFIC TRANSPORTATION)
COMPANY, a Delaware corporation,)
and subsidiary of SOUTHERN)
PACIFIC RAIL CORPORATION,)
a Delaware corporation, and)
SPCSL CORP., a Delaware corporation)
and subsidiary of SOUTHERN PACIFIC)
TRANSPORTATION COMPANY,)

Defendants.)

No. CH KA 95 0527



CONSENT ORDER

Plaintiff, the PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of the State of Illinois, ex rel. DAVID R. AKEMANN, State's Attorney of Kane County, Illinois, and Defendants, BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, and subsidiary of SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, and SPCSL CORP., a Delaware corporation and subsidiary of SOUTHERN PACIFIC TRANSPORTATION COMPANY, having agreed to the making of this stipulation and the entry of this Consent Order, do hereby stipulate and agree as follows:

I.

STIPULATION OF USE AND AUTHORIZATION

The parties stipulate that this Consent Order is entered into for purposes of settlement only and that neither the fact that a party has entered into this Consent Order, nor any of the facts stipulated herein, shall be used for any purpose in this or any other proceeding except to enforce the terms hereof by the parties to this agreement. Further, this Consent Order or the performance hereunder by the defendants BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, and subsidiary of SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, and SPCSL CORP., a Delaware corporation and subsidiary of SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall not create any right on behalf of any person or entity not a party hereto. Notwithstanding the previous sentences, this Consent Order may be used in any future enforcement action as evidence of a past adjudication of violation of the Illinois Environmental Protection Act ("Act") for purposes of Section 42(h) of the Act, 415 ILCS 5/42(h) (1994).

The undersigned representative for each party certifies that he/she is fully authorized by the party who he/she represents to enter into the terms and conditions of this Consent Order and to legally bind the party he/she represents to the Consent Order.

II.

STATEMENT OF FACTS

A. Parties

1. The Attorney General of the State of Illinois brings this action on his own motion as well as at the request of the Illinois Environmental Protection Agency ("Agency"), and the State's Attorney of Kane County, Illinois, brings this action on his own motion, pursuant to the statutory authority vested in them under Section 42 of the Act, 415 ILCS 5/42 (1994).

2. The Agency is an agency of the State of Illinois created pursuant to Section 4 of the Act, 415 ILCS 5/4 (1994), and charged, *inter alia*, with the duty of enforcing the Act.

3. At all times relevant to this Consent Order, Burlington Northern Railroad Company ("Burlington"), is a Delaware corporation authorized to do business in Illinois since February 27, 1970, and is engaged in the business of providing rail transportation services.

4. At all times relevant to this Consent Order, Southern Pacific Rail Corporation ("SPRC"), is a Delaware rail holding corporation and is not authorized to do business in Illinois. SPRC is the parent company of Southern Pacific Transportation Company, owning 100% of its capital stock.

5. At all times relevant to this Consent Order, Southern Pacific Transportation Company, ("Southern Pacific"), a Delaware corporation and subsidiary of Southern Pacific Rail Corporation, is the parent company of SPCSL Corp. Southern Pacific is in the business of providing railroad freight transportation services and provides such services in Illinois through its wholly-owned

subsidiary SPCSL. Southern Pacific itself is not authorized to do business in Illinois. On information and belief Southern Pacific conducts business in Illinois through its wholly owned subsidiary SPCSL Corp.

6. At all times relevant to this Consent Order, SPCSL Corp. ("SPCSL") was and is a Delaware corporation qualified to do business in Illinois on November 3, 1989. SPCSL is a wholly-own subsidiary of Southern Pacific and is in the business of providing rail transportation services in Illinois.

7. Defendants Southern Pacific, SPRC and SPCSL, shall hereinafter be referred to collectively as Southern Pacific.

B. Site Description

1. At all times relevant to this Consent Order, the site is located on the Burlington rail lines east of the Village of Aurora near the community of Eola, Aurora, Kane County, Illinois. The site consists of five east-west rail tracks and spurs with a warehouse forming its southern boundary and a smaller building forming the northern boundary.

2. Of the five east west rail tracks, three are mainline tracks and the other two are siding tracks. The three mainline tracks provide Burlington access into the Chicago, Illinois gateway. The three mainline tracks originate in Chicago, Illinois and extend west to Galesburg, Illinois, and Kansas City, Missouri and also to St. Paul, Minnesota and to Seattle, Washington. The mainline tracks are utilized to provide through freight rail service, Amtrak service and Metra computer service. In excess of 155 trains per 24 hour period operate over the three mainline tracks. The two siding tracks are used as passing tracks and for the storage of cars and

trains. They are also used to assist in train movement over the three mainline tracks.

3. Located parallel to the site is a drainage ditch. Surface runoff is collected by a storm sewer that discharges into Indian Creek which is a tributary of the Fox River.

4. At all times relevant to this Consent Order, Burlington owns, operates and is in control of the site. The movement of trains, cars and engines over and along its tracks are subject to Burlington's direction and control.

5. At all times relevant to this Consent Order, pursuant to a Trackage Rights Agreement entered into by and between Burlington and Southern Pacific, Southern Pacific uses the site for the conduct of its rail services.

C. Alleged Violations

1. Section 12(a) of the Act, 415 ILCS 5/12(a) (1994), provides as follows:

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;

2. Section 12(d) of the Act, 415 ILCS 5/12(d) (1994), provides as follows:

No person shall:

- d. Deposit any contaminants upon land in such place and manner so as to create a water pollution hazard;

3. Plaintiff alleges that on January 20, 1993, due to errors on the part of certain Burlington employees, including, its

dispatcher, train engineer and conductor, a train owned and operated by Burlington and traveling westbound over the site, collided head-on with a train owned and operated by Southern Pacific which was traveling eastbound. Burlington denies this allegation.

4. On January 20, 1993, when the trains collided, three diesel fuel tanks with combined fuel capacity of 10,800 gallons of fuel, ruptured, releasing approximately 5,800-6,800 gallons of diesel fuel onto the ground and into a nearby creek causing an "oily" sheen to appear on the waters in the nearby ditch and creek.

5. To date, 208 gallons of the 5,800-6,800 gallons of diesel fuel spilled at the site have been recovered via the recovery trench system installed. Burlington as the owner and operator of the site has not fully remediated the diesel fuel contaminated soil at the site.

III.

APPLICABILITY

This Consent Order shall apply to and be binding upon the State or plaintiff, Burlington and Southern Pacific. Burlington and Southern Pacific shall not raise as a defense to any action to enforce this Consent Order, the failure of any of its officers, agents, servants or employees to take such action as shall be required to comply with the provisions of this Consent Order.

IV.

COMPLIANCE WITH OTHER LAWS AND REGULATIONS

This Consent Order in no way affects the responsibilities of Burlington and Southern Pacific to comply with any other federal, state or local regulations, including but not limited to the Act, and the Board Rules and Regulations, 35 Ill. Adm. Code Subtitles A

through H.

V.

VENUE

The parties agree that the venue of any action commenced in Circuit Court for the purpose of interpretation and enforcement of the terms and conditions of this Consent Order shall be in Kane County.

VI.

SEVERABILITY

It is the intent of the parties hereto that the provisions of this Consent Order shall be severable, and should any provisions be declared by a court of competent jurisdiction to be inconsistent with state or federal law, and therefore unenforceable, the remaining clauses shall remain in full force and effect. In the event that any provision of this Consent Order and plans implemented herein shall be declared inconsistent with the provisions of the Act, 415 ILCS, 5/1 et seq. (1994), the provisions of the Act shall be controlling.

VII.

FINAL JUDGMENT ORDER

NOW, THEREFORE, in consideration of the foregoing, and upon the consent of the parties hereto to perform the activities to be ordered by the court, it is hereby ORDERED, ADJUDGED AND DECREED:

A. Jurisdiction

This court has jurisdiction of the subject matter herein and of the parties consenting hereto pursuant to the Act.

B. Objective

The objective of this Consent Order is to have an enforceable order which will ensure the implementation of the terms hereof, to obtain remediation of the site as is economically reasonable and technologically feasible, to assure the protection of public health, safety, welfare and the environment, and compliance with the Act, Board's Water Pollution Regulations, the Federal Clean Water Act and any applicable rules and regulations promulgated thereunder.

C. Terms of Settlement

1. Payment to the Environmental Protection Trust Fund

a. Penalty

- i. Burlington and Southern Pacific shall together pay a penalty of \$85,000.00 into the Illinois Environmental Protection Trust Fund. Such penalty amount shall be paid within thirty (30) days of the date of this order. This penalty shall be paid by check to the Treasurer of the State of Illinois for deposit in the Environmental Protection Trust Fund and delivered to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

The name and number of the case, the Agency's incident number that was assigned to this release and Burlington's and Southern Pacific's Federal Employer's Identification Number

("FEIN") shall appear in the face of the check. Burlington's FEIN is 41-6034000. Southern Pacific's FEIN is 94-600123. The Agency's incident number is 930190.

- ii. Burlington and Southern Pacific are jointly and severally liable for the \$85,000.00 civil penalty required in Section VII.C.1.a.i. herein.

b. Stipulated Penalties

- i. In the event Burlington fails to satisfy any requirement or comply with any provision of this Consent Order, or fails to satisfy any requirement of any plaintiff-approved work plan or schedule developed pursuant to this Consent Order, Burlington shall pay to the plaintiff for payment into the Illinois Environmental Protection Trust Fund, stipulated penalties in the amount of \$500.00 per day of noncompliance until such time as compliance is achieved.
- ii. All penalties owed the plaintiff under this subsection VII.C.1.b. shall be payable within thirty (30) days of the date Burlington knows or should have known of its noncompliance with any provision of the Consent Order.
- iii. All penalties shall begin to accrue on the day that complete performance is due and continue to accrue through the final day of

correction of the non-compliance.

- iv. All stipulated penalties shall be paid by check made payable to the Treasurer of the State of Illinois for deposit in the Environmental Protection Trust Fund and delivered to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62794-9276

The name and number of the case and Burlington's Federal Employer's Identification Number ("FEIN") shall appear on the face of the check.

- v. The stipulated penalties shall be enforceable by the plaintiff and shall be in addition to and shall not preclude the use of any other remedies or sanctions arising from Burlington's failure to comply with the Consent Order.

c. Past Response Costs

Within thirty (30) days of entry of the Consent Order, Burlington shall pay the amount of \$1,430.55 in satisfaction of claim(s) the plaintiff may have for all investigation, response, and oversight costs that occurred prior to the entry of this Consent Order. The \$1,430.55 payment required herein shall be paid to the Treasurer of the State of Illinois designated to the Hazardous Waste Fund with the Emergency Oversight number, 930190 on the face of the check, and submitted to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

d. Future Response Costs

Subject to Section F below, Burlington shall reimburse the Agency for any response and oversight cost incurred subsequent to the entry of this Consent Order. The Agency agrees to submit to Burlington, on a quarterly or annual basis at its discretion, a detailed accounting that shall include a summary of response and oversight activities performed, a detailed summary of all expenses claimed and a statement that the expenses have actually been incurred. Upon request, the Agency shall provide Burlington with copies of all receipts and other documents evidencing such expenditures, excluding actual Agency employee signed timesheets. No reimbursement shall be required for the costs for which no documentation was provided, until such time as the required documentation is provided for such costs. Said detailed accounting shall include all response and oversight costs incurred pursuant to this Consent Order by the Agency with respect to this Consent Order after the effective date of this Consent Decree. Specifically relating to the issue of future response cost only, where the Dispute Resolution provision of Section F is invoked herein in good faith, each party to bear its own legal costs associated with the resolution of the future response costs dispute.

Within thirty (30) days of receipt of the accounting required herein, any payments required herein shall be paid to the Treasurer of the State of Illinois designated to the

Hazardous Waste Fund on the check, and submitted to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

e. The name and number of the case and Burlington's Federal Identification Number ("FEIN") shall appear on the face of all checks required herein.

f. Interest on Penalty

Pursuant to Section 42(g) of the Act, 415 ILCS 5/42(g) (1994), interest shall accrue on any penalty amount not paid within the time prescribed herein, at the maximum rate allowable under Section 1003(a) of the Illinois Income Tax Act, 35 ILCS 5/1003(a) (1994).

- i. Interest on unpaid penalties shall begin to accrue from the date the penalty payment is due and continue to accrue to the date payment is received.
- ii. Where partial payment is made on any payment amount that is due, such partial payment shall be first applied to any interest on unpaid penalties then owing.
- iii. All interest on penalties owed the plaintiff, shall be paid by certified check payable to the Treasurer of the State of Illinois for deposit in the Environmental Protection Trust Fund and delivered to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

The name and number of the case and Burlington's Federal Identification Number ("FEIN") shall appear on the face of the check.

2. Fuel Containment and Recovery Activities

Burlington shall minimize the impact to the environment from the approximately 5,800 - 6,800 gallons of diesel fuel spilled and released at the site. The following is designed to achieve this objective:

- a. On approximately February 14, 1994, Burlington provided to Plaintiff, a report titled, Phase I Emergency Fuel Containment ("Phase I Report"), which outlined the activities and measures implemented by Burlington in its initial response to contain, the 5,800 - 6,800 gallons of diesel fuel spilled and released at the site. These included the following:
 - i. On January 20, 1993, absorbent material was placed in the creek immediately north of the site where fuel was ponding.
 - ii. Shallow cut-off trenches were dug on either side of the tracks in the area of the spill and two (2) over and under dams were constructed.
 - iii. Booms were deployed at the east end of the storm sewer and at the west end of the storm sewer where such storm sewer discharges.

- iv. From February 8 - 10, 1993, four soil borings were installed and completed as monitoring wells on each side of the track in the area of the diesel fuel release. Four additional monitoring wells were installed downgradient of the area of the diesel fuel spill.

- b. In approximately March, 1993, Burlington retained the services of Radian Corporation ("Radian"), an Engineering firm, to characterize the subsurface extent of any diesel fuel contamination of the site, and to implement a diesel fuel recovery system. These included but were not limited to the following activities:
 - i. Soil and groundwater samples were obtained and analyzed for total petroleum hydrocarbons ("TPH"). The result from such sampling activity showed diesel fuel contamination of the area soil and groundwater. Free diesel fuel was also observed in one of the monitoring wells.

 - ii. Between April 2, 1993 and August 17, 1993, a groundwater interceptor trench with a groundwater depression pump and scavenger pump was installed to remove free diesel fuel from the groundwater.

- iii. On May 30, 1993, a Wastewater Discharge Permit IWDP-029 was issued by the Aurora Sanitary District ("Sanitary District") for the discharge of groundwater from Burlington's remediation system to the sanitary district sewer. 525,360 gallons of groundwater have been pumped and discharged to the sanitary district sewer.
- iv. The Phase I Report provided for a Phase II Follow-up Response which included among other things, the performance of a supplemental site characterization and evaluation of remedial options.
- c. Effective immediately, Burlington shall at all times maintain in good working order its diesel fuel containment and recovery system.
- d. Effective immediately and continuing until the site, including the soil and groundwater, and off-site areas are remediated to meet any and all Agency-approved closure criteria established for this site, Burlington shall continue to monitor its diesel fuel containment and recovery system and implement as appropriate, all measures designed to prevent the diesel fuel spilled and released at its site, from migrating further off-site.
- e. No later than sixty (60) days of entry of this Consent Order, Burlington shall prepare and provide to the plaintiff and the Agency, a report which

summarizes all fuel containment, recovery, remediation, monitoring and maintenance activities conducted at the site since the January 20, 1993 diesel fuel release. Burlington shall also document in said report all soil and groundwater analyses conducted at the site from January 20, 1993 to the date of entry of this Consent Order. Burlington shall also include copies of all analytical results and all boring logs obtained during this period of time.

3. Identified Response Action

Burlington shall determine the extent to which the soil and groundwater are impacted by the diesel fuel released, and shall remediate the site including the soil and groundwater and any off-site impacted area(s) to achieve the Agency-approved closure criteria established for the site and to prevent further migration of the released and unrecovered diesel fuel. The following is designed to achieve this requirement:

- a. Beginning not later than forty-five (45) days from the date of entry of this Consent Order, Burlington's Engineering Consultant shall prepare and provide to the plaintiff and the Agency for review and approval, a draft Phase II Work Plan ("Work Plan") and schedule for all of the activities required herein. This Work Plan shall include a detailed description of the procedures for the conduct of a study to determine the technical feasibility of in-situ bioremediation and soil

flushing as well as other technologically feasible technologies to address soil and groundwater remediation on and off-site. The Work Plan shall also include the activities to be performed for the characterization of the soil and groundwater, the identification of potential pathways of migration of the diesel fuel contaminated soil and groundwater, and identification of potentially affected human and environmental receptors. The Work Plan shall also propose the site closure criteria for the plaintiff and Agency approval. Such approval shall not be unreasonably withheld. The plaintiff shall have thirty (30) days for the review of this Work Plan. The plaintiff may extend the time for review by a period not to exceed fourteen (14) days by notifying Burlington prior to the expiration of the initial thirty (30) day review period.

- i. If the plaintiff accepts the Phase II Work Plan required in paragraph VII.C.3.a. above, Burlington shall implement said Work Plan in accordance with the schedule contained therein.
- ii. If the plaintiff objects to any recommended activity, or requires any additional activity to be performed by Burlington, it shall provide Burlington with a detailed statement as to reasons for its objections, including the specific type of information which the plaintiff deems Burlington did not provide in

the Phase II Work Plan, or the specified activity Burlington is required to perform.

- iii. Within thirty (30) days of receipt of any Phase II Work Plan disapproval or modification, Burlington shall submit a revised Phase II Work Plan to the plaintiff which incorporates the modifications required by the plaintiff, or shall invoke the Dispute Resolution provisions of Section VII.F. below. If Burlington fails to initiate the Dispute Resolution procedures within the thirty (30) day time period specified herein, Burlington shall be deemed to have agreed to the specified modifications.
- iv. In the event that the Dispute Resolution provision of paragraph VII.F. herein, is invoked, within twenty-one (21) days from the date of the resolution, of the dispute, Burlington shall provide to the plaintiff a revised Phase II Work Plan consistent with the results of the Dispute Resolution addressing Plaintiff's comments. Plaintiff shall have thirty (30) days to review this revised Phase II Work Plan.
- v. Burlington shall initiate and complete the implementation of the Phase II Work Plan including the study of the technical feasibility of in-situ bioremediation and soil flushing or other possible technologies to

address soil and groundwater remediation on and off-site, within the time frame specified in any Phase II Work Plan approved by the Plaintiff.

- b. Within forty-five (45) days of the completion of all activities required pursuant to the plaintiff-approved Phase II Work Plan, the engineering consultant shall prepare a draft report of all Phase II activities performed. This draft report shall be submitted to the plaintiff and the Agency for review and comments. The draft report shall document the study process including copies of all drawings indicating all materials and equipment examined in the study. The report shall also include, Burlington's determination of technical feasibility of in-situ bioremediation and soil flushing or other technologies to address soil and groundwater remediation on and off-site, all findings of Burlington's site characterization including results of the groundwater sampling analyses, and all identified potential pathways for migration of the diesel fuel contaminated soil and groundwater and the potentially affected human and environmental receptors. This draft report shall also include any and all recommended remedies including but not limited to in-situ bioremediation and soil flushing to remediate the site, as well as other technologies to remediate soil and groundwater on and off-site.

Plaintiff shall have thirty (30) days to comment on the draft report.

- c. Within thirty (30) days of receiving plaintiff's comments, Burlington shall provide to the Plaintiff a final report which shall incorporate the Plaintiff's comments. Concurrent with this report, Burlington shall notify the plaintiff and the Agency in writing, of the action(s) to be taken by Burlington to remediate the site, including soil and groundwater.
- d. If Burlington proposes not to remediate the site, including the soil and groundwater contamination, or proposes an alternative remedial measure not outlined in its final report, the notification required in Section VII.C.3.c. above shall set forth in detail, all reasons for either the non-action or the alternative remedial action being proposed.
- e. The plaintiff retains the right to among other things, rebut and/or reject Burlington's selection of a particular remedial action or its decision of non-action or selection of an alternative remedial action not outlined in its final report and pursuant to Section VII.F. of this Consent Order, request that the Kane County Circuit Court decide the propriety of Burlington's decision.
- f. If Burlington proposes to remediate the site, including the soil and groundwater, the notification required in Section VII C.3.c. above, must also

include for review and approval, a work plan for implementation of the selected remedial activity. The work plan shall detail all soil and groundwater remedial activities to be performed at the site and the date(s) on which all such activities will be implemented. The Work Plan shall also propose the site closure criteria for the plaintiff and Agency approval. Such approval shall not be unreasonably withheld.

- i. If the plaintiff accepts the work plan for implementation of selected remedial activities required in paragraph VII.C.3.f. above, Burlington shall implement the work plan in accordance with the schedule contained therein.
 - ii. If the plaintiff objects to any recommended activity, or requires any additional activity or work to be performed by Burlington, it shall provide Burlington with a detailed statement as to the reasons for its objections, including the specific type of information which the plaintiff deems Burlington did not provide in the work plan, or the specific activity or work Burlington is required to perform.
- g. Within thirty (30) days of receipt of any work plan disapproval or modification, Burlington shall submit a revised work plan to the plaintiff which incorporates the modifications required by the plaintiff, or shall invoke the Dispute Resolution

provisions of Section VII.F. below. If Burlington fails to initiate the Dispute Resolution procedures within the thirty (30) day time period specified herein, Burlington shall be deemed to have agreed to the specified modifications.

- h. In the event that the Dispute Resolution provision of paragraph VII.F. herein, is invoked, within thirty (30) days from the date of the resolution of the dispute, Burlington shall provide to the plaintiff a revised work plan consistent with the results of the Dispute Resolution, addressing plaintiff's comments. Plaintiff shall have thirty (30) days to review this revised work plan.
- i. Beginning thirty (30) days after Burlington commences the soil and groundwater remediation activities, and monthly for six (6) months and quarterly thereafter until the completion of all such remediation activities, Burlington shall provide to the plaintiff and the Agency reports of the progress of all remediation activities being conducted at the site.
- j. Burlington shall initiate and complete all soil and groundwater remediation activities in accordance with the requirements of the plaintiff-approved Work Plan and in accordance with any and all schedule contained therein.

4. Project "Close-Out" Report

- a. Subject to Section VII.C.3.d. and e. above, not

later than sixty (60) days of the completion of all remedial activities at the site, including soil and groundwater remediation, Burlington shall prepare and submit to the plaintiff and the Agency a project "close-out" report. This report shall include at a minimum the following:

- i. A summary of all data required to be collected pursuant to this Consent Order, including sampling data from the soil and the groundwater monitoring wells.
 - ii. A certification by an Illinois Registered Professional Engineer that the requirements pursuant to this Consent Order have been met consistent with the objectives of the Consent Order, including the achievement of the Agency-approved closure criteria. The certification shall also include his/her conclusion(s) regarding the condition of the site, including the soil and groundwater.
 - iii. A compilation of each written report previously prepared and provided to the plaintiff pursuant to Section VI.C.3. above.
 - iv. All laboratory reports and boring logs referenced in the data summary required herein.
- b. Plaintiff shall have ninety (90) days to review and provide comment(s) on the project "close-out" report required herein. The plaintiff may extend this time for review for a period not to exceed thirty (30)

days, by notifying Burlington in writing prior to the expiration of the initial (90) day review period.

- c. Within seven (7) days following the completion of its review, the plaintiff shall notify Burlington in writing whether plaintiff accepts or rejects the project "close-out" report.
- d. If the plaintiff accepts the project "close-out" report provided by Burlington, the report shall then be filed by the parties with this Court as an amendment to this Consent Order, within fourteen (14) days of the date of the acceptance notification.
- e. If the plaintiff rejects the project "close-out" report provided by Burlington it shall provide Burlington with a detailed statement as to the reasons for its rejection, including any insufficiency found in the evaluation of the remediation activities conducted on and off-site and the completeness of such remediation, the specified type of information which the plaintiff deems Burlington did not provide in the report or other deficiencies contained therein. Plaintiff reserves its right to seek judicial intervention pursuant to Section VII.F. below to resolve any dispute regarding the project "close-out" report.

D. Certification and Reports

- 1. All certifications, correspondence(s), documents,

notifications, reports, plans, scope of work, studies, and any other documentation required by this Consent Order shall be submitted in writing and sent by certified mail or any other form of mail delivery which records the date of receipt, to the plaintiff and the Agency at the addresses which appear below or to such other addresses which the plaintiff and the Agency may hereafter designate in writing.

John Waligore
Assistant Counsel
Illinois EPA
P.O. Box 19276
2200 Churchill Road
Springfield, IL 62794-9276

RoseMarie Cazeau
Senior Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
100 W. Randolph Street, 11th Flr.
Chicago, Illinois 60601

Stan Komperda
Bureau of Land
Illinois EPA
2200 Churchill Road
Springfield, IL 62794

Michele Niermann
Assistant State's Attorney
Kane County State's Attorney's
Office
Kane County Judicial Center
37 W 777 Route 38, Suite 300
St. Charles, IE 60175-7535
Chicago, Illinois 60601

Dennis Ahlberg
Emergency Response Unit
Illinois EPA
2200 Churchill Road
Springfield, IL 62794

Howard Chinn, P.E.
Chief Engineer
Illinois Attorney General's Office
100 W. Randolph Street, 11th Flr.
Chicago, IL 60601

2. All documents including plans, approvals and all other correspondences to be submitted to Burlington pursuant to this Consent Order shall be sent to:

Michael L. Sazdanoff, Esq.
Kenneth J. Wysoglad & Associates
Suite 10028
2200 West Monroe Street
Chicago, Illinois 60606

Greg Jeffries, Manager
Environmental Operations
Burlington Northern Railroad Co.
4105 Lexington Avenue
North Arden Hills, MN 55126

Elizabeth Hill
Law Department
Burlington Northern Rail Co.
3800 Continental Plaza
777 Main Street
Fort Worth, TX 76102

E. Cease and Desist

Burlington and Southern Pacific shall cease and desist from violation of the Act, any and all of 35 Ill. Adm. Code, Subtitle C, and any and all federal laws and regulations except as specifically provided in this Consent Order. Burlington shall at all times properly operate and maintain its site and take all reasonable measures to prevent releases which violate the Act and the Board's Air Pollution Regulations, in accordance with the Compliance Plan set forth in Section VII.C.

F. Dispute Resolution

The parties shall use their best efforts to resolve all disputes or differences of opinion arising with regards to this Consent Order, informally and in good faith. If, however, disputes arise concerning this Consent Order which the parties are unable to resolve informally, either party may, by written motion, request that an evidentiary hearing be held before the Kane County Circuit Court to resolve the dispute between the parties.

Burlington shall have the burden of persuasion, by a preponderance of the evidence, on all issues concerning the activities required in Sections VII.C.2., VII.C.3. and VII.C.4. of this Consent Order. Except as specifically provided herein and in Section VII.G. below, the rules of civil procedure shall govern these proceedings.

G. Force Majeure

1. Force Majeure for purposes of this Consent Order is defined as any event arising from causes beyond the control of Burlington which delays or prevents the performance of any obligation under this Consent Order. "Force Majeure" shall not include increased costs or expenses associated with performance of the obligations under this Consent Order.

2. When an event occurs which will delay the timely completion of any obligation under this Consent Order, whether or not caused by a force majeure event, Burlington shall promptly notify the plaintiff and the Agency in writing within forty-eight (48) hours of the occurrence of the event. Within ten (10) days of the occurrence of the event which Burlington contends will be responsible for a delay, Burlington shall also provide to the plaintiff and the Agency in writing, the reason(s) for and anticipated duration of such delay, the measures taken and to be taken by Burlington to prevent or minimize the delay, and the timetable for implementation of such measures. Failure to provide the 48-hour notice and/or provide the 10-day follow-up written explanation to the plaintiff and the Agency in a timely manner, shall constitute a waiver of any claim of force majeure.

3. If within thirty (30) days of the date of Burlington's 48-hour notification, the plaintiff agrees that a delay is or will be attributable to a force majeure event, the parties shall modify the relevant schedules to provide such additional time as may be necessary to allow the completion of the specific obligation.

4. If the plaintiff and Burlington cannot agree whether the reason for the delay was a force majeure event, or whether the duration of the delay is or will be warranted under the circumstances, Burlington may invoke the Dispute Resolution provisions of paragraph VII.F. of this Consent Order. However, Burlington invoking the Dispute Resolution provisions of Section VII.F. is not in and of itself a force majeure event. Burlington has the burden of proving force majeure by a preponderance of the evidence.

H. Right of Entry

In addition to any other authority, the Agency, its employees and representatives, and the plaintiff his agents and representatives, in accordance with constitutional limitations, shall have the right of entry into and upon Burlington's site which is the subject of this Consent Order, at all reasonable times, with twenty-four (24) hours notice, for the purposes of carrying out inspections including taking photographs, collecting samples, collecting information, and enforcing the terms of this Consent Order.

The individuals conducting any inspections of the site shall make all reasonable attempts to ensure that inspection activities will not impede the safe and efficient operation of rail traffic at the site. Further, the individuals conducting the inspections will comply with reasonable site safety rules and regulations in effect at the site at the time of such inspections. A copy of Burlington's Safety Rules and Regulations were provided to the plaintiff.

I. Transfer of Interest

No less than thirty (30) days prior to any transfer by Burlington of an ownership interest and/or control in the Burlington's site, Burlington shall notify the plaintiff and the Agency of the transfer, as provided in Section VII.D.1. Burlington shall also notify the transferee of this Consent Order and provide to the transferee a copy of this Consent Order. Burlington shall include in any agreement or contract for such transfer a provision requiring the transferee to implement the compliance plan contained in Section VII.C. herein. In any event, Burlington shall remain responsible for the completion of all activities specified herein.

J. Covenant Not to Sue

1. Southern Pacific

Upon receipt of Southern Pacific's payment of a \$85,000.00 penalty jointly with Burlington and commitment to refrain from future violations of the Act, the plaintiff or State covenants not to sue or bring any civil, judicial or administrative action against Southern Pacific for known violations of the Act which were the subject matter of the Consent Order herein. In the event the \$85,000.00 penalty is not paid, the State shall be released from this covenant not to sue.

Further, nothing in this Consent Order shall be construed as a waiver by the plaintiff of the right to redress future violations of the Act, the Board's regulations, or this Consent Order, or to obtain penalties with respect thereto.

2. Burlington

Upon receipt of Burlington's payment of a \$85,000.00 penalty

jointly with Southern Pacific and the payment of past costs of \$1,430.55 and the actions Burlington has taken to date, the completion of all actions required pursuant to this Consent Order and commitment to reimburse the plaintiff its future response and oversight costs and to refrain from future violations of the Act, the plaintiff or State covenants not to sue or bring any civil, judicial or administrative action against Burlington for known violations of the Act which were the subject matter of the Consent Order herein. In the event any money owing the State is not paid and/or Burlington refuses or fails to perform to completion all actions required by this Consent Order, the State shall be released from this covenant not to sue.

Further, nothing in this Consent Order shall be construed as a waiver by the plaintiff of the right to redress future violations of the Act, the Board's regulations, or this Consent Order, or to obtain penalties with respect thereto.

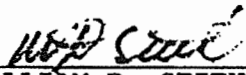
K. Enforcement of Consent Order

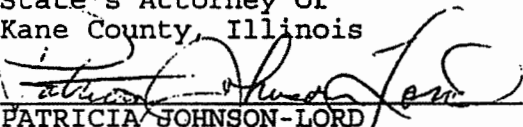
Upon entry of this Consent Order, any party hereto, upon motion, may reinstate these proceedings solely for the purpose of enforcing the terms and conditions of this Consent Order. This Consent Order is a binding and enforceable Order of the Court and

may be enforced as such through any and all available means.

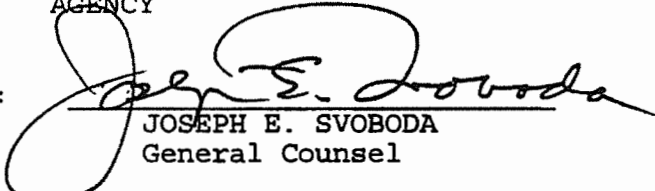
PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

Date: 1/18/96 By: 
WILLIAM D. SEITH, Chief
Environmental Bureau
Assistant Attorney General

ex rel. DAVID R. AKEMANN,
State's Attorney of
Kane County, Illinois
By: 
PATRICIA JOHNSON-LORD
Chief, Civil Division

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

Date: 1/11/96 By: 
JOSEPH E. SVOBODA
General Counsel

BURLINGTON NORTHERN RAILROAD COMPANY

Date: 1/3/98 By: J. Elizabeth Hill
Title: Attorney

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
subsidiary of SOUTHERN PACIFIC RAIL
CORPORATION, and SPCSL Corp.

Date: 1/9/96 By: 
Title: Asst. Gen. Atty
MELVIN E. DUNN

Entered: FEB 03 1996
Judge

EXHIBIT B

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
 KANE COUNTY, ILLINOIS
 CHANCERY DIVISION

Diana S. Sully
 Clerk of the Circuit Court
 Kane County, IL

NOV 18 2009

FILED
 ENTERED 32

PEOPLE OF THE STATE OF ILLINOIS,)
 ex rel. LISA MADIGAN, Attorney General)
 of the State of Illinois, and ex rel. JOHN A.)
 BARSANTI, State's Attorney of Kane County,)
 Illinois,)
)
 Plaintiff,)
)
 vs.)
)
 BURLINGTON NORTHERN RAILROAD)
 COMPANY, a Delaware corporation,)
)
 Defendant.)

CH KA 95 0527

AMENDMENT TO CONSENT ORDER DATED FEBRUARY 5, 1996

1. This Amendment to Consent Order Dated February 5, 1996 ("Amendment") amends the Consent Order entered in Kane Co. Case No. CH KA 95 0527 on February 5, 1996 ("Consent Order") and supersedes that Consent Order to the extent that is specifically stated herein. Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, ex rel. LISA MADIGAN, Attorney General of the State of Illinois, and ex rel. JOHN A. BARSANTI, State's Attorney of Kane County, Illinois, the Illinois Environmental Protection Agency, and Defendant, Burlington Northern Railroad Company, n/k/a BNSF Railway Company, (collectively, "parties") have agreed to the making of this Amendment and submit it to this Court for approval.

2. Section II.B.1 of the Consent Order is amended by the addition of the following sentence as its final sentence:

The site shall also include all properties and media (hereinafter media shall include but not be limited to soil, groundwater, sediment and surface water) not owned or under the control of Burlington impacted by the diesel fuel release that resulted from the January 20, 1993 collision, including, but not limited to, the property owned by Indian Creek Development Corporation ("ICDC"), which is on the southern boundary of the five east-west rail tracks and spurs of Burlington rail lines east of the Village of Aurora near the community of Eola, Aurora, Kane County,

Illinois, and the sediments in Indian Creek, but only to the extent such properties or media are impacted by diesel fuel contamination resulting from the January 20, 1993 collision.

3. Section II.B.4 of the Consent Order is amended by the addition of the following sentences as its final sentences:

The portion of the site owned by third parties, including ICDC, is not under the control of Burlington. As of the time of the entry of this Amendment, Burlington has access to the ICDC property pursuant to an access agreement.

4. Section II.D of the Consent Order is added as follows:

Burlington represents that it has entered into this Consent Order for the purpose of settling and compromising disputed claims without having to incur the expense of contested litigation. By entering into this Consent Order and complying with its terms, Burlington does not affirmatively admit the allegations of violation within the Complaint, the Verified Petition to Enforce Court Order and For Rule to Show Cause filed September 26, 2007 and/or referenced above, and this Consent Order shall not be interpreted as including such admission.

5. Section VII.C.1.b.iv and Section VII.C.1.d of the Consent Order are amended by substitution of the following address for the Illinois Environmental Protection Agency ("Agency"):

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

6. A new Section VII.C.1.b.vi is hereby added to the Consent Order, to read:

The stipulated penalties provision of the Consent Order shall apply with equal force in the event that Burlington fails to satisfy any requirement or comply with any provision of this Amendment.

7. Section VII.C.2, 3 and 4 of the Consent Order shall be of no further effect and shall be null and void.

8. Identified Response Action

- a. Burlington shall implement (to the extent not yet completed as determined by the Agency) the pilot project for remediation of diesel fuel contamination on the ICDC property as specified in the Draft Pilot Test Study Work Plan dated September 7, 2006, as approved and modified by the Illinois EPA in its review letter dated March 22, 2007.
- b. Within 60 days of entry of this Amendment, Burlington shall submit a Pilot Test Study Results Report to the Agency for its review and approval.
- c. Within 30 days of the Agency's approval of the Pilot Test Study Results Report, Burlington shall submit to the Agency for its review and approval, a Site Investigation Plan ("SIP"), which shall include the ICDC property, sediments in Indian Creek and soils and groundwater at all other impacted properties to determine whether and to what extent such soils, groundwater and sediments may have been impacted by diesel fuel contamination resulting from the January 20, 1993 collision. The SIP shall include a proposed schedule for the Agency's review and approval. The investigation shall be conducted in accordance with the applicable requirements of Attachment B to this Amendment. In all instances, the investigation of the soils, groundwater and sediments shall be limited to diesel fuel contamination resulting from the January 20, 1993 collision.
- d. Within 30 days of Agency approval of the SIP and obtaining all necessary governmental permits and authorizations, for which Burlington has timely filed a request and/or application as applicable for said permits and authorizations, Burlington shall begin implementation of the Agency approved SIP and shall complete the investigation in accordance with the Agency approved schedule. Burlington shall notify the Agency in writing within seven (7) days when it has filed an application or request for any such permit or authorization. The Agency-approved SIP and schedule for investigation of sediments in Indian Creek and soils and groundwater at all impacted properties shall be incorporated herein and shall constitute enforceable parts of this Amendment. Burlington shall notify the Agency in writing within seven (7) days of its completion of the work specified and approved in the SIP.
- e. Within 90 days of completion of the work approved by the Agency and specified in the SIP, Burlington shall submit a Site Investigation Report ("SIR") to the Agency for review and approval. The SIR shall conform to the applicable requirements of Attachment B.

- f. Within 60 days of Agency approval of the SIR, Burlington shall submit a Remedial Objectives Report ("ROR") for all properties and media, which the Agency reasonably determines have been impacted by diesel fuel contamination resulting from the January 20, 1993 collision.
- g. Within 60 days of the Agency's approval of the ROR, Burlington shall submit a Remedial Action Plan ("RAP"), if determined to be necessary by the Agency, for cleanup of the ICDC property, sediments in Indian Creek and all other impacted properties and media, which the Agency reasonably determines have been impacted by diesel fuel contamination resulting from the January 20, 1993 collision.
- h. Within 30 days of the Agency's approval of the RAP and obtaining all necessary governmental permits and authorizations, for which Burlington has timely filed a request and/or application as applicable for said governmental permits and authorizations, Burlington shall begin implementation of the RAP, if determined to be necessary by the Agency, and shall conduct to completion the Agency-approved RAP in accordance with the Agency approved schedule, which shall be incorporated herein and shall constitute enforceable parts of this Amendment. Burlington shall notify the Agency in writing within seven (7) days when it has filed an application or request for any such permit or authorization.
- i. When Burlington believes it has completed remediation of the ICDC property, sediments in Indian Creek and soils and groundwater at all other impacted properties, in accordance with the Agency-approved RAP, if determined to be necessary by the Agency, it shall notify the Agency in writing within seven (7) days, and it shall submit a proposed Remedial Action Completion Report ("RACR") to the Agency for its review and approval within 90 days.
- j. No later than six (6) years from the date of the Agency's approval of the RAP, Burlington shall complete the remediation (including any post-remediation groundwater or surface water monitoring, if required) of the diesel contamination on all impacted properties and medias identified in the RAP resulting from the January 20, 1993 collision consistent with the Tiered Approach to Corrective Action Objectives, 35 Ill. Admin. Code Part 742, and submit a RACR to the Agency, subject to modification pursuant to Paragraph 15 of this Amendment. If Burlington is unable to comply with this final compliance date, Burlington shall submit a written request for extension of time of the deadline for completion to the State pursuant to Section VII.D. of the Consent Order as amended in this Amendment at Paragraph 9, and

subject to modification pursuant to Paragraph 15 of this Amendment no later than six months prior to the expiration of six years from approval of the RAP. Burlington's timely request for extension of time of the deadline for completion will not be unreasonably denied.

- k. Burlington shall prepare its ROR, RAP (if determined to be necessary by the Agency) and RACR, in accordance with the applicable requirements of Attachment A to this Amendment.
- l. Plaintiff and the Agency reserve the right to require Burlington to conduct further investigation and remediation if additional properties or media are reasonably determined to be impacted by diesel fuel contamination resulting from the January 20, 1993 collision. Such activities shall be subject to Agency review and approval. Any required investigations and reports shall conform with the applicable requirements of Attachments A and B to this Amendment. In all instances, any required investigations, remediation or reports shall be limited to diesel fuel contamination resulting from the January 20, 1993 collision.
- m. Burlington shall provide the Agency with at least five (5) business day's notice of any site work that is to occur except when emergency conditions warrant more immediate attention or action, then Burlington shall notify the Agency no more than 72 hours after undertaking said site work.
- n. Within 30 days of entry of this Amendment, Burlington shall conduct (to the extent not yet completed as determined by the Agency) a potable well survey and submit a potable well survey report to the Agency for review and approval. The well survey shall be designed to accomplish the following requirements:

Identify all potable water supply wells located at the Site or within 200 feet of the Site, all community water supply wells located at the Site or within 2,500 feet of the Site, and all regulated recharge areas and wellhead protection areas in which the Site is located and any additional wells as the Agency reasonably requires. Identification of wells shall include a visual check of the areas for evidence of private wells. Burlington shall submit the following to the Agency:

- 1. A map to scale showing community and other potable water wells and setback zones;
- 2. A map demonstrating the extent of the measured and modeled contamination plume;

3. A map to scale of locations of any regulated recharge areas and wellhead protection areas in close proximity to the Site;
4. Tables showing the setback zone for each potable water well; and
5. Narrative identifying field observations, persons contacted, and sources of information used.

If any potable wells are located within 200 feet of the area of contamination (on and off-site), sampling and/or notification may be required by the Agency.

- o. During the pendency of the Consent Order and this Amendment, Burlington shall provide monthly written progress reports of its work to Plaintiff and the Agency. These reports shall be due by the 15th of each month and shall include, as applicable, work performed, work anticipated for the next month, amounts of free product and contaminated groundwater recovered, results of any analytical sampling, and any problems encountered during conduct of the work.
 - p. During the pendency of the Consent Order and this Amendment, Burlington shall provide a written notice to the Plaintiff and the Agency within five (5) business days when it is refused access to off-site property.
 - q. If the Agency disapproves of any work plan, report or other submittal required herein (or any portion thereof), including the initial submission or any revisions thereto, Burlington shall, within 45 days after receiving notice of such disapproval, submit a proposal that addresses all deficiencies identified by the Agency in its disapproval.
 - r. Burlington shall conduct site investigation and remediation activities under the oversight of the Agency's State Sites Unit in accordance with the Agency's approved schedules required by this Amendment. All activities required under this Amendment and Attachments hereto shall be subject to the Agency's review and approval.
 - s. The Agency's review, approval and determinations under this paragraph 8 shall be consistent with the Tiered Approach to Corrective Action Objectives, 35 Ill. Adm. Code Part 742.
9. Section VII.D of the Consent Order is amended as follows:

delete the reference to Dennis Ahlberg of the Agency; substitute Ann Cross for Stan Komperda; change the address for the Agency staff to 1021 North Grand Avenue East, P.O. Box 19276, Springfield, IL 62794-9276;

substitute Nancy Tikalsky for RoseMarie Cazeau; and change the address for the Attorney General's staff to 69 West Washington Street, Suite 1800, Chicago, IL 60602.

10. Section VII.F, paragraph 2 of the Consent Order is amended as follows: delete the phrase "Section VII.C.2, VII.C.3 and VII.C.4 of this Consent Order." and replace it with "Paragraph 8 of this Amendment"

11. Burlington shall undertake all best efforts to obtain and maintain access for itself to the ICDC property and any other properties and media impacted by the diesel contamination from the 1993 train collision, including the filing of any suits necessary under Section 22.2c of the Environmental Protection Act, 415 ILCS 5/22.2c (2008). The failure of Burlington to, in good faith, undertake all best efforts to obtain and maintain access to ICDC property and all other impacted properties in accordance with this paragraph shall subject Burlington to the imposition of stipulated penalties, as provided in the prior Consent Order and Paragraph 6 of this Amendment. Burlington shall file a lawsuit under Section 22.2c of the Environmental Protection Act, 415 ILCS 5/22.2c (2008), against a third-party landowner within 60 days of being denied access by such third-party landowner to any property that has been impacted by diesel fuel contamination resulting from the January 20, 1993 collision.

12. Plaintiff's covenant not to sue set forth in Section VII.J.2 of the Consent Order shall apply with equal force and effect to the matters addressed in this Amendment. The covenant not to sue shall not become effective until such time as Burlington has completed all activities required under this Amendment, and shall only become effective if Burlington has achieved and maintained compliance with all requirements of the Consent Order and this Amendment from the entry of this Amendment through such time.

13. Release of Liability:

In consideration of Burlington's commitment to Cease and Desist, payment of all oversight and response costs incurred by Illinois EPA, and completion of all activities required in the Consent Order and this Amendment, the Plaintiff releases, waives and discharges Burlington from any further liability or penalties for the violations of the Act and Board Regulations that were the subject matter of the Complaint filed on December 29, 1995 and Plaintiff's Verified Petition to Enforce Court

Order and for Rule to Show Cause filed on September 26, 2007 ("Petition") herein. The release set forth above does not extend to any matters other than those expressly specified in Plaintiff's Complaint filed on December 29, 1995 or Plaintiff's Petition filed on September 26, 2007. The Plaintiff reserves, and this Consent Order is without prejudice to, all rights of the State of Illinois against Burlington with respect to all other matters, including but not limited to the following:

- a. criminal liability;
- b. liability for future violations;
- c. liability for natural resources damage arising out of the alleged violations; and
- d. Burlington's failure to satisfy the requirements of the Consent Order or this Amendment.

Nothing in this Consent Order and/or this Amendment is intended as a waiver, discharge, release, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State of Illinois or the Illinois EPA may have against any person, as defined by Section 3.315 of the Act, 415 ILCS 5/3.315 (2008), other than Burlington.

14. The individuals entering the Burlington site shall comply with Burlington's Safety Rules and Regulations, a copy of which has been provided to Plaintiff and the Agency.

15. Modification

The parties to this Amendment may, by mutual written consent, extend any compliance dates or modify the terms of the Consent Order or this Amendment without leave of this Court. A request for modification shall be made in writing and submitted to the designated representatives. Any such request shall be made by separate document, and shall not be submitted within any other report or submittal required by the Consent Order or this Amendment. Any such agreed modification shall be in writing and signed by representatives of each party to this Amendment, for filing and incorporation by reference into the Consent Order.

16. A copy of the Consent Order is provided as Attachment C to this Amendment.

17. This Amendment may be executed in counterparts.

18. Plaintiff, the Agency, and Burlington are the parties to this Amendment. ICDC, any other owner of impacted property and the successor to Southern Pacific are

not parties to this Amendment and shall acquire no rights against Plaintiff, the Agency or Burlington as a result of the entry of this Amendment.

~~19~~ This Amendment to Consent Order Dated February 5, 1996 is hereby incorporated by reference into the Consent Order that was entered by this Court on February 5, 1996 in this matter.

~~20~~ Except as modified herein, all of the other provisions of the Consent Order that were entered by this Court on February 5, 1996 remain in full force and effect.

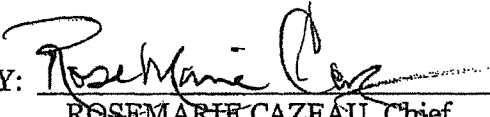
FOR THE PLAINTIFF:


PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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

DOUGLAS P. SCOTT, Director
Illinois Environmental Protection Agency


BY: 
ROSEMARIE CAZEAU, Chief
Environmental Bureau

BY: 
JOHN J. KIM
Chief Legal Counsel

DATE: 11/5/09

DATE: 11/2/09

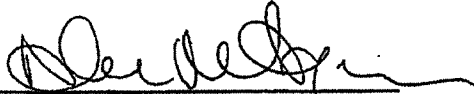
PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN A. BARSANTI
State's Attorney of Kane County, Illinois

BY: 
Michele Niermann
Assistant State's Attorney

DATE: 11.18.09

FOR THE DEFENDANT:

BNSF RAILWAY COMPANY

BY: 

Name: ALLEN M. STEBBINS

Title: GENERAL DIRECTOR - ENVIRONMENTAL

DATE: 10/21/09

ENTERED:

MICHAEL J. COLWELL

JUDGE

DATE: NOV 18 2009

ATTACHMENT A

Attachment A – Investigation Guidelines

1. Site Investigation – General

A site investigation shall be performed under this Notice to identify all recognized environmental conditions existing at the remediation site, the related contaminants of concern, and associated factors that will aid in the identification of risks to human health, safety and the environment, the determination of remediation objectives, and the design and implementation of a Remedial Action Plan.

Site investigations shall satisfy the following data quality objectives for field and laboratory operations to ensure that all data is scientifically valid and of known precision and accuracy:

- a) All field sampling activities relative to sample collection, documentation, preparation, labeling, storage, shipment and security, quality assurance and quality control, acceptance criteria, corrective action, and decontamination procedures shall be conducted in accordance with "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846), Vol. One, Ch. One (Quality Control) and Vol. Two (Field Manual). If approved by the Agency, such activities also may be conducted in accordance with ASTM standards, methods identified in "A Compendium of Superfund Field Operations Methods" (EPA/540/0-87-001, OSWER Directive 9355.0-14, December 1987), "Subsurface Characterization and Monitoring Techniques: A Desk Reference Guide, Volume I: Solids and Ground Water, Appendices A and B" (EPA/625/R-93/003a, May 1993), "Subsurface Characterization and Monitoring Techniques: A Desk Reference Guide, Volume II: The Vadose Zone, Field Screening and Analytical Methods, Appendices C and D" (EPA/625/R-93/003b, May 1993), or other procedures.
- b) All field measurement activities relative to equipment and instrument operation, calibration and maintenance, corrective action, and data handling shall be conducted in accordance with "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846), Vol. One, Ch. One (Quality Control), or with an equipment or instrument manufacturer's or vendor's published standard operating procedures.
- c) All laboratory quantitative analysis of samples to determine concentrations of regulated substances or pesticides shall be conducted fully in accordance with "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846), relative to all facilities, equipment and instrumentation, operating procedures, sample management, test methods, equipment calibration and maintenance, quality assurance and quality control, corrective action, data reduction and validation, reporting, and records management. The practical quantitation limit (PQL) of the test methods selected must be less than or equal to the most protective Tier 1 soil remediation objectives in 35 Ill. Adm. Code 742.Appendix B, applicable groundwater remediation objectives under 35 Ill. Adm Code 742.Appendix B, or, if already determined, the remediation objective

concentrations for the site. If a contaminant of concern is not identified in Part 742 or the remediation objectives for the site have not been determined, the PQL shall equal the lowest concentration that reliably can be achieved within specified limits of precision and accuracy during routine laboratory operating conditions but shall not be greater than ten times the method detection limit.

- d) All field or laboratory measurements of samples to determine physical or geophysical characteristics shall be conducted in accordance with ASTM standards or other procedures as approved by the Agency.
- e) All laboratory quantitative analyses of samples to determine concentrations of any regulated substances or pesticides that require more exacting detection limits or cannot be analyzed by standard methods identified in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846), shall be conducted in accordance with analytical protocols developed in consultation with and approved by the Agency.
- f) Effective January 1, 2003, all quantitative analyses of samples collected on or after that date and utilizing any of the approved test methods identified in 35 Ill. Adm. Code 186.180 shall be completed by an accredited laboratory in accordance with the requirements of 35 Ill. Adm. Code 186. Quantitative analyses not utilizing an accredited laboratory in accordance with Part 186 shall be deemed invalid.

2. Comprehensive Site Investigation

The comprehensive site investigation is designed to identify all recognized environmental conditions and all related contaminants of concern that may be expected to exist at a remediation site. The comprehensive site investigation shall be performed in two phases as set forth below.

- a) Unless an alternative is approved by the Agency, the phase I environmental site assessment shall be designed and implemented in accordance with the procedures for such assessments set forth in "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (ASTM E 1527-00)
- b) The phase II environmental site assessment shall determine the nature, concentration, direction and rate of movement, and extent of the contaminants of concern at the remediation site and the significant physical features of the remediation site and vicinity that may affect contaminant fate and transport and risk to human health, safety and the environment. At a minimum, the phase II environmental site assessment shall include:

- 1) Sampling, analyses, and field screening measurements indicating the concentrations of contaminants whose presence has been indicated by the phase I environmental site assessment.
- 2) Characterization of sources and potential sources of recognized environmental conditions and the related contaminants of concern, identifying:
 - A) The sources or potential sources of contamination;
 - B) The contaminants of concern;
 - C) Statutory or regulatory classification of the contaminants of concern and contaminated materials (e.g., hazardous waste, hazardous substance, special waste);
- 3) Characterization of the extent of contaminants of concern, identifying:
 - A) The actual contaminated medium or media;
 - B) The three-dimensional configuration of contaminants of concern with concentrations delineated; and
 - C) The nature, direction, and rate of movement of the contaminants of concern;
- 4) Characterization of present and post-remediation exposure routes, identifying:
 - A) All natural and man-made pathways that are on the remediation site, in rights-of-way attached to the remediation site, or in any areas surrounding the remediation site that may be adversely affected as a result of a release (from the recognized environmental conditions) and whether there is evidence of migration of contaminants of concern, in either solution or vapors, along such pathways that may potentially threaten human or environmental receptors or that may cause explosions in basements, crawl spaces, utility conduits, storm or sanitary sewers, vaults or other spaces;
 - B) The locations of any human and environmental receptors and receptor exposure routes; and
 - C) Current and post-remediation uses of affected or potentially affected land, groundwater, surface water, and sensitive habitats; and

- 5) Characterization of significant physical features of the remediation site and vicinity that may affect contaminant fate and transport and risk to human health, safety and the environment.

3. Determination of Remediation Objectives

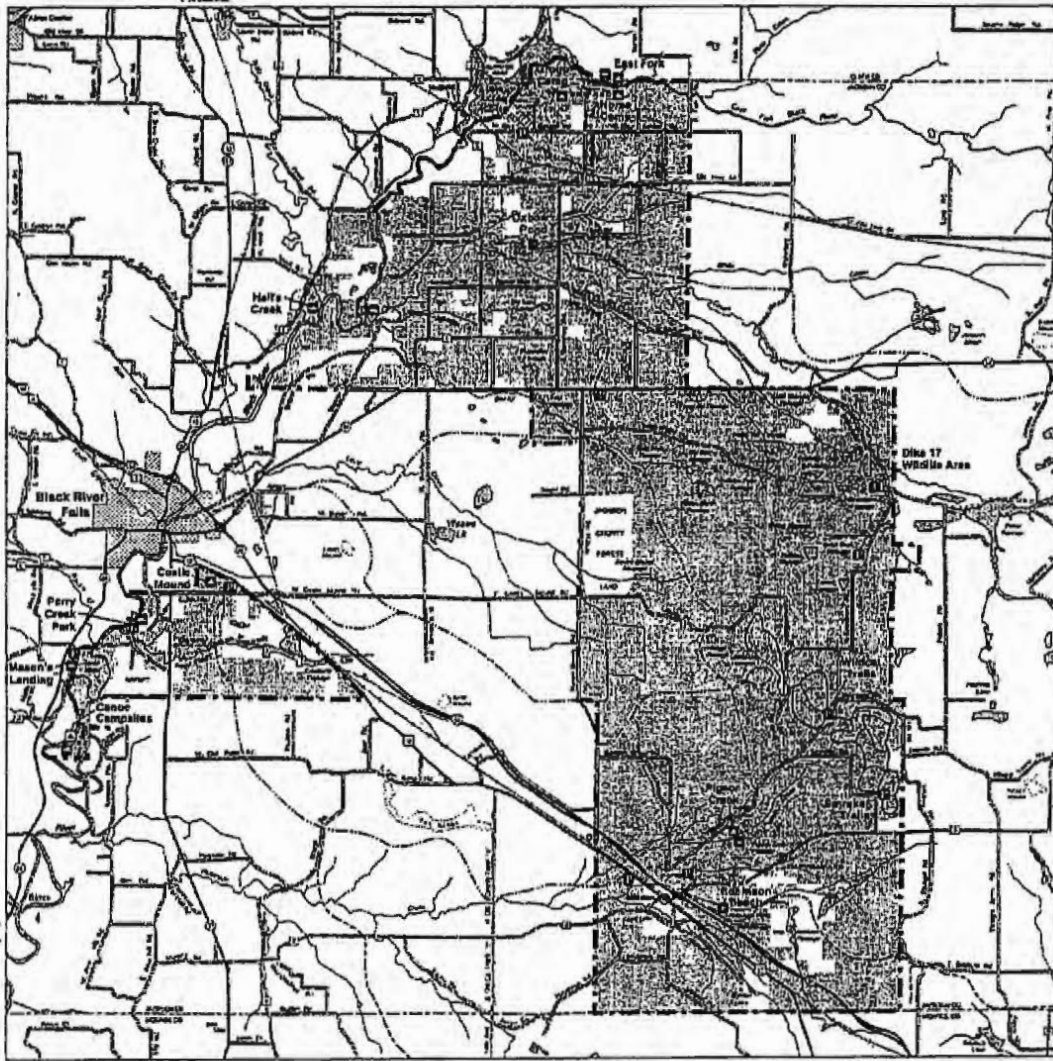
- a) If the site investigation reveals evidence of the existence of one or more contaminants of concern, the Responsible Party shall develop remediation objectives in accordance with 35 Ill. Adm. Code 742 or other remediation measures as appropriate (e.g., removal of drums threatening a release).
- b) Where there will be no reliance on an institutional control to achieve compliance, or where an institutional control will be relied upon to limit site use to industrial/commercial use, compliance with remediation objectives shall be demonstrated as follows:
 - 1) For groundwater remediation objectives:
 - A) Sampling points shall be located on the remediation site in areas where, following site investigation under Section 2 of this Attachment, concentrations of contaminants of concern exceeded remediation objectives.
 - B) Compliance with the groundwater remediation objectives at applicable sampling points shall be determined in accordance with 35 Ill. Adm. Code 742.225.
 - 2) For soil remediation objectives:
 - A) Sampling points shall be located on the remediation site in areas where, following site investigation under Section 2 of this Attachment, concentrations of concern exceeded remediation objectives.
 - B) Compliance with soil remediation objectives at applicable sampling points shall be determined in accordance with 35 Ill. Adm. Code 742.225.
- c) Where an institutional control or remediation measure will be relied upon to achieve compliance, compliance shall be determined based on approval by the Agency of the institutional control or remediation measure and the timely implementation of the institutional control or remediation measure (e.g., if an institutional control prohibiting the use of groundwater within the boundaries of the remediation site as a potable water supply is obtained under 35 Ill. Adm. Code

742, Subpart J, sampling points shall be located at the boundary of the remediation site).

- d) Upon completing the determination of remediation objectives, the Defendant shall compile the information into a Remediation Objectives Report for submittal to the Agency.

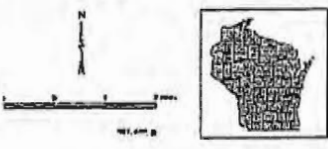
Black River State Forest

Wisconsin Department of Natural Resources



Compass Rose	Section 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Section 1	1															
Section 2	2	1														
Section 3	3	2	1													
Section 4	4	3	2	1												
Section 5	5	4	3	2	1											
Section 6	6	5	4	3	2	1										
Section 7	7	6	5	4	3	2	1									
Section 8	8	7	6	5	4	3	2	1								
Section 9	9	8	7	6	5	4	3	2	1							
Section 10	10	9	8	7	6	5	4	3	2	1						
Section 11	11	10	9	8	7	6	5	4	3	2	1					
Section 12	12	11	10	9	8	7	6	5	4	3	2	1				
Section 13	13	12	11	10	9	8	7	6	5	4	3	2	1			
Section 14	14	13	12	11	10	9	8	7	6	5	4	3	2	1		
Section 15	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1	
Section 16	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1

- Forest Boundary
- State Forest Lands
- Class 1 Wetlands
- Interstate, U.S. & State Highways
- County Roads
- Town Roads
- Unimproved Roads
- Parking
- Picnic Area
- Camping / Picnic Area
- Campground / Picnic Area
- Camps (Active)
- Camps (Inactive)
- Observation Tower
- State or County - Geometric Separated ATN & Motorcycle Trail
- State or County - Separated County Trail
- State or County - Shared County Trail
- State or County - Shared State Trail
- State or County - Shared State & County Trail



This publication is available free (except for shipping) to all Wisconsin residents. Please contact the Division of Forestry at (608) 267-7224 for more information.

The Wisconsin Department of Natural Resources provides equal opportunity for all people to participate in its programs. If you have any questions, please write to: Equal Opportunity Office, U.S. Department of the Interior, Washington, D.C. 20248



ATTACHMENT B

Attachment B – Report Guidelines

1. General

All plans and reports required by the Violation Notice shall be submitted to the Agency with attachments and accompanying documentation as necessary. Plans and reports shall be mailed or delivered to the address designated by the Notice. Plans and reports that are hand-delivered to the Agency shall be delivered during the Agency's normal business hours.

All plans and reports submitted to the Agency shall include:

- a) The full legal name, address and telephone number of the Responsible Party or any authorized agent acting on behalf of the Responsible Party, and any contact persons to whom inquiries and correspondence must be addressed;
- b) The original signature of the Responsible Party or of any authorized agent acting on behalf of the Responsible Party;
- c) The name of the Licensed Professional Engineer (LPE) responsible for site activities and preparation of the plan or report, the date of preparation, registration number, license expiration date, and professional seal; and
- d) The LPE responsible for the site investigations, remedial activities, and preparation of the plans or reports shall affirm by original signature as follows:

“I attest that all site investigations or remedial activities, including review of laboratory data, that are the subject of this plan or report were performed under my direction and this document and all attachments were prepared under my direction or reviewed by me, and, to the best of my knowledge and belief, the work described in the plan or report has been designed or completed in accordance with the Act, and generally accepted engineering practices, and the information presented, including any qualified laboratory data, is accurate and complete.”

2. Comprehensive Site Investigation Report

- a) Site investigation results for both Phase I and Phase II of the comprehensive site investigation shall be combined into one Site Investigation Report.
- b) A Site Investigation Report for a comprehensive site investigation shall include, but not be limited to, the following chapters:
 - 1) Executive summary. This chapter shall identify the objectives of the site investigation and the technical approach utilized to meet such objectives.

It shall state whether recognized environmental conditions were identified and the data limitations in the assessment;

- 2) Site characterization. This chapter shall include the compilation of all sources reviewed and information obtained as a result of the site investigation per Attachment A of this Notice, including but not limited to:
 - A) Sources consulted or reviewed. This subchapter shall contain a list of reference documents used in completing the site investigation;
 - B) Site history. This subchapter shall present a chronological summary of the historic uses of the remediation site as prescribed by "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (ASTM E 1527-00),
 - C) Site description. This subchapter shall describe the regional location, pertinent boundary features, general facility physiography, geology, hydrogeology, existing and potential migration pathways and exposure routes, and current and post-remediation uses of the remediation site and surrounding areas that are immediately adjacent to the remediation site;
 - D) Site base map(s) including the following:
 - i) A distance of at least 1,000 feet around the remediation site at a scale no smaller than one inch equal to 200 feet;
 - ii) Map scale, north arrow orientation, date, and location of the site with respect to township, range and section;
 - iii) Remediation site boundary lines, with the owners of property adjacent to the remediation site clearly indicated, if reasonably identifiable;
 - iv) Surrounding land uses (e.g., residential property, industrial/commercial property, agricultural property, and conservation property);
 - v) The sources or potential sources of the contaminants of concern, spill areas, and other suspected areas for any or all contaminants of concern;
 - vi) On-site and off-site injection and withdrawal wells; and
 - vii) All buildings, tanks, piles, utilities, paved areas, easements, rights-of-way and other features, including all known past and current product and waste underground tanks or piping; and

- E) A legal description or reference to a plat showing the boundaries of the remediation site, or, for a Federal Landholding Entity, a common address, notations in any available facility master land use plan, site specific GIS or GPS coordinates, plat maps, or any other means that identifies the site in question with particularity;
- 3) Site-specific sampling plan. This chapter shall indicate those applicable physical and chemical methods utilized for contaminant source investigations, soil and sediment investigations, hydrogeological investigations, surface water investigations, and potential receptor investigations;
 - 4) Documentation of field activities. This chapter shall include the results of the field activities to determine physical characteristics. At a minimum, this chapter shall include the following elements:
 - A) Narrative description of the field activities conducted during the investigation;
 - B) The quality assurance project plan utilized to document all monitoring procedures (e.g., sampling, field measurements and sample analyses) performed during the investigation, so as to ensure that all information, data and resulting decisions are technically sound, statistically valid, and properly documented; and
 - C) Presentation of the data in an appropriate format (e.g., tabular and graphical displays) such that all information is organized and presented logically and that relationships between the different investigations for each medium are apparent;
 - 5) Endangerment assessment. This chapter shall analyze the results of the field activities and characterize the extent of contamination (qualitative and quantitative) for contaminants of concern and compare the remediation site information with the applicable provisions of 35 Ill. Adm. Code 742. This chapter shall:
 - A) Describe any recognized environmental conditions, evaluate exposure routes, including threatened releases, and evaluate exposure routes excluded under 35 Ill. Adm. Code 742;
 - B) Describe all conditions the LPE has determined to be de minimis along with the rationale for each such de minimis determination;

- C) Describe the nature, concentration and extent of contaminants of concern within all environmental media at the remediation site and assess the observed and potential contaminant fate and transport;
 - D) Describe the significant physical features of the remediation site and vicinity that may affect contaminant transport and risk to human health, safety and the environment; and
 - E) Compare the concentrations of the contaminants of concern with the corresponding Tier 1 remediation objectives under 35 Ill. Adm. Code 742;
- 6) Conclusion. This chapter shall assess the sufficiency of the data in the report and recommend future steps;
 - 7) Appendices. References and data sources, including but not limited to field logs, well logs, and reports of laboratory analyses, shall be incorporated into the appendices with reports containing laboratory analyses of samples collected on or after January 1, 2003, including the following:
 - A) Accreditation status of the laboratory performing the quantitative analyses;
 - B) Certification by an authorized agent of the laboratory that all analyses have been performed in accordance with the requirements of 35 Ill. Adm. Code 186 and the scope of accreditation; and
 - 8) Licensed Professional Engineer affirmation in accordance with 1(d) of this Attachment.

3. Remediation Objectives Report

The Remediation Objectives Report shall address the recognized environmental condition(s) and related contaminants of concern that were identified in the site investigation conducted pursuant to this Part.

- a) If an exposure route is to be excluded, the Responsible Party shall prepare a Remediation Objectives Report demonstrating that the requirements for excluding an exposure route under 35 Ill. Adm. Code 742 have been satisfied.
- b) If the Responsible Party chooses to use the Tier 1 remediation objectives under 35 Ill. Adm. Code 742, the Responsible Party shall prepare a Remediation Objectives Report stating the applicable remediation objectives for the contaminants of concern.

- c) If the Responsible Party elects to develop remediation objectives appropriate for the remediation site using Tier 2 or Tier 3 procedures under 35 Ill. Adm. Code 742, the Defendant shall prepare a Remediation Objectives Report demonstrating compliance with those procedures.
- d) If the Responsible Party elects to develop remediation objectives appropriate for the remediation site using the area background procedures under 35 Ill. Adm. Code 742, the Responsible Party shall prepare a Remediation Objectives Report demonstrating compliance with those procedures.
- e) If the recognized environmental condition requires remediation measures other than, or in addition to, remediation objectives determined under 35 Ill. Adm. Code 742 (e.g., removal of drums threatening a release), the Remediation Objectives Report shall describe those measures and demonstrate that the measures selected:
 - 1) Will prevent or eliminate the identified threat to human health and the environment;
 - 2) Are technically feasible and can be implemented without creating additional threats to human health and the environment; and
 - 3) Are not inconsistent with the Act and applicable regulations.
- f) IN THE EVENT THAT THE AGENCY HAS DETERMINED IN WRITING THAT THE BACKGROUND LEVEL FOR A REGULATED SUBSTANCE or pesticide POSES AN ACUTE THREAT TO HUMAN HEALTH OR THE ENVIRONMENT AT THE SITE WHEN CONSIDERING THE POST-REMEDIAL ACTION LAND USE, THE RESPONSIBLE PARTY SHALL DEVELOP APPROPRIATE RISK-BASED REMEDIATION OBJECTIVES IN ACCORDANCE WITH subsections (a), (b) and/or (c) above.
- g) The Remediation Objectives Report shall contain the affirmation of a Licensed Professional Engineer(s) in accordance with 1(d) of this Attachment.

4. Remedial Action Plan

The plan shall describe the proposed remedy and evaluate its ability and effectiveness to achieve the remediation objectives approved for the remediation site, including but not limited to:

- a) Executive summary. This chapter shall identify the objectives of the Remedial Action Plan and the technical approach utilized to meet such objectives. At a minimum, this chapter shall include the following elements:

- 1) The major components (e.g., treatment, containment, removal actions) of the Remedial Action Plan;
 - 2) The scope of the problems to be addressed by the proposed remedial action(s) including the specific contaminants of concern and the physical area to be addressed by the Remedial Action Plan; and
 - 3) Schedule of activities with estimated dates of completion through the recording of the Environmental Land Use Control (ELUC).
- b) Statement of remediation objectives or reference to Remediation Objectives Report;
- c) Remedial technologies selected. This chapter shall describe how each major remedial technology identified in the Remedial Action Plan fits into the overall strategy for addressing the recognized environmental conditions at the remediation site, including but not limited to:
- 1) Feasibility of implementation;
 - 2) Whether the technologies will perform satisfactorily and reliably until the remediation objectives are achieved;
 - 3) Whether remediation objectives will be achieved within a reasonable period of time;
- d) Confirmation sampling plan. This chapter shall describe how the effectiveness of the remedial action will be measured. At a minimum, a site-specific sampling plan and quality assurance project plan must be prepared in accordance with the provisions set forth in the Site Investigation requirements in Attachment A;
- e) Current and post-remediation use of the property;
- f) Applicable engineered barriers, institutional controls, and groundwater monitoring. This chapter shall describe any such controls selected or relied upon in determining or achieving remediation objectives, including long-term reliability, operating and maintenance plans, and monitoring procedures;
- g) Appendices. References and other informational sources should be incorporated into the appendices; and
- h) Licensed Professional Engineer affirmation in accordance with Section 1(d) of this Attachment.

5. Remedial Action Completion Report

- a) Except as provided in subsection (b) below, upon completion of the Remedial Action Plan, the Responsible Party shall prepare a Remedial Action Completion Report. The report shall demonstrate whether the remedial action was completed in accordance with the approved Remedial Action Plan and whether the remediation objectives, as well as any other requirements of the plan, have been attained. The report shall include, but not be limited to:
 - 1) Executive summary. This chapter shall identify the overall objectives of the remedial action and the technical approach utilized to meet those objectives, including:
 - A) A brief description of the remediation site, including the recognized environmental conditions, the contaminants of concern, the contaminated media, and the extent of contamination;
 - B) The major components of the Remedial Action Completion Report;
 - C) The scope of the problems corrected or mitigated by the proposed remedial action(s); and
 - D) The anticipated post-remediation uses of the remediation site and areas immediately adjacent to the remediation site;
 - 2) Field activities. This chapter shall provide a narrative description of the:
 - A) Field activities conducted during the investigation;
 - B) Remedial actions implemented at the remediation site and the performance of each remedial technology utilized
 - 3) Special conditions. This chapter shall provide a description of any:
 - A) Engineered barriers utilized in accordance with 35 Ill. Adm. Code 742 to achieve the approved remediation objectives;
 - B) Institutional controls accompanying engineered barriers or industrial/commercial property uses in accordance 35 Ill. Adm. Code 742, including a legible copy of any such controls, as appropriate;
 - C) Post-remedial monitoring, including:

- i) Conditions to be monitored;
 - ii) Purpose;
 - iii) Locations;
 - iv) Frequency; and
 - v) Contingencies in the event of an exceedence; and
 - D) Other conditions, if any, necessary for protection of human health and the environment that are related to this Consent Order
 - 4) Results. This chapter shall analyze the effectiveness of the remedial actions by comparing the results of the confirmation sampling with the remediation objectives prescribed in the Agency-approved Remedial Action Plan. The data shall state the remediation objectives or reference the Remediation Objectives Report and be presented in an appropriate format (e.g., tabular and graphical displays) such that all information is organized and presented logically and that relationships between the different investigations for each medium are apparent;
 - 5) Conclusion. This chapter shall identify the success of the remedial action in meeting objectives. This chapter shall assess the accuracy and completeness of the data in the report and, if applicable, future work;
 - 6) Appendices. References, data sources, and a completed environmental notice form as provided by the Agency shall be incorporated into the appendices. Field logs, well logs and reports of laboratory analyses shall be organized and presented logically with reports of laboratory analyses of samples collected on or after January 1, 2003, including the following:
 - A) Accreditation status of the laboratory performing the quantitative analyses;
 - B) Certification by an authorized agent of the laboratory that all analyses have been performed in accordance with the requirements of 35 Ill. Adm. Code 186 and the scope of the accreditation; and
 - 7) Licensed Professional Engineer affirmation in accordance with Section 1(d) of this Attachment.
- b) If the approved remediation objectives for the regulated substances of concern established under this Violation Notice are equal to or above the levels existing at the site prior to any remedial action, notification and documentation of such, including a description of any engineered barriers, institutional controls, and post-remedial monitoring, shall constitute the entire Remedial Action Completion Report for purposes of this Violation Notice.

ATTACHMENT C

ILLINOIS POLLUTION CONTROL BOARD
January 6, 2011

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,)

Complainants,)

v.)

THE BURLINGTON NORTHERN)
SANTA FE RAILWAY COMPANY,)
a Delaware corporation,)

Respondent.)

PCB 07-44
(Citizens Enforcement – Land, Water)

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

The Board today rules upon the complainants' motion to strike a portion of the respondent's five-year statute of limitations affirmative defense. The complainants, Indian Creek Development Company, individually and as beneficial owner, and the Chicago Title and Trust Company, as trustee (collectively, Indian Creek), filed a three-count complaint against the Burlington Northern Santa Fe Railway Company (BNSF). The case concerns the alleged release of diesel fuel due to two trains colliding in 1993 at BNSF's Kane County property. In its complaint, Indian Creek pleads that the resulting contamination has migrated and continues migrate to Indian Creek's neighboring property. In its amended answer, BNSF pleads that the complaint is barred by the statute of limitations. For the reasons below, the Board grants Indian Creek's motion to strike three paragraphs of BNSF's affirmative defense.

In this order, after summarizing the procedural history of the case, the Board describes the complaint, the affirmative defense, and the parties' arguments for and against striking part of BNSF's statute of limitations pleading. The Board then discusses its ruling.

PROCEDURAL HISTORY

Indian Creek filed the complaint on December 4, 2006 (Comp.). On March 15, 2007, the Board accepted the complaint for hearing, denying BNSF's motion to dismiss the complaint as duplicative of a State enforcement action brought against BNSF in Kane County Circuit Court, No. CH KA 95 0527. BNSF filed an answer to the complaint on May 17, 2007, raising six alleged affirmative defenses. Indian Creek filed a motion to strike the affirmative defenses on

June 25, 2007. After responsive filings were made, the hearing officer conducted numerous telephonic status conferences as the parties discussed settlement and outstanding issues. On June 18, 2009, the Board granted Indian Creek's motion, striking all six alleged affirmative defenses. In the same order, the Board granted BNSF leave to plead, with adequate factual specificity, the stricken affirmative defenses of the five-year statute of limitations, waiver, estoppel, and laches.

On July 20, 2009, BNSF filed its amended answer (Am. Ans), pleading only one affirmative defense: the five-year statute of limitations (735 ILCS 5/13-205 (2008)). On August 13, 2009, Indian Creek filed a motion to strike three paragraphs from the affirmative defense (Mot.). On August 31, 2009, BNSF filed a response to Indian Creek's motion (Resp.). On September 8, 2009, Indian Creek filed a reply, but without requesting leave to do so. The Board accepts Indian Creek's reply (Reply), however, because the reply helps to clarify the nature of the relief sought by the motion (discussed below), and BNSF has never objected to the reply. Since September 8, 2009, the hearing officer has conducted a number of telephonic status conferences while the parties have continued to discuss settling the case.

INDIAN CREEK'S COMPLAINT

Indian Creek alleges that BNSF violated Sections 12(a), 12(d), and 21(e) of the Environmental Protection Act (415 ILCS 5/12(a), 12(d), 21(e) (2008)). Comp. at 7, 10, 14. According to Indian Creek, BNSF violated these provisions by (1) threatening and eventually causing and allowing the ongoing discharge of diesel fuel contaminants onto the soil and into the groundwater on and under Indian Creek's property so as to cause and tend to cause water pollution; (2) depositing diesel fuel contaminants upon the land so as to create a water pollution hazard on the BNSF and Indian Creek properties; and (3) abandoning and disposing of diesel fuel and diesel fuel contaminants under the BNSF property and the Indian Creek property, neither of which meets the requirements for a waste disposal site. *Id.*

Indian Creek seeks an order from the Board requiring, among other things, that BNSF cease and desist from further violations, that remediation be performed at the BNSF and Indian Creek properties, and that BNSF reimburse Indian Creek for past and future costs and expenses related to the alleged contamination. Comp. at 8-10, 11-13, 14-16. According to the complaint, "[t]his case is a refile of Kane County [Circuit Court] case number 04 L 607 filed on or about December 7, 2004," by Indian Creek against BNSF. *Id.* at 6.

BNSF'S AFFIRMATIVE DEFENSE

Citing the Illinois Code of Civil Procedure (735 ILCS 5/13-205 (2008)), BNSF pleads its five-year statute of limitations affirmative defense as follows:

1. Complainant admits in its Complaint that "[o]n or about late October or November, 2000, Indian Creek excavated a small portion of a building floor on [Indian Creek's site] . . ." and "[d]uring the excavation, an odor was noted and free product and apparently contaminated soil and groundwater were observed." (Compl. ¶¶ 12-14).

2. Shortly, thereafter, upon information and belief, Indian Creek identified the contamination as diesel fuel.
3. Indian Creek notified BNSF that it had identified petroleum contamination purportedly resulting from the 1993 accident in late 2000 or early 2001.
4. In that same time frame, BNSF removed soil from [Indian Creek's site].
5. Indian Creek did not file the instant action until December 4, 2006, more than 5 years after the date that it first discovered the contamination and formed its opinion that BNSF was at fault.
6. The Kane County [Circuit Court] lawsuit [against BNSF, brought and] referenced by Indian Creek[,] was dismissed with leave to reinstate, which order has been extended a number of times.
7. Currently, the Kane County lawsuit may be reinstated by Indian Creek prior to November 23, 2009.
8. Indian Creek has not reinstated the Kane County lawsuit. Am. Ans. at 11.

PARTIES' ARGUMENTS

Indian Creek's Motion to Strike

Indian Creek argues that paragraphs 6 through 8 of BNSF's affirmative defense do not support the statute of limitations defense and their relevance is "complete guesswork." Mot. at 3, 4. According to Indian Creek, these paragraphs do not allege "ultimate facts as are required," but instead may be a "premature response to Indian Creek[']s expected answer to the statute of limitations defense." *Id.* Indian Creek asserts that this "improper surplusage" should be stricken, not as a "hyper technical application of the law of pleadings," but because the "[t]he pleadings determine the scope of admissible evidence." *Id.* at 4. Moreover, Indian Creek continues, striking paragraphs 6 through 8 "prevents future claims that the surplus language means something or constitutes some sort of defense or support for a defense that cannot presently [be] imagined by either party much less properly pled." *Id.*

BNSF's Response

BNSF responds that while paragraphs 6 through 8 "may not typically be necessary for a statute of limitations affirmative defense," they do allege "ultimate facts as Indian Creek, itself, first raised [Indian Creek's] Kane County lawsuit in its Complaint and stated that the matter before the Board is a refiling of that matter." Resp. at 3. BNSF argues that paragraphs 6 through 8 of the affirmative defense pleading must be liberally construed so as to accomplish substantial justice between the parties. *Id.* According to BNSF, the paragraphs are intended to put the Board and Indian Creek on notice of BNSF's argument "as to why the statute of limitations has

run." *Id.* BNSF concludes that if the Board determines that paragraphs 6 through 8 do not conform to pleading requirements, the Board "can only strike those paragraphs and not the entire affirmative defense." *Id.* at 4.

Indian Creek's Reply

Indian Creek maintains that BNSF's response to the motion "completely ignores both the lack of relevancy and the lack of materiality" of paragraphs 6 through 8 to the statute of limitations defense. Reply at 3. "A proper affirmative defense," continues Indian Creek, "would merely raise the statute of limitations defense," after which Indian Creek could plead that "the limitations period has not run and was tolled by the filing of the Kane County case." *Id.* After that, BNSF could plead that "the prior filed case failed to toll the statute of limitations because of some unstated and unpled reasons possibly related to the dismissal with leave to reinstate." *Id.* Indian Creek asserts that "neither the Board nor Indian Creek are required to guess" what paragraphs 6 through 8 mean. *Id.* at 4.

According to Indian Creek, if BNSF believes that the issue of whether the Kane County case is timely reinstated gives BNSF an argument that the instant case is time barred, BNSF "should move to amend its affirmative defense and/or file a motion to dismiss at that time." Reply at 4. Absent the instant motion to strike, Indian Creek argues, BNSF "would not [be] forced to litigate or even properly plead the Kane County case's impact on the statute of limitations until the hearing or, perhaps, post hearing motions." *Id.*

DISCUSSION

An affirmative defense is a "response to a [complainant's] claim which attacks the [complainant's] legal right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n.1 (Jan. 23, 1997), (emphasis in original) (quoting *Black's Law Dictionary*). In an affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . [the complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).

Under the Board's procedural rules, "[a]ny facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). The "facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action." International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993). To set forth "a good and sufficient . . . defense, a pleading must allege ultimate facts sufficient to satisfy each element of the . . . affirmative defense pled." Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts. See Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539

N.E.2d 787, 791 (2nd Dist. 1989). Where the well-pled facts of an affirmative defense and reasonable inferences drawn therefrom raise the possibility that the party asserting them will prevail, the defense should not be stricken. *Id.*

BNSF pleads the affirmative defense of the five-year statute of limitations, relying upon Section 13-205 the Illinois Code of Civil Procedure:

Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. 735 ILCS 5/13-205 (2008).

For its statute of limitations affirmative defense, BNSF alleges eight paragraphs of facts in its amended answer. Paragraphs 1 through 5 of the affirmative defense allege, among other things, that Indian Creek's complaint was filed with the Board on December 4, 2006, more than five years after Indian Creek, in "late 2000 or early 2001," both discovered the petroleum contamination and determined that the contamination resulted from the 1993 accident. Am. Ans. at 11; *see also* Resp. at 2, 4.

Only paragraphs 6 through 8 of the affirmative defense, however, are the subject of Indian Creek's motion to strike. It is true that Indian Creek's motion is entitled "Motion to Strike [BNSF's] Affirmative Defense," and the motion asks that the Board "enter an order striking Respondent's affirmative defense[]." Mot. at 1, 4; *see also* Resp. at 2. Nevertheless, the substance of Indian Creek's motion addresses paragraphs 6 through 8 only (Mot. at 2-4), and Indian Creek's reply states that Indian Creek "moved to strike paragraphs 6 through 8 inclusive" (Reply at 2). The Board finds that Indian Creek's motion challenges only paragraphs 6 through 8 of BNSF's affirmative defense.

To rule upon Indian Creek's motion to strike, the Board need not determine whether the statute of limitations applies in this case. Paragraphs 6 through 8 of the affirmative defense refer to the dismissal of Indian Creek's Kane County Circuit Court action, and concentrate on the potential for Indian Creek to "reinstate" that action by the extended deadline of November 23, 2009. Am. Ans. at 11. Indian Creek's complaint before the Board does allege that the instant case is a "refiling" of Indian Creek's court case filed on or about December 7, 2004, which was "voluntarily dismissed" on November 21, 2006. Comp. at 6, Exh. C (court's dismissal order). BNSF's amended answer denies the complaint's allegation that the proceeding before the Board is a "refiling" of the court case (Am. Ans. at 6), but BNSF did not file a motion to strike the allegation from the complaint or to dismiss the complaint as time-barred.

The Board's June 18, 2009 order granted BNSF leave to plead the five-year statute of limitations defense with sufficient facts. Paragraphs 6 through 8 do not plainly allege ultimate facts constituting elements of the statute of limitations defense, which BNSF appears to concede

(Resp. at 2, 3, 4). The paragraphs fail to reasonably inform Indian Creek of what it is being called upon to meet. Nowhere does BNSF explain the legal import of paragraphs 6 through 8. The Board will not, under the auspices of liberal construction, speculate about what bearing the three paragraphs might have on the affirmative defense being pled.

Under these circumstances, the Board grants Indian Creek's motion to strike paragraphs 6 through 8 of BNSF's affirmative defense. Nothing in this order, however, precludes the parties from addressing, through proper motion or pleading before hearing, the applicability of the statute of limitations to this case and any related significance of Indian Creek's Kane County court proceeding.

Finally, the Board notes that BNSF's amended answer asks that the Board "award BNSF its costs and expenses." Am. Ans. at 10, 11. As the Board lacks the authority to make the requested award, the Board, on its own motion, strikes these requests of BNSF. See Malinowski v. Chicago Transit Authority, PCB 10-36, slip op. at 2, n.1 (Jan. 21, 2010).

CONCLUSION

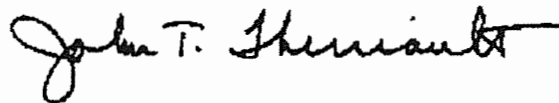
On Indian Creek's motion, paragraphs 6 through 8 of BNSF's statute of limitations affirmative defense are stricken from the amended answer. Paragraphs 1 through 5 of the affirmative defense, which were beyond the scope of Indian Creek's motion, remain in the amended answer. On the Board's motion, BNSF's requests for costs and expenses are stricken from the amended answer.

SUMMARY

1. The Board grants Indian Creek motion to strike paragraphs 6 through 8 of the five-year statute of limitations defense pled in BNSF's amended answer.
2. On its own motion, the Board strikes the requests for costs and expenses from BNSF's amended answer.

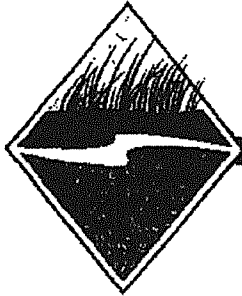
IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 6, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board

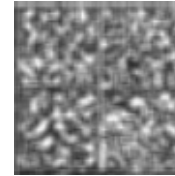
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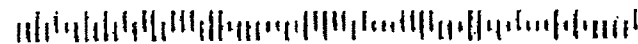
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