

BEFORE THE 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)

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JAN 10 2007

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

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

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

DATE: January 5, 2007

BNSF RAILWAY COMPANY

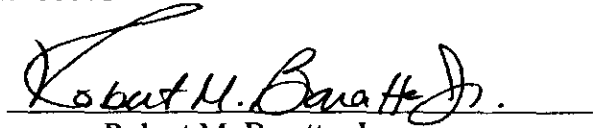
By: Robert M. Baratta Jr.
One of Its Attorneys

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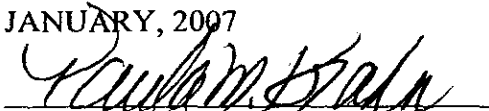
CERTIFICATE OF SERVICE

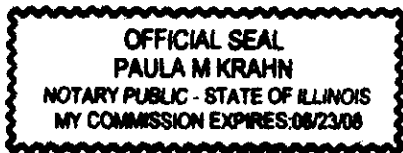
I, the undersigned, certify that I have served the Respondent's Memorandum in Support of Its Motion to Dismiss by depositing the same in the U.S. Mail box at 311 South Wacker Drive, Chicago, Illinois before 5:00 p.m. on January 5, 2007, postage prepaid and addressed to:

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


Robert M. Baratta, Jr.

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 5th DAY OF
JANUARY, 2007


NOTARY PUBLIC



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RESPONDENT'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS

Complainant has admittedly filed a duplicative action before the Illinois Pollution Control Board (the "Board"). This proceeding duplicates a lawsuit filed by the Illinois Attorney General and the State's Attorney of Kane County (the "State") in the Circuit Court of Kane County, which addressed the very same railroad incident, involved the same respondent/defendant, and provided for the cleanup of the same environmental conditions. Indeed, the Complainant here alleges the very same violations of the Illinois Environmental Protection Act (the "Act"), with one exception, as the State alleged in the Kane County lawsuit. The State and the BNSF Railway Company ("BNSF"), the respondent in this action, settled the Kane County lawsuit in February 1996 in a 31-page Consent Order, which provided for the same type of relief as Complainant seeks in this proceeding. Moreover, Complainant admits in the Complaint that "[t]he Agency is working to fulfill its role under the Consent Decree [sic] and to obtain the remediation by BNSF." (Compl. ¶21). By filing this action, Complainant attempts to

circumvent the Consent Order, disregarding the detailed and comprehensive resolution previously reached between the State and BNSF and ordered by the Circuit Court of Kane County. The Complaint is duplicative and should be dismissed by the Board.

BACKGROUND ALLEGATIONS

The Complaint and the exhibits attached thereto describe the following “facts,” which define the circumstances surrounding this matter for purposes of this Motion to Dismiss¹:

1. “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.” (Compl. ¶3).
2. The Consent Order attached as Exhibit A to the Complaint describes in detail the purported release of diesel fuel resulting from a collision between two trains on January 20, 1992. (Exhibit A to Compl. pp. 5-6). This is the subject “railroad operations” noted in the Complaint.
3. “Subsequent to the release and pursuant to the Act, including Sections 12(a) and 12(d), the Attorney General and the State’s Attorney of Kane County filed an enforcement action against the BNSF and others in the Circuit Court bearing case number CH KA 95 0527.” (Compl. ¶5).
4. “On or about February 5, 1996, a consent decree² ... was entered in the Kane County enforcement action regarding the release of diesel fuel on the BNSF Property.” (Compl. ¶6).
5. “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 the BNSF Property.” (Compl. ¶7).

¹ BNSF neither admits nor denies the allegations in the Complaint at this time. If the Board denies this Motion to Dismiss, BNSF reserves the right to file an answer to the Complaint.

6. “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.” (Compl. ¶8).

7. “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.” (Compl. ¶9).

8. Under the Consent Order, the parties are required to “use their best efforts to resolve all disputes or differences of opinion arising with regards to this Consent Order, informally and in good faith. If, however, disputes [arose] concerning this Consent Order which the parties are unable to resolve informally, either party may, by written motion, request that an evidentiary hearing be held before the Kane County Circuit Court to resolve the dispute between the parties.” (Exhibit A to Compl. p. 26).

9. Additionally, under the Consent Order, “any party hereto, upon motion, may reinstate these proceedings solely for the purpose of enforcing the terms and conditions of this Consent Order.” (Exhibit A to Compl. p. 30).

10. Under the Consent Order, BNSF agreed to: (1) pay a substantial civil penalty (Exhibit A to Compl. pp. 8-9); (2) imposition of stipulated penalties for failure to comply with the Consent Order (Exhibit A to Compl. pp. 9-10); (3) payment of past and future response and oversight costs (Exhibit A to Compl. pp. 10-11); (4) assume full responsibility for the cleanup on and off the BNSF site (Exhibit A to Compl. pp. 16-25); and (5) cease and desist from future violations of the Act (Exhibit A to Compl. p. 26).

² The Complaint refers to a “Consent Decree,” but the subject document is actually a Consent Order.
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11. The Consent Order contains pages of detailed response action requirements to be implemented by BNSF, including the submission of work plans, feasibility studies (for *in situ* and other technologies), notifications and reports. The Consent Order provides an orderly process and timeline for completion of this work. (Exhibit A to Compl. pp. 16-25).

12. Complainant admits that “[t]he Agency is working to fulfill its role under the Consent Decree and to obtain the remediation by the BNSF.” (Compl. ¶21).

ARGUMENT

A simple comparison of the Complaint and the Consent Order attached to the Complaint as Exhibit A establishes that the alleged violations in the complaint are the very same matters that were resolved by the State and BNSF in the Consent Order. The Complaint and the Kane County lawsuit both address the purported release of diesel fuel resulting from the collision of two trains on January 20, 1993. The Complaint and the Kane County lawsuit both allege the same or similar violations of the Act. The Complaint is brought by Indian Creek in its capacity as a private attorney general, whereas the Kane County lawsuit was brought by the actual attorney general. BNSF is the defendant/respondent in both the Complaint and the Kane County lawsuit. There simply is no substantive difference between this action and the Kane County lawsuit brought by the State.

The Board addressed this very issue in *Lefton Iron and Metal Co., Inc. v. Moss American Corp.*, PCB 87-191, 1990 WL 263948 (Nov. 29, 1990). In *Lefton*, the complainant, Lefton, Iron and Metal Co., brought a citizen’s enforcement action against respondent Moss American Corp. and its affiliates alleging violations of the Act. As in this case, the respondent Moss American Corp. was a defendant in a state court case brought by the Illinois Attorney General’s Office. Like BNSF and the State, the respondent and the Illinois Attorney General had entered into a

consent decree in which respondent undertook responsibility for the cleanup and agreed to pay a civil penalty. In dismissing the Board action, the Board concluded that “[d]ue to the existence of the consent decree, the question of whether [respondent] has violated Sections 12 and 21 of the Act is moot. [Respondent] has undertaken full liability and, as such, the purpose of the Act has been achieved.” *Id.* at 3. The Board further found that “the presence of only one adjudicator would alleviate the possibility of two dissimilar rulings and future litigation.” *Id.* at 4. The Board finally concluded that “[i]t is the Board’s position that in instances where the Board has concurrent jurisdiction with the Circuit Court, substantially similar matters previously brought before the Circuit Court can similarly be dismissed by the Board.” *Id.* at 4 citing *Northern Illinois Anglers Assn. v. City of Kankakee*, PCB 88-183 (January 5, 1989) at 5; See also *Sherex Chemical Co., v. Illinois EPA*, PCB 91-202, 1992 WL 196660 (July 30, 1992) (“The Board concludes that because the Agency has entered into a consent decree agreeing to the corrective action measures to be performed at the [site], it is barred from imposing a permit condition designating that same site as a SWMU subject to investigation and corrective action.”).

Under the Consent Decree, BNSF, among other things, assumed full responsibility for the cleanup, paid a civil penalty and agreed to cease and desist from future violations of the Act. Additionally, BNSF agreed to stipulated penalties in the event of failure to comply with the Consent Order. The Consent Order fully addresses the release of diesel fuel at and from the BNSF property. Like the *Lefton* case, the Consent Order moots Complainant’s arguments, as the violations and resulting environmental conditions have already been fully addressed by the Circuit Court of Kane County.

Moreover, should the Board entertain this action, the Board would create the very real possibility of conflicting mandates and/or inconsistent findings. The Complainant seeks relief from the Board with respect to the remediation that is contradictory to the response actions mandated by the Consent Order. For instance, the Consent Order requires that BNSF maintain its diesel fuel containment and recovery system, meet IEPA closure criteria and submit various work plans and closure reports for IEPA approval. In the Complaint, the Complainant requests that Indian Creek or the Board (not IEPA) select the means of remediation and set the cleanup criteria at background levels. Moreover, the Complaint requests that Indian Creek or the Board select the response action contractor, essentially disqualifying the present contractor who has substantial knowledge about the environmental conditions and has already submitted remediation work plans for the Complainant's property to IEPA.

Quite simply, the Consent Order provides the process and means by which Complainant's property is to be remediated. An order from the Board granting the relief sought in the Complaint would place BNSF between two masters: the Board and the Circuit Court of Kane County. Recognizing this problem, the dissent in *State of Illinois v. Estate of Lloyd Weiman and Cheryl Halbrooks*, PCB 93-191, 1999 WL 1134752 (December 2, 1999) found,

Thus, citizens may bring enforcement actions under the Act, but such complaints are subject to a duplicitous and frivolous determination by the Board, unlike the cases brought by the Attorney General on behalf of the People. The citizen suit under Section 31(d) is subject to the duplicitous and frivolous test for a variety of reasons, among which are to insure that the Attorney General and the "private attorney general" do not duplicate efforts and that a respondent is not required to defend against a claim more than once.

Id. at 2.

Here, complainant is acting as a “private attorney general” in bringing its citizen’s enforcement claims under the Act. These claims, however, duplicate the claims made by the Illinois Attorney General and the State’s Attorney of Kane County. BNSF should not be subject to enforcement claims in two separate actions by plaintiffs and complainants who are acting in the same capacity. As the dissent noted above, a respondent “is not required to defend against a claim more than once.”

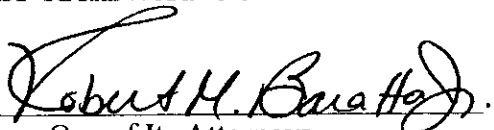
CONCLUSION

Complainant asks the Board to ignore that fact that the violations and environmental conditions alleged in the Complaint have already been addressed by the Illinois Attorney General and the State’s Attorney of Kane County in the Kane County lawsuit. The Consent Order resulting from that lawsuit governs the on-site and off-site environmental response action, response costs, fines, liquidated penalties and cease and desist requirements – precisely the same type of matters sought by complainant in the Complaint. Indeed, Complainant specifically alleges that “[t]he Agency is working to fulfill its role under the Consent Decree and to obtain the remediation by the BNSF.” In other words, the IEPA is overseeing and directing the cleanup of Complainant’s property. Why then should the Board become involved? As the Board has ruled in similar matters, there simply is no reason to subject a respondent like BNSF to duplicative enforcement actions seeking the same type of relief. Moreover, any action by the Board granting the relief requested would very likely be in direct contradiction to the Consent

Order entered by the Circuit Court of Kane County. For these reasons, the Complaint should be dismissed.

Respectfully submitted,

BNSF RAILWAY COMPANY

By: 
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