

BEFORE THE 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.

ORIGINAL

PCB-14-081

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FEB 10 2014

STATE OF ILLINOIS Pollution Control Board

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 February 10, 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's Response to Motion to Dismiss Complaint for Allocation of Proportionate Share Responsibility, a copy of which is herewith served upon you.

BNSF RAILWAY COMPANY

By: [Signature] One of Its Attorneys

Pam Nehring
Sean M. Sullivan
Jennifer Schuch
DALEY MOHAN GROBLE, P.C.
55 West Monroe Street
Suite 1600
Chicago, Illinois 60603
(312) 422-9999

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 February 10, 2014:

William J. Anaya
Matthew E. Cohn
Arnstein & Lehr LLP
120 South Riverside Plaza
Suite 1200
Chicago, IL 60606

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STATE OF ILLINOIS
Pollution Control Board



Sean M. Sullivan

BEFORE THE 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.)
_____)

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PCB-14-081

**COMPLAINANT'S RESPONSE TO MOTION TO DISMISS
COMPLAINT FOR ALLOCATION OF PROPORTIONATE SHARE RESPONSIBILITY**

Complainant, BNSF Railway Company ("BNSF"), by its attorneys, Daley Mohan Groble, P.C., as its response to Respondents' motion to dismiss the complaint for allocation of proportionate share responsibility, states as follows:

1. 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).

2. Respondents seek dismissal based on the argument that "the Board . . . lacks the authority to award BNSF contribution or to allocate Respondents' proportionate share of liability." (Motion, ¶ 23). That is simply incorrect.

3. Under § 31(d)(1) of the Environmental Protection Act (the “Act”) (415 ILCS 5/31(d)(1)), “[a]ny person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act . . .”

4. Part 741 of the Environmental Code specifically “establish[es] 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 or pesticides on, in, under or from a site.” (35 Ill. Adm. Code 741.100).

5. 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. (35 Ill. Adm. Code 741.105(a)(1)).

6. 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)).


7. The Board determines the proportionate shares of responsibility based on various factors, including: (1) the volume of regulated substances for which each person is responsible; (2) the degree of risk or hazard posed by the regulated substances contributed by each person; and (3) the degree of each person’s involvement in any activity that proximately caused or contributed to the release or substantial threat of release. (35 Ill. Adm. Code 741.135).

8. Thus, the Board is expressly authorized to allocate responsibility and costs in the manner sought in BNSF’s complaint. BNSF’s complaint for allocation is particularly warranted

in this case because Respondent Indian Creek Development Company (“Indian Creek”) 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, including the requirement of remediation to “residential standards.” (See Indian Creek Complaint, at 8-10, attached hereto as Exhibit A). Because the Board’s procedures do not provide for a “counterclaim” for allocation, BNSF filed a separate complaint. BNSF suggests that the two proceedings should be consolidated after Respondents answer the complaint.¹

9. A complaint should not be dismissed unless it clearly appears that no set of facts could be proven that would entitle a complainant to relief. Miehl v. Chicago Bridge and Iron Co. (November 4, 1993), PCB 93-150. Particularly where Indian Creek has sought a determination from the Board that BNSF is responsible for remediation costs at the site, BNSF is authorized to use the Board’s express allocation procedures to assert Respondents’ proportionate responsibility. The Respondents’ motion to dismiss should be denied.

BNSF RAILWAY COMPANY

By: 
One of Its Attorneys

¹ Respondents’ exclusive focus on the applicability of § 22.2d(f) misses the point. (Respondents’ Motion, ¶¶ 19-21). First, that statutory provision is just one mechanism allowing contribution and allocation of fault. See, 35 Ill. Adm. Code Part 741; People v. Fiorini, 143 Ill. 2d 318, 337-338 (1991) (allowing defendant sued by Attorney General under the Act to assert third-party complaint for contribution). Regardless of whether § 22.2d(f) applies, the Administrative Code specifically allows an allocation complaint. Second, that statute does apply because Indian Creek has filed a complaint with the Board seeking, among other things, to have the IEPA require BNSF to remediate the site according to Indian Creek’s proposed standards.

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CERTIFICATE OF SERVICE

I, Sean M. Sullivan, an attorney, certify that I caused a true copy of the foregoing **Complainant's Response to Motion to Dismiss Complaint for Allocation of Proportionate Share Responsibility** to be served upon the attorneys listed below, by electronic mail and U.S. mail on February 10, 2014:

William J. Anaya
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Sean M. Sullivan

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 SANTA FE)
RAILWAY COMPANY, a Delaware Corporation)

Respondents.)

PCB- 07-44
Citizen's Enforcement
§21(e), §12(a), §12(d)

RECEIVED
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STATE OF ILLINOIS
Pollution Control Board

COMPLAINT

VIOLATIONS OF SECTION 21(e) OF THE ILLINOIS ENVIRONMENTAL
PROTECTION ACT (415 ILCS 5/21(e))

NOW COME the complainants, Indian Creek Development Company, individually and as the beneficiary owner under the Chicago Title and Trust Company trust number 3291 dated December 15, 1981 and the Chicago Title and Trust Company, trustee under trust number 3291 dated December 15, 1981 (collectively, "Indian Creek") and in support of its complaint against the Respondent, the Burlington Northern Santa Fe Railway Company ("BNSF") Indian Creek states as follows:

1. At all times relevant hereto, complainant, Indian Creek Development Company, an Illinois Partnership, was the beneficial owner, through the aforesaid Chicago Title and Trust Company t/u/t 3291, of certain real property in Kane County, Illinois commonly known as 1500 Dearborn Avenue, Aurora, Illinois 60505 and including



property index numbers: 15-13-376-001; 15-14-479-005, 15-14-479-006, 15-14-479-009, and 15-14-479-010; 15-23-227-026 and 15-23-227-028; 15-24-101-004; 15-24-102-001, 15-24-102-008, 15-24-102-009 and 15-24-102-010; 15-24-103-002 and 15-24-103-003. (collectively the "Premises").

2. At all times relevant hereto, respondent, BNSF, a Delaware corporation, owned real property adjacent to the Premises which contained railroad tracks upon which BNSF operated a railroad ("BNSF Property").

3. 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.

4. The direction of groundwater flow is from the BNSF Property to the Premises and Indian Creek, which runs through the Premises.

5. Subsequent to the release and pursuant to the Act, including Sections 12(a) and 12(d), the Attorney General and State's Attorney of Kane County filed an enforcement action against the BNSF and others in Circuit Court bearing case number CH KA 95 0527.

6. On or about February 5, 1996, a consent decree (hereinafter, "Consent Decree") was entered in the Kane County enforcement action regarding the release of diesel fuel on the BNSF Property. A copy of that Consent Decree is attached hereto as Exhibit A.

7. 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 of the BNSF Property.

8. 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. See generally Exhibit A.

9. 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.

10. The BNSF's initial efforts to remediate the affected areas, limit the migration of free product, and recover released diesel fuel were primarily focused on areas distanced from the Premises. Moreover, these efforts were largely unsuccessful, resulting in the recovery of only a small amount of the diesel fuel that was actually released.

11. Since 1993, the diesel fuel has remained abandoned on and under the BNSF Property and thereafter has migrated, and continues to migrate, from the BNSF Property onto and under the Premises.

12. On or about late October or November, 2000, Indian Creek excavated a small portion of a building floor on the Premises in order to install a piece of equipment

there. The area of the excavation of the Premises was located near the boundaries of the BNSF Property.

13. During the excavation, an odor was noted and free product and apparently contaminated soil and groundwater were observed. Subsequently, samples of the free product were taken from the excavated part of the Premises, and lab analysis identified the free product as diesel fuel.

14. Indian Creek notified BNSF of the excavation on the Premises, and the attendant odor, and the BNSF responded by removing some of the contaminated soil from the excavation on the Premises.

15. The BNSF has a duty to prevent the migration to and contamination of the soil and groundwater on and under the Premises, but despite the obligations imposed by law and the Consent Decree, the BNSF has completely failed to take sufficient steps to halt the migration of the diesel fuel contamination onto the soil and groundwater on and under the Premises.

16. In contravention of its duty, the BNSF did little to remediate the affected areas, recover released diesel fuel, limit the migration of the diesel fuel contamination, adequately sample to determine the extent of contamination, and to monitor the migration of the diesel fuel contaminants from the BNSF Property.

17. Diesel fuel contamination on the BNSF Property continues to migrate onto the Premises, further contaminating the soil and groundwater located on and under the Premises on an ongoing basis.

18. Subsequent to the discovery of diesel fuel contamination on the Premises, without having performed any remediation of the premises and without prior

notification to Indian Creek, the BNSF requested Agency closure of the incident pursuant to the Consent Decree without notifying the Agency of the contamination that Indian Creek found on the Premises.

19. The BNSF failed to disclose the contamination of the Premises to the Agency despite Indian Creek's notification to the BNSF regarding the contamination it found on and under the Premises when it excavated, despite the BNSF's removal of contaminated soil from the excavation on the Premises, despite the observations of BNSF's agents, servants, and employees when it removed the contaminated soil, and despite the fact that laboratory analysis of samples taken from the excavations of the Premises revealed that the contamination was diesel fuel. A copy of the BNSF's request for closure dated April 2, 2001 with a prior request for closure dated November 6, 1998 attached thereto, attached to this petition as Exhibit B.

20. The spread of diesel fuel contamination to portions of the BNSF property not initially impacted and eventually to the Premises was willful, as is amply demonstrated by the BNSF's attempt to close the incident under the Consent Decree without informing the Agency of the diesel fuel contamination on and under the Premises.

21. The Agency is working to fulfill its role under the Consent Decree and to obtain the remediation by the BNSF.

22. The diesel fuel contamination in the groundwater under both the BNSF Property and under the Premises constitutes Water Pollution within the meaning of Section 3.545 of the Environmental Protection Act, 415 ILCS 5 *et. seq.* ("the Act"), as it is a nuisance, renders such groundwater harmful or detrimental or injurious to public

health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

23. This case is a refiling of Kane County case number 04 L 607 filed on or about December 7, 2004.

24. This case, like the Kane County case, concerns contamination that has migrated to and continues to migrate onto the Premises from the BNSF Property. The Kane County case was voluntarily dismissed on November 21, 2006. A copy of the order of dismissal is attached as Exhibit C.

COUNT I
Section 12(a) Violation

25 Paragraphs 1-24 are incorporated by reference as paragraph 25 hereof.

26. Section 12(a) of the Act provides that no person shall:

Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

27. Section 3.550 of the Act defines "Waters" as all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

28. Accordingly, the groundwater under the Premises and that under the BNSF Property are Waters within the meaning of Section 3.550 of the Act.

29. Section 3.165 of the Act (415 ILCS 5/3.165) defines "Contaminant" as any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

30. The diesel fuel which was released is a Contaminant within the meaning of Section 3.165 of the Act.

31. Section 3.545 of the Act defines "Water Pollution" as such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545.

32. The General Assembly has expressly found "that pollution of the waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses". 415 ILCS 5/11(a).

33. The BNSF caused and allowed the discharge of diesel fuel contaminants on the BNSF Property in 1993, threatened, caused and allowed the discharge of said diesel fuel contaminants through migration to other parts of the BNSF Property, and threatened and eventually caused and allowed the ongoing discharge of contaminants onto the soil and into the groundwater on and under the Premises so as to cause and tend to cause water pollution in violation of Section 12(a) of the Act.

34. Because of the ongoing migration of the diesel contamination and its continued discharge onto and under the Premises, the violation of Section 12(a) of the

Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

WHEREFORE, Complainants, pray that the Board grant the following relief in favor of Indian Creek and against the BNSF:

- A. Find the BNSF in violation of Section 12(a) of the Act;
- B. Direct the BNSF to cease and desist from further violations of Section 12(a) of the Act;
- C. Mandate and direct the abatement of the continuing violation of Section 12(a) of the Act at the expense of the BNSF as follows:
 - i. Mandate the remediation of the BNSF Property in such a manner as to stop the ongoing contamination of the Premises; and
 - ii. Mandate that the Premises be remediated to achieve the removal of all contamination on the Premises that flowed from the BNSF Property;
 - iii. Mandate, to the extent technically feasible, that all remediation be performed to background levels and that, in no event, remediation be performed to a level less than the applicable residential standards contained in the Tiered Approach to Corrective Action Objectives, 35 Ill. Admn. Code 742; and
 - iv. Mandate that the remediation of the Premises occurs pursuant to the Agency's Site Remediation Program and that a No Further Remediation Letter be obtained;

- D. Mandate that the Agency as well as the Parties hereto and their consultants and attorneys be permitted to monitor the remediation of the BNSF Property and the Premises, and allow them to have access to all reports and laboratory analyses related in any way to the BNSF Property and the contamination thereon;
- E. Order that any and all remediation be conducted by consultants and engineers selected by either Indian Creek or the Board due to the BNSF's failure to take adequate steps over more than 13 years to prevent to migration of the contamination to other properties, and based on the BNSF's attempt to obtain closure of the incident without notification to Indian Creek and without informing the Agency of the contamination that it knew existed on and under the Premises;
- F. Order that any and all remediation that is conducted be conducted by utilizing methods selected by either Indian Creek or the Board;
- G. That the Board request the Agency to investigate the facts and violations set forth herein pursuant to Section 30 of the Act and thereafter name the Agency as a party in interest, pursuant to 35 Ill. Adm. Code 101.404 and 103.202, to coordinate the Agency's duties and efforts pursuant to the Consent Decree, Exhibit B;
- H. Mandate that the BNSF reimburse Indian Creek for its all of its costs and expenses (including the fees of consultants and experts as well as the cost of sampling and laboratory analysis) related to the contamination, including but not limited to:

- i. The costs of past and, to the extent reasonably necessary, future investigation of the contamination on the Premises;
 - ii. The costs of past and, to the extent reasonably necessary, future sampling and monitoring of the contamination on the Premises, its migration from the BNSF Property to the Premises; AND
- I. Grant such other and further relief as the Illinois Pollution Control Board deems appropriate.

COUNT II
Section 12(d) Violation

35. Paragraphs 1 to 34 are incorporated by reference as paragraph 35 hereof.
36. Section 12(d) of the Act provides that no person shall:

Deposit any contaminants upon the land in such a place and manner so as to create a water pollution hazard.
37. The BNSF caused and allowed the deposit of diesel fuel contaminants on the BNSF Property in 1993. Subsequently, the BNSF caused and allowed the deposited contaminants to move, migrate, and deposit onto other portions of the BNSF Property, and eventually to the Premises.
38. Accordingly, the BNSF's actions have created a water pollution hazard on both the BNSF Property and the Premises in violation of Section 12(d) of the Act.
39. Because of the ongoing migration of the diesel contamination onto the Premises, the violation of Section 12(d) of the Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

WHEREFORE, Complainants, pray that the Board grant the following relief against the BNSF:

- A. Find the BNSF in violation of Section 12(d) of the Act;
- B. Direct the BNSF to cease and desist from further violations of Section 12(d) of the Act;
- C. Mandate and direct the abatement the continuing violation of Section 12(d) of the Act at the expense of the BNSF as follows:
 - i. Mandate the remediation of the BNSF Property in such a manner as to stop the ongoing contamination of the Premises;
 - ii. Mandate the Premises be remediated causing the removal of all contamination on the Premises which flowed from the BNSF Property;
 - iii. Mandate, to the extent technically feasible, that all remediation be performed to background levels and, in no event, that the remediation be performed to a level less than applicable residential standards contained in the Tiered Approach to Corrective Action Objectives, 35 Ill. Admn. Code 742;
 - iv. Mandate that the remediation of the Premises occur pursuant to the Agency's Site Remediation Program and that a No Further Remediation Letter be obtained;
- D. Mandate that the Agency as well as the Parties hereto and their consultants and attorneys be permitted to monitor the remediation of the BNSF Property and the Premises, and allow them to have access to all

reports and laboratory analysis related in any way to the BNSF Property and the contamination thereon;

- E. Order that any and all remediation be conducted by consultants and engineers selected by either Indian Creek or the Board due to the BNSF's failure to take adequate steps over more than 13 years to prevent to migration of the contamination to other properties, and based on the BNSF's attempt to obtain closure of the incident without notification to Indian Creek and without informing the Agency of the contamination that it knew existed on and under the Premises;
- F. Order that any and all remediation that is conducted be conducted by utilizing methods selected by either Indian Creek or the Board;
- G. That the Board request the Agency to investigate the facts and violations set forth herein pursuant to Section 30 of the Act and thereafter name the Agency as a party in interest, pursuant to 35 Ill. Adm. Code 101.404 and 103.202, to coordinate the Agency's duties and efforts pursuant to the Consent Decree, Exhibit B.
- H. Mandate that the BNSF reimburse Indian Creek for its all of its costs and expenses (including but not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis) related to the contamination including but not limited to:
 - i. The costs of past and, to the extent reasonably necessary, future investigation,

- ii. The costs of past and, to the extent reasonably necessary, future sampling and otherwise monitoring the contamination on the Premises and the migration of contamination on the BNSF Property;
 - iii. such costs and expenses include but are not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis; AND
- I. Grant such other and further relief as the Illinois Pollution Control Board may deem appropriate.

COUNT III
Section 21(e) Violation

40. Paragraphs 1 to 38 are incorporated by reference as paragraph 39 hereof.
41. Section 21(e) of the Act provides that:
- No person shall. . .[d]ispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.
42. Section 3.535 of the Act defines "Waste" as, *inter alia*, any "discarded material" resulting from industrial or commercial operations. 415 ILCS 5/3.535.
43. The diesel fuel and contaminated media on and under the BNSF Property that the BNSF has abandoned and disposed of is Waste under the Act.
44. Section 3.185 of the Act defines "Disposal" as the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste may enter

the environment or be emitted into the air or discharged into any waters, including groundwater. 415 ILCS 5/3.185.

45. By allowing the diesel fuel spilled in 1993 to remain on and under the BNSF Property and the Premises to mix with soil and groundwater media, the BNSF has abandoned and disposed of said diesel fuel and diesel fuel contaminants.

46. The BNSF's abandonment and disposal of the diesel fuel and diesel fuel contaminated media under the BNSF Property and the Premises are knowing violations of the Act, as aptly demonstrated by the BNSF's attempt to close the incident pursuant to the Consent Decree without informing the Agency of the diesel fuel contamination on and under the Premises – contamination of which the BNSF was fully aware.

47. Neither the BNSF Property nor the Premises are permitted by the Agency to be waste disposal sites or facilities and for that reason and otherwise they do not meet the requirements of a waste disposal site or facility under the Act or under applicable Illinois Pollution Control Board regulations.

48. Such violation of Section 21(e) of the Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

WHEREFORE, Complainants, pray that the Board grant the following relief against the BNSF:

- A. Find the BNSF in violation of Section 21(e) of the Act;
- B. Direct the BNSF to cease and desist from further violations of Section 21(e) of the Act;
- C. Mandate and direct the abatement the continuing violation of Section 21(e) of the Act at the expense of the BNSF as follows:

- i. Mandate the remediation of the BNSF Property in such a manner as to stop the ongoing contamination of the Premises;
 - ii. Mandate the Premises be remediated causing the removal of all contamination on the Premises which flowed from the BNSF Property;
 - iii. Mandate, to the extent technically feasible, that all remediation be performed to background levels and, in no event, that the remediation be performed to a level less than applicable residential standards contained in the Tiered Approach to Corrective Action Objectives, 35 Ill. Admn. Code 742;
 - iv. Mandate that the remediation of the Premises occur pursuant to the Agency's Site Remediation Program and that a No Further Remediation Letter be obtained;
- D. Mandate that the Agency as well as the Parties hereto and their consultants and attorneys be permitted to monitor the remediation of the BNSF Property and the Premises, and allow them to have access to all reports and laboratory analysis related in any way to the BNSF Property and the contamination thereon;
- E. Order that any and all remediation be conducted by consultants and engineers selected by either Indian Creek or the Board due to the BNSF's failure to take adequate steps over more than 13 years to prevent to migration of the contamination to other properties, and based on the BNSF's attempt to obtain closure of the incident without notification to

Indian Creek and without informing the Agency of the contamination that it knew existed on and under the Premises;

- F. Order that any and all remediation that is conducted be conducted by utilizing methods selected by either Indian Creek or the Board;
- G. That the Board request the Agency to investigate the facts and violations set forth herein pursuant to Section 30 of the Act and thereafter name the Agency as a party in interest, pursuant to 35 Ill. Adm. Code 101.404 and 103.202, to coordinate the Agency's duties and efforts pursuant to the Consent Decree, Exhibit B.
- H. Mandate that the BNSF reimburse Indian Creek for its all of its costs and expenses (including but not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis) related to the contamination including but not limited to:
 - iv. The costs of past and, to the extent reasonably necessary, future investigation,
 - v. The costs of past and, to the extent reasonably necessary, future sampling and otherwise monitoring the contamination on the Premises and the migration of contamination on the BNSF Property;
 - vi. such costs and expenses include but are not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis; AND

- I. Grant such other and further relief as the Illinois Pollution Control Board may deem appropriate.

Respectfully Submitted,

**Indian Creek Development Company and
Chicago Land Trust Company t/u/t 3291,
dated December 15, 1981**

By: M. Hope Whitfield
One of Its Attorneys

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