

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

MAY 17 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

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
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 Answer to Complaint, a copy of which is hereby served upon you.

DATE: May 17, 2007

BNSF RAILWAY COMPANY

By: 
One of Its Attorneys


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Robert M. Baratta, Jr.
FREEBORN & PETERS LLP
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served **Respondent's Answer to Complaint** by depositing the same in the U.S. Mail box at 311 South Wacker Drive, Chicago, Illinois before 5:00 p.m. on May 17, 2007, postage prepaid and addressed to:

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

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601


Robert M. Baratta, Jr.

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ANSWER TO COMPLAINT

NOW COMES the Respondent, BNSF Railway Company ("BNSF") and for its answer to the Complaint states as follows:

1. At all times relevant hereto, complainant, Indian Creek Development Company, an Illinois Partnership, was the beneficial owner, through the aforesaid Chicago Title and Trust Company t/u/t 3291, of certain real property in Kane County, Illinois commonly known as 1500 Dearborn Avenue, Aurora, Illinois 60505 and including property index numbers: 15-13-376-001; 15-14-479-005, 15-14-479-006, 15-14-479-009, and 15-14-479-010; 15-23-227-026 and 15-23-227-028; 15-24-101-004; 15-24-102-001, 15-24-102-008, 15-24-102-009 and 15-24-102-010; 15-24-103-002 and 15-24-103-003. (collectively the "Premises").

ANSWER: BNSF lacks knowledge thereof sufficient to form a belief as to the truth or falsity of the allegations contained in this paragraph.

2. At all times relevant hereto, respondent, BNSF, a Delaware corporation, owned real property adjacent to the Premises which contained railroad tracks upon which BNSF operated a railroad ("BNSF Property").

ANSWER: BNSF admits the allegations contained in this paragraph.

3. On or about January 20, 1993 there occurred a release through the discharging, depositing, dumping, leaking and spilling of thousands of gallons of diesel fuel as a result of the industrial or commercial railroad operations conducted on the BNSF Property.

ANSWER: BNSF admits only that on or about January 20, 1993, diesel fuel was released on the BNSF Property. BNSF denies the remaining allegations contained in this paragraph.

4. The direction of groundwater flow is from the BNSF Property to the Premises and Indian Creek, which runs through the Premises.

ANSWER: BNSF admits that a portion of Indian Creek runs through the Premises. BNSF states that groundwater flow is complex and denies the remaining allegations contained in this paragraph.

5. Subsequent to the release and pursuant to the Act, including Sections 12(a) and 12(d), the Attorney General and State's Attorney of Kane County filed an enforcement action against the BNSF and others in Circuit Court bearing case number CH KA 95 0527.

ANSWER: BNSF admits the allegations contained in this paragraph.

6. On or about February 5, 1996, a consent decree (hereinafter, "Consent Decree") was entered in the Kane County enforcement action regarding the release of diesel fuel on the BNSF Property. A copy of that Consent Decree is attached hereto as Exhibit A

ANSWER: BNSF admits the allegations contained in this paragraph.

7. Among other things, the Consent Decree required the BNSF to prevent further migration of the diesel fuel contamination and to determine the extent to which the soil and groundwater were impacted both on and off of the BNSF Property.

ANSWER: BNSF states that the Consent Decree attached to the Complaint as Exhibit A speaks for itself.

8. Pursuant to specific deadlines, the Consent Decree required the BNSF to submit a work plan to, and obtain the approval of, the Illinois Environmental Protection Agency ("Agency"), and it also required that the BNSF notify the State's Attorney, Attorney General and IEPA in writing of the action(s) taken. See generally Exhibit A.

ANSWER: BNSF states that the Consent Decree attached to the Complaint as Exhibit A speaks for itself.

9. Thereafter, the BNSF was, pursuant to the Consent Decree, required to file a close-out report which, at a minimum, was to include a summary of all sampling and other data required to be collected, as well as a certification by an Illinois Registered Professional Engineer that the requirements of the Consent Decree had been met.

ANSWER: BNSF states that the Consent Decree attached to the Complaint as Exhibit A speaks for itself.

10. The BNSF's initial efforts to remediate the affected areas, limit the migration of free product, and recover released diesel fuel were primarily focused on areas distanced from the Premises. Moreover, these efforts were largely unsuccessful, resulting in the recovery of only a small amount of the diesel fuel that was actually released.

ANSWER: BNSF denies the allegations contained in this paragraph.

11. Since 1993, the diesel fuel has remained abandoned on and under the BNSF Property and thereafter has migrated, and continues to migrate, from the BNSF Property onto and under the Premises.

ANSWER: BNSF denies the allegations contained in this paragraph.

12. On or about late October or November, 2000, Indian Creek excavated a small portion of a building floor on the Premises in order to install a piece of equipment there. The area of the excavation of the Premises was located near the boundaries of the BNSF Property.

ANSWER: BNSF lacks knowledge thereof sufficient to form a belief as to the truth or falsity of the allegations contained in this paragraph.

13. During the excavation, an odor was noted and free product and apparently contaminated soil and groundwater were observed. Subsequently, samples of the free product were taken from the excavated part of the Premises, and lab analysis identified the free product as diesel fuel.

ANSWER: BNSF lacks knowledge thereof sufficient to form a belief as to the truth or falsity of the allegations contained in this paragraph.

14. Indian Creek notified BNSF of the excavation on the Premises, and the attendant odor, and the BNSF responded by removing some of the contaminated soil from the excavation on the Premises.

ANSWER: BNSF admits that it removed and properly disposed of some soil from the Premises.

15. The BNSF has a duty to prevent the migration to and contamination of the soil and groundwater on and under the Premises, but despite the obligations imposed by law and the Consent Decree, the BNSF has completely failed to take sufficient steps to halt the migration of the diesel fuel contamination onto the soil and groundwater on and under the Premises.

ANSWER: BNSF denies the allegations contained in this paragraph.

16. In contravention of its duty, the BNSF did little to remediate the affected areas, recover released diesel fuel, limit the migration of the diesel fuel contamination, adequately sample to determine the extent of contamination, and to monitor the migration of the diesel fuel contaminants from the BNSF Property.

ANSWER: BNSF denies the allegations contained in this paragraph.

17. Diesel fuel contamination on the BNSF Property continues to migrate onto the Premises, further contaminating the soil and groundwater located on and under the Premises on an ongoing basis.

ANSWER: BNSF denies the allegations contained in this paragraph.

18. Subsequent to the discovery of diesel fuel contamination on the Premises, without having performed any remediation of the premises and without prior notification to Indian Creek, the BNSF requested Agency closure of the incident pursuant to the Consent Decree without notifying the Agency of the contamination that Indian Creek found on the Premises.

ANSWER: BNSF admits only that it requested closure of the incident under the Consent Order. BNSF denies the remaining allegations contained in this paragraph.

19. The BNSF failed to disclose the contamination of the Premises to the Agency despite Indian Creek's notification to the BNSF regarding the contamination it found on and under the Premises when it excavated, despite the BNSF's removal of contaminated soil from the excavation on the Premises, despite the observations of BNSF's agents, servants, and employees when it removed the contaminated soil, and despite the fact that laboratory analysis of samples taken from the excavations of the Premises revealed that the contamination was diesel fuel. A copy of the BNSF's request for closure dated April 2, 2001 with a prior request for closure dated November 6, 1998 attached thereto, attached to this petition as Exhibit B.

ANSWER: BNSF admits only that Exhibit B is a true and correct copy of the April 2, 2001 letter to IEPA. BNSF denies the remaining allegations contained in this paragraph.

20. The spread of diesel fuel contamination to portions of the BNSF property not initially impacted and eventually to the Premises was willful, as is amply demonstrated by the BNSF's attempt to close the incident under the Consent Decree without informing the Agency of the diesel fuel contamination on and under the Premises.

ANSWER: BNSF denies the allegations contained in this paragraph.

21. The Agency is working to fulfill its role under the Consent Decree and to obtain the remediation by the BNSF.

ANSWER: BNSF admits that it is working with the IEPA to satisfy its obligations under the Consent Decree and the IEPA is fulfilling its role under the Consent Decree.

22. The diesel fuel contamination in the groundwater under both the BNSF Property and under the Premises constitutes Water Pollution within the meaning of Section 3.545 of the Environmental Protection Act, 415 ILCS 5 *et. seq.* ("the Act"), as it is a nuisance, renders such groundwater harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

ANSWER: BNSF denies the allegations contained in this paragraph.

23. This case is a refile of Kane County case number 04 L 607 filed on or about December 7, 2004.

ANSWER: BNSF denies the allegations contained in this paragraph.

24. This case, like the Kane County case, concerns contamination that has migrated to and continues to migrate onto the Premises from the BNSF Property. The Kane County case was voluntarily dismissed on November 21, 2006. A copy of the order of dismissal is attached as Exhibit C.

ANSWER: BNSF admits only that some of the issues from the Kane County case are similar to that of this matter and that complainant voluntarily dismissed the Kane County case on or about November 21, 2006. BNSF admits that a copy of the dismissal order is attached as Exhibit C. BNSF denies the remaining allegations contained in this paragraph.

COUNT I
Section 12(a) Violation

25. Paragraphs 1-24 are incorporated by reference as paragraph 25 hereof.

ANSWER: BNSF incorporates its answers to paragraphs 1-24 as if fully stated herein.

26. 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.

ANSWER: Section 12(e) of the Act speaks for itself.

27. Section 3.550 of the Act defines "Waters" as all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

ANSWER: Section 3.550 of the Act speaks for itself.

28. Accordingly, the groundwater under the Premises and that under the BNSF Property are Waters within the meaning of Section 3.550 of the Act.

ANSWER: This paragraph contains a legal conclusion to which BNSF is not required to respond.

29. Section 3.165 of the Act (415 ILCS 5/3.165) defines "Contaminant" as any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

ANSWER: Section 3.165 of the Act speaks for itself.

30. The diesel fuel which was released is a Contaminant within the meaning of Section 3.165 of the Act.

ANSWER: This paragraph contains a legal conclusion to which BNSF is not required to respond.

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

ANSWER: Section 3.545 of the Act speaks for itself.

32. The General Assembly has expressly found “that pollution of the waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses”. 415 ILCS 5/11(a).

ANSWER: The quoted language from the statute speaks for itself.

33. The BNSF caused and allowed the discharge of diesel fuel contaminants on the BNSF Property in 1993, threatened, caused and allowed the discharge of said diesel fuel contaminants through migration to other parts of the BNSF Property, and threatened and eventually caused and allowed the ongoing discharge of contaminants onto the soil and into the groundwater on and under the Premises so as to cause and tend to cause water pollution in violation of Section 12(a) of the Act.

ANSWER: BNSF denies the allegations contained in this paragraph.

34. Because of the ongoing migration of the diesel contamination and its continued discharge onto and under the Premises, the violation of Section 12(a) of the Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

ANSWER: BNSF denies the allegations contained in this paragraph.

COUNT II
Section 12(d) Violation

35. Paragraphs 1 to 34 are incorporated by reference as paragraph 35 hereof.

ANSWER: BNSF incorporates its answers to paragraphs 1-34 as if fully stated herein.

36. 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 create a water pollution hazard.

ANSWER: Section 12(d) of the Act speaks for itself.

37. The BNSF caused and allowed the deposit of diesel fuel contaminants on the BNSF Property in 1993. Subsequently, the BNSF caused and allowed the deposited contaminants to move, migrate, and deposit onto other portions of the BNSF Property, and eventually to the Premises.

ANSWER: BNSF denies the allegations contained in this paragraph

38. Accordingly, the BNSF's actions have created a water pollution hazard on both the BNSF Property and the Premises in violation of Section 12(d) of the Act.

ANSWER: BNSF denies the allegations contained in this paragraph.

39. Because of the ongoing migration of the diesel contamination onto the Premises, the violation of Section 12(d) of the Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

ANSWER: BNSF denies the allegations contained in this paragraph.

COUNT III
Section 21(e) Violation

40. Paragraphs 1 to 38 are incorporated by reference as paragraph 39 hereof.

ANSWER: BNSF incorporates its answers to paragraphs 1-38 as if fully stated herein.

41. Section 21(e) of the Act provides that:

No person shall...[d]ispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

ANSWER: Section 21(e) of the Act speaks for itself.

42. Section 3.535 of the Act defines "Waste" as, *inter alia*, any "discarded material" resulting from industrial or commercial operations. 415 ILCS 5/3.535.

ANSWER: Section 3.535 of the Act speaks for itself.

43. The diesel fuel and contaminated media on and under the BNSF Property that the BNSF has abandoned and disposed of is Waste under the Act.

ANSWER: BNSF denies the allegations contained in this paragraph.

44. Section 3.185 of the Act defines "Disposal" as the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste may enter the environment or be emitted into the air or discharged into any water, including groundwater. 415 ILCS 5/3.185.

ANSWER: Section 3.185 of the Act speaks for itself.

45. By allowing the diesel fuel spilled in 1993 to remain on and under the BNSF Property and the Premises to mix with soil and groundwater media, the BNSF has abandoned and disposed of said diesel fuel and diesel fuel contaminants.

ANSWER: BNSF denies the allegations contained in this paragraph.

46. The BNSF's abandonment and disposal of the diesel fuel and diesel fuel contaminated media under the BNSF Property and the Premises are knowing violations of the Act, as aptly demonstrated by the BNSF's attempt to close the incident pursuant to the Consent Decree without informing the Agency of the diesel fuel contamination on and under the Premises – contamination of which the BNSF was fully aware.

ANSWER: BNSF denies the allegations contained in this paragraph.

47. Neither the BNSF Property nor the Premises are permitted by the Agency to be waste disposal sites or facilities and for that reason and otherwise they do not meet the requirements of a waste disposal site or facility under the Act or under applicable Illinois Pollution Control Board regulations.

ANSWER: BNSF admits that the BNSF Property is not an IEPA-permitted waste disposal facility. BNSF lacks knowledge sufficient to form a belief as to the truth or falsity of whether the Premises is an IEPA-permitted waste disposal facility. BNSF denies the remaining allegations contained in this paragraph.

48. Such violation of Section 21(e) of the Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

ANSWER: BNSF denies the allegations contained in this paragraph.

WHEREFORE, BNSF respectfully requests that the Board dismiss the Complaint with prejudice and award BNSF its costs and expenses, and any such other relief the Board deems appropriate.

AFFIRMATIVE DEFENSES

First Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property more than five years prior to filing the complaint. Accordingly, complainant's claims must be dismissed pursuant to the applicable statute of limitations. 735 ILCS 5/13-205.

Second Affirmative Defense. Complainant has failed to mitigate its damages.

Third Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, Complainant has waived its rights to make claims against BNSF based on the alleged contamination.

Fourth Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, Complainant is estopped from asserting claims against BNSF based on the alleged contamination.

Fifth Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, the doctrine of laches prohibits complainant from asserting claims against BNSF based on the alleged contamination.

Sixth Affirmative Defense. Complainant's purported damages have not been identified with sufficient particularity, to the extent such damages even exist.

WHEREFORE, BNSF respectfully requests that the Board dismiss the Complaint with prejudice and award BNSF its costs and expenses, and any such other relief the Board deems appropriate.

Respectfully Submitted,

BNSF RAILWAY COMPANY

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

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