

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BNSF RAILWAY COMPANY, f/k/a The)
Burlington Northern and Santa Fe Railway)
Company,)

Complainant,)

v.)

INDIAN CREEK DEVELOPMENT COMPANY,)
an Illinois Partnership, individually and as)
beneficiary under trust 3291 of the Chicago Title and)
Trust Company dated December 15, 1981 and the)
Chicago Title & Trust Company, as trustee under)
trust 3291, dated December 15, 1981, and JB)
INDUSTRIES, INC.,)

Respondents.)

PCB 2014-081

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CLERK'S OFFICE

FEB 24 2014

STATE OF ILLINOIS
Pollution Control Board

 ORIGINAL

NOTICE OF MOTION

To: Pamela Nehring
Sean Sullivan
Daley Mohan Groble, P.C.
55 West Monroe Street
Suite 1600
Chicago, IL 60606

PLEASE TAKE NOTICE that on February 24, 2014, we caused to be filed with the Clerk of the Illinois Pollution Control Board located at the James R. Thompson Center, 100 Randolph, Suite 11-500, Chicago, Illinois, **RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINANT'S RESPONSE TO MOTION TO DISMISS**, a copy of which is attached hereto and is hereby served upon you.

William J. Anaya (ARDC No. 6180020)
Matthew E. Cohn (ARDC No. 6273807)
Arnstein & Lehr LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100
wjanaya@arnstein.com
mecohn@arnstein.com

Respectfully submitted,

Indian Creek Development Company, JB
Industries, Inc., and Chicago Title and Trust
Company, as Land Trustee under Trust No.
3291 dated December 15, 1981

By: 
One of Its Attorneys

CERTIFICATE OF SERVICE

Matthew E. Cohn, an attorney, certifies that a true and correct copy of the foregoing **RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINANT'S RESPONSE TO MOTION TO DISMISS** was served upon the following counsel of record:

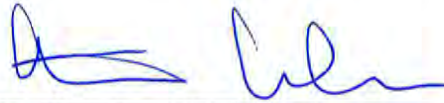
Pamela Nehring
Sean Sullivan
Daley Mohan Groble, P.C.
55 West Monroe Street
Suite 1600
Chicago, IL 60606

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STATE OF ILLINOIS
Pollution Control Board

by depositing a copy thereof, enclosed in an envelope, in the United States Mail at 120 South Riverside Plaza, Chicago, Illinois, proper postage prepaid, at or about the hour of 5:00 p.m. on February 24, 2014.



Matthew E. Cohn

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INDIAN CREEK DEVELOPMENT)
COMPANY, an Illinois Partnership, individually)
and as beneficiary under trust 3291 of the Chicago)
Title and Trust Company dated December 15, 1981)
and the Chicago Title & Trust Company, as trustee)
under trust 3291, dated December 15, 1981, and)
JB INDUSTRIES, INC.,)
)
Respondents.)
)

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Pollution Control Board



ORIGINAL


**RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY
TO COMPLAINANT'S RESPONSE TO MOTION TO DISMISS**

Respondents Indian Creek Development Company, JB Industries, Inc., and Chicago Title and Trust Company, as Land Trustee under Trust No. 3291, dated December 15, 1981 (collectively, "Respondents"), pursuant to 35 Ill. Adm. Code 101.500(e), hereby move the Illinois Pollution Control Board (the "Board") for leave to file a reply to Complainant BNSF Railway Company's ("BNSF") Response to Respondents' Section 31(d) Motion to Dismiss BNSF's Complaint. A copy of Respondents' reply brief is attached hereto as Exhibit A.

Should the Board grant Respondents' Motion for Leave, Respondents respectfully request that the attached Reply (Exhibit A) be deemed entered and filed with the Board.

Respectfully submitted,

Indian Creek Development Company, JB
Industries, Inc., and Chicago Title and Trust
Company, as Land Trustee under Trust No.
3291 dated December 15, 1981

By:  

One of Its Attorneys

William J. Anaya (ARDC No. 6180020)
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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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INDIAN CREEK DEVELOPMENT COMPANY,)
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Chicago Title & Trust Company, as trustee under)
trust 3291, dated December 15, 1981, and JB)
INDUSTRIES, INC.,)

Respondents.)

PCB 2014-081

**RESPONDENTS' REPLY TO
COMPLAINANT'S RESPONSE TO MOTION TO DISMISS**

Respondents Indian Creek Development Company, JB Industries, Inc., and Chicago Title and Trust Company, as Land Trustee under Trust No. 3291, dated December 15, 1981 (collectively, "Respondents"), as its reply to Complainant BNSF Railway Company's ("BNSF") Response to Respondents' Section 31(d) Motion to Dismiss, state as follows:

1. BNSF identifies in its Response 35 Ill. Adm. Code 741 as its basis to allocate proportionate share of liability from the release or substantial threat of a release of regulated substances. *Response*, ¶¶ 4-7.

2. BNSF cites to 35 Ill. Adm. Code 741 as the basis for its relief for the first time in its Response. In BNSF's initial Complaint, BNSF only cited to 415 ILCS 5/22.2d as the basis for Respondents' liability. *Complaint*, ¶ 36.

3. As explained in Respondents Section 31(d) Motion to Dismiss, BNSF's request for relief under 415 ILCS 5/22.2d is frivolous as the Consent Order under which BNSF has been

performing environmental response work since 1993 was not entered into, nor could have been entered into pursuant to 415 ILCS 5/22.2d. The order was not issued by the Director of the IEPA, as required by Section 22.2d. Further, the Consent Order, by its own terms, requires BNSF to investigate and remediate its own contamination that it is 100% liable for, and not any other contamination. Accordingly, BNSF has no cause of action against Respondents as the Board lacks authority to award BNSF contribution or allocation relief under Section 22.2d.

4. By asserting relief under 35 Ill. Adm. Code 741 for the first time in its Response, BNSF is improperly seeking to save its defective complaint from being dismissed as frivolous under 415 ILCS 5/31(d).

5. As the Complaint is defective, BNSF could only properly seek relief under 35 Ill. Adm. Code 741 by filing an amended complaint.

6. Even so, 35 Ill. Adm. Code 741 does not provide a cause of action against Respondents. 35 Ill. Adm. Code 741 is derived from 415 ILCS 58.9. Section 58.9 provides that no action may be brought:

to require any person to conduct remedial action or to seek recovery of costs for remedial activity . . . 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(a)(1)

7. Therefore, 35 Ill. Adm. Code 741 is not a proper basis of relief for BNSF because BNSF and Respondents are not jointly responsible for the contamination at issue.

8. In Respondents' complaint filed with the Board in a separate action (PCB 2007-044), which prompted Complainant to file this action, Respondents only requested relief for

environmental contamination attributed to BNSF. The only proper procedural course of action in that matter (PCB 2007-044) would be for BNSF to deny liability on Respondents' complaint that is pending before the Board.

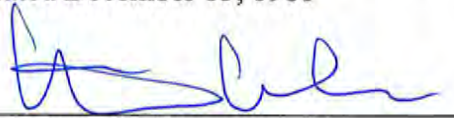
9. BNSF has in fact already denied liability for the contamination alleged to be caused by BNSF in Respondents' Complaint (in PCB 2007-044). As such, BNSF bringing a separate complaint here is not only procedurally improper but is also duplicative as there is no need or availability to request relief based on the 415 ILCS 5/58.9.

WHEREFORE, for the reasons stated above, BNSF's complaint should be dismissed as frivolous as BNSF does not have a cause of action against Respondents under 415 ILCS 5/22.2d or 415 ILCS 5/58.9.

Respectfully submitted,

Indian Creek Development Company, JB
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