

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)

RECEIVED
CLERK'S OFFICE
OCT 28 2009
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

- To: ARAMARK UNIFORM SERVICES, INC.
Jennifer Nijman
Nijman Franzetti LLP
10 South LaSalle St., Suite 3600
Chicago, IL 60603
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
131 South Dearborn St., Suite 2400
Chicago, IL 60603
BORDEN CHEMICAL CO.
c/o Matthew Larson
Shook Hardy & Bacon
2555 Grand Boulevard
Kansas City, MO 64108
ARCHER DANIELS MIDLAND, INC.
Lee Cunningham
4666 Faries Parkway
Decatur, IL 62526
CATERPIILLAR, INC.
c/o Kevin Desharnais and Jennifer Simon
Mayer Brown LLP
71 South Wacker Drive
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CLIMATE CONTROL, INC.
c/o Edward Q. Costa

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TRINITY RAIL GROUP, INC.
Kristen Parker, Michael Dolan
Jones Day
77 West Wacker Drive, Suite 3500
Chicago, IL 60601-1692

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a COMPLAINANT'S RESPONSE TO MOTION BY CATERPILLAR, INC. FOR LEAVE TO REPLY, a copy of which is attached hereto and herewith served upon you.


Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:


JAMES L. MORGAN
Sr. Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: October 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that I did on the 23rd day of October, 2009, send by First Class Mail, with postage thereon fully prepaid, a true and correct copy of the instruments entitled Notice of Filing, Complainant's Response to Motion Caterpillar, Inc. For Leave to Reply

TO:

ARAMARK UNIFORM SERVICES, INC.

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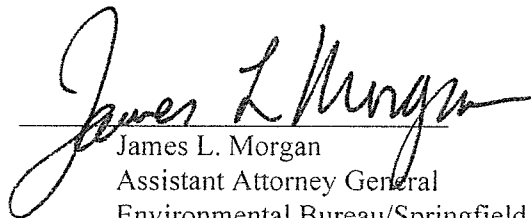
Carol Webb, Esq.
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Service is currently unavailable for:
WASTE HAULING LANDFILL, INC., JERRY CAMFIELD, SR, BRIDGESTONE FIRESTONE, INC.
ZEXEL ILLINOIS, INC

and the original and ten copies were sent to:

John T Therriault
Illinois Pollution Control Board
James R. Thompson Center

100 W. Randolph, Suite 11-500
Chicago, IL 60601

A handwritten signature in black ink, reading "James L. Morgan". The signature is written in a cursive style with a horizontal line underneath the name.

James L. Morgan
Assistant Attorney General
Environmental Bureau/Springfield
500 South Second Street
Springfield, IL 62706

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COMPLAINANT'S RESPONSE TO MOTION BY
CATERPILLAR, INC., FOR LEAVE TO REPLY

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., for leave to reply to the Complainant's Response to Motion to Dismiss Complaint. As established below, that motion should be denied since the reply constitutes a thinly veiled attempt to rewrite the original motion to dismiss.

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

1. After having the legs cut out from its assertion that Section 58.9(a)(1) of the Act, 415 ILCS 5/58.9(a)(1), requires dismissal of the Complaint by the Board's ruling in *Cole Taylor Bank v. Rowe Industries, et al.*, PCB 01-173 slip op. at 4 (June 2, 2002). 2002 WL 1298771, Caterpillar's latest pleading seeks to recast its motion to dismiss as merely a challenge to the sufficiency of the pleading in the complaint and ignores the plain language of 35 Ill. Adm. Code 741.205 that the complaint need not allege a requirement "a specific alleged percentage of liability" to state a claim.

2. The specific percentage of liability determination follows a determination of liability. The Complaint sufficiently pleads the "ultimate facts" necessary to show liability:are

- 1) Caterpillar is within a class of persons potentially liable;
- 2) There has been a release or releases of hazardous substances or threatened release of hazardous substances;
- 3) Illinois EPA has incurred costs in response thereto; and
- 4) Caterpillar did not perform the work requested by the 4(q) notice issued by Illinois EPA.

Thus, the complaint is sufficient to seek recovery of response costs.

B. The Complaint properly pled a claim for treble damages.

1. As the Fourth District Appellate Court held in *Quincy v. Carlson*, 163 Ill.App.3d 1049, 1053, treble damages may be avoided if the “responsible party can establish that he acted with ‘sufficient cause’” when it refused to perform work requested by a 4(q) notice.

2. Thus, the reasons why a responsible party chose not to perform the work requested by the 4(q) notice must be pled as an affirmative defense and not as an element of the Complaint.

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

1. Caterpillar’s latest pleading goes to great length in reciting the content of captions but ignores the substance of the Complaint and the law. The General Assembly and the Pollution Control Board have recognized that cost recovery actions are markedly different from proceedings to address violations of the Act and regulations. Section 22.2(I) provides that the “costs and damages provided for in this Section may be imposed by the Board in an action brought before the Board in accordance with Title VIII of this Act, except that Section 33(c) of this Act shall not apply.”

2. Title VIII includes Section 31.1 of the Act provides for administrative citations. Based upon the plain language of that provision, it does not apply to recovery of costs and damages under Section 22.2. Similarly, Section 33(c) requires “consideration of all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved * * *.” Since “emissions and discharges” are each activities included within the definition of “release” that provision could have been construed to apply to recovery of costs and damages under Section 22.2 but was specifically excluded from applying by the General Assembly.

3. Section 31 specifically limits its applicability to “alleged violations.” Expanding its coverage to matters not dependent upon a finding of violation contravenes the plain language of that statute.

D. Conclusion

WHEREFORE, Complainant prays that the motion of the Respondent, Caterpillar, Inc., for leave to file a response and its additional arguments challenging the complaint be denied.

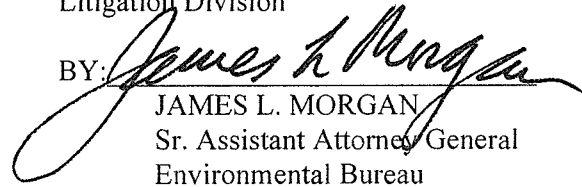
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
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