

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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FEB 21 2007

STATE OF ILLINOIS  
Pollution Control Board

INDIAN CREEK DEVELOPMENT COMPANY, )  
an Illinois partnership, individually as )  
beneficiary under trust 3291 of the Chicago )  
Title and Trust Company dated December 15, 1981 )  
and the Chicago Title and Trust Company, )  
as trustee under trust 3291, dated )  
December 15, 1981, )

Complainant, )

vs. )

THE BURLINGTON NORTHERN AND SANTA FE )  
RAILWAY COMPANY, a Delaware Corporation, )

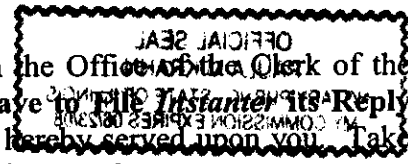
Respondent. )

PCB- 07-44  
Citizen's Enforcement  
§21(e), §12(a), §12(d)

NOTICE OF FILING

TO: Glenn C. Sechen  
Schain, Burney, Ross Citron, Ltd.  
222 N. LaSalle Street, Suite 1900  
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Respondent's Motion For Leave to File Its Answer, its Reply Brief in Support of its Motion to Dismiss, a copy of which is hereby served upon you. Take note that you may be required to attend a hearing at a date set by the Board.



DATE: February 21, 2007

BNSF RAILWAY COMPANY

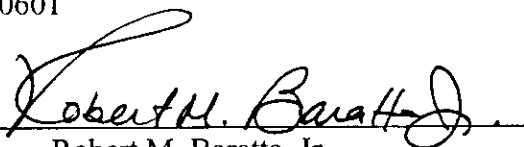
By: *Robert M. Baratta, Jr.*  
One of Its Attorneys

Weston W. Marsh  
Robert M. Baratta, Jr.  
James M. Witz  
FREEBORN & PETERS LLP  
311 South Wacker Drive  
Suite 3000  
Chicago, Illinois 60606  
(312) 360-6000 – telephone  
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**CERTIFICATE OF SERVICE**

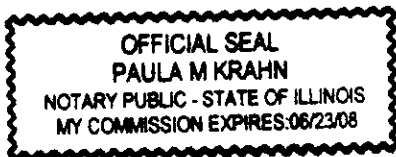
I, the undersigned, certify that I have served **Respondent's Motion For Leave to File *Instantly* its Reply Brief in Support of its Motion to Dismiss** by depositing the same in the U.S. Mail box at 311 South Wacker Drive, Chicago, Illinois before 5:00 p.m. on February 21, 2007, postage prepaid and addressed to:

Glenn C. Sechen  
Schain, Burney, Ross Citron, Ltd.  
222 N. LaSalle Street, Suite 1900  
Chicago, Illinois 60601

  
Robert M. Baratta, Jr.

SUBSCRIBED AND SWORN TO  
BEFORE ME THIS 21<sup>st</sup> DAY OF  
FEBRUARY, 2007

  
NOTARY PUBLIC



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**RESPONDENT'S MOTION FOR LEAVE TO FILE INSTANTER  
ITS REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

The BNSF Railway Company ("BNSF"), by and through its attorneys, moves this Board pursuant to the Board's General Rules, Ill. Admin. Code tit. 35, § 101.500(e), for leave to file *instanter* the attached Respondent's Reply Brief in Support of Its Motion to Dismiss. In support of this motion, BNSF states as follows:

1. In its response brief, complainant refers to facts outside of the complaint and wrongly implies that BNSF has undertaken little, if any, response activities with respect to the investigation and remediation of complainant's property.

2. For example, on page 2 of its response brief, complainant argues "[h]owever, simply deafening in the BNSF's silence on what remediation measures have been submitted to and approved by the Agency regarding ANYTHING on the Indian Creek or even the BNSF's own property since the entry of the Consent Order." Response Brief, p. 2.

3. Complainant's repeated references to the claimed inaction on the part of BNSF completely misrepresent the facts of the matter and materially prejudices BNSF.

4. In fact, as described in the attached reply brief and exhibits attached thereto, BNSF has undertaken very substantial investigation and remediation planning with respect to the complainant's site. The reply brief and exhibits attached thereto also firmly establish that the Illinois Environmental Protection Agency ("IEPA") has actively monitored, reviewed and overseen these activities, as well as general compliance with the Consent Order. As discussed in the reply brief, as recently as February 20, 2007, representatives of the Illinois Attorney General's Office, IEPA and BNSF met to discuss the remediation plans for complainant's property developed by BNSF's consultant.

4. Complainant's response brief goes well beyond simply rebutting or responding to the arguments presented by BNSF in its Motion to Dismiss and paints a set of facts that simply are not true. It is only fair that BNSF be given the opportunity to respond and set the record straight.

5. Additionally, BNSF suggests that the Board request that IEPA file a status report detailing the response activities BNSF has undertaken at the complainant's property and the status of IEPA's review of the remediation alternatives submitted by BNSF for complainant's property.

WHEREFORE, to avoid the material prejudice to BNSF resulting from complainant's misleading description of the facts surrounding this matter, BNSF respectfully requests that the Board grant this motion and deem the attached reply brief filed *instanter*.

Respectfully submitted,

**BNSF RAILWAY COMPANY**

By:   
One of Its Attorneys

Weston W. Marsh  
Robert M. Baratta, Jr.  
James M. Witz  
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**RESPONDENT'S REPLY BRIEF**  
**IN SUPPORT OF ITS MOTION TO DISMISS**

**INTRODUCTION**

The BNSF Railway Company ("BNSF") has diligently pursued investigation and remediation of any diesel fuel released from its property as a result of the subject train collision. Indeed, the subsurface investigation of complainant's property is complete (See Exhibit A to Affidavit attached hereto) and BNSF has submitted to the Illinois Environmental Protection Agency ("IEPA") and complainant a proposed remediation plan (See Exhibit B to Affidavit attached hereto) and Draft Pilot Test Study Work Plan (See Exhibit C to Affidavit attached hereto). IEPA has reviewed the plans and recently held a meeting with BNSF on February 20, 2007 to discuss remediation of complainant's property. (See Affidavit ¶5 attached hereto). Quite simply, both BNSF and IEPA have performed, and continue to perform, their obligations under the pending Consent Order with respect to complainant's property.

Complainant, however, has another agenda. Shortly after finding contamination on its property, complainant sought unreasonable sums from BNSF for access to its property. When it didn't get what it wanted, complainant denied BNSF access to its property for more than a year. Then, looking for a lotto-type payout, plaintiff filed a 35-page, eight-count complaint in Kane County Circuit Court against BNSF and others seeking "in excess of \$8,000,000" for bogus losses (See Exhibit B to Complainant's Response to Motion to Dismiss). When complainant actually had to prove up such losses, it voluntarily dismissed its Kane County lawsuit and paid the costs incurred by BNSF therein (See Exhibit C to Complaint).

Of course, all of these facts are by way of background and have little relevance to the instant motion, which is well supported by the Board rules, Board opinions and common sense. The reason BNSF sets forth these facts is only to rebut complainant's strained argument in response to the motion. In its response brief, complainant argues "However, simply deafening is the BNSF's silence on what remediation measures have been submitted to and approved by the Agency ... ." (Complainant's Brief, p.2). Complainant's argument is irrelevant to the undeniable fact that all of the issues raised in this duplicative proceeding were addressed by the State of Illinois in the Consent Order. But, given that complainant has raised the issue, it is only right that BNSF be allowed to set the record straight and provide the Board with a brief description of the status of the investigation and cleanup of complainant's property.

As for substance, complainant's brief describes nothing new and provides no legal support for its argument that its case should not be dismissed. Complainant concedes, as it must, that this duplicative proceeding addresses the very same party (BNSF), release of diesel fuel, location and purported statutory violations as those addressed by the State of Illinois in the Consent Order. Complainant does **not** argue that the Consent Order inadequately addresses the

investigation and remediation of the contamination. Complainant does **not** argue that BNSF has failed to thoroughly investigate its property or provide a remediation plan to IEPA. Indeed, complainant plainly states in its Complaint that “the Agency is working to fulfill its role under the Consent [Order] and to obtain remediation by the BNSF.” (Complaint, ¶21).

Instead, complainant’s sole argument is that the response activities are taking too long, despite the fact that it claims that it did not identify contamination on its property until 2000 and refused to allow BNSF access for more than a year. Of course, there is no time exception to the Board rules regarding duplicative actions, nor is there any legal basis to circumvent the Consent Order. Similarly, mere passage of time does not create new statutory violations, as complainant argues. In fact, in a truly bizarre twist, if the Board were to grant the relief sought by complainant (*e.g.*, starting over with a new consultant chosen by complainant), the remediation of complainant’s property would undoubtedly take much longer than is now anticipated.

### ARGUMENT

**I. In compliance with the Consent Order, BNSF has extensively investigated the complainant’s property and has submitted to IEPA and complainant a plan to initiate remediation of complainant’s property.**

On November 2, 2005, BNSF’s consultant submitted to IEPA *and complainant* its Additional Site Investigation Report (“Report”) detailing the extensive subsurface investigation of complainant’s property. (Exhibit A to Affidavit). The Report supplemented two previous reports: a 2002 Phase II Site Investigation and a 2003 Site Investigation Report. IEPA reviewed and approved the work plan for the additional investigation described in the Report, which in total included the installation of at least 26 soil borings and 20 monitoring wells on or adjacent to complainant’s property.



On April 21, 2006, BNSF's consultant submitted a Remedial Action Plan (Exhibit B to Affidavit) to IEPA **and complainant** detailing BNSF's proposed *in situ* remediation plan for complainant's property. IEPA reviewed the plan and requested a revised plan. After discussions with IEPA, on September 7, 2006, BNSF's consultant submitted to IEPA **and complainant** a Draft Pilot Test Study Work Plan (Exhibit C to Affidavit) describing its proposed "pilot-scale tests that will be performed to allow for selection of an active remediation technology or technologies that will be used to recover free-phase petroleum hydrocarbons and remediate diesel-impacted soil and groundwater ... on an adjacent property to the south owned by Indian Creek Industrial Development ... ." The pilot study includes: (1) an aquifer pump test; (2) a two-phase extraction pilot test; and (3) a chemical oxidation injection pilot test. IEPA is reviewing these reports and held a meeting on February 20, 2007 with BNSF to discuss them in more detail.<sup>1</sup>

Complainant's brief makes it appear as if BNSF has done nothing to investigate and address the contamination on complainant's property. Nothing could be further from the truth. The attached reports establish the very substantial work that BNSF has undertaken on the complainant's property. The reports also establish IEPA's active engagement in this matter, as contemplated by the Consent Order. BNSF is not attempting to "sidestep its responsibility," as complainant falsely accuses, but is actively working with IEPA to address these issues.

**II. By dismissing this proceeding, the Board would not circumvent its role under the Illinois Environmental Protection Act.**

Complainant seeks the Board's involvement because "[t]he drafter of the Act and the Legislature recognized that the Agency is well intentioned but the Agency in particular and State

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<sup>1</sup> BNSF suggests that the Board request that IEPA file a status report in this matter detailing the status of their review and the proposed remedial activities at complainant's property.

government in general is understaffed, overburdened and too frequently led to pursue seemingly more immediate pressing issues.” (Complainant’s Brief, p.7) But Complainant has not alleged in its complaint that BNSF has violated the Consent Order, or that IEPA has not fulfilled its role under the Consent Order. As previously noted, complainant affirmatively alleges the contrary, stating that IEPA “is working to fulfill its role under the Consent [Order].” (Complaint ¶21).

Complainant’s argument for Board involvement thus falls flat. As complainant concedes, IEPA is fulfilling its role under the Consent Order and is not “pursu[ing] more immediately pressing issues,” as Professor Currie feared may happen in certain instances. Indeed, just the opposite is true. The State of Illinois has actively engaged BNSF since the date of the train collision, negotiated a detailed and thorough Consent Order and monitored compliance through the IEPA. Indeed, the Consent Order specifically states:

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.

(See Exhibit A to Complaint, p.8) Clearly, Board involvement would serve no reasonable purpose, duplicating the actions already pursued by the State and addressed in the Consent Order.

To add to the confusion, complainant requests the following relief in its complaint: “That the Board request the Agency to investigate the facts and violations set forth herein pursuant to Section 30 of the Act and thereafter name the Agency as a party in interest, pursuant to 35 Ill. Adm. Code 101.404 ad 103.202, to coordinate the Agency’s duties and efforts pursuant to the Consent [Order].” (Complaint, p.9). But IEPA already is actively and closely involved in

monitoring compliance with the Consent Order. Complainant concedes as much when it alleges in its complaint that “the Agency is working to fulfill its role under the Consent [Order] and to obtain remediation by the BNSF.” (Complaint ¶21). Complaint’s requested relief is unnecessary and redundant.

**III. The cases cited by BNSF are directly on point and clearly establish that this admittedly duplicative action should be dismissed.**

The case of *Lefton Iron and Metal Co. v. Moss American Corp.*, PCB 87-191, 1990 WL 263946 (Nov. 29, 1990) is right on point. In *Lefton*, the complainant, Lefton, Iron and Metal Co., brought a citizen’s enforcement action against respondent Moss American Corp. and its affiliates alleging violations of the Act. As in this case, the respondent Moss American Corp. was a defendant in a state court case brought by the Illinois Attorney General’s Office. Like BNSF and the State, the respondent and the Illinois Attorney General had entered into a consent decree in which respondent undertook responsibility for the cleanup and agreed to pay a civil penalty. In dismissing the Board action, the Board concluded that “[d]ue to the existence of the consent decree, the question of whether [respondent] has violated Sections 12 and 21 of the Act is moot. [Respondent] has undertaken full liability and, as such, the purpose of the Act has been achieved.” *Id.* at 3. The Board further found that “the presence of only one adjudicator would alleviate the possibility of two dissimilar rulings and future litigation.” *Id.* at 4. The Board finally concluded that “[i]t is the Board’s position that in instances where the Board has concurrent jurisdiction with the Circuit Court, substantially similar matters previously brought before the Circuit Court can similarly be dismissed by the Board.” *Id.* at 4 citing *Northern Illinois Anglers Assn. v. City of Kankakee*, PCB 88-183 (January 5, 1989) at 5.

Complainant attempts to distinguish this case based on the unconvincing argument that the Board dismissed the complaint in *Lefton* solely on the basis that the Board determined that

the Circuit Court “was in a much better position to consider the equitable issues because of the consent decree entered in that issue.” (Complainant’s Brief, p. 8). Even a cursory reading of the *Lefton* decision establishes that this was not the primary reason that the Board dismissed the complaint. But, even if that were true, this is not a distinguishing fact, but a substantially similar one. In this matter, like *Lefton*, the Circuit Court entered a Consent Order granting substantial equitable relief. Undoubtedly, like in *Lefton*, the Circuit Court should be allowed to interpret and enforce the Consent Order and, like in *Lefton*, is in a much better position than the Board to do so.

That said, the main reason the Board dismissed the complaint in *Lefton* was because the Consent Order rendered the complaint before the Board moot. The Board found that the respondent had “undertaken full liability and, as such, the purpose of the Act has been achieved.” *Lefton* at 3. The same is true here. BNSF has taken responsibility under the Consent Order and is working with IEPA to remediate complainant’s site – the very relief sought by complainant. Complainant does not allege that BNSF has failed to fully investigate its site or that BNSF and IEPA have failed to work towards a remediation plan. Indeed, complainant concedes, as it must, that IEPA is fulfilling its obligations under the Consent Order. Therefore, any action by Board in response to the complaint would: (1) be redundant in that such relief already has been addressed in the Consent Order; or (2) contradict the obligations in the Consent Order.

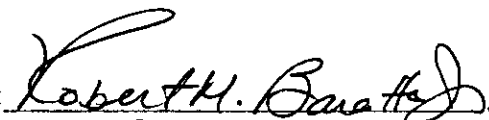
Additionally, the other cases cited by BNSF fully support dismissal of the complaint and complainant’s attempt to distinguish them is misplaced.

**CONCLUSION**

Complainant asks the Board to ignore that fact that the very violations and environmental conditions alleged in the Complaint have already been addressed by the Illinois Attorney General and the State's Attorney of Kane County in the Kane County lawsuit. The Consent Order resulting from that lawsuit governs the response action with respect to complainant's property and IEPA is actively involved in monitoring compliance with the Consent Order. For these reasons, the Complaint should be dismissed.

Respectfully submitted,

**BNSF RAILWAY COMPANY**

By:   
One of Its Attorneys

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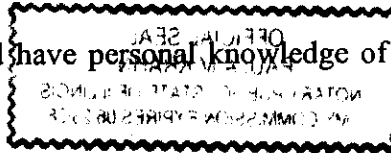
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**AFFIDAVIT**

I, Robert M. Baratta, Jr., being first duly sworn under oath, hereby depose and state as follows:

1. I am an attorney with Freeborn & Peters LLP and have represented BNSF with respect to the matters at issue in this proceeding and have personal knowledge of the matters discussed in this affidavit.



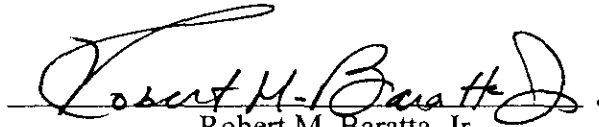
2. Exhibit A attached hereto is a true and correct copy of the Additional Site Investigation Report prepared by BNSF's consultant and submitted to complainant and IEPA.

3. Exhibit B attached hereto is a true and correct copy of the Remedial Action Plan prepared by BNSF's consultant and submitted to complainant and IEPA.

4. Exhibit C attached hereto is a true and correct copy of the Draft Pilot Test Study Work Plan prepared by BNSF's consultant and submitted to complainant and IEPA.

5. Representatives of IEPA, the Illinois Attorney General's Office and BNSF met on February 20, 2007 to discuss, among other things, the reports identified in paragraphs 3 and 4 above and remediation of complainant's property.

**FURTHER AFFIANT SAYETH NOT.**

  
Robert M. Baratta, Jr.

Subscribed and Sworn to before  
Me this 21<sup>st</sup> day of February, 2007

  
Notary Public

