

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
vs.)	
)	
WASTE HAULING LANDFILL, INC., JERRY)	PCB No. 10-9
CAMFIELD, A. E. STALEY MANUFACTURING)	(Enforcement – Land, Cost
CO., ARCHER DANIELS MIDLAND, INC.,)	Recovery)
ARAMARK UNIFORM SERVICES, INC., BELL)	
SPORTS, INC., BORDEN CHEMICAL CO.,)	
BRIDGESTONE/FIRESTONE, INC., CLIMATE)	
CONTROL, INC., CATERPILLAR INC., COMBE)	
LABORATORIES, INC., GENERAL ELECTRIC)	
RAILCAR SERVICES CORPORATION, P & H)	
MANUFACTURING, INC., TRINITY RAIL)	
GROUP, INC., TRIPLE S REFINING)	
CORPORATION, and ZEXEL ILLINOIS, INC.,)	
)	
Respondents.)	

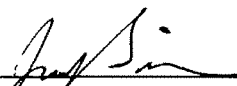
NOTICE OF FILING

TO:

John T. Therriault, Assistant Clerk Illinois Pollution Control Board James R. Thompson Center Suite 11-500 100 West Randolph Street Chicago, IL 60601	Matthew J. Dunn, Chief James L. Morgan, Sr. Assistant Attorney General Environmental Bureau Environmental Enforcement/Asbestos Litigation Division 500 South Second Street Springfield, Illinois 62706
Carol Webb, Hearing Officer Illinois Pollution Control Board 1021 North Grand Avenue East P.O. Box 19274 Springfield, IL 62794-9274	Persons included on the attached SERVICE LIST

PLEASE TAKE NOTICE that on this date I have filed with the Office of the Clerk of the Pollution Control Board Caterpillar’s Motion for Leave to Reply and Reply to the State’s Response to Motion to Dismiss Complaint, a copy of which is herewith served upon you.

CATERPILLAR INC.



Jennifer A. Simon

Date: October 2, 2009

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CERTIFICATE OF SERVICE

I, the undersigned, certify that, on this October 2, 2009, I have served electronically the attached Motion for Leave to Reply and Reply to the State's Response to Motion to Dismiss

Complaint upon the following person:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and by U.S. Mail, first class postage prepaid, to the following persons:

Carol Webb, Hearing Officer
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1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

Matthew J. Dunn, Chief
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The persons included on the attached SERVICE LIST



Jennifer A. Simon

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2938 Oakmont Drive
Decatur, IL 62521

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2938 Oakmont Drive
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MOTION FOR LEAVE TO REPLY

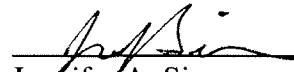
Pursuant to 35 Ill. Adm. Code 101.500(e), Caterpillar Inc. (“Caterpillar”) requests leave to file the attached Reply to the State’s Response to Motion to Dismiss Complaint:

1. On September 2, 2009, Caterpillar filed its Motion to Dismiss the Complaint. On September 17, 2009, the People of the State of Illinois (“State”) filed its Response to Caterpillar’s Motion to Dismiss Complaint. The State’s Response was served on Caterpillar on September 18, 2009.
2. The State’s Response contains misstatements of the applicable law and regulations, and raises new legal issues not raised in Caterpillar’s Motion that necessitate a reply from Caterpillar.
3. On September 16, 2009, the State filed its First Amended Complaint, which addresses only the argument set forth in paragraph 1 of Caterpillar’s Motion to Dismiss, but which fails to address the remaining arguments set forth in Caterpillar’s Motion. Therefore, because the First

Amended Complaint does not address the remaining grounds for dismissal set forth in Caterpillar's Motion to Dismiss, Caterpillar concurrently moves that its Motion to Dismiss be treated as a Motion to Dismiss the First Amended Complaint for the reasons set forth in paragraphs 2 through 5 of its Motion to Dismiss, and as further set forth in its Memorandum of Law In Support of Motion to Dismiss.

WHEREFORE, for the reasons set forth above, Caterpillar requests leave to file the attached Reply to the State's Response to Motion to Dismiss Complaint.

CATERPILLAR INC.


Jennifer A. Simon

Date: October 2, 2009

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**REPLY TO THE STATE’S RESPONSE TO MOTION TO DISMISS COMPLAINT /
MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Pursuant to 35 Ill. Adm. Code 101.500(e), Caterpillar Inc. (“Caterpillar”) submits this Reply to the State’s Response to Motion to Dismiss Complaint. Concurrently, pursuant to 35 Ill. Adm. Code 101.506, Caterpillar moves that its Motion to Dismiss be treated as a Motion to Dismiss the First Amended Complaint filed by the People of the State of Illinois (“State”) on September 16, 2009, for the reasons set forth in paragraphs 2 through 5 of its Motion to Dismiss, and as further set forth in its Memorandum of Law In Support of Motion to Dismiss.¹ In support of its Reply and its Motion, Caterpillar states as follows:

¹ Caterpillar hereby incorporates by reference its Motion to Dismiss and its Memorandum in Support of Motion to Dismiss, filed on September 2, 2009.

INTRODUCTION

On July 29, 2009, the State filed this action with the Board. Caterpillar received service of the Complaint on August 3, 2009. Caterpillar moved to dismiss the Complaint on September 2, 2009. The State filed its First Amended Complaint on September 16, 2009, which responds to the arguments set forth in paragraph 1 of Caterpillar's Motion to Dismiss. Caterpillar acknowledges that the First Amended Complaint adequately addresses the arguments set forth in paragraph 1 of its Motion to Dismiss, and, provided the State's Motion to file the First Amended Complaint is granted, hereby withdraws those grounds for its Motion. On September 17, 2009, the State filed its Response to Caterpillar's Motion to Dismiss Complaint. The State's Response was served on Caterpillar on September 18, 2009.

Caterpillar now timely files its Reply to the State's Response to Motion to Dismiss and reiterates the following grounds for dismissing the State's Complaint as its basis for dismissing the State's First Amended Complaint: (1) the Illinois Environmental Protection Agency ("Agency") failed to follow the notification procedures and satisfy the other pre-suit requirements of Section 31 of the Act; (2) the State failed to plead with the level of specificity required by 35 Ill. Adm. Code Section 103.204 and Illinois' fact-pleading standard; (3) the State seeks to impose a greater liability upon Caterpillar than permitted by Illinois' Proportionate Share Liability Rule at 415 ILCS 5/58.9; and (4) the State has not alleged facts sufficient to support its claim for treble damages under paragraph C of the "Prayer for Relief" section of the Complaint.

As set forth below, the State's Response fails to address several of Caterpillar's arguments, misinterpreted others, and incorrectly applies certain statutory and regulatory provisions.

ARGUMENT

I. The Agency Failed to Follow the Notification and Other Pre-Suit Procedures of Section 31 of the Act.

The State responds to Caterpillar's 415 ILCS 5/31 notice arguments by erroneously stating that Section 31 does not apply to this matter. *See* State's Response, ¶ C(4-5). The State argues that Section 31 applies only in the instance of a "violation" of the Act. *Id.* However, here, the State is alleging that Caterpillar violated the Act by not performing the remedial work set forth in the Agency's Section 4(q) letter. *See* First Amended Complaint, "Prayer for Relief" ¶ C. Because of this alleged violation, the State is seeking treble damages pursuant to 415 ILCS 5/22.2(k). *See id.* Accordingly, as the State has alleged a violation of the Act, Section 31 does apply to the State's cause of action.

Moreover, the Board itself has cited Section 31 as applicable to this matter. *See* Board's Order accepting the State's Complaint for hearing, August 6, 2009, p. 1 ("Under the Environmental Protection Act (Act) (415 ILCS 5 (2008)), the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. *See* 415 ILCS 5/31 (2008)").

Section 31 of the Act outlines specific notification procedures the Agency must follow before referring a matter to the Attorney General for enforcement. The Agency failed to follow these procedures. Therefore, it was never authorized to refer this matter to the Attorney General. Because the preconditions for filing were never met, this matter must be dismissed.

Alternatively, because the Agency failed to follow the procedures set forth in Section 31 of the Act, the Agency was not authorized to seek enforcement of this matter by the Attorney General, and the Attorney General likewise was not authorized to bring this matter on behalf of

the Agency. Therefore, the portion of the Complaint whereby the Attorney General seeks to bring this action at the request of the Agency must be stricken, and the Agency must not be permitted to participate in this proceeding directly or indirectly until it has followed the procedures set forth in Section 31.

II. The State Failed to Plead with the Specificity Required by 35 Ill. Adm. Code Section 103.204 and Illinois' Fact-Pleading Standard.

The State incorrectly argues that the 35 Ill. Adm. Code Section 103.204 fact-pleading requirements do not apply to this matter, as 35 Ill. Adm. Code Section 103.204 applies only to enforcement proceedings. *See* State's Response, ¶ C(3). The State fails to address Caterpillar's common law fact-pleading standard arguments.

Initially, we note that, irrespective of the regulatory applicability of 35 Ill. Adm. Code Section 103.204, as the Board has recognized, Illinois common law independently requires "the pleader to set out the ultimate facts which support his cause of action." *United City of Yorkville v. Hammon Farms*, PCB No. 08-96 (Citizen's Enforcement -- Land, Air, Water), 2008 Ill. ENV LEXIS 352, *36-37 (October 16, 2008), *quoting Grist Mill Confections*, PCB 97-174, slip op. at 4. "[L]egal conclusions unsupported by allegations of specific facts are insufficient." *Id.*, *quoting La Salle Nat'l Trust, N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557 (Ill. App. Ct. 2d Dist. 1993). The State's First Amended Complaint fails to meet this fact-pleading standard and, accordingly, must be dismissed.

However, in addition to the general fact pleading requirements under Illinois law, the requirements of 35 Ill. Adm. Code Section 103.204 and the other regulations directed toward enforcement proceedings do apply to this matter. The very provision the State claims supersedes Section 103 – the proportionate share regulations at 35 Ill. Adm. Code 741 – explicitly states that "[t]he Board's procedural rules at 35 Ill. Adm. Code 101 and 103 apply to all proceedings under

this Part.” 35 Ill. Adm. Code 741.105(b). Only “in the event of a conflict between the rules of 35 Ill. Adm. Code 101 and 103 and this Part,” does Part 741 apply to the exclusion of Sections 101 and 103. The State has not identified any conflict that renders 35 Ill. Adm. Code Part 741 incompatible with 35 Ill. Adm. Code 101 and 103, and, indeed, cannot, since no relevant conflict exists. In fact, nowhere does Part 741 even address fact- versus notice-pleading standards. Those standards are found solely in the more general procedural rules of 35 Ill. Adm. Code 103. Without a clear conflict between the two sections, 35 Ill. Adm. Code 103 remains applicable to this action.

Additionally, despite the State’s misguided attempt to distinguish between “cost recovery” and “enforcement” proceedings, this cause of action is best characterized as an enforcement proceeding that seeks both cost recovery and penalties. As an enforcement proceeding, 35 Ill. Adm. Code Part 103 is applicable. This characterization is made evident by several key facts.

First, the State is seeking an enforcement penalty in addition to cost recovery in its Amended Complaint, so the State lacks a factual basis for drawing a distinction between cost recovery and enforcement. *See* First Amended Complaint, “Prayer for Relief,” ¶ C. As the State is alleging that Caterpillar violated the Act by failing to act in accordance with the Agency’s 4(q) letter, and as the State is now seeking to impose a penalty of treble damages, the State is clearly intending to enforce the Act and its authority through this action.

As such, the State originally properly captioned this matter as an enforcement action (*see* the State’s Notice of Filing and Entry of Appearance (July 30, 2009) (“PCB No. 10-9; Enforcement”)), and likewise included with its filing the notice language required to be included with all enforcement complaints pursuant to 35 Ill. Adm. Code 103.204(f) (*see* Notice of Filing,

July 30, 2009). That the State changed course and captioned its Complaint and its First Amended Complaint as cost recovery actions does not mask the State's clear intent or change the nature of this proceeding. "Cost Recovery" is not even a valid caption under the Board's procedural rules (*see* 35 Ill. Adm. Code 101, Appendix A), nor does it appear that the Board has ever captioned a proceeding solely as "Cost Recovery." Typically, the Board captions cost recovery proceedings as a subset of enforcement proceedings. *See, e.g., The Village of Lombard v. Bill's Auto Center*, PCB No. 04-213 (Citizens Enforcement - Cost Recovery), 2007 Ill. ENV LEXIS 216 (June 7, 2007); *People of the State of Illinois v. Thomas Gray*, PCB No. 04-106 (Enforcement -- Cost Recovery), 2006 Ill. ENV LEXIS 272 (May 4, 2006); *People of the State of Illinois v. Kenneth Morrison*, PCB No. 00-212 (Enforcement - Cost Recovery), 2001 Ill. ENV LEXIS 439 (September 20, 2001); *People of the State of Illinois v. Dayne Rogers*, PCB No. 00-127 (Enforcement - Cost Recovery), 2001 Ill. ENV LEXIS 7 (January 4, 2001); *People of the State of Illinois v. Babson Brothers Company*, PCB No. 00-102 (Enforcement - Cost Recovery), 2000 Ill. ENV LEXIS 228 (April 20, 2000).

Indeed, in the Board's Order accepting the Complaint for hearing, the Board likewise captioned this matter as an enforcement action. *See* Order dated August 6, 2009 ("PCB 10-9; Enforcement – Land, Cost Recovery"). In that Order, the Board also cited the enforcement regulations as being applicable here. *See id.* at p. 1-2 ("Under the Environmental Protection Act (Act) (415 ILCS 5 (2008)), the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. *See* 415 ILCS 5/31 (2008); 35 Ill. Adm. Code 103."); *id.* at p. 2 ("The Board finds that the complaint meets the content requirements of the Board's procedural rules and accepts the complaint for hearing. *See* 35 Ill. Adm. Code 103.204(c), (f), 103.212(c).").

Moreover, the Board has previously utilized the enforcement regulations in similar proceedings. *See, e.g., People of the State of Illinois v. Thomas Gray*, PCB No. 04-106 (Enforcement -- Cost Recovery), 2006 Ill. ENV LEXIS 272, *4 (May 4, 2006); *People of the State of Illinois v. Babson Brothers Company*, PCB No. 00-102 (Enforcement - Cost Recovery), 2000 Ill. ENV LEXIS 228, *2 (April 20, 2000); *People v. Bath Incorporated*, PCB No. 05-139 (Enforcement -- Land, Cost Recovery), 2005 Ill. ENV LEXIS 73 (February 3, 2005); *City of Chicago v. Purex Industries, Inc.*, PCB Nos. 03-55 (Citizens UST Enforcement), 2003 Ill. ENV LEXIS 659, *4 (2003).

For these reasons, the requirements set forth at 35 Ill. Adm. Code Section 103 are applicable to this matter. As the State has failed to meet the standard set forth in 35 Ill. Adm. Code Section 103.204 or in Illinois' fact-pleading requirements, the First Amended Complaint must be dismissed for failure to plead with sufficient specificity.

III. Neither the Agency Nor the State May Seek Damages From Caterpillar that Represent More Than Caterpillar's Proportionate Share of the Liability.

As set forth in Caterpillar's motion, the proportionate share provisions of Section 58.9 of the Act and the proportionate share regulations at 35 Ill. Adm. Code Part 741 limit Caterpillar's potential liability at the Waste Hauling Landfill. The Motion further notes that, in bringing its claim against Caterpillar, the State was required to allege facts sufficient to support a valid claim under the proportionate share regulations, but failed to do so. The State raises two arguments in response, neither of which can stand.

A. Pleading vs. Burden of Proof

The State correctly asserts that it is not obligated to plead a specific percentage of liability. *See State's Response*, ¶ B(3). Nevertheless, the State must plead facts sufficient to support its cause of action. As Illinois' fact-pleading regulations require, this would include

“[t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations.” 35 Ill. Adm. Code Section 103.204(c)(2). Those facts form the basis of the State’s claim – both generally as to all the respondents and specifically as to Caterpillar’s proportionate share – and so must be set forth in the Complaint. “Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action.” *United City of Yorkville v. Hammon Farms*, PCB No. 08-96 (Citizen's Enforcement -- Land, Air, Water), 2008 Ill. ENV LEXIS 352, *36-37 (October 16, 2008), *quoting Grist Mill Confections*, PCB 97-174, slip op. at 4. “[L]egal conclusions unsupported by allegations of specific facts are insufficient.” *Id.*, *quoting La Salle Nat'l Trust, N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557 (Ill. App. Ct. 2d Dist. 1993).

In addition, the State must provide “a concise statement of the relief that the complainant seeks,” as mandated by 35 Ill. Adm. Code Section 103.204. The State has not done this, instead requesting treble damages generally. With no facts by which Caterpillar could deduce its share of the response costs, a general plea for treble damages is far from a concise statement of the relief sought. Because of this pleading deficiency, Caterpillar cannot adequately prepare a defense.

To the extent the State has failed to plead facts specific to Caterpillar because the State seeks to impose an equal share of liability on all parties, the State is in violation of the proportionate share regulations, and the First Amended Complaint must be dismissed. To the extent the State is proposing a proportionate share liability corresponding to the parties’ degree of involvement, the State has failed to plead with specificity or to provide a concise statement of the relief it is seeking. Accordingly, the First Amended Complaint must be dismissed.

B. Permitted Owners

The State correctly notes that permitted owners or operators of facilities are excluded from the proportionate share regulations. *See* State's Response, ¶ B(5). However, Caterpillar is not a permitted owner or operator, nor an owner or operator of any kind, with respect to the Waste Hauling Landfill. Accordingly, regulatory provisions pertaining to permitted owners and operators are inapplicable to Caterpillar. As the proportionate share regulations do apply to Caterpillar, the State has failed to plead with adequate specificity such that Caterpillar can understand the nature of the State's claim. Because the State has failed to provide a concise statement of the relief sought against Caterpillar, the First Amended Complaint must be dismissed. Further, to the extent the State is seeking damages from Caterpillar in excess of Caterpillar's proportionate share of liability at the Waste Hauling Landfill, the First Amended Complaint must likewise be dismissed.

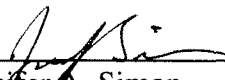
IV. The State's Claim for Treble Damages Against Caterpillar Must be Dismissed.

In its Response, the State does not address Caterpillar's argument that the Complaint fails to allege facts supporting a claim for treble damages against Caterpillar. Likewise, in the First Amended Complaint, the State has not pled any additional facts supporting its claim for treble damages. In sum, the State has never informed Caterpillar of the factual basis for its liability at this site – not in the Agency's May 13, 2002, 4(q) letter; not in the Attorney General's May 4, 2007, letter; and not the Complaint or First Amended Complaint. Therefore, as the State has again failed to allege sufficient facts to support a claim for treble damages as to Caterpillar, Paragraph C of the First Amended Complaint under "Prayer for Relief" must be dismissed.

CONCLUSION

Accordingly, for the reasons set forth above, the reasons set forth in paragraphs 2 through 5 of its Motion to Dismiss, and the supporting arguments set forth in its Memorandum of Law In Support of Motion to Dismiss, Caterpillar moves that the First Amended Complaint be dismissed in its entirety as to Caterpillar and that the Board grant such further relief as may be just and proper.² In the alternative, Caterpillar moves that: (1) the demand for treble damages in the operative complaint be stricken; and (2) the Illinois Environmental Protection Agency be barred from further direct or indirect participation in these proceedings until it has followed the procedures set forth in Section 31.

CATERPILLAR INC.



Jennifer A. Simon

Date: October 2, 2009

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² Should the Board deny the State's Motion to Amend Complaint, Caterpillar moves that the initial Complaint be dismissed in its entirety, and that the Board grant such further relief as may be just and proper.