BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

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

Complainant,

vs.

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

Respondents.

PCB-14-081

NOTICE OF FILING

TO: William J. Anaya
Matthew E. Cohn
Arnstein & Lehr LLP
120 South Riverside Plaza
Suite 1200
Chicago, IL 606

PLEASE TAKE NOTICE that on May 1, 2014, the undersigned filed with the Clerk of the Illinois Pollution Control Board, 100 West Randolph Street, James R. Thompson Center, Suite 11-500, Chicago, Illinois, **Complainant BNSF Railway Company's Response to Motion for Reconsideration**, a copy of which is herewith served upon you.

BNSF RAILWAY COMPANY

By:
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Sean M. Sullivan, an attorney, certify that I caused a true copy of the foregoing **BNSF's Notice of Filing** to be served upon the attorneys listed below, by electronic mail and U.S. mail on May 1, 2014:

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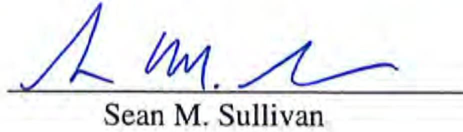

Sean M. Sullivan

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COMPLAINANT'S RESPONSE TO MOTION FOR RECONSIDERATION

Complainant, BNSF Railway Company ("BNSF"), by its attorneys, Daley Mohan Groble, P.C., as its response to Respondents' motion for reconsideration, states as follows:

BACKGROUND

1. The Board's Order

Respondents request reconsideration of the Board's March 20, 2014 order (the "Order") denying their motion to dismiss BNSF's complaint. In the complaint, BNSF seeks a judgment for costs of response at the subject property proportionate to Respondents' comparative responsibility for the presence of contaminants at the property. (Complaint, ¶ 38). BNSF alleges that Respondents violated §§ 12(a), 12(d) and 12(e) of the Environmental Protection Act (the "Act") and thereby caused or allowed contamination of the subject property. (Complaint, ¶¶ 28-

34; Order, at 9). Respondents moved to dismiss the complaint based on the argument that "the Board . . . lacks the authority to award BNSF contribution or to allocate Respondents' proportionate share of liability" (Motion to Dismiss, ¶ 23), and that § 58.9 of the Act only applies where complainant and respondent are "jointly responsible for the contamination at issue." (Reply, ¶ 7). Respondents cited no relevant authority in support of their arguments, and the Board correctly denied the motion to dismiss.

Under § 31(d)(1) of the Act, any person may file with the Board a complaint against any person allegedly violating the Act. Part 741 of the Environmental Code establishes procedures under which the Board will allocate proportionate shares of the performance or costs of a response resulting from the release or substantial threat of a release of regulated substances on, in, under or from a site (35 Ill. Adm. Code 741.100). Part 741 was adopted pursuant to the authority conferred under § 58.9(d) of the Act, and applies to proceedings before the Board in which any person seeks to recover the costs of a response that results from a release or substantial threat of a release of regulated substances. (35 Ill. Adm. Code 741.105(a)(1)).

In denying Respondents' motion to dismiss, the Board correctly applied the express provisions of the Act and Part 741. As the Board wrote:

> . . . Part 741 applies whenever a complaint is filed with the Board that seeks, under the Act, to require another person to perform, or to recover the costs of, a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in, under, or from a site. . . [C]ontrary to respondents' claim, Part 741 does not provide that a complainant and respondent must be jointly liable for alleged contamination. Part 741 merely places the burden on complainant to prove, and limits the clean-up cost recovery to, respondent's proportionate share.
>
> * * *
>
> The complaint sufficiently pleads a violation of the Act and thus is properly filed with the Board under Section 31(d) of the Act. . . . [U]nder Section 58.9 a person may seek contribution for remediation costs of a site where other persons

> have proximately contributed to contamination and, under Part 741, the Board is authorized to order a party to pay its proportionate share of liability for remediation costs.

(Order, at 10, 11).

Thus, the Board is expressly authorized to allocate responsibility and costs in the manner sought in BNSF's complaint.[1]

2. The Motion for Reconsideration

In their motion for reconsideration, Respondents suggest that the Board should "fully" consider the "language, context, intent and purpose" of § 58.9 of the Act, and should reverse its decision denying Respondents' motion to dismiss. (Motion for Reconsideration, at 2). However, Respondents offer no cogent argument as to why the language, context, intent or purpose of the statute support any conclusion other than the one the Board reached – that under § 58.9 "a person may seek contribution for remediation costs of a site where other persons have proximately contributed to contamination." (Order, at 11).

The purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of the original hearing, changes in existing law or errors in the court's application of the law. Continental Casualty Company v. Security Insurance Company of Hartford, 279 Ill. App. 3d 815, 821 (1st Dist. 1996); Korogluyan v. Chicago Title and Trust Company, 213 Ill. App. 3d 622, 627 (1st Dist. 1991). A party may not use a motion for reconsideration to merely recycle unsupported arguments the court has already rejected, or to proffer new legal theories not previously argued. See, e.g., Gonzalez v. Pollution

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[1] To establish a respondent's proportionate share, the complainant must show: (1) that the respondent proximately caused or contributed to a release or substantial threat of a release of regulated substances; and (2) the degree to which the performance or costs of a response result from the respondent's proximate causation of or contribution to the release or substantial threat of a release. (35 Ill. Adm. Code 741.205(a)).

Control Board, 2011 IL App (1st) 093021, ¶ 38; Holzer v. Motorola Lighting, Inc., 295 Ill. App. 3d 963, 978 (1st Dist. 1998). Respondents do not claim any change in the law, cite any new authority or propose any new legal theory warranting dismissal of the complaint. The motion for reconsideration should be denied.

ARGUMENT

A. Respondents' Argument that § 58.9 Does Not Apply is Contrary to the Language of the Statute and the Case Law on Which They Rely

Respondents argue that Title XVII (including § 58.9) is "just not applicable to this dispute." (Motion for Reconsideration, at 10). That is directly contrary to the language of the Act, and State Oil Company v. People of the State of Illinois, 352 Ill. App. 3d 813 (2nd Dist. 2004), upon which Respondents rely, says no such thing.

Section 58.1(a)(2) of the Act governs the applicability of proportionate share liability, and states:

> Any person, including persons required to perform investigations and remediations under this Act, may elect to proceed under this Title unless (i) the site is on the National Priorities List . . . , (ii) the site is a treatment, storage, or disposal site for which a permit has been issued, or that is subject to closure requirements under federal or State solid or hazardous waste laws, (iii) the site is subject to federal or State underground storage tank laws, or (iv) investigation or remedial action at the site has been required by a federal court order or an order issued by the United States Environmental Protection Agency. (emphasis added).

Thus, any person may pursue proportionate share liability unless the site fits one of the four enumerated exceptions. None of those four exceptions is remotely applicable to this site (and Respondents do not argue that any of the exceptions apply). Contrary to Respondents' suggestion, the court in State Oil recognized that the proportionate share liability provisions apply except in those limited circumstances described in the statute. The court wrote:

> According to the State, since the service station operated by Millstream is subject to underground storage tank laws, section 58.1(a)(2) exempts the station from the whole of Title XVII, which includes the proportionate share liability provision upon which Millstream relies. We agree with the State. . . . A plain reading of section 58.1(a)(2) shows that Millstream is excluded from the operation of Title XVII as a whole. (emphasis added).

352 Ill. App. 3d at 817.

Here, a plain reading of the statute shows that Title XVII (including § 58.9) does apply. None of the statutory exceptions apply, and BNSF is entitled to pursue a claim against Respondents for their proportionate share of liability.

B. The "Intent" of the Act is Shown by the Statutory Language

Respondents' argument that §58.9 was not "intended" to allow a "polluter" to obtain relief again ignores the express language of the statute. By definition a claim for proportionate liability is brought by a party that caused (or may have caused) some of the contamination at the subject site. The effect of the statute is to allocate a portion of the investigation and remediation costs to another party that also caused contamination at the site. That is exactly what BNSF seeks.[2]

The fundamental principle of statutory construction is to ascertain and give effect to the intent of the legislature. Town & Country Utilities, Inc. v. Illinois Pollution Control Board, 225 Ill. 2d 103 (2007). The best evidence of legislative intent is the language of the statute and courts should interpret the statutory language according to its plain and ordinary meaning. Lulay v. Lulay, 193 Ill. 2d 455 (2000); In re Estate of Ellis, 236 Ill. 2d 45 (2009). Where the statutory language is clear and unambiguous, courts may not depart from the statute's plain meaning by

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[2] Respondents also recycle the argument that § 58.9 "was intended to allocate responsibility between or among parties responsible for a common source of contamination." (Motion for Reconsideration, at 11). Respondents again offer no authority in support of this argument, which the Board rightly rejected in the Order.

reading into it exceptions, limitations, or conditions the legislature did not express. Ellis, 236 Ill. 2d at 51.

Based on the legislature's clear and unambiguous language, § 58.9 is intended to allow a party that caused contamination at a site to recover under the proportionate share process. Respondents posit various hypothetical scenarios and argue that the Act would not allow proportionate share liability in those circumstances. (Motion for Reconsideration, at 8). Even assuming that those hypotheticals are factually similar to this case, in each of those cases the party tasked with investigating and remediating the subject release would have the right to seek proportionate share liability from the adjoining property owner under the hypothetical facts given. The language of the statute allows no other conclusion.

Likewise, the fact that BNSF is operating under a consent order – or otherwise has any legal obligation to investigate or remediate the site – does not preclude a claim for proportionate share liability. (Motion for Reconsideration, at 7). Relief under § 58.9 is expressly available to any person "including persons required to perform investigations and remediations under this Act." 415 ILCS 5/58.1(a)(2) (emphasis added).

Respondents' related argument – that BNSF has not "proven" the existence of non-BNSF contamination – misses the point. (Motion for Reconsideration, at 7). The Board is addressing a motion to dismiss the complaint at the pleading stage. BNSF is not required to "prove" Respondents' liability in the complaint.[3]

[3] The entire premise of the Respondents' motion is the factual assumption that they did not cause any contamination at the site. (Motion for Reconsideration, at 2, 3, 7, 8, 10, 11). That is a factual matter to be determined at the hearing – it is not a ground for seeking dismissal of the complaint.

C. The Circuit Court's Analysis of BNSF's Common Law Counterclaim for Unjust Enrichment is Unrelated to the Board's Determination of Proportionate Share Liability

The Board's analysis of BNSF's statutory claim for proportionate share liability involves only the allegations of the complaint and the language of the Act and Part 741 of the Environmental Code. It is in no way governed by the Circuit Court's ruling on a separate and distinct common law claim for unjust enrichment. (Motion for Reconsideration, at 6-7). In the Circuit Court, Respondent Indian Creek argued primarily that BNSF could not state a claim for unjust enrichment unless it alleged a separate tort or contract claim. (Motion for Reconsideration, Ex. G, at 7-10). The Circuit Court apparently accepted that argument as the ground for dismissing the counterclaim:

> I agree with plaintiff that there is no right or claim for restitution or unjust enrichment on the facts as they stand.
>
> And there was a reference by Mr. Sullivan to the possibility that he could state a cause of action or he could replead it to state something in the nature of an implied contract to get to the restitution and unjust enrichment; however, I don't see that as a possibility under these facts.

(Motion for Reconsideration, Ex. J, at 38).

Although Indian Creek's choice to litigate its claims in multiple forums has created a convoluted procedural landscape – which BNSF described in its complaint – the issues before the Circuit Court were completely separate from BNSF's statutory claim for proportionate share liability.[4] The Board correctly denied Respondents' motion to dismiss BNSF's complaint. The Circuit Court's decision (on different common law claims) provides no basis for reconsideration of the Board's Order.

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[4] The Circuit Court itself recognized the separate nature of proceedings before the court and those before the Board, when it granted BNSF's motion to stay Indian Creek's claims for injunctive relief pending disposition of Indian Creek's citizen suit before the Board. (Motion for Reconsideration, Ex. J, at 37).

D. The Purported Limited Applicability of the Consent Order and Indian Creek's PCB Action Do Not Exclude a Claim for Proportionate Liability

Respondents' final argument – that no proportionate share liability claim exists because the consent order and Indian Creek's PCB complaint refer only to contamination caused by BNSF – is also baseless. (Motion for Reconsideration, at 3-5). The argument is disingenuous because Respondents assert – in the same motion – that BNSF must investigate and remediate non-BNSF contamination. Thus, Respondents argue:

> Any investigation or remediation of non-BNSF contamination that may exist on Respondents' property is incidental to BNSF's existing legal duty.

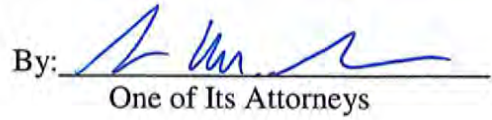
(Motion for Reconsideration, at 7).

It may be impossible to remediate BNSF contamination (if any) and Respondents' contamination (if any) separately. Under those circumstances, BNSF is entitled to recover from respondents a share of the remediation costs proportional to their share of the contamination. Moreover, the statute does not limit recovery to remediation costs – it includes investigation costs. Thus, if a portion of the contamination BNSF has been required to investigate is attributable to Respondents, BNSF is entitled to recover that portion of the investigation costs even if BNSF is not required to remediate Respondents' contamination.

CONCLUSION

Respondents have offered no colorable basis for dismissal of the complaint, or for reconsideration of the Board's order denying the motion to dismiss. The motion for reconsideration appears to serve no purpose other than to delay the progress of this proceeding and to cause BNSF to incur unnecessary costs. BNSF requests that the Board deny Respondents' motion for reconsideration and enter such further relief as it determines is appropriate.

BNSF RAILWAY COMPANY

By: 
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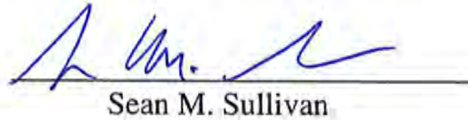

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