

**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. )

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**JAN 09 2014**

PCB 2014-081 **STATE OF ILLINOIS**  
Pollution Control Board

 **ORIGINAL**

**NOTICE OF FILING**

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

PLEASE TAKE NOTICE that on January 9, 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' SECTION 31(d) MOTION TO DISMISS**, a copy of which is attached hereto and is hereby served upon you.

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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' SECTION 31(d) 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

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 January 9, 2014.



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Matthew E. Cohn

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**RESPONDENTS' SECTION 31(d) 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 Section 31(d) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/31(d), and 35 Ill. Adm. Code 101.202, hereby move the Illinois Pollution Control Board (the "Board") to dismiss BNSF Railway Company's ("BNSF") Complaint for Allocation of Proportionate Share Responsibility. Pursuant to Section 22.2d(f) of the Act, 415 ILCS 5/22.2d(f), BNSF improperly seeks an award of "contribution" and an "allocation" of Respondents' "proportionate share of liability" for costs incurred by BNSF for its environmental response work on Respondents' property. BNSF is entitled to neither.

BNSF has an obligation to investigate and clean up its own contamination that it caused to become located on Respondents' property. A judicial Consent Order



requiring such response work was entered in an enforcement action brought by the State of Illinois against BNSF. BNSF claims that while addressing its own contamination on Respondents' property, BNSF also responded to Respondents' contamination. Respondents deny that they contaminated their property, but even if they did, Section 22.2d(f) of the Act affords BNSF no right to contribution, no right to an allocation of a proportionate share of liability, and no right to relief of any kind, as BNSF's actions were not associated with an order issued by the IEPA Director pursuant to Section 22.2d(b) of the Act. The Board has no authority to act on BNSF's Complaint. BNSF's Complaint is frivolous and should be dismissed.

In support thereof, Respondents state as follows:

#### **BACKGROUND**

1. Respondents own and lease property commonly known as 601 North Farnsworth Avenue and 1500 Dearborn Street in Aurora, Illinois (hereinafter the "Indian Creek Property").

2. Since at least 1993, BNSF has owned, operated, controlled and maintained railroad tracks, a railroad yard, and right-of-way adjacent to and immediately north of the Indian Creek Property. Five railroad tracks traverse east and west, and parallel the northern line of the Indian Creek Property for approximately 2,200 feet.

3. On January 20, 1993, without any fault of Respondents or any one of them, a locomotive collision took place on BNSF's railroad tracks, resulting in the rupture of locomotive fuel tanks and the release of locomotive diesel fuel. (Respondents also allege that in addition to locomotive diesel fuel, other petroleum products were released.)

4. After the collision, BNSF reported to the Illinois Emergency Management Agency that 7,000 gallons of locomotive diesel fuel were released to the environment.

5. In response to the release of locomotive diesel fuel, the State of Illinois initiated an enforcement action against BNSF in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, in a case titled People of the State of Illinois v. Burlington Northern Railroad Company, et al., Case No. CH KA 95 0527.

6. In 1996, a Consent Order was entered in the Circuit Court case which required that, under the oversight of the Illinois Environmental Protection Agency ("IEPA"), BNSF investigate and remediate the locomotive diesel fuel and contamination caused by the 1993 collision, wherever present.

7. BNSF's locomotive diesel fuel and contamination migrated from the collision site to the Indian Creek Property, and in 2009, the Consent Order was specifically amended to identify the Indian Creek Property as part of the "Site" to be investigated and remediated by BNSF.

8. Now, over twenty years after the collision, locomotive diesel fuel and contamination caused by the collision remain on and under the Indian Creek Property, and the IEPA continues to demand that BNSF investigate and remediate that locomotive fuel and contamination there.

9. BNSF argues that based on the historical and contemporary industrial uses of the Indian Creek Property, there is petroleum contamination on the Indian Creek Property not associated with the 1993 locomotive collision, and that incidental to responding to its own locomotive diesel fuel and contamination, BNSF has incurred and

will continue to incur costs for the investigation and remediation of the allegedly non-BNSF contamination.

10. Even if non-BNSF contamination is present on the Indian Creek Property, which Respondents deny, Respondents are not required by the IEPA to perform their own investigation and remediation work of any non-BNSF contamination.

11. Respondents never asked for, wanted, or sought BNSF's environmental response work to address any non-BNSF contamination, if even present, on the Indian Creek Property

12. BNSF is not entitled to contribution from Respondents. Respondents did not contribute to the contamination that BNSF caused and that BNSF must investigate and clean up.

13. BNSF is not entitled to an allocation of a proportionate share of liability from Respondents. There is nothing to allocate.

14. BNSF must simply investigate and remediate its own locomotive diesel fuel and petroleum contamination, as required by the State of Illinois and the IEPA.

#### **SECTION 31(d) STANDARD**

15. Section 31(d) of the Act provides that any person may file a complaint with the Board, and further states that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d).

16. 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." 35 Ill. Adm. Code 101.202.



## ARGUMENT

17. Although not presented in a clear and concise manner, BNSF's Complaint does ultimately identify Section 22.2d(f) of the Act, 415 ILCS 5/22.2d(f), as the basis for the relief it seeks.

18. Section 22.2d(f) of the Act provides:

any 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.

415 ILCS 5/22.2d(f) (emphasis added).

19. The response actions "under this Section" are response actions performed pursuant to orders issued by the Director of the IEPA under its Section 22.2d(b) authority. Section 22.2d(b) allows the Director of the IEPA to

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.

415 ILCS 5/22.2d(b).

20. Stated simply, a Section 22.2d(f) contribution action is available to a Section 22.2d(b) order recipient. BNSF's pursuit of relief pursuant to Section 22.2d(f) is misplaced. Section 22.2d(f) of the Act serves a different purpose, and is for a different kind of action.

21. Providing additional context, in 2005, over twelve years after the locomotive collision, Section 22.2d was added to the Act to allow the Director of the IEPA:

to quickly and effectively respond to a release or substantial threat of a release of a hazardous substance, pesticide, or petroleum for which the Agency is required to give notice under Section 25d-3(a) of this Act by authorizing the Director to issue orders, unilaterally or on consent, requiring appropriate response actions and by providing for the exclusive administrative and judicial review of these orders.

415 ILCS 5/22.2d(a). (Section 25d-3(a) of the Act, referred to in Section 22.2d(a) quoted above, requires the IEPA to notify the owners of properties that are affected by soil or groundwater contamination that extends beyond the boundaries of the sites that are the sources of such soil and groundwater contamination.)

22. The Consent Order pursuant to which BNSF has been performing environmental response work since 1993 was entered in state court (i.e., the Circuit Court of Kane County) in 1996 (amended in 2009). The Consent Order was not entered pursuant to, and has no connection with, Section 22.2d of the Act. There was no order issued by the Director the IEPA against BNSF, and there could not have been such an order because Section 22.2d of the Act did not exist at the time of the collision.

23. The Board therefore lacks the authority to award BNSF contribution or to allocate Respondents' proportionate share of liability pursuant to Section 22.2d(f) of the Act, as requested by BNSF.

24. Furthermore, pursuant to its own terms, the 1996 Consent Order only requires BNSF to investigate and remediate its own contamination. The Consent Order does not apply to other contamination. Since Respondents are not responsible for the locomotive diesel fuel and contamination on the Indian Creek Property that resulted from the 1993 collision, and since Respondents have no obligation to investigate and



remediate any other contamination on the Indian Creek Property, if even present, there is no basis for the contribution sought by BNSF from Respondents.

25. Lastly, the inapplicability of Section 22.2d(f) of the Act is apparent by the fact that the IEPA did not follow any the procedural requirements provided under Section 22.2d(b) of the Act. The IEPA never required BNSF to follow the United States Environmental Protection Agency regulations adopted pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 415 ILCS 5/22.2d(b)(1). And the IEPA never issued BNSF a Special Notice Letter. 415 ILCS 5/22.2d(b)(2). The absence of the IEPA following these procedural steps further demonstrates that the relief sought by BNSF pursuant Section 22.2d(f) of the Act is unavailable.

### CONCLUSION

26. For the reasons stated above and as briefly summarized below, BNSF's complaint should be dismissed in its entirety as frivolous pursuant to Section 31(d) of the Act, 415 ILCS 5/31(d), and 35 Ill. Adm. Code 101.202:

a. Section 22.2d(f) of the Act, the statutory provision through which BNSF seeks its relief, is only applicable to orders issued by the Director of the IEPA pursuant to Section 22.2d(b) of the Act;

b. BNSF has performed and will continue to perform environmental response work pursuant a judicial Consent Order entered in 1996 (amended in 2009), not a Section 22.2d(b) order;

c. BNSF is being required by the State of Illinois and the IEPA to address its own locomotive diesel fuel and contamination that it caused to become located on the Indian Creek Property;

d. Respondents have not been required by the State of Illinois or the IEPA to address any contamination on the Indian Creek Property;

e. The Board lacks the authority to require the Respondents to pay BNSF any costs of contribution to BNSF, or to allocate a proportionate share of liability to Respondents.

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