

ILLINOIS POLLUTION CONTROL BOARD  
March 20, 2014

BNSF RAILWAY COMPANY, f/k/a The	)	
Burlington Northern and Santa Fe Railway	)	
Company,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 14-81
	)	(Citizen's Enforcement - Water, Land)
INDIAN CREEK DEVELOPMENT	)	
COMPANY, an Illinois Partnership, individual	)	
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.	)	

ORDER OF THE BOARD (by D. Glosser):

On December 10, 2013, BNSF Railway Company (BNSF) filed a complaint against Indian Creek Development Company (ICDC) and JB Industries, Inc. (JB Industries) (collectively, respondents). The complaint (Comp.) alleges that respondents violated Sections 12(a), 12(d), and 21(e) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), and 21(e) (2012)). The complaint also alleges that BNSF incurred costs for its environmental response work on ICDC's property regarding petroleum constituents not related to a 1993 collision and diesel fuel spill on BNSF's property. BNSF seeks "judgment in its favor and against respondents in an amount commensurate with respondents' comparative responsibility for the presence of contaminants on the ICDC site." The ICDC site is located at 1500 Dearborn Avenue, Aurora, Kane County.

On January 9, 2014, respondents timely filed a motion to dismiss the complaint (Mot.). On February 10, 2014, BNSF filed a response to the motion to dismiss (Resp.). On February 24, 2014, respondents filed a motion for leave to file a reply to BNSF's response to the motion to dismiss, accompanied by a reply (Reply). For the reasons discussed below, the Board denies the motion to dismiss and directs the parties to proceed to hearing.

In this order, the Board first sets out the procedural history of this case. The Board then summarizes the complaint, motion to dismiss the complaint, response to the motion to dismiss, and reply. Next, the Board provides the applicable legal framework, including a discussion of citizen's enforcement actions and the standards that apply in determining whether a complaint is duplicative or frivolous. Finally, the Board rules on respondents' motion to dismiss.

## **BACKGROUND**

This complaint stems from a train collision involving BNSF that occurred on January 20, 1993, which resulted in locomotive diesel fuel leaking into the environment. Comp. at 2. On February 9, 1996, BNSF entered into a Consent Decree with the People of the State of Illinois, the Illinois Attorney General, and the Illinois Environmental Protection Agency (Agency) to provide for investigation and remediation of the fuel that spilled on BNSF's property as a result of the train collision. Comp. at 2. BNSF entered into an Amendment to the Consent Order on November 18, 2006, after ICDC discovered diesel fuel on its property, alleged to be fuel resulting from the 1993 collision and spill. Comp. at 3.

On December 4, 2006, ICDC filed a complaint before the Board, alleging that, as a result of the 1993 collision and spill, BNSF violated Sections 12(a), 12(d), and 12(e) of the Act. Comp. at 3; *see Indian Creek Development Company, et al. v. Burlington Northern Santa Fe Railway Co.*, PCB 07-44, slip op. at 1 (March 15, 2007). In the complaint, ICDC requests that BNSF be required to remediate the ICDC site, that ICDC and its consultants be permitted to monitor the remediation, and that BNSF be required to reimburse ICDC for all costs and expenses relating to the investigation and remediation. Comp. at 3-4. The Board complaint remains pending. *Id.* at 4.

On November 9, 2007, ICDC filed a complaint against BNSF in the Circuit Court for the Sixteenth Judicial Circuit in Kane County. Comp. at 4. Through the complaint, ICDC sought damages and injunctive relief relating to the 1993 collision and spill. *Id.* The lawsuit remains pending. *Id.*

On December 10, 2013, BNSF filed the complaint at issue here alleging various violations of the Act. On January 9, 2014, respondents filed a motion to dismiss the complaint. On February 10, 2014, BNSF filed a response to the motion to dismiss. On February 24, 2014, respondents filed a motion for leave to file a reply to BNSF's response to the motion to dismiss, accompanied by a reply. On March 4, 2014, BNSF filed a response objecting to the motion for leave to file the reply (Resp.Reply)

## **MOTION TO FILE REPLY**

Respondents seek leave to file a reply with the Board. BNSF argues that the reply offers no additional support or information that would assist the Board in making its determination. Resp.Reply at 1-2. BNSF asks that the Board deny the motion for leave to file a reply. Section 101.500(e) provides that "the moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The Board grants the motion for leave to file the reply to prevent material prejudice. The Board will consider the reply.

## COMPLAINT

The complaint alleges that pursuant to the Consent Order and the Amendment to the Consent Order, BNSF has spent large sums of money in order to investigate and remediate the presence of locomotive diesel fuel resulting from the 1993 collision and spill. Comp. at ¶ 13. BNSF states that it has spent large sums of money on obtaining access to the ICDC site, on consultants retained by ICDC, and on reimbursement to the Agency for investigation and remediation costs. *Id.* JB Industries is an affiliate and principal tenant of the ICDC site. *Id.* at ¶12.

BNSF alleges that the petroleum constituents found or that will be found on the ICDC site are likely to be from sources other than the 1993 collision and spill, “including sources for which Respondents are responsible.” Comp. at ¶ 14. BNSF alleges that the ICDC site has a history of engaging in and continues to engage in “heavy industrial activity” and investigations have concluded that oil and gas tanks, as well as oil reservoirs, have been present on the property over the years. *Id.* at ¶¶ 17-18. The complaint alleges that a variety of petroleum products are also presently located on the property and there is a history of numerous environmental releases at the ICDC site. *Id.* at ¶¶ 19, 21.

BNSF states that its investigation, pursuant to the Consent Orders, concluded that the petroleum and other contaminants on the ICDC property did not come from the 1993 collision and spill. Comp. at ¶ 23. The complaint alleges that the polynuclear aromatic hydrocarbons (PAHs) found on the ICDC site could not have migrated to the ICDC site from the 1993 spill. *Id.* at ¶ 25. Further, the petroleum constituents found on the site are heavy fuel oil, not diesel fuel, which was the type of fuel involved in the 1993 spill. *Id.* at ¶ 26.

The complaint then alleges that respondents violated Sections 12(a), 12(d), and 21(e) of the Act (415 ILCS 5/12(a), 12(d), and 21(e) (2012)). Comp. at ¶¶ 28-34. BNSF alleges that respondents “caused or allowed contaminants” on the ICDC property in violation of the Act. *Id.* at ¶ 33. Further, the complaint alleges that respondents have caused or allowed contaminants into the ground and soil, as well as the groundwater on the property. *Id.* at ¶ 34.

Lastly, BNSF alleges that because of the expense that it incurred and continues to incur investigating and remediating the ICDC site, BNSF is entitled to reimbursement of those amounts. *Id.* at ¶¶ 37-38. The complaint states that pursuant to Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012), BNSF is entitled to judgment “in an amount commensurate with Respondents’ comparative responsibility for the presence of contaminants on the ICDC Site.” *Id.* at ¶ 38.

With respect to the allegations set forth in its complaint, BNSF requests judgment be entered in its favor in an amount equal to the costs BNSF incurred in investigating and remediating the ICDC site. Comp. at 10-11. BNSF further seeks an amount equal to respondents’ “comparative responsibility” for the presence of contaminants on the property. *Id.* at 11.

## STATUTORY AND REGULATORY BACKGROUND

Section 31(d)(1) of the Act provides in pertinent part:

Any person<sup>1</sup> may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder. 415 ILCS 5/31(d)(1) (2012).

Section 22.2d of the Act provides in pertinent part:

[T]he Director may issue to any person who is potentially liable under this Act for the release or substantial threat of release any order that may be necessary to protect the public health and welfare and the environment.

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[A]ny person may seek contribution from any other person who is liable for the costs of response actions under this Section. In resolving contribution claims, the Board or court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

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The provisions of Section 58.9 of this Act do not apply to any action taken under this Section. 415 ILCS 5/22.2d(b), (f), (h) (2012).

Section 58.9 of the Act provides:

[I]n no event may the Agency, 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 or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person beyond the remediation of release of regulated substances that may be attributed to being proximately caused by such person's acts or omissions or beyond such person's proportionate degree of responsibility for costs of the remedial action of release of regulated substances that were proximately caused or contributed to by 2 or more persons. 415 ILCS 5/58.9(a)(1) (2012).

The Board's "Proportionate Share Liability" rules implement Section 58.9 of the Act. *See* 35 Ill. Adm. Code 741. Section 741.100 sets out the purpose of the Part:

The purpose of this Part is to establish procedures under which the Board will allocate proportionate shares of the performance or costs of a response resulting

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<sup>1</sup> The Act defines "person" as "any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent, or assigns." 415 ILCS 5/3.315 (2012).

from the release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site. 35 Ill. Adm. Code 741.100.

Section 741.105, which addresses the applicability of the proportionate share liability rules, states in relevant part:

- a) This Part applies to proceedings before the Board in which:
  - 1) Any person seeks, under the Environmental Protection Act [415 ILCS 5] or the Groundwater Protection Act [415 ILCS 55], 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; \*\*\* 35 Ill. Adm. Code 745.105(a)(1); *but see* 35 Ill. Adm. Code 741.105(f) (matters to which Part 741 is inapplicable).

Section 741.125 requires the complainant to serve the Agency with a copy of the complaint seeking cost recovery:

A person seeking allocation of proportionate shares must serve a copy of the complaint . . . on the Agency within 30 days after the filing of the complaint or petition. \*\*\* 35 Ill. Adm. Code 741.125.

Additionally, Section 741.205 of the Board's proportionate share rules provides:

- a) To establish a respondent's proportionate share, the complainant must prove the following by a preponderance of the evidence:
  - 1) That the respondent proximately caused or contributed to a release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site; 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 as established under subsection (a)(1) of this Section.

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- c) A complainant is not required to plead a specific alleged percentage of liability for the performance or costs of a response in a complaint that seeks to require a respondent to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides. 35 Ill. Adm. Code 741.205(a), (c).

### **MOTION TO DISMISS**

Respondents move to dismiss the complaint on the ground that the complaint is frivolous. First, respondents argue that the complaint is frivolous because the Board does not have the authority to grant the relief requested. Mot. at ¶ 23. BNSF requests relief under Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)). *Id.* at ¶ 17. Respondents allege that Section 22.2d(f) does not apply in this situation because a contribution action under Section 22.2d is only appropriate when seeking contribution from recipients of an order from the Director. *Id.* at ¶ 20. Section 22.2d(f) of the Act authorizes a person to bring an allocation complaint against another person who is liable for response costs “under this Section.” 415 ILCS 5/22.2d(f) (2012). The Consent Order under which BNSF has been investigating and remediating the ICDC site, in connection with the 1993 spill, was entered in state court and not pursuant to Section 22.2d of the Act. *Id.* at ¶ 22. Thus, respondents argue that the Board does not have the authority to grant BNSF relief under Section 22.2d(f). *Id.* at ¶ 23.

Second, respondents argue that the complaint is frivolous because there is no basis for the relief sought by BNSF, and thus BNSF failed to state a cause of action upon which the Board can grant relief. Mot. at ¶ 24. Respondents state that the Consent Order requires BNSF to investigate and remediate only contamination that BNSF caused. *Id.* Respondents allege that because respondents are not responsible for the contamination on the ICDC site resulting from the 1993 spill, and because respondents are not obligated to remediate any other possible contamination present on the site, there is no basis for the relief sought by BNSF from respondents because the Consent Order only pertains to BNSF-caused contamination. *Id.*

Lastly, respondents argue that the relief sought in the complaint is not available because the Agency did not follow the procedural requirements under Section 22.2d(b) of the Act (415 ILCS 5/22.2d(b) (2012)). Mot. at ¶ 25. Respondents state that the Agency specifically never required BNSF to follow certain United States Environmental Protection Agency (USEPA) regulations relating to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as well as never issued BNSF a Special Notice Letter as required by that Section. *Id.* Therefore, respondents argue that the complaint should be dismissed. *Id.*

### **RESPONSE TO MOTION TO DISMISS**

In its response, BNSF asserts that the Board has express authority to grant the relief that BNSF requests. Resp. at 2. BNSF argues that under Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2012)), anyone may file a complaint with the Board for an alleged violation of the Act. *Id.* BNSF alleges that Part 741 of the Board’s rules (35 Ill. Adm. Code 741) sets out procedures for the Board to follow when allocating proportionate shares of performance or costs of a response. *Id.*, citing 35 Ill. Adm. Code 741.100. BNSF argues that Part 741 “applies to proceedings before the Board in which any person 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.” Resp. at 2, citing 35 Ill. Adm. Code 741.105(a)(1).

BNSF argues that respondents' focus on the applicability of Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)) in its motion to dismiss "misses the point." Resp. at 3; *see* Mot. at 5. BNSF argues that Section 22.2d(f) is only one avenue for obtaining an allocation of proportionate shares. Resp. at 3. BNSF also argues that regardless of whether Section 22.2d(f) applies here, Part 741 of the Board's rules allows an allocation complaint. Resp. at 3. BNSF argues that Section 22.2(d)(f) applies here because ICDC filed a complaint seeking to have the Agency require BNSF to remediate the site according to ICDC's proposed standards. Resp. at 3, n. 1. Therefore, BNSF argues that the Board is authorized to allocate responsibility and costs in the manner in which BNSF seeks, and the motion to dismiss should be denied. Resp. at 2.

Further, BNSF opines that its complaint for allocation is "particularly warranted" because ICDC "has filed a complaint with the Board in which it seeks to mandate remediation of the site under terms separate and apart from the terms of the Consent Order between BNSF and the State . . ." Resp. at 2-3. BNSF filed a separate complaint because the Board's procedures do not provide for a counterclaim for allocation. Resp. at 3. Therefore, BNSF suggests that the two proceedings should be consolidated after the Board receives respondents' answer to the complaint. *Id.*

### **REPLY TO THE RESPONSE TO MOTION TO DISMISS**

In their reply, respondents argue that because the Board lacks the authority to grant the requested relief under Section 22.2d of the Act (415 ILCS 5/22.2d (2012)), the complaint is defective and should be dismissed. Reply at 1-2. Respondents again argue that the relief requested by BNSF cannot be granted under Section 22.2d of the Act because the Consent Order was not granted pursuant to Section 22.2d and was not issued by the Director of the Agency. *Id.* at 2. Additionally, respondents state that BNSF first mentioned Part 741 of the Board's rules (35 Ill. Adm. Code 741) as a basis for relief in its response to the motion to dismiss. *Id.* Because Section 22.2d of the Act (415 ILCS 5/22.2d (2012)) was the only basis for BNSF's requested relief in its complaint, the complaint is defective. *Id.*

Because the complaint is defective, respondents argue that BNSF can only seek relief under Part 741 of the Board's rules (35 Ill. Adm. Code 741) by filing an amended complaint, which it has not done here. Reply at 2. Furthermore, respondents argue that Part 741 (35 Ill. Adm. Code 741) does not provide a cause of action against respondents. *Id.* Respondents argue that pursuant to Section 58.9 of the Act (415 ILCS 5/58.9 (2012)), from which Part 741 is derived, parties must be jointly responsible for the alleged contamination in order to bring a valid allocation complaint. *Id.* Respondents argue that because BNSF and respondents are not jointly responsible for the contamination on the ICDC site, Part 741 of the Board's rules (35 Ill. Adm. Code 741) is not a proper basis for relief. *Id.*

Lastly, respondents argue that the complaint should be dismissed because it is duplicative. Reply at 2-3. Respondents state that in their "complaint filed with the Board in a separate action (PCB 07-44), which prompted [BNSF] to file this action, Respondents only requested relief for environmental contamination attributed to BNSF." *Id.* Respondents argue that the only "proper procedural course of action" in PCB 2007-044 would be for BNSF to deny liability on respondents' complaint. *Id.* at 3. Because BNSF has already denied liability for the

contamination alleged in the prior complaint (PCB 2007-044), respondents argue that BNSF filing a separate complaint here is both procedurally improper and duplicative. *Id.*

## **DISCUSSION**

The Board first provides the legal framework for today's decision. The Board then analyzes and resolves respondents' motion to dismiss.

### **Legal Framework**

Section 31(d)(1) of the Act authorizes any person to file a complaint with the Board against any person in violation of the Act or Board rules. 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). Under this Section, the Board shall schedule a hearing unless it finds the complaint to be "duplicative or frivolous." *Id.*

This type of enforcement action is referred to as a "citizen's enforcement proceeding," which the Board defines as "an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois." 35 Ill. Adm. Code 101.202. BNSF's complaint against ICDC initiated a citizen's enforcement proceeding.

Section 31(c) states that the complaint "shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation . . . ." 415 ILCS 5/31(c) (2012). Even though "[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in the court of law," (*Lloyd A. Fry Roofing Co. v. PCB*, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)), the Act and the Board's procedural rules "provide for specificity in pleadings" (*Rocke v. PCB*, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)), and "the charges must be sufficiently clear and specific to allow preparation of a defense" (*Lloyd A. Fry Roofing*, 20 Ill. App. 3d at 305, 314 N.E.2d at 354).

The Board's procedural rules codify the requirements for the contents of a complaint, including:

- 1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating.
- 2) 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.
- 3) A concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c).



Within 30 days after being served with a complaint, a respondent may file a motion to strike or dismiss a complaint, which may include a challenge that the complaint is “duplicative” or “frivolous.” 35 Ill. Adm. Code 101.506, 103.212(b). A complaint is “duplicative” if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. A complaint is “frivolous” if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.*

### **Motion to Dismiss**

In deciding a motion to dismiss, the Board considers all well-pled facts contained in the pleading as true, and draws all inferences from the facts in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001); Shelton v. Crown, PCB 96-53 (May 2, 1996); Krautsak v. Patel, PCB 95-143 (June 15, 1995). Dismissal of the complaint is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See Stein Steel*, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143.

The complaint sets forth allegations that respondents violated Section 12(a), 12(d), and 21(e) of the Act (415 ILCS 5/12(a), (f), and 21(e) (2012)). Comp. at ¶¶ 28-34. BNSF alleges that respondents “caused or allowed contaminants” on the ICDC property in violation of the Act. *Id.* at 33. Further, the complaint alleges that respondents have caused or allowed contaminants into the ground and soil, as well as the groundwater on the property. *Id.* at ¶ 34. Respondents do not argue that the allegations of violations of the Act are frivolous, but rather that the remedy sought by BNSF cannot be granted.

Respondents specifically assert that the Board lacks the authority to grant the relief requested under Section 22.2d of the Act (415 ILCS 5/22.2d (2012)). To be clear, the complaint quotes Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)) and then alleges that Agency wrongfully required BNSF to remediate contaminates on respondent’s property that were respondent’s responsibility. Comp. at ¶ 36, 37. The complaint then states:

BNSF is entitled to a judgment in its favor and against respondent in an amount to all of the costs that BNSF has incurred to investigate and remediate the ICDC Site. Alternatively, BNSF is entitled to a judgment in its favor and against respondents in an amount commensurate with respondents’ comparative responsibility for the presence of contaminants on the ICDC Site. Comp. at ¶38.

In this instance the complaint alleges violations of the Act and seeks recovery of costs for clean-up at the site, and the complaint cites to a statutory provision for the premise that the Board can allocate costs. Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)) grants the Board the authority to allocate response costs among responsible parties under specific circumstances. Therefore, the Board finds it does have the authority to grant BNSF the relief requested in the complaint.

Furthermore, regarding respondents' arguments concerning Part 741, there is no requirement for a complaint to plead that Part 741 applies. *See People v. Waste Hauling Landfill, Inc.*, PCB 10-9, slip op. at 14-15 (Dec. 3, 2009) (noting Part 741 applicable though complaint makes no reference to Part 741); *see also* 35 Ill. Adm. Code 741. Nor is there any requirement that the complaint plead a specific percentage of liability for response costs. *See* 35 Ill. Adm. Code 741.205(c). Generally, 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. *See* 35 Ill. Adm. Code 741.105(a)(1), (d). Also contrary 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. *See* 35 Ill. Adm. Code 741.205(a), 741.210(b).

A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *See* 35 Ill. Adm. Code 101.202. Considering the facts in the complaint as true, and drawing all inferences in favor of the non-movant, the Board finds that this matter is not frivolous as the Board can award contribution of remediation costs. The Board further finds that the complaint sufficiently alleges violations of the Act pursuant to Section 31 of the Act (415 ILCS 5/31 (2012)).

The Board notes that the reference to Section 22.2d(f) of the Act Act (415 ILCS 5/22.2d(f) (2012)) in the complaint seems to be one theory that BNSF is putting forward for relief. In BNSF's responses to the motion to dismiss, BNSF offers another theory for the relief BNSF is seeking. The Board cannot determine at this time whether complainant's requested relief is available under Section 22.2d(f). However, under 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.

Respondents further argue that the complaint should be dismissed because it is duplicative. Reply at 2-3. Respondents argue that the only course of action following from the previous complaint in PCB 07-44 would be to deny liability, which BNSF has already done. *Id.* at 3. First, the Board finds that the complaint at issue here is not duplicative. While BNSF has denied liability before, BNSF is now bringing a complaint alleging that respondents violated the Act and are responsible for a portion of the contamination on the ICDC site. Comp. at ¶¶ 13-14. BNSF, in its actions pursuant to the previous Consent Order, argues that it has incurred substantial costs in remediating contamination that allegedly was not caused by the 1993 collision and spill. *Id.* The Board finds that these allegations were not previously alleged in the former proceeding (PCB 07-44), and thus the complaint at issue is not duplicative. *See* PCB 07-44.

### **Conclusion on the Motion**

Under these circumstances, the Board denies the motion to dismiss. The complaint sufficiently pleads a violation of the Act and thus is properly filed with the Board under Section 31(d) of the Act (415 ILCS 5/31(d) (2012)). The Board cannot determine at this time whether BNSF's requested relief is available under Section 22.2d(f). However, under 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. Viewing the allegations in the complaint in the light most favorable to BNSF, the complaint sufficiently pleads what relief BNSF seeks. Therefore, the Board accepts the complaint for hearing. .

### **HEARING**

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2012); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2012). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2012). Section 42(h) requires the Board to ensure

that the penalty is “at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship.” *Id.* Such penalty, however, “may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent.” *Id.*

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent’s economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 20, 2014, by a vote of 4-0.



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John T. Therriault, Clerk  
Illinois Pollution Control Board