

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
WASTE HAULING LANDFILL, INC., et al.,)
)
Respondents.)

PCB No. 10-9
(Cost Recovery)

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STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: ARAMARK UNIFORM SERVICES, INC.
C T Corporation System
208 South LaSalle St., Suite 814
Chicago, IL 60604

BELL SPORTS, INC.
c/o John E. Collins
Husch Blackwell Sanders, LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

A. E. STALEY MANUFACTURING CO.
c/o Jeryl Olson, James Curtis and Elizabeth Leifel Ash
Seyfarth Shaw
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BORDEN CHEMICAL CO.
c/o Matthew Larson
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2555 Grand Boulevard
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ARCHER DANIELS MIDLAND, INC.
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Chicago, IL 60604

CATERPIILLAR, INC.
c/o Kevin Desharnais and Jennifer Simon
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71 South Wacker Drive
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CLIMATE CONTROL, INC.
c/o Edward Q. Costa
Samuels, Miller, Schroeder, Jackson & Sly

CERTIFICATE OF SERVICE

I hereby certify that I did on the 15th day of September, 2009, send by First Class Mail, with postage thereon fully prepaid, a true and correct copy of the instruments entitled Notice of Filing, Response to Motion to Dismiss Complaint

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RESPONSE TO MOTION TO DISMISS COMPLAINT

The Complainant, People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, submits this response to the motion of Caterpillar, Inc., to dismiss the Complaint. As established below, that motion should be denied.

A. The Complaint states a cause of action against Caterpillar.

1. As its first basis for dismissing the Complaint, Caterpillar points out that paragraph 23 of the original complaint omitted reference to Section 22.2(f)(3) of the Environmental Protection Act, 415 ILCS 5/22.2(f)(3). Due to a typographic error, paragraph 23 of the Complaint omitted that reference. Complainant has moved for leave to amend the complaint to correct that error.

2. Paragraph 23 originally alleged that:

23. Respondents are each a responsible party as described in Section 22.2(f)(1)-(2) of the Act, 415 ILCS 4/22.2(f)(1)-(2). Respondents are each liable for past, present, and future removal costs, as defined by the Act, incurred by the State resulting or arising out of the releases and threatened releases at the Landfill.

3. A reference to subparagraph (3) of Section 22.2(f) of the Environmental Protection Act was inadvertently omitted. That subparagraph imposes liability for response and removal costs upon

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of such hazardous substances owned or possessed by such person, by any other party or entity, at any facility, * * *, owned or operated by another party or entity and containing such hazardous substances, * * *

That subparagraph was included in the excerpt of Section 22.2(f) quoted in paragraph 20 of the Complaint.

Paragraph 23 should have provided that:

23. Respondents are each a responsible party as described in Section 22.2(f)(1)-(3) of the Act, 415 ILCS 4/22.2(f)(1)-(3). Respondents are each liable for past, present, and future removal costs, as defined by the Act, incurred by the State resulting or arising out of the releases and threatened releases at the Landfill.

4. For further clarification, paragraph 23 will now provide that:

23. Respondents are each a responsible party as described in Section 22.2(f)(1), (2), or (3) of the Act, 415 ILCS 4/22.2(f)(1), (2), or (3). Respondents are each liable for past, present, and future removal costs, as defined by the Act, incurred by the State resulting or arising out of the releases and threatened releases at the Landfill.

5. Thus, the complaint states a cause of action against entities such as Caterpillar which sent wastes containing hazardous substances to the Waste Hauling Landfill.

B. Section 58.9(a)(1) of the Act does not bar this action.

1. Caterpillar assertion that Section 58.9(a)(1) of the Act, 415 ILCS 5/58.9(a)(1), requires dismissal of the Complaint ignores the requirement of 35 Ill. Adm. Code 741.205 that “proportionate share” is a burden of proof issue rather than a pleading requirement.

2. As the Board held,

Proportionate share liability is a limitation on remedies, not a bar to a cause of action. See Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16, slip op. at 4 (Dec. 17, 1998). *Cole Taylor Bank v. Rowe Industries, et al.*, PCB 01-173 slip op. at 4 (June 2, 2002). 2002 WL 1298771.

3. 35 Ill. Adm. Code 741.205 establishes the Complainant’s burden of proof when bringing an action to recover the costs of a response. 35 Ill. Adm. Code 741.205(c) specifically provides that a complainant is not obligated to plead “a specific alleged percentage of liability” to state a claim.

4. Pleading Section 58.9(a)(1) as an affirmative defense rather than as a part of the claim is in keeping with the structure of Title XVII of the Act since certain respondents are precluded from invoking it. 35 Ill. Adm. Code 741.105(f) provides that “proportionate share” is not applicable to owners or operators of a treatment, storage or disposal site subject to a permit under State solid waste laws or which is subject to closure under State solid waste laws.

5. The Waste Hauling Landfill had been issued a permit under State solid waste laws. See *People of the State of Illinois v. Waste Hauling Landfill, Inc., et al.*, PCB 95-91, May 21, 1998 Opinion and

Order, p. 6. The Waste Hauling Landfill was also subject to closure requirements under State solid waste laws. *Ibid*, Opinion and Order, pp.19-20. Waste Hauling Landfill, Inc., and Jerry Camfield are thus excluded.

6. Section 58.9(a)(1) does not bar this complaint.

C. Provisions of the Act and Regulations applicable to “violations” do not apply to cost recovery proceedings.

1 The General Assembly and the Pollution Control Board have recognized that cost recovery actions are markedly different from enforcement proceedings to address violations of the Act and regulations. Thus, Caterpillar’s attempt to bootstrap the complaint into the procedures applicable to enforcement proceedings must be rejected.

2. As noted above, 35 Ill.Adm.Code Part 741 establishes “the procedures under which the Board will allocate proportionate shares of *** costs of a response * * *” (35 Ill.Adm.Code 741.100). 35 Ill.Adm.Code 741.105(b) provides that in the event of a conflict between 35 Ill.Adm.Code Parts 101 and 103 and Part 741, Part 741 applies. Thus, provisions establishing pleading requirements for enforcement action complaints addressing violations of the Act are not applicable to cost recovery proceedings.

3. 35 Ill.Adm.Code 103.204 establishes the requirements for an “enforcement proceeding.” “Enforcement proceeding” is a defined term under 35 Ill.Adm.Code 101.202 and that definition does not mention complaints seeking cost recovery. The Complaint in this cause is for a “cost recovery” proceeding and therefore, not subject to 103.204.

4. Similarly, the requirements of Section 31(a)-(e) for complaints in enforcement actions also do not apply to cost recovery actions since those provisions are triggered by “violations” of the Act or regulations. Section 22.2(f) imposes liability for costs resulting from “a release or substantial threat of a release of a hazardous substance or pesticide.”

5. Thus, the requirements of Section 31 and 35 Ill.Adm.Code 103.204 do not apply to this complaint.

D. Conclusion

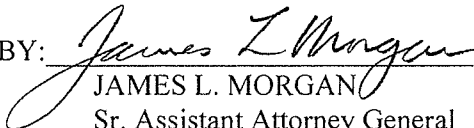
WHEREFORE, Complainant prays that the motion of the Respondent, Caterpillar, Inc., to dismiss the complaint be denied.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
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State of Illinois

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BY: 
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Dated: September 15, 2009