

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 06-177
	)	(Enforcement – Used Tires)
SHERIDAN SAND & GRAVEL CO.,	)	
an Illinois corporation,	)	
	)	
Respondent.	)	

**COMPLAINANT'S RESPONSE TO RESPONDENT SHERIDAN SAND & GRAVEL
CO.'S MOTION TO DISMISS COMPLAINT**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and responds to Respondent SHERIDAN SAND & GRAVEL CO.'S Motion to Dismiss Complaint brought pursuant to Section 2-615 of the Illinois Code of Civil Procedure ("Code"), 735 ILCS 5/2-615(a).

I. INTRODUCTION

On May 22, 2006, the Complainant filed its five-count Complaint in this matter. The Complaint is an environmental enforcement action against a single corporation alleging violations and seeking penalties pursuant to the Illinois Environmental Protection Act ("Act") and the Illinois Pollution Control Board's ("Board") regulations.

Respondent seeks dismissal on the grounds of defective pleading, challenging the sufficiency of each count. A claim should not be dismissed on the pleadings unless there is no set of facts in favor of the allegations that would entitle the pleader to relief. *See, e.g. Northrup Corp. v. Crouch-Walker, Inc.*, 175 Ill.App.3d 203, 212 (1st Dist. 1988).

In considering whether a cause of action should be stricken, pleadings are to be liberally construed and should not be stricken if the facts alleged constitute a good cause of action. *See e.g. First Nat. Bank v. City of Aurora*, 71 Ill.2d 1, 15 Ill.Dec. 642, 373 N.E.2d 1326 (1978) and

Great Atlantic & Pac. Tea Co., Inc. v. LaSalle Nat. Bank, 77 Ill.App.3d 478, 32 Ill.Dec. 812, 395 N.E.2d 1193 (1st Dist. 1979). Section 1-106 of the Code explicitly mandates liberal construction: "This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." Indeed, liberal construction of the Illinois Environmental Protection Act is mandated by similar language in Section 2(c), 415 ILCS 5/2(c) (2004).

In light of case law, the Code and the Act, Complainant has more than adequately alleged violations against Respondent in all five counts of the Complaint.

ARGUMENT

II. THE PEOPLE HAVE PLED SUFFICIENT FACTS TO STATE A CLAIM IN COUNTS I AND II

Respondent contends that Counts I and II of the Complaint, alleging improper storage of tires, are insufficient in law. The question presented by a Section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *See e.g. Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475 (1991). The facts that the Board must, in ruling on this motion to dismiss, accept as true are well pleaded in the Complaint. Contrary to Respondent's contentions, these factual allegations are "plain and concise" as required by Section 2-603(a) of the Code, and satisfy the substantive requirements of Section 103.204(c) of the Board's Procedural Rules.

Respondent argues that Count I fails to describe how Respondent's actions meet the legal definition of "storage." This argument is irrelevant and ignores what the Complaint does allege. Complainant does not allege "storage", but rather that Respondent has been operating as an unregulated "tire storage site," which is provided its own definition under the Act.

Count I alleges that Respondent operated a tire storage site in violation of Section 55(d)(1) of the Act. Section 55(d)(1) provides: "...no person shall cause or allow the operation of: (1) a tire storage site which contains more than 50 used tires, unless the owner or operator...(i) registers the site with the Agency, (ii) certifies to the Agency that the site complies with any applicable standards adopted by the Board pursuant to Section 55.2, (iii) reports to the Agency the number of tires accumulated, the status of the vector controls, and the actions taken to handle and process the tires, and (iv) pays the fee required under subsection (b) of Section 55.6; ..." Count I at ¶ 12. "Tire storage site means a site where used tires are stored or processed other than (1) the site at which the tires were separated from the vehicle wheel rim, (2) the site where the used tires were accepted in trade as part of a sale of new tires, or (3) a site at which tires are sold at retail in the regular course of business, and at which not more than 250 used tires are kept at any time or (4) a facility at which tires are sold at retail provided that the facility maintains less than 1300 recyclable tires, 1300 tire carcasses, and 1300 used tires on site and those tires are stored inside a building or so that they are prevented from accumulating water." Count I at ¶ 15.

The facts alleged by Complainant are: "On April 19, 2005, the Illinois EPA...inspectors observed approximately 500 used and waste tires at the Site." Count I at ¶ 4. "The tires were stored inside seven (7) uncovered roll-off boxes and two (2) uncovered semi-trailers." Count I at ¶ 5. "The tires that were off the rims were stored inside the roll-off boxes and semi-trailers and contained water." Count I at ¶ 6. "During the inspection at the Site, the Illinois EPA observed unmounted tires that were worn, damaged or defective and that, therefore, constituted used tires as defined in Section 54.13 of the Act, 415 ILCS 5/54.13 (2004)." Count I at ¶ 14. "Respondent failed to register the Site with the Illinois EPA, certify that the Site complies with applicable

Board standards, report to the Agency the number of tires accumulated, the status of vector controls, and the actions taken to handle and process the tires, and failed to pay the fee required under subsection (b) of Section 55.6..." Count I at ¶ 17. "The Site constitutes a tire storage site as that term is defined in Section 54.12 of the Act, 415 ILCS 5/54.12 (2004), because used tires were stored or processed at the Site." Count I at ¶ 16.

In light of what the Act provides, Complainant has alleged sufficient facts to inform Respondent of the specific allegations against which it must defend. The Complaint even further alleges that "[o]n May 4, 2005, Illinois EPA sent a Violation Notice ('VN') to Sheridan S & G, advising Respondent that the accumulation of tires at the Site constituted violations of the Act and Board regulations." Count I at ¶ 8. Thus, Respondent's objection that the Complaint does not define "stored" or "processed" as those terms are incorporated under the definition of 'tire storage site' is baseless. Through its argument, Respondent is, in effect, defending itself by attempting to exclude its activities from the scope of the Act based on a separate and unrelated definition.

Contrary to Respondent's assertions, it is not necessary at this stage, if applicable at any stage, to extrapolate a term from the definition of "tire storage site" and require the Complainant to further describe how a used tire is "deemed subject to 'storage' under the Act." Motion at p. 2. In its motion to dismiss, Respondent essentially argues on the merits its defense. Respondent has not demonstrated its inability to understand the capacity in which it is being sued in Count I. Respondent's argument that Complainant has failed to define "storage" is hardly a defect in the pleadings, much less capable of rendering the allegations "substantially insufficient in law."

Furthermore, Complainant is not required to prove its case in its complaint, but only must allege sufficient facts to state all the elements of the asserted causes of action. Certainly the

Complaint provides Respondent sufficient information to understand the nature of the allegations and to prepare a response, especially since that is exactly what Respondent has already proceeded to do in its motion to dismiss.

Respondent's second argument, that Count I and II are contradictory, is without merit. Under the Code, Complainant is allowed to "plead as many causes of action" as it may have. 735 ILCS 5/2-613(a). Nothing in the Code prohibits Complainant from alleging liability under multiple or alternative theories of recovery.

In Count 11, Complainant alleges that Respondent violated Section 55(e) of the Act. Section 55(e) provides: "No person shall cause or allow the storage, disposal, treatment or processing of any used or waste tire in violation of any regulation or standard adopted by the Board." Count II at ¶ 17. The facts alleged by Complainant are: "During the April 19, 2005 inspection, the Illinois EPA observed waste tires at the Site that were placed in uncovered receptacles on the land and were not part of a systematic reuse or conversion in the regular course of business and, therefore, constituted disposal of waste tires as those terms are defined at Sections 54.04 and 54.16 of the Act." Count II at ¶ 20. "Section 54.16 of the Act, 415 ILCS 5154.16 (2004), provides as follows: 'Waste tire' means a used tire that has been disposed of." Count II at ¶ 18. "Section 54.04 of the Act, 415 ILCS 5154.04 (2004), provides as follows: 'Disposal' means the placement of used tires into or on any land or water except as an integral part of systematic reuse or conversion in the regular course of business." Count II at ¶ 19. "Respondent stored or disposed of used **and/or** waste tires at the Site in violation of Section 55(e) of the Act, 415 ILCS 5/55(e) (2004)..." Count II at 722.

Complainant does not make contradictory allegations, as Respondent claims, but rather, is pleading an additional, complimentary, count. Motion at p. 3. Count II alleges that waste tires, in

addition to used tires, were present at the site. Complainant is not precluded from alleging an additional count involving violations of tire regulations relating to waste tires, and as such, has properly pled Count II.

Respondent next contends along a similar line of reasoning it applied to Count I, that the allegation with respect to Section 848.202(b)(4) of the Board's regulations pleaded in Count II "is a mere conclusion." Motion at p. 5. Respondent's objection as to factual specificity is groundless. Complainant alleges in Count II that Respondent violated Section 55(e) of the Act and Section 848.202(b)(4) of the Board's regulations. Section 55(e) of the Act provides as follows: "No person shall cause or allow the storage, disposal, treatment or processing of any used or waste tire in violation of any regulation or standard adopted by the Board." Count II at ¶ 17. Section 848.202(b)(4) of the Board regulations provides: "At sites at which more than 50 used or waste tires are located the owner or operator shall comply with the following requirements: ... (4) Used or waste tires shall be drained of water on the day of generation or receipt." Count II at ¶ 21.

The facts alleged by Complainant in Count II are: "On April 19, 2005...the Illinois EPA inspectors observed approximately 500 used and waste tires at the Site." Count II at ¶ 4. "The tires were stored inside seven (7) uncovered roll-off boxes and two (2) uncovered semi-trailers." Count II at ¶ 5. "The tires that were off the rims were stored inside the roll-off boxes and semi-trailers and contained water." Count II at ¶ 6. "Tires located outdoors can fill with water from precipitation events and provide breeding habitat for mosquitoes." Count II at ¶ 7. "During the April 19, 2005 inspection, the Illinois EPA observed waste tires at the Site that were placed in uncovered receptacles on the land and were not part of a systematic reuse or conversion in the regular course of business and, therefore, constituted disposal of waste tires as those terms are

defined at Sections 54.04 and 54.16 of the Act, 415 ILCS 5154.04 and 54.16 (2004)." Count 11 at ¶ 20.

To the extent that the facts are known to Complainant, these allegations apprise the Respondent of the extent and nature of the improper water conditions at the site. This allegation is not conclusory. It has factual support, and is sufficient as a matter of law.

In considering this motion to dismiss, the Board shall also construe all reasonable inferences in favor of Complainant. For instance, the tires were uncovered and contained water at the time of Illinois EPA's inspection. In the context of the date of generation, the Board may infer that the water was never drained since the date Respondent received the tires. Such evidentiary facts supporting the allegation will be adduced at trial to address relevant issues such as, on what date and in what condition Respondent received the tires. Evidence need not be pled in the complaint. It is at trial, not in the pleadings, that Complainant must present all its evidence of how and when water was accumulated in the tires.

In addition, Count 11 alleges that Respondent violated Section 848.202(b)(5) of the Board regulations. Section 848.202(b)(5) provides: "At sites at which more than 50 used or waste tires are located the owner or operator shall comply with the following requirements: ... (5) Used or waste tires received at the site shall not be stored unless within 14 days after the receipt of any used tire the used tire is altered, reprocessed, converted, covered or otherwise prevented from accumulating water. All used and waste tires received at the site before June 1, 1989, shall be altered, reprocessed, converted, covered or otherwise prevented from accumulating water by January 1, 1992." Count 11 at 721.

Basing its pleading on the same set of facts, Complainant alleges violation of a different regulation, but one with a similar purpose as Section 848.202(b)(4), to prevent the accumulation

of water in "used or waste tires received at the site." Complainant is not prohibited from alleging liability under multiple theories. As such, Complainant properly alleges in Count II that "Respondent stored or disposed of used and/or waste tires at the Site in violation of Section 55(e) of the Act, 415 ILCS 5/55(e) (2004), and 35 Ill. Adm. Code 848.202(b)(4) and (b)(5)." Count II at ¶ 22. While each cause of action in the Complaint referenced all of the factual allegations contained in the first 16 paragraphs of the Complaint, Count II clearly sets forth the elements of the cause of action as well as a general statement as to the actions of the Respondent pertinent to that count.

III. COMPLAINANT PROPERLY ALLEGED RECORDKEEPING AND REPORTING REQUIREMENTS IN COUNT III

Count III of the Complaint alleges that Respondent violated Sections 848.304(a) and (c), and 848.305 of the Board's Regulations. Section 848.304(a) provides as follows: "The owner or operator shall maintain an Annual Tire Summary at the site; such record shall include the Agency designated site number, the site name and address and the calendar year for which the summary applies." Count 111 at ¶ 21. Section 848.304(c) of the Board regulations provides as follows: "The Annual Tire Summary shall be received by the Agency on or before January 31 of each year and shall cover the preceding calendar year." Count III at ¶ 21. Section 848.305 of the Board regulations provides as follows: "Copies of all records required to be kept under this Subpart shall be retained by the owner and operator for three years and shall be made available at the site during the normal business hours of the operator for inspection and photocopying by the Agency." Count 111 at ¶ 22.

Simply stated, much in the same way the Board regulations are simply presented, the facts alleged by the Complainant to support these violations are: "Respondent failed to maintain

and submit an annual tire summary to the Illinois EPA at any time relevant to the Complaint..." and "Respondent failed to maintain records at the Site at all times relevant to this Complaint..." Count III at ¶¶ 23 and 24. These factual allegations are plain and concise as required by Section 2-603(a) of the Code, and give notice to the Respondent of the claims being presented. Smith v. Heissinner, 319 Ill.App.3d 150, 154, 253 Ill.Dec. 543, 745 N.E.2d 666 (2001). The Code also provides that "[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." 735 ILCS 5/2-612(b).

Respondent's argument is simply that because the exact language provided in the regulation was not alleged, the cause of action fails entirely. This simplistic challenge by the Respondent is itself "substantially insufficient in law." The Complaint alleges the presence of "approximately 500 used and waste tires at the site." Count I at ¶ 4. Respondent argues that because the recordkeeping and reporting requirements under the Board regulations apply to "sites at which more than 500 used or waste tires are located," Respondent is precluded from having to comply with such regulations. Motion at p. 6. In support of its tenuous argument, Respondent narrowly defines "approximately" under Black's Law Dictionary, so as to limit its meaning and effect, and exclude "more than."

This argument is, at best, a stretch. A complaint is to be liberally construed with its purpose being to reasonably inform the Respondent of the nature of the claim. Moreover, Complainant is not required to prove its case in the complaint, but must only allege sufficient facts to bring its claim within the scope of a legally recognized cause of action. Thus, when combining Complainant's definition of "approximately" found in Webster's Dictionary, that is,

"nearly correct, or exact," with the Board regulation requiring "more than 500" tires, Respondent has been adequately informed of its claimed acts or omissions to enable it to respond.

IV. COMPLAINANT HAS PROPERLY PLED COUNT IV

With respect to payment of the annual fee, Respondent presents the same argument as it did in Sections I and II of its motion to dismiss, that is, that the site is not a tire storage site as Complainant properly alleges, and therefore, is not subject to the applicable regulations. For the reasons already discussed in Sections I and II of this response, this argument is without merit.

Count IV alleges that by failing to pay an annual fee required for operation of tire storage sites, Respondent violated Section 21(k) of the Act. Section 21(k) provides that "No person shall: fail to pay any fee imposed under this Act." Count IV at ¶ 21. Section 55.6(b) of the Act provides: "...the owner or operator of each site required to be registered under subsection (d) of Section 55 shall pay to the Agency an annual fee of \$100." Count IV at ¶ 22. Section 55(d)(1) provides: "...no person shall cause or allow the operation of: (1) a tire storage site which contains more than 50 used tires, unless the owner or operator...(i) registers the site with the Agency, (ii) certifies to the Agency that the site complies with any applicable standards adopted by the Board pursuant to Section 55.2, (iii) reports to the Agency the number of tires accumulated, the status of the vector controls, and the actions taken to handle and process the tires, and (iv) pays the fee required under subsection (b) of Section 55.6; ..." Count I at ¶ 12.

Complainant alleges these facts: "At the time of the April 19, 2005 inspection, Respondent operated a tire storage site that contained more than 50 used tires and was required to register with the Illinois EPA as a tire storage site, and therefore, required to pay an annual fee." Count IV at ¶ 23. "Respondent failed to pay the annual fee in violation of Sections 55.6(b),

55(d)(1) and 21(k) of the Act." Count IV at ¶ 24. Thus, the Complaint sets forth the factual allegations as to the activities of the corporate Respondent.

While the Count references all of the factual allegations contained in the first 20 paragraphs of the Complaint, Count IV clearly sets forth the elements of the cause of action as well as a general statement as to the actions of the Respondent pertinent to that count. There is no referencing between counts to render the Complaint incomprehensible. To reiterate, the purpose of Section 2-603 is to give notice to the Respondent of the claims being asserted. Smith, 319 Ill.App.3d at 154. Thus, and for the same reasons already provided in Complainant's response in Sections I and II, the Complaint more than sufficiently states facts supporting its claim contained in Count IV.

V. COMPLAINANT HAS PROPERLY PLED COUNT V

Respondent's argument that "nowhere in Count V does the State allege" facts as to why Respondent is a tire transporter under the Act fails for several reasons. To defeat a motion for failing to state a claim, you must first look at the Code. The Code mandates that "[a]ll pleadings shall contain a plain and concise statement of the pleader's cause of action." 735 ILCS 512-603(a).

Count V alleges that "Respondent transported used or waste tires at the Site" in violation of Section 55(g) of the Act. Count V at ¶ 23. Section 55(g) of the Act provides: "No person shall engage in any operation as a used or waste tire transporter except in compliance with Board regulations." Count V at ¶ 21. Section 54.12(b) of the Act, 415 ILCS 5/54.12(b) (2004) defines a tire transporter as "a person who transports used or waste tires in a vehicle." Count V at ¶ 22.

Complainant alleges that "Respondent transported used or waste tires to the Site, and is therefore a tire transporter as defined in Section 54.12(b) of the Act, 415 ILCS 5/54.12(b)

(2004)." Count V at ¶ 23. Complainant further alleges: "Section 848.601 of the Board regulations, 35 Ill. Adm. Code 848.601, provides, in pertinent part, as follows:... no person shall transport more than 20 used or waste tires in a vehicle unless ... 1) The owner or operator has registered the vehicle with the Agency in accordance with this Subpart, received approval of such registration from the Agency, and such registration is current, valid and in effect." Count V at ¶ 24. "Respondent failed to register vehicles that were used for transporting used or waste tires with the Illinois EPA, in violation of Section 55(g) of the Act, 415 ILCS 5/55(g) (2004), and 35 Ill. Adm. Code 848.601(a)(1)." Count V at ¶ 25. Thus, in light of what the statute and regulations provide, Complainant has alleged sufficient facts to apprise the Respondent of the extent and nature of the transporter violations.

The Respondent's objections as to factual specificity are simply unfounded. Respondent argues that Complainant does not allege "when such tires were transported, who transported them, how many such tires were transported, or how such tires were transported." Motion at p. 8. Respondent fails to recognize the distinction between pleading and proof. As repeatedly pointed out in Complainant's response to this motion to dismiss, the pleader is not required to set out its evidence in its complaint. The pleading is only required to allege ultimate facts, and not evidentiary facts tending to prove such ultimate facts. *Zeitz v. Village of Glenview*, 227 Ill.App.3d 891, 592 N.E.2d 384, 169 Ill.Dec.897 (1st Dist. 1992). Therefore, it is not necessary to plead evidence, especially when more information may be expected at trial regarding the method of transportation.

Respondent's second argument, that "the regulation is inherently unenforceable" because the regulation does not provide an exception, is irrelevant. Motion at p. 9. Count V alleges that Respondent failed to display a placard on vehicles used for transporting used or waste tires in

violation of Section 848.601(a)(2) of the Board regulations. Section 848.601(a)(2) provides that "no person shall transport more than 20 used or waste tires in a vehicle unless the following requirements are met. 2) [t]he owner or operator displays a placard on the vehicle, issued by the Agency following registration, in accordance with the requirements of this Subpart." Count V at ¶ 24. Complainant alleges that "Respondent failed to display a placard on vehicles used for transporting used or waste tires, in violation of Section 55(g) of the Act, 415 ILCS 5/55(g) (2004), and 35 Ill. Adm. Code 848.601(a)(2)." Count V at ¶ 26.

This pleading is sufficient to inform the violator of the specific allegations against which it must defend. Complainant specifically alleges that Respondent violated Section 848.601(a)(2). The regulation's language is clear. Complainant will present its evidence on this issue at hearing. The Complaint is legally sufficient.

VI. CONCLUSION

In summary, Complainant states a claim in each of the five counts of the Complaint. Respondent's Motion to Dismiss must be denied because it does not meet the standard required by Section 2-615 of the Code. The Respondent should be directed to file an answer addressing the allegations of the Complaint.

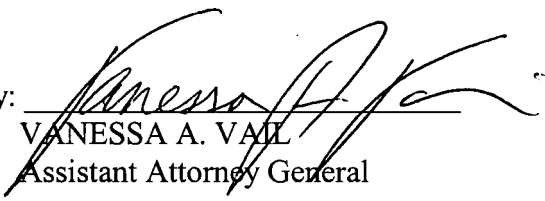
WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board deny Respondent's Motion to Dismiss.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN,
Attorney General of the State of Illinois

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By: 

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Dated: July 28, 2006

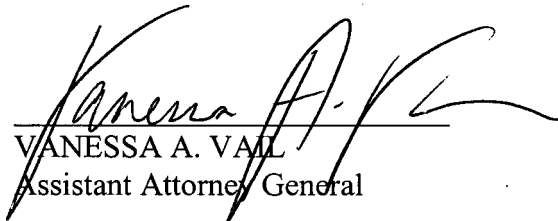
CERTIFICATE OF SERVICE

I, VANESSA A. VAIL, an Assistant Attorney General, certify that on the 28th day of July 2006, I caused to be served by First Class Mail the foregoing NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT SHEFUDAN SAND & GRAVEL CO.'S MOTION TO DISMISS COMPLAINT, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601:

To: Kenneth Anspach
Eight South Michigan Avenue
Suite 3400
Chicago, Illinois 60603

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601


VANESSA A. VAIL
Assistant Attorney General