BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois	)	
Complainant,	)	PCB No. 11-79
v.	)	
INVERSE INVESTMENTS, L.L.C., an Illinois Limited Liability Company,	)	
Respondent.	)	

NOTICE OF FILING

TO: Krystyna Bednarczyk
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, IL 60602

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

PLEASE TAKE NOTICE that I have electronically filed today with the Office of the Clerk of the Pollution Control Board Respondent's Motion to Dismiss and Respondent's Memorandum in Support of Its Motion to Dismiss, copies of which are attached hereto and herewith served upon you.

Dated: September 21, 2011

INVERSE INVESTMENTS, L.L.C.

By: _____
Jennifer T. Nijman

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RESPONDENT'S MOTION TO DISMISS

Respondent, Inverse Investments, L.L.C. ("Inverse"), respectfully moves to dismiss the Complaint brought by the People of the State of Illinois, ("the State"). In support of its Motion, Inverse submits its Memorandum in Support of Motion to Dismiss and states as follows:

1) The property at issue is located at 3004 West Route 120 (Elm Street) in McHenry County, Illinois (the "Site"). (Complaint, ¶3)

2) For some period of time in the early to mid 1970s, the former owner of the Site leased a portion of the Site to a dry cleaner. (Complaint, ¶7)

3) The former owner placed the Site into a land trust in the late 1990s. (Affidavit of Richard Adams "Adams Affidavit" ¶4)

4) The former owner enrolled the Site in Illinois Environmental Protection Agency's ("IEPA") Site Remediation Program ("SRP") in October, 2003. In 2005, Inverse inherited the Site. (Adams Affidavit ¶7). Inverse is an Illinois Limited Liability Company. (Adams Affidavit ¶2)

5) Since inheriting the Site, Inverse has spent significant resources addressing contaminants located on the Site through the State's Site Remediation Program. (Adams Affidavit ¶¶8-9) Also, Inverse has ensured that no contaminants have been disposed, stored, discharged, released, or in any way associated with the Site since Inverse's ownership. (Adams Affidavit ¶10)

6) Inverse retained an environmental consultant (Complaint ¶14) and has been working with IEPA's Bureau of Land to investigate and remediate the Site. Inverse submitted a Remedial Objectives Report and Remedial Action Plan for the Site, which was approved by IEPA. (Affidavit of Michael Butler "Butler Affidavit" ¶5) In 2007, Inverse implemented a program of bio-remediation to remediate the Site. (Butler Affidavit ¶¶6-10)

7) On May 4, 2011, the People of the State of Illinois filed a one count complaint against Inverse alleging a violation of Section 12(a) of the Illinois Environmental Protection Act (415 ILCS 5/12(a)) for the migration of contamination from the Site.

8) Two Agreed Motions for Extension of Time to respond to complaint were filed by the parties on June 1, 2011 and on June 27, 2011. At the July 28, 2011 telephonic status conference, the Hearing Officer ordered Respondent's Answer or other pleadings to be due on or before September 21, 2011.

9) The complaint fails and should be dismissed because it never alleges a discharge from the Site as required by Section 12(a). The passive migration of contaminants does not constitute a discharge.

10) The complaint fails and should be dismissed because Inverse did not "cause, threaten or allow" the discharge of contaminants from the Site after it inherited the property.

11) The complaint fails to plead the elements required pursuant to 415 ILCS 5/58.9 and 35 Ill. Adm. Code 741.205 to reasonably allow Inverse to prepare a defense; therefore it should be dismissed.

12) The complaint fails to state a cause of action and must be dismissed because Inverse is not a liable party under the statute. (415 ILCS 5/22.2)

WHEREFORE, Respondent, Inverse Investments, L.L.C., respectfully requests that the Court dismiss Complainant's Complaint with prejudice.

Respectfully submitted,

INVERSE INVESTMENTS, L.L.C.

By _____
One of Its Attorneys

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Respondent.	)	

RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Respondent, Inverse Investments, L.L.C. ("Inverse"), has filed its Motion to Dismiss requesting that the Illinois Pollution Control Board ("Board") dismiss the complaint filed by the People of The State of Illinois, ("the State") pursuant to Sections 101.500 – 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.500-506, because the complaint fails to state a claim and is barred by affirmative matter defeating the claim. In support of its Motion, Inverse states as follows:

I. BACKGROUND

The property at issue is located at 3004 West Route 120 (Elm Street) in McHenry County, Illinois (the "Site"). (Complaint, ¶3) For some period of time in the early to mid 1970s, the former owner of the Site leased a portion of the Site to a dry cleaner. (Complaint, ¶7) The former owner placed the Site into a land trust in the late 1990s. (Affidavit of Richard Adams "Adams Affidavit" ¶4, attached as Exhibit A) Some years later, the trust's owner discovered that the dry cleaner's operations appeared to have caused contamination at the Site. The former

owner enrolled the Site in Illinois Environmental Protection Agency's ("IEPA") Site Remediation Program ("SRP") in October, 2003. (Adams Affidavit ¶5) When the Site trust owner died in 2004, the Site was transferred to a trust for the benefit of the prior owner's wife. (Adams Affidavit ¶6) In 2005[1], the trust was transferred to Inverse. (Adams Affidavit ¶7) Inverse is an Illinois Limited Liability Company.[2] (Adams Affidavit ¶2)

Since inheriting the Site, Inverse has spent significant resources addressing contaminants located on the Site through the State's Site Remediation Program. Inverse has spent in excess of $200,000 to date for Site investigation and remediation. (Adams Affidavit ¶9) Inverse retained an environmental consultant (Complaint ¶14) and has been working with IEPA's Bureau of Land to investigate and remediate the Site. Inverse submitted a Remedial Objectives Report and Remedial Action Plan for the Site, which was approved by IEPA. (Affidavit of Michael Butler "Butler Affidavit" ¶5, attached as Exhibit B) Inverse implemented a program of bio-remediation to reduce levels of chlorinated solvents at the Site. The remedial action consisted of the two-staged injection of an oxidant (RegenOx) followed by an accelerated bioremediation compound (HRC Advanced [HRC]). (Butler Affidavit ¶6) The RegenOx application was conducted from August to November of 2007. (Butler Affidavit ¶7) The HRC injection was completed in May to October of 2008. (Butler Affidavit ¶8) Quarterly monitoring began approximately one year following the injection and is currently ongoing. (Butler Affidavit ¶9) The remedy will also consist of engineered barriers, institutional controls and implementation of land use controls, as required. (Butler Affidavit ¶10) Properties adjacent to the Site are zoned industrial/commercial.

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[1] Although the complaint alleges Inverse has owned the Site since 2003 (Complaint ¶3), the correct date is 2005. (Adams Affidavit ¶7)

[2] Inverse has limited assets and has provided financial data to Complainant in support of a claim of inability to pay and small business protection. Inverse's only asset is the Site itself, and its only income is rental income from that property. (Adams Affidavit ¶3)

(Butler Affidavit ¶2) The groundwater monitoring at the Site reveals that levels of contamination at the Site have decreased in response to the remedy. (Butler Affidavit ¶11)

On May 4, 2011, the People of the State of Illinois filed a one count complaint against Inverse.[3] The complaint alleges a violation of Section 12(a) of the Illinois Environmental Protection Act (Act), which states that it is a violation of the Act to:

> Cause or threaten or allow the *discharge* of any contaminants ...so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources...(emphasis added) 415 ILCS 5/12(a).

The complaint specifically states that contamination in soils and groundwater resulted from the historic use of dry cleaning solvents at the Site. (Complaint ¶9) Complainant's allegations against Inverse concern migration of contaminants during the time period after Inverse inherited the Site in 2005. The complaint alleges that, *after* Inverse inherited the Site in 2005, Inverse caused, threatened or allowed "*the migration*" of contaminants to groundwater...and that contaminants were allowed "*to migrate*" into groundwater. (Complaint ¶¶40-41)

Complainant alleges that wells as far as 500 feet from the Site have been impacted. (Complaint ¶¶24-32)[4] Certain wells Complainant claims to be impacted are impacted by constituents that are not related to a dry cleaner and have never been detected at the Site. (Butler Affidavit ¶12) Methyl tertiary-butyl ether ("MTBE") has been detected in several samples (G106S, G106D and a private well) and benzene in others (*i.e.* G102). It is well recognized that the source of MTBE and benzene is gasoline/gas stations. (Butler Affidavit ¶13) Several former gas station sources are located to the northwest of these detections. (Butler Affidavit ¶14)

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[3] Two Agreed Motions for Extension of Time to respond to complaint were filed by the parties on June 1, 2011 and on June 27, 2011. At the July 28, 2011 telephonic status conference, the Hearing Officer ordered that Respondent's Answer or other pleadings would be due on or before September 21, 2011.

[4] Residential wells cited in the complaint are up to 1000 feet from the Site. (Complaint ¶23; Butler Affidavit ¶3)

Neither MTBE nor benzene has been detected at the Site. (Butler Affidavit ¶14) IEPA informed Inverse that there were other sources of contaminants in the area (Adams Affidavit ¶2), and the complaint itself points out that the contaminants at issue (volatile organic compounds) come from a variety of sources. (Complaint ¶10)

Standard for Granting Motion to Dismiss

In ruling on a motion to dismiss, the Board looks to the Illinois civil practice for guidance. *Elmhurst Memorial Healthcare et al. v. Chevron U.S.A. Inc. and Texaco Inc.*, PCB 09-66, December 16, 2010. Illinois requires fact-pleading, and the Board has stated that the pleader is required "to set out the ultimate facts which support his cause of action. *Id.* "[L]egal conclusions unsupported by allegations of specific facts are insufficient." *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist., 1993), citing *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). Also, a complaint's allegations should be sufficiently specific that they reasonably inform the defendant by factually setting forth the elements necessary to state a cause of action. *United City of Yorkville v. Hamman Farms*, PCB 08-96, October 16, 2008. The Board may consider pleadings as well as affirmative matter not contained in the pleadings, including affidavits. (35 Ill. Adm. Code 101.504) In ruling on a motion to dismiss, the Board may determine whether a complaint is duplicative or frivolous. "Frivolous" means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief. *People Of The State Of Illinois And The County Of Grundy, Illinois Ex Rel. Grundy County State's Attorney David W. Neal, Petitioner v. Environtech, Inc., And The City Of Morris*, PCB 92-107, January 21, 1993, 1993 WL 45402.

II. ARGUMENT

The complaint fails on its face because it never alleges a *discharge* from the Site. The passive *migration* of contaminants does not constitute a discharge. The complaint further fails because Inverse did not "cause, threaten or allow" the discharge of contaminants from the Site after it inherited the property. Further, the complaint fails to plead the elements required pursuant to 415 ILCS 5/58.9 and 35 Ill. Adm. Code 741.205 to reasonably allow Inverse to prepare a defense. Finally, the complaint fails to state a cause of action because Inverse is not a liable party under the statute. (415 ILCS 5/22.2)

A. The Complaint Should be Dismissed Because There is No Discharge

The complaint alleges that Inverse caused or allowed *the migration* of VOCs. An allegation of migration, however, does not meet the elements of Section 12(a) of the Act requiring a *discharge*. (415 ILCS 5/12(a)) The complaint does not, and cannot, allege that Inverse caused or allowed *the discharge* of contaminants. A violation of Section 12(a) mandates that a party "cause or threaten or allow the *discharge* of any contaminants into the environment...." (415 ILCS 5/12(a) (emphasis added)) Although the term "discharge" is not defined in the Act, there is no basis to conclude that passive migration equates to a discharge. In fact, both the federal Clean Water Act ("CWA") and cases interpreting the CWA confirm that migration does not constitute a "discharge." (33 U.S.C. 1251 *et seq.*)[5]

In the CWA, "discharge" and "discharge of a pollutant" are defined in sections 502(16) and (12) respectively. (33 U.S.C. 1362(16), (12)) A "Discharge" is defined as a discharge of a pollutant or pollutants. (33 U.S.C. 1362(16)) The terms "discharge of a pollutant" and "discharge of pollutants" each mean (A) any addition of any pollutant to navigable waters from

[5] Section 301.102 of the Illinois Regulations, regarding water pollution, states that it is the purpose of the Illinois Regulations to meet the requirements of Section 402 of the CWA. (35 Ill. Adm. Code 301.102)

any point source,[6] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. (33 U.S.C. 1362(12)) In interpreting these sections, federal courts have held that "migration of residual contamination resulting from previous releases is not an ongoing discharge...." *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 120 (E.D.N.Y. 2001) (where migration from a former landfill was not a discharge) *citing Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333, 1354 (D.N.M. 1995); *see also Wilson v. Amoco Corp.* 33 F.Supp.2d 969, 975 (D.Wyo., 1998) (concluding that migration of residual contamination from previous releases is not an ongoing discharge). When the facility in which the contaminants were emanating ceased to operate, rarely will an ongoing CWA violation exist. *Wilson* at 975. These CWA cases address the question of when a discharge is ongoing, and analyze the language of the CWA requiring a party "to be in violation" or, in other words, to have an ongoing discharge to be liable under the Act. *Aiello* at 120; *Wilson* at 975.

Here, by alleging that Inverse allowed migration to occur "after 2003 and continuing through the date of filing" (Complaint ¶40), Complainant is asking the Board to find that Inverse is responsible for an ongoing discharge. Following the analysis of the language in the CWA, migration is not an ongoing discharge of contaminants. As alleged in the complaint, dry cleaning operations ceased at the Site over 30 years ago. Complainant specifically alleges that it is the 1970s dry cleaning operations that caused the contamination. (Complaint ¶9, "Historic use of dry cleaning solvents at the Site has resulted in the contamination....") Respondent Inverse only took ownership of the Site in 2005. There is no allegation of a *discharge* by Inverse and

[6] A "point source" is defined as "a discernible, confined and discrete conveyance," which definition "evokes images of physical structure and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to a navigable waterway." *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 118, FN 29 (E.D.N.Y. 2001) A former landfill is not a point source. *Id.*

there has been no action taken by Inverse other than to investigate and remediate the Site. (Complaint ¶14; Butler Affidavit ¶5; Adams Affidavit ¶10) Even assuming the validity of the allegation that migration from the Site occurred after 2005, such passive migration is not a discharge pursuant to Section 12(a). Therefore, the complaint fails to state a cause of action upon which the Board can grant relief and should be dismissed.

B. The Complaint Should be Dismissed Because Inverse Did Not Cause or Allow a Discharge

The complaint fails because Inverse did not "cause, threaten or allow" the discharge of contaminants from the Site after it inherited the property. The Board has held that the Illinois Environmental Protection Act ("Act") does not operate under a theory of strict liability. *People of the State of Illinois v. William Charles*, PCB 10-108, March 17, 2011 at 8, *citing People v. A.J. Davinory Contractors*, 249 Ill. App. 3d 788, 793. The "analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution." *People v. Fiorini*, 143 Ill.2d 318, 346, 574 N.E.2d 612, 623 (1991); *see also Phillips Petroleum v. Pollution Control Board*, 72 Ill.App.3d 217, 221, 390 N.E.2d 620 (2nd Dist., 1979) (Act requires that the alleged polluter have "sufficient control over the source of the source of the pollution in such a way as to have caused, threatened or allowed the pollution.").

In *Perkinson v. Pollution Control Board*, 187 Ill. App. 3d 689, 694 (3rd Cir. 1989), the court stated "the owner of the source of pollution causes or allows the pollution...unless the facts establish the owner either lacked the capability to control the source...or had undertaken extensive precautions." The court elaborated by stating that the case was "controlled by the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless

the facts establish the owner either lacked the capability to control the source, as in *Phillips Petroleum,* or had undertaken extensive precautions to prevent vandalism or other intervening causes, as in *Union Petroleum*." *Id.* at 694-695.[7] This holding has been repeatedly cited by the Board. *See People of the State of Illinois v. State Oil Co.* PCB 97-103, April 4, 2002, at 10, *City of Chicago Dept. of Environment v. Speedy Gonzalez Landscaping, 1601-1759 East 130th Street, L.L.C., and Jose R. Gonzalez*, AC 06-39, AC 06-40, AC 06-41, AC 07, 25, March 19, 2009, at 23-24, *Illinois EPA v. Dan Cadwallader*, May 20, 2004, AC 03-13 at 5.

The phrase "cause or allow" relates to a person's acts or omissions. *Rodney B. Nelson v. Kane County*, PCB 94-244, July 18, 1996, at 5. Finding that the Act does not define "cause," the court in *People v. McFalls*, 313 Ill.App.3d 223 (3rd Dist., 2000), used a dictionary definition stating that "[t]he verb "cause ordinarily means 'to serve as cause or occasion of [or to] bring into existence...." *Id.* at 227. The Board has stated that the "cause or allow" language of Section 12(a) of the Act means that the owner of a property has a duty to take prudent measures to prevent pollution. *Illinois EPA v. Omer Thomas*, AC 89-215, January 23, 1992 at 4.

In this case, Inverse did not cause or allow the discharge of contaminants because it did not "bring into existence" the dry cleaning operation that was the source of the contamination and it lacked the capability to control the historic dry cleaner source. Inverse inherited the property in 2005 and did not have any control over the property before that time. Complainant specifically states that the source of the contamination was the historic dry cleaning operation. (Complaint ¶9) Inverse had no control over the dry cleaner operation that was present as a tenant

[7] In *Union Petroleum Corp. v. United States*, 651 F.2d 734 (Ct. Cl. 1981), after vandals had opened tank cars releasing oil into a creek, Union Petroleum immediately took appropriate actions to contain and remediate the spill and they had taken reasonable precautions against vandalism. Therefore, the Court held that they had taken reasonable care and were not liable for the cost of cleanup. *Id.*

at the Site in the 1970s. Although Inverse controlled the property after 2005, it did not control the source of the contamination – the dry cleaning operations.

Even if Complainant argues that controlling the property after 2005 should be enough to find "cause and allow," the argument fails because Inverse has taken prudent measures to prevent pollution, vandalism or other intervening causes. *Perkinson* at 694-695 (party is not liable if it *either* lacks the capability to control the source *or* had undertaken extensive precautions) (emphasis added). Upon acquiring the property through inheritance in 2005, Inverse investigated and remediated the property under the SRP program with the review and approval of the IEPA. Inverse conducted a biological remedy at the Site, and the remedy has reduced contaminant levels. (Butler Affidavit ¶¶5-11) By actively participating in the SRP program, Inverse has taken extensive precautions to prevent pollution. Further, Inverse leased the Site to a car rental company which does no repair work on the Site. (Adams Affidavit ¶10) Inverse has ensured that no contaminants have been disposed, stored, discharged, released, or in any way associated with the Site since Inverse's ownership.

Complainant does not allege any act or omission by Inverse that caused or allowed the discharge of contamination. Inverse did not control the source of the contamination and Inverse took prudent and preventative measures. Because Inverse did not cause, threaten or allow the discharge of contaminants in the groundwater, the complaint fails to state a cause of action upon which the Board can grant relief and should be dismissed.

C. The Complaint Should be Dismissed Because Complainant Failed to Plead Sufficient Facts to Support a Valid Claim Under Proportionate Share Laws

The complaint fails to allege sufficient facts to reasonably inform Inverse of proportionate share liability. Illinois is a fact-pleading state. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300 (1981). For a complaint to be sufficient, the complaint must set out

the ultimate facts which support the cause of action. *People v. Waste Hauling et. al*, PCB 10-9 (December 3, 2009) *14 citing *United City of Yorkville v. Hamman Farms*, PCB 08-96 (Oct. 16, 2008), *15. The Board's procedural rules specifically state that a complaint must contain:

> The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense;
>
> (35 Ill. Adm. Code 103.204(c)(2))

Under Section 58.9 of the Act, no action may be filed seeking to force a respondent to pay or perform more than its proportionate share of a cleanup. (415 ILCS 5/58.9) Specifically, Section 58.9 states:

> Notwithstanding any other provisions of this Act to the contrary, including subsection (f) of Section 22.2 [stating that only defenses in 22.2(j) apply], in no event may the Agency, the State of Illinois or any person bring an action pursuant to this Act or the Groundwater Protection Act to require any person to conduct remedial action...beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond such person's proportionate degree of responsibility for costs of the remedial action of releases of regulated substances that were proximately caused or contributed to by 2 or more persons.
>
> (415 ILCS 5/58.9)

Thus, in no event may Complainant bring an action unless Complainant establishes "[t]hat the respondent proximately caused or contributed to the release," and also "[t]he degree to which the performance or costs of a response result from the respondent's proximate causation of or contribution to the release...." (35 Ill. Adm. Code 741.205(a)) Section 58.9 applies to any complaint that seeks to "require any person to perform a response that results from a release or substantial threat of a release of regulated substances." (35 Ill. Adm. Code. 741.105(d)(1))

Here, Section 58.9 applies because the State is seeking to require Inverse to perform a response activity. IEPA demanded that Inverse perform additional remediation at the Site

including connecting a large area to the municipal water system. (Adams Affidavit ¶11; *see also* IEPA Violation Notice, attached as Exhibit C) In addition, the complaint seeks that Inverse "cease and desist" from further violations of Section 12(a). (Complaint, Prayer for Relief) Since the only allegation against Inverse is that it allowed migration of contaminants, a cease and desist order to stop further migration at the distances alleged by the complaint (500 to 1000 feet) would require some response action. There is no doubt that Complainant seeks to have Inverse perform a response, and the proportionate share laws thus apply.

In *People v. Waste Hauling et al.*, the Board dismissed a complaint in part because the Complainant failed to plead sufficient facts to support a valid claim under the proportionate share laws. The Board held that even though the complainant is not required to allege the percentage of liability for cleanup under the proportionate share liability regulations (*see* 35 Ill. Adm. Code 741.205(c)), the complaint should have included facts sufficient to reasonably allow the respondent to prepare a defense. *People v. Waste Hauling et al.* The Board specifically found that Section 103.204 applies when considering proportionate share liability. *Id.**14, 35 Ill. Adm. Code 741.105(b).

In this case, the complaint states that the chlorinated VOCs at issue are commonly associated with operations other than dry cleaners, such as metal degreasing activities. (Complaint ¶10) Further, constituents from gas station operations (MTBE and benzene) have been detected in the groundwater in the area but have not been detected at the Site. (Butler Affidavit ¶¶12-14) In fact, IEPA specifically informed Inverse that there were other sources of the groundwater contamination. (Adams Affidavit ¶12)

Despite its knowledge of other sources, Complainant does not identify the other potential contributors to the contamination at the Site, does not state when they may have released

contaminants, and does not provide their relationship to the Site. Also, while Complainant identifies certain wells that are alleged to be impacted by chlorinated VOCs, Complainant does not state whether Inverse (after 2005) is the source of the contaminants at each of those wells, or even whether the Site (historically) is the sole source of contaminants at those wells. There are no facts to allow Inverse to prepare a defense regarding its potential proportionate share. Complainant has failed to meet the pleading requirements under 35 Ill. Adm. Code Sections 741.205(a) and 103.204 by failing to provide information supporting a valid proportionate share claim, therefore, the Complaint should be dismissed.

D. The Complaint Should be Dismissed Because Inverse is not Liable for the Contamination

The Board should dismiss the Complaint because Inverse is not liable for the contamination pursuant to Section 22.2(j) of the Act and the Board cannot grant the relief requested. (415 ILCS 5/22.2(j)) Section 22.2(j) of the Act applies to this case based on the plain language of the proportionate share laws. As stated above, the proportionate share laws apply in this case due to Complainant's demand for response action. *Supra* at §C. The applicable regulations, Section 741.205(b), state that *the 22.2(j) defenses are available* under regulations promulgated for proportionate share liability in Section 58.9. (415 ILCS 5/58.9) Specifically, Section 741.205(b) states:

> Liability to perform or pay for a response that results from the release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site *is subject to all defenses allowed by law, including the defenses set forth in Section 22.2(j) of the Act,* and the limitations set forth in Section 58.9(a)(2) of the Act. (35 Ill. Adm. Code 741.205(b)) (emphasis added).

Therefore, Inverse may claim the defenses set forth in Section 22.2(j).[8]

[8] Although the Board has stated that the defenses under Section 22.2(j) are available in causes of action brought pursuant to Section 22.2 (*Cole Taylor Bank v. Rowe Industries, Inc.*, PCB 01-173, June 6, 2002), the Board did not address the availability of the defenses through the proportionate share regulations which specifically state that 22.2(j) applies. To hold otherwise ignores the plain language and frustrates the policy behind the defenses.

Under Section 22.2(j) of the Act, a person may claim a defense to liability when the act or omission causing the contamination is of a third party other than one whose act or omission occurred in connection with a contractual relationship, if the person can show he exercised due care, and took precautions against foreseeable acts or omissions of such third party and the consequences. (415 ILCS 5/22.2(j))

A party whose act or omissions occurred in connection with a contractual relationship does not include the person who inherited the property. (415 ILCS 5/22.2(j)(6)(A)(iii)) This is the same defense that is delineated in Section 107(b) of CERCLA. (42 U.S.C. 9607(b)) Section 107(b) and the cases interpreting it are informative for this case, particularly the interpretation of "due care." The person claiming that they took "due care" under §107(b) of CERCLA must show that they took all precautions that a similarly situated reasonable and prudent person would have taken (*New York v. Lashins Arcade Co.*, 91 F.3d 353 (2nd Cir. 1996)) and took "positive steps" to reduce the threat posed by the contamination. *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994). Inverse has done both.

The *New York v. Lashins Arcade Co.* case is analogous to this case because in *Lashins* the State was also demanding damages relating to cleanup of VOCs used by a dry cleaners at the site in the 1960s and 1970s. Lashins Arcade Co. ("Lashins") acquired the property in 1987 following four previous transfers of the property. *Id.* The Second Circuit found that Lashins was a third party and the release of VOCs did not occur in connection with a contractual relationship with Lashins. The court then found that Lashins took adequate precautions against further actions by third parties that would lead to a release because the release occurred over 15 years prior to the Lashins' purchase. *Id.* at 360. The Second Circuit focused its evaluation on whether Lashins took due care with respect to the hazardous substances. In looking at the legislative

history, the Second Circuit found that to demonstrate due care, a defendant must demonstrate that he took all precautions that a similarly situated reasonable and prudent person would have taken. *Id.* at 361. The court noted that Lashins had maintained the filter on its well, took water samples which were analyzed for VOCs on a semi-annual basis, and instructed all tenants to avoid discharging any hazardous substances into the waste and septic systems. *Id.* at 358. The Second Circuit concluded that Lashins' due care did not require it to go beyond the measures it already took to address the contamination nor already taken by the State at the time of the purchase. Thus, the Second Circuit held that the defense applied and Lashins was not liable. *Id.*

A related element in showing "due care" is that the person take "positive steps" to reduce the threat posed by the contamination. *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994). Those positive steps include taking precautions to prevent the "threat of release" or other foreseeable consequences arising from the pollution of the site. *Id.* Courts considering the meaning of "due care" have held that a person must not only monitor the contamination but also reduce the threat posed by the hazardous substance (*American Nat'l Bank & Trust Co. v. Harcros*, 997 F.Supp. 994 (N.D.Ill., 1998) and make attempts to test for, or address, hazardous substances (*City of Gary, Indiana v. Shafer*, 683 F.Supp.2d 836 (N.D.Ind., 2010)).

Inverse is not liable in this case because Section 22.2(j) clearly applies. First, Inverse inherited the property, and thus falls squarely within the definition of a third party who has no contractual relationship to any person that caused the original release. (Adams Affidavit ¶¶7-8) Second, Inverse has taken adequate precautions against further actions by such third party that would lead to a release. There are presently no dry cleaning operations at the Site (nor have there been for many years) nor any other operations that may use, dispose, or store in any way

similar chemicals. (Adams Affidavit ¶10) Third, Inverse has taken due care because it has taken multiple positive steps to investigate and remediate the Site. Since inheriting the Site, Inverse has investigated the soil and groundwater and instituted groundwater monitoring through the SRP program. (Butler Affidavit ¶¶5-9) Further, Inverse applied bio-remediation to reduce levels of chlorinated solvents and remediate the Site, consisting of a two-staged injection of an oxidant, RegenOx, followed by an accelerated bioremediation compound, HRC Advanced [HRC]. (Butler Affidavit ¶6) IEPA reviewed and approved all of these remedial activities. (Butler Affidavit ¶5) Groundwater monitoring shows that the contaminant levels at the Site are decreasing in response to the bio-remediation remedy. (Butler Affidavit ¶11)

In this case, because Inverse squarely falls within Section 22.2(j) of the Act, the Board cannot find Inverse liable for the contamination alleged in the complaint. Therefore, the complaint against Respondent must be dismissed because it fails to state a cause of action upon which the Board can grant relief.

III. CONCLUSION

For the reasons stated herein, Respondent, Inverse Investments, LLC, respectfully requests that the Board dismiss Complainant's Complaint.

Respectfully submitted,

INVERSE INVESTMENTS, L.L.C.

By _____
One of Its Attorneys

Jennifer T. Nijman
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois	)	
Complainant,	)	
v.	)	**PCB No. 11-79**
INVERSE INVESTMENTS, L.L.C., An Illinois Limited Liability Company,	)	
Respondent.	)	

AFFIDAVIT OF RICHARD ADAMS

Richard A. Adams, II, being first duly sworn on oath, deposes and states as follows:

1. I am the manager of Inverse Investments, LLC, ("Inverse") which has as an asset the land trust that the holds the property located at 3004 West Route 120 (Elm Street) in McHenry, McHenry County, Illinois (the "Site").
2. Inverse is an Illinois Limited Liability Company.
3. Inverse's only asset is the Site and its only income is the rental income from the property. Inverse provided financial data to Complainant, the People of the State of Illinois, in support of a claim of inability to pay and small business protection.
4. The former owner of the Site placed it into a land trust in the late 1990s.
5. After the former owner discovered contamination at the Site, the former owner enrolled the Site in the Illinois Site Remediation Program in October 2003.
6. In 2004, the former owner died and the Site was transferred to a trust for the benefit of the prior owner's wife.
7. In 2005, the trust that comprises the Site was transferred to Inverse.

8. Upon inheriting the Site, Inverse continued participating in the Site Remediation Program, spending significant resources addressing the contamination at the Site and taking extensive precautions to remediate the Site.
9. Inverse has spent in excess of $200,000.00 to date for the investigation and remediation of the Site.
10. Inverse has ensured that no pollutants or contaminants of concern have been disposed, stored, discharged, released or in any way associated with the property. The Site was leased by Enterprise (rental car) in 2005 and they moved on to the Site in May of 2006. No auto repair or other work is conducted at the Site.
11. In a meeting I attended and in recent correspondence to Inverse, IEPA demanded that Inverse connect the surrounding community to the municipal water system.
12. IEPA also informed me in a meeting that there were other sources of contamination in the area surrounding the Site and that none of the other sources have been pursued by IEPA.

I have personal knowledge of the facts stated herein.

I declare under penalty of perjury that the foregoing is true and accurate.

FURTHER AFFIANT SAYETH NOT.

Richard A. Adams, II

Sworn and subscribed before me
this 19 day of September, 2011

OFFICIAL SEAL
LYNDA WHITING
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:12/18/14

Notary Public

EXHIBIT B

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois	)	
Complainant,	)	**PCB No. 11-79**
v.	)	
INVERSE INVESTMENTS, L.L.C., An Illinois Limited Liability Company,	)	
Respondent.	)	

AFFIDAVIT OF MICHAEL BUTLER

Michael Butler, being first duly sworn on oath, deposes and states as follows:

1. I am a Professional Engineer for Stantec Consulting Services, Inc. (fka Bonestroo, Inc.) and have been retained by Inverse Investments, LLC, ("Inverse"), to investigate and remediate the property located at 3004 West Route 120 (Elm Street) in McHenry, McHenry County, Illinois (the "Site"). I have personal knowledge of the facts stated herein.
2. Adjacent properties to the Site are zoned industrial/commercial. There are current and former gas stations located in the area, including two stations (a Shell and a Phillips 66) at Route 120 and River Road.
3. Residential wells cited in the complaint are up to 1000 feet from the Site. For instance, residences at 1106, 1107 and 1109 River Road are approximately 1000 feet from the Site.
4. The Site was entered into the Illinois Site Remediation Program in October 2003.
5. After conducting various investigations, Inverse submitted a remedial objectives report and remedial for the Site in early 2007, which was reviewed and approved by the Illinois Environmental Protection Agency ("IEPA").

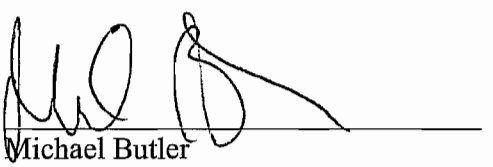
6. The remediation program approved by IEPA and implemented by Inverse is a bio-remediation to reduce levels of chlorinated solvents at the Site, consisting of a two-staged injection of an oxidant, RegenOx, followed by an accelerated bioremediation compound (HRC Advanced [HRC]) for remediation of tetrachloroethylene ("PCE") contamination in the soil and groundwater at the site.
7. The RegenOx was applied from August to November of 2007.
8. The HRC injection was completed in May to October of 2008.
9. Post-remedy quarterly monitoring of the groundwater began in November 2009 and is currently ongoing. The most recent samples were taken in August 2011.
10. Additional remedial activities at the Site are engineered barriers, institutional controls, and implementation of land use controls, as required.
11. The groundwater monitoring shows that the levels of contamination at the Site have decreased in response to the remedy. For example, vinyl chloride at monitoring well ('MW") 2 on the Site has gone from a high of 1.7 mg/l to the most recent sample in August 2011 of .88 mg/l; Vinyl chloride at MW 4 has gone from a high of 13 mg/l to the most recent sample in August 2011 of 2.4 mg/l; Tetrachloroethene at MW 5 has gone from a high of 4.0 mg/l to the most recent sample in August 2011 of 0.46 mg/l.
12. Constituents that are not related to a dry cleaner have been detected in wells in the vicinity of the Site. Methyl tertiary-butyl ether ("MTBE") has been detected in several samples (G106S, G106D and a private well) and benzene in others (G102).
13. MTBE is almost exclusively used as a fuel additive in motor gasoline. It has been used in U.S. gasoline at low levels since 1979 to replace lead as an octane enhancer (helps prevent the engine from "knocking"). *See US EPA "MTBE in Fuels,"* http://www.epa.gov/mtbe/gas.htm. Benzene is also a natural part of crude oil and

gasoline. *See Center for Disease Control, Facts about Benzene,* *http://www.bt.cdc.gov/agent/benzene/basics/facts.asp*.

14. Current and former gas station sources are located near the Site, and 2 are located to the northwest of the detections of MTBE. Neither MTBE nor benzene has been detected at the Site.

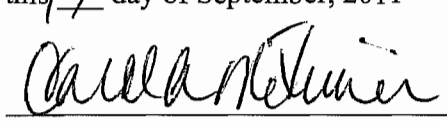
I declare under penalty of perjury that the foregoing is true and accurate.

FURTHER AFFIANT SAYETH NOT.



Michael Butler

Sworn and subscribed before me
this 9th day of September, 2011



Notary Public

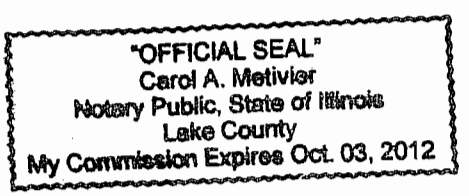


EXHIBIT C

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/785-8604
TDD 217/782-9143

7004 2510 0001 8622 4352
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 28, 2009

Inverse Investments, LLC
Attn: Richard Adams
P.O. Box 614
McHenry, Illinois 60051

Re: **Violation Notice, M-2009-01027**
1110605163–McHenry County
McHenry/Inverse Investments
ILR000110817
Compliance File

Dear Mr. Adams:

This constitutes a Violation Notice pursuant to Section 31(a)(1) of the Illinois Environmental Protection Act (Act), 415 ILCS 5/31(a)(1), and is based upon a record review completed on September 21, 2009 by a representative of the Illinois Environmental Protection Agency ("Illinois EPA").

The Illinois EPA hereby provides notice of alleged violations of environmental statutes, regulations, or permits as set forth in the attachment to this notice. The attachment includes an explanation of the activities that the Illinois EPA believes may resolve the specified alleged violations, including an estimate of a reasonable time period to complete the necessary activities. Due to the nature and seriousness of the alleged violations, please be advised that resolution of the violations may require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of statutory penalties.

A written response which may include a request for a meeting with representatives of the Illinois EPA, must be submitted via certified mail to the Illinois EPA within 45 days of receipt of this notice. The response must address each alleged violation specified in the attachment and include for each an explanation of the activities that will be implemented and the time schedule for the completion of that activity. If a meeting is requested, it shall be held within 60 days of receipt of this notice. The written response will constitute a proposed Compliance Commitment Agreement ("CCA") pursuant to Section 31 of the Act. The Illinois EPA will review the proposed CCA and will accept or reject it within 30 days of receipt.

If a timely written response to this Violation Notice is not provided, it shall be considered to be a waiver of the opportunity to respond and to meet provided by Section 31(a) of the Act, and the Illinois EPA may proceed with a referral to the prosecutorial authority.

Written communications should be directed to:

Illinois EPA
Attn: Brian White
Bureau of Land #24
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276

All communications must include reference to your **Violation Notice M-2009-01027**. If you have questions regarding this matter, please contact **Thomas Rivera** at **847/294-4079**.

Sincerely,

Paul M. Purseglove, Manager
Field Operations Section
Bureau of Land

PMP:TR:dv01027

Enclosure

cc: Division File
Des Plaines Region, Thomas Rivera
Andrew Catlin, IEPA/SRP
Carol Fuller, IEPA/OCR
Tom Crause, IEPA/OSE
Deanne Virgin

ATTACHMENT A

Inverse Investments, LLC is the owner of the property that is in apparent violation of the Illinois Environmental Protection Act because of a release of chlorinated Volatile Organic Compounds (chlorinated VOCs) to onsite soil and groundwater and to offsite groundwater. The site is located at 3004 W Route 120 (Elm Street) in McHenry. The attached Narrative provides documentation that supports the apparent violations.

1. Pursuant to Section 12(a) of the [Illinois] Environmental Protection Act (415 ILCS 5/12(a)), 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.

   A violation of Section 12(a) of the [Illinois] Environmental Protection Act (415 ILCS 5/12(a)) is alleged for the following reason: **The discharge of contaminants caused water pollution. Chlorinated VOCs were detected in onsite and offsite groundwater. Offsite potable drinking water wells are impacted above Class 1 Groundwater Remediation Objectives.**

2. Pursuant to Section 12(d) of the [Illinois] Environmental Protection Act (415 ILCS 5/12(d)), no person shall deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

   A violation of Section 12(d) of the [Illinois] Environmental Protection Act (415 ILCS 5/12(d)) is alleged for the following reason: **Contaminants were deposited upon the land in such a place and manner that created a water pollution hazard. Chlorinated VOCs were detected in onsite and offsite groundwater, and in onsite soil. Offsite potable drinking water wells are impacted above Class 1 Groundwater Remediation Objectives.**

3. Pursuant to Section 21(a) of the [Illinois] Environmental Protection Act (415 ILCS 5/21(a)), no person shall cause or allow the open dumping of any waste.

   A violation of Section 21(a) of the [Illinois] Environmental Protection Act (415 ILCS 5/21(a)) is alleged for the following reason: **Contaminants were open dumped. Chlorinated VOCs were detected in onsite and offsite groundwater, and in onsite soil. Offsite potable drinking water wells are impacted above Class 1 Groundwater Remediation Objectives.**

SUGGESTED RESOLUTIONS

* Immediately cease all open dumping.

* Immediately determine the source(s) of chlorinated VOCs that have been detected onsite and offsite.

* Immediately determine the extent of soil and groundwater contamination both onsite and offsite.

* Immediately manage the soil and groundwater to mitigate impairment caused by the release of chlorinated VOCs.

* Immediately provide an alternate potable drinking water supply to all private/non-community water well users within the area of concern where groundwater has been impacted with chlorinated VOCs.

* All copies of receipts/manifests, and analytical reports must be submitted to the Illinois EPA that document the proper disposal of any waste (i.e. impacted soil, contaminated groundwater). The receipts/manifests must be submitted within 10 days after the offsite shipment.

* Within 45 days from the receipt of this letter, provide the Village of McHenry with an agreed upon commitment to monetarily assist with the planned water main project that will make municipal water available to the area of concern where groundwater has been impacted with chlorinated VOCs.

* At the completion of the water main project, provide full monetary assistance to all private/non-community water well users with connections to the municipal water supply for the area of concern where groundwater has been impacted with chlorinated VOCs.

The written response to this Violation Notice must include information in rebuttal, explanation, or justification of each alleged violation and must be submitted to the Illinois EPA by certified mail within 45 days of receipt of this Violation Notice. The written response must also include a proposed Compliance Commitment Agreement that commits to specific remedial actions, includes specified times for achieving each commitment, and may include a statement that compliance has been achieved.

CERTIFICATE OF SERVICE

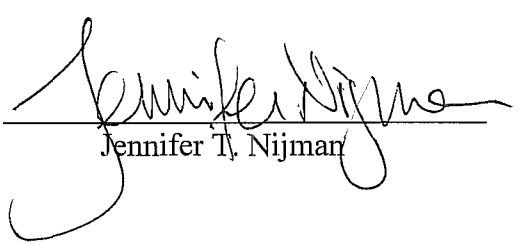
The undersigned certifies that on this 21st day of September, 2011, she caused to be served electronically the attached Respondent's Motion to Dismiss and Respondent's Memorandum in Support of Its Motion to Dismiss upon the following person:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and by U.S. Mail, first class postage prepaid, to the following persons:

Krystyna Bednarczyk
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, IL 60602

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



Jennifer T. Nijman